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Cause Lawyers Inside the State

Douglas NeJaime
Loyola Law School

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CAUSE LAWYERS INSIDE THE STATE

Douglas NeJaime*

Scholarship on the legal profession tends to situate cause lawyers in a state of adversarial tension with government lawyers. In this traditional paradigm, cause lawyers challenge the agenda of government attorneys, who represent institutional interests and the status quo. From this oppositional perspective, socio-legal scholars explore the activity of lawyers working at public interest law firms, for general social movement organizations, and in private practice. For some time, however, cause lawyers have moved in and out of government, thus complicating the conventional picture of lawyer-state opposition. This Article aims to identify and understand the significant role that cause lawyers play inside the state. It does so by drawing on recent social movement scholarship exploring the overlapping and interdependent relationship between movements and the state. Ultimately, this Article identifies four key impacts that cause lawyers within the state may produce: (1) reforming the state itself; (2) shaping state personnel and priorities; (3) harnessing state power to advance shared movement-state goals; and (4) facilitating and mediating relationships between the movement and the state. These productive functions, however, also come with significant limitations. By appealing to governmental authority and involving the state as a pro-movement force, cause lawyers in government positions may channel movement activity toward moderate goals and into institutional, state-centered tactics. Accordingly, this Article explores not only the benefits but also the costs of cause lawyer movement in and out of the state.

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INTRODUCTION

In 2011, the *National Law Journal* found that 60 out of 118 lawyers hired to the Department of Justice (DOJ) Civil Rights Division over the previous two years had worked for a civil rights organization¹—including twenty-four for the ACLU, fifteen for the Lawyers’ Committee for Civil Rights Under Law, and ten for the NAACP or the NAACP Legal Defense & Educational Fund (LDF).² Also in 2011, *The New York Times* reported that approximately 90 percent of lawyers recently hired across three sections of the Civil Rights Division had civil rights backgrounds.³ In other words,

1. See David Ingram, *Civil Rights Staffs Up*, NAT’L L.J., May 30, 2011, at 11.

2. See *id.*

3. See Charlie Savage, *In Shift, Justice Dept. Hiring Lawyers with Civil Rights Backgrounds*, N.Y. TIMES, June 1, 2011, at A19. While federal law prohibits the use of political or ideological considerations in hiring career attorneys to the DOJ, see 5 U.S.C. §§ 2301–2305 (2006), the 2008 Inspector General’s report found that during the Bush Administration the DOJ’s Bradley Schlozman used conservative political affiliations to screen candidates for positions in the Civil Rights Division. See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN. & U.S. DEP’T OF JUSTICE, OFFICE OF PROF’L RESPONSIBILITY, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION 4–6 (July 2, 2008), available at <http://www.justice.gov/oig/special/s0901/final.pdf> [hereinafter INSPECTOR GENERAL’S REPORT]. Of course, there is a correlation between political affiliation and service at a traditional civil rights organization. As *The New York Times* reported on its specific sample,

those with significant cause lawyering experience were entering (or reentering) government service during the Obama Administration.⁴ While the lawyers' civil rights credentials qualified them for their government positions, they also signaled the likelihood of increased action on issues important to the organizations from which these lawyers came. Indeed, a former DOJ Bush appointee, who himself had joined a conservative movement organization after his government service, worried that attorneys in the Obama Administration would coordinate efforts with their former employers.⁵ Therefore, even as cause lawyering experience furnished relevant expertise, it suggested relationships between activist networks and the government that fueled partisan criticism.⁶

Cause lawyering credentials appear especially important for political appointees to top-level enforcement positions. For instance, Professor Samuel Bagenstos, a leading disability rights advocate and scholar, served as the Assistant Attorney General for Civil Rights in the DOJ from 2009 to 2011.⁷ Bagenstos had worked on significant disability rights cases, including *United States v. Georgia*.⁸ Another accomplished disability

while nearly 25 percent of the Bush hires had listed conservative affiliations, such as Federalist Society membership, on their resumes, none of the Obama hires did. *See* Savage, *supra* note 3. And more than 60 percent of the Obama hires listed liberal credentials. *See id.*

4. *See* Savage, *supra* note 3 (several of the DOJ hires during the Obama Administration had left the DOJ during the Bush Administration). In the seminal first volume of their cause lawyering series, Professors Austin Sarat and Stuart Scheingold explained that cause lawyering "is frequently directed at altering some aspect of the social, economic, and political status quo." Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Sarat & Scheingold, *Cause Lawyering*]; *see also* Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3, 13 (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter Sarat & Scheingold, *State Transformation*] ("The objective of the attorneys that we characterize as cause lawyers is to deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources." (citing Sarat & Scheingold, *Cause Lawyering*, *supra* note 4)).

5. *See* Ingram, *supra* note 1 (reporting remarks by Hans von Spakovsky, who worked at the Heritage Foundation after his time at the DOJ).

6. For instance, Ed Whelan attacked two openly gay DOJ attorneys with cause lawyering experience by suggesting they were part of "a broader ideological agenda that would have gay causes trump religious liberty." Ed Whelan, *Re: Obama DOJ Picks a Fight Against Religious Freedom*, NAT'L REV. ONLINE: BENCH MEMOS (Aug. 29, 2011, 1:01 PM), <http://www.nationalreview.com/blogs/print/275777>.

7. *See* Samuel Bagenstos, MICH. LAW, http://web.law.umich.edu/_facultybiopage/facultybiopagenew.asp?ID=411 (last visited Oct. 20, 2012) ("From 2009–2011, he was a political appointee in the U.S. Department of Justice, where he served as the Principal Deputy Assistant Attorney General for Civil Rights, the number-two official in the Civil Rights Division.").

8. 546 U.S. 151 (2006). Disability rights scholars linked Bagenstos's appointment to the potential for more vigorous civil rights enforcement by the DOJ. *See* Michael Ashley Stein, Michael E. Waterstone, & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1697 (2010) (reviewing SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009)).

rights advocate, Eve Hill, serves as Senior Counselor to the Assistant Attorney General.⁹ Hill had been Executive Director of the Disability Rights Legal Center and handled disability rights work at the Burton Blatt Institute.¹⁰ These appointees' cause lawyering credentials constituted qualifications for their government positions. In fact, when President Obama announced his selection of Jacqueline Berrien, who had spent several years at LDF,¹¹ to head the Equal Employment Opportunity Commission (EEOC), he drew attention to Berrien's cause lawyering work, explaining that she "has spent her entire career fighting to give voice to underrepresented communities and protect our most basic rights."¹² Indeed, Berrien's EEOC biography recounts her years at LDF, the Lawyers' Committee, and the ACLU.¹³

Yet, by suggesting social movement affiliations and loyalties, political appointees' cause lawyering credentials also animate partisan attacks. When President Obama appointed Professor Chai Feldblum to the EEOC, he touted her cause lawyering experience, including her work as legislative counsel for the ACLU's HIV/AIDS Project and her role in drafting the Americans with Disabilities Act of 1990 (ADA).¹⁴ And the LGBT press praised Feldblum's appointment by noting her legal work for the LGBT community.¹⁵ Feldblum's accomplishments, however, made her a target for social conservatives.¹⁶ The Traditional Values Coalition (TVC)

9. *See Statement of Eve Hill Before the Senate Committee on Health, Education, Labor & Pensions*, U.S. DEP'T JUST. (Feb. 7, 2012), <http://www.help.senate.gov/imo/media/doc/Hill2.pdf>.

10. *See Eve L. Hill*, BURTON BLATT INST., SYRACUSE UNIV., http://bbi.syr.edu/publications/staffcvs/EHill_CV.pdf (last visited Oct. 20, 2012).

11. *See Jacqueline A. Berrien, Chair*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/berrien.cfm> (last visited Oct. 20, 2012).

12. *Id.*

13. *See id.*

14. *See Obama Labor Pick's Support for Gay Rights Worries Conservatives*, FOXNEWS.COM (Mar. 31, 2010), <http://www.foxnews.com/politics/2010/03/31/obamas-pick-join-eeoc-blasted-conservative-groups/>. Feldblum's EEOC biography stresses her work to advance both disability and LGBT rights. *See Chai Feldblum, Commissioner*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/feldblum.cfm> (last visited Oct. 20, 2012).

15. *See Lisa Keen, Senate Confirms Feldblum to EEOC Seat*, WINDY CITY TIMES (Dec. 29, 2011), <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=29957> ("She is best known to the LGBT community as a key counsel on the drafting and negotiations over [ENDA] [and] . . . as legislative counsel for the [ACLU] in Washington, D.C.").

16. Similarly, Professor Craig Becker, a labor law attorney and law professor, recently served on the National Labor Relations Board. *See Craig Becker, Biography*, GEO. LAW, <http://www.law.georgetown.edu/faculty/becker-craig.cfm#> (last visited Oct. 20, 2012). He had served as Associate General Counsel to two major unions. *See id.* His nomination was met with intense opposition by conservatives. *See Carl Hulse, Republicans Block Confirmation of Labor Lawyer*, N.Y. TIMES: CAUCUS (Feb. 9, 2010, 5:22 PM), <http://thecaucus.blogs.nytimes.com/2010/02/09/republicans-block-confirmation-of-labor-lawyer/>. Becker served pursuant to a recess appointment before the Administration ultimately withdrew his nomination. *See Byron Tau, Obama Withdraws Labor Lawyer's Nomination*, POLITICO (Dec. 15, 2011, 4:30 PM), <http://www.politico.com/politico44/2011/12/obama-withdraws-labor-lawyers-nomination-107671.html>. Professor Lani Guinier, a former LDF

connected her cause lawyering work to its objection to her government appointment. “Instead of being an unbiased referee on the EEOC,” TVC declared, Feldblum “would be a radical activist who would use the force of government to implement aggressive and intrusive employment non-discrimination laws to benefit the LGBT political agenda.”¹⁷

As these examples illustrate, both social movement activists and government officials acknowledge that cause lawyers enter the state. Those on both the right and left recognize the opportunities offered when lawyers who have worked for a particular movement are elevated to government positions. And those inside the state see previous cause lawyering experience as a marker of relevant expertise.

Yet socio-legal scholars generally have not devoted sustained attention to either the movement of cause lawyers into the state or the impact of these lawyers once in government positions.¹⁸ Instead, scholarship on the legal profession tends to situate cause lawyers in a state of adversarial tension with government lawyers, including criminal prosecutors and civil attorneys representing state and federal agencies. In this traditional paradigm, cause lawyers challenge the agenda of government lawyers, who represent institutional interests and the status quo. From this oppositional perspective, socio-legal scholars explore the activity of lawyers working at public interest law firms, for general social movement organizations, and in private practice. For some time, however, cause lawyers have moved in and out of government, thus complicating the conventional picture of lawyer-state opposition.¹⁹ This Article aims to expose and begin to understand the significant role that cause lawyers play in social movement activity from inside the state.²⁰

lawyer, has written about her appointment to be Assistant Attorney General for Civil Rights. When President Clinton nominated Guinier, conservative activists attacked her by mischaracterizing her views. Ultimately, Clinton withdrew her nomination in an episode that revealed the politicized (and impoverished) discourse that may surround cause lawyer movement into the state. See LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 37, 126–27 (1998).

17. *Lesbian Activist Chai Feldblum Confirmed for EEOC: US Senate’s Lame-Duck Gift to the Homosexual Movement*, MASSRESISTANCE (Dec. 31, 2010), http://www.massresistance.org/docs/gen/10d/brown_dadt/feldblum.html (quoting TVC posting).

18. Notable exceptions emerge from research on the conservative legal movement. See *infra* Part I.C.2.

19. The *National Law Journal* reported that fourteen lawyers who had left (or been pushed out of) the DOJ during the Bush Administration returned to the DOJ during the Obama Administration, and many of them had worked at public interest organizations in the interim. See Ingram, *supra* note 1.

20. The definition of “cause lawyer” is contested. In this Article, I take a relatively broad view, including lawyers beyond those who have done cause lawyering work at public interest organizations. See Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1602–03 (2006) (explaining that their study of public interest law organizations “is not a study of public interest practice or ‘cause lawyering’ in general because such a study might also include, among other things, pro bono work by attorneys in private practice and other, non-traditional forms of law practice”). Indeed, the very basis of my analysis assumes that some cause lawyering work may occur in government settings. Furthermore, for the government lawyers I identify, I

By attending to the relationship between cause lawyers and state power, this Article identifies four key impacts that cause lawyers within the state *may* produce: (1) reforming the state itself; (2) shaping state personnel and priorities; (3) harnessing state power to advance shared movement-state goals; and (4) facilitating and mediating relationships between the movement and the state. By drawing on state power, cause lawyers in government positions may make the state a more favorable context in which to pursue movement goals and may shape the state into a more positive force in movement activity. Bound up in these productive functions, however, are significant limitations and constraints. By appealing to governmental authority and involving the state as a pro-movement force, cause lawyer movement into the state may channel movement activity toward moderate goals and into institutional, state-centered tactics.

It is important to note that I am not suggesting that cause lawyers who move into the state are inevitably cause lawyering in their government positions. Rather, I am asking what their cause lawyering experience and ties mean for their work in the government and what their government position means for the cause.²¹ On some occasions, we can observe government lawyers clearly wielding state power for movement gains. Most of the time, however, the relationship between social movement activism and state power is much more subtle and complex. While my research does not directly shed light on lawyer motives and identity, government lawyers appear aware of the responsibilities of their positions and likely contemplate the need for agency legitimacy and client accountability.²² Accordingly, their work to advance social movement

include as cause lawyering experience academic positions that involve some advocacy through writing, clinical work, or pro bono work, *see* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 42–45 (2008); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1893 (2007); Anna-Maria Marshall, *Social Movement Strategies and the Participatory Potential of Litigation*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 164, 176 (Austin Sarat & Stuart Scheingold eds., 2006); significant private practice pro bono or fee-generating work on behalf of a cause, *see* Marshall, *supra* note 20, at 177; Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, *supra* note 4, at 261, 265; and nonlitigation (or even nonlegal) positions at a public interest or social movement organization, *see* McCann & Silverstein, *supra* note 20, at 265; Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering During the Enactment of the Americans with Disabilities Act*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* note 4, at 211, 214. I do not, however, include lawyers who simply identify with or are members of a cause-oriented organization. Therefore, my analysis does not consider an individual a cause lawyer merely because she supports the ACLU with financial contributions or affiliates with and attends events sponsored by the Federalist Society.

21. Indeed, as research on insider feminists shows, many feminist activists entered government service for career-oriented, rather than cause-oriented, reasons. *See* LEE ANN BANASZAK, *THE WOMEN'S MOVEMENT INSIDE AND OUTSIDE THE STATE* 173–74 (2010).

22. There is a voluminous literature considering the client identity of government lawyers. *See* Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1050–52 & nn.67–73 (2008). While the cause may at times fit within

goals is more likely to emerge when their government positions dictate—or at least make legitimate space for—such work. Ultimately, while I point to some instances of straightforward cause lawyering work inside the state, I am generally constructing a more nuanced picture of movement-state overlap in which cause lawyer movement in and out of the state aids, often in subtle ways, advances within the government and facilitates (a particular form of) movement progress.

My intervention focuses on filling a substantial gap in cause lawyering theory by exploring the overlapping and dynamic relationship between cause lawyers and state power. I rely on publicly available documents, media accounts, and research in social movement theory, political science, and antidiscrimination law to suggest a general account of cause lawyers within the state. This Article supplies neither a case study of specific cause lawyers in a particular setting nor an analysis of lawyer identity and motivation. Instead, I attempt to open doors to both additional theoretical developments and qualitative research on cause lawyers in government positions. While interviewing former government lawyers poses serious challenges, future work should attempt to do so. Following in the rich tradition of socio-legal research reliant on in-depth, qualitative studies of lawyers themselves, such work could elaborate, qualify, and perhaps correct the claims advanced here about the roles that cause lawyers moving in and out of the state can and do play in service of the causes with which they identify.

This Article proceeds in four parts. Part I explains how cause lawyering scholarship generally has neglected the existence of cause lawyer movement into the state. Part II turns to social movement theory on movement-state overlap to inform an analysis of cause lawyers in government positions. Like cause lawyering scholarship, which largely locates lawyers outside and in opposition to the state, social movement theory traditionally situates movements operating independent of and against the state. Recently, however, social movement scholars have acknowledged the overlapping and interdependent relationship between movements and the state and, in doing so, have uncovered movement activists within the state. This work on movement-state overlap contributes to both a more dynamic account of cause lawyering and a more contextual approach to the state's role in movement progress. Accordingly, Part III identifies four impacts cause lawyers inside the state may produce: (1) reforming the state; (2) shaping state personnel and priorities; (3) harnessing state power for shared movement-state objectives; and (4) facilitating and mediating movement-state relationships. Finally, Part IV points to some of the constraints involved when cause lawyers move inside the state, specifically focusing on the channeling of movement activity into moderate goals and institutional tactics.

objectives of the agency, the President, or the public interest, government lawyers do not serve a cause in the same ways as lawyers working at social movement organizations.

I. LAWYER-STATE RELATIONSHIPS IN CAUSE LAWYERING SCHOLARSHIP

By addressing the way in which cause lawyering scholarship traditionally situates cause lawyers operating against and outside the state, this Part identifies a significant gap in the cause lawyering literature. Socio-legal scholars generally have focused on lawyers working against the status quo and, therefore, inevitably struggling to resist and challenge the state. When cause lawyering scholars place lawyers in closer proximity to the state, they tend to focus on lawyer-state cooperation, which maintains space between cause lawyers and the state. In this view, cause lawyers occasionally interact with state officials, but they are not state actors themselves. The handful of scholarly contributions that focus on cause lawyers as state actors tend to feature non-U.S. lawyers working within emerging democracies or transformed state structures.²³ In the U.S. context, the few treatments of government cause lawyers depict occasional or newly minted cause lawyers; these lawyers take up the cause through their state positions rather than enter the state as cause lawyers. Scholarship on conservative cause lawyers provides an important exception, as it meaningfully explores the movement of cause lawyers in and out of government. This Part shows that, notwithstanding this notable exception, the cause lawyering literature generally has neglected a common and significant phenomenon—cause lawyer movement in and out of the state.

A. *Cause Lawyers Against the State*

Many of the central contributions to the cause lawyering literature locate, almost instinctively, cause lawyers against the state. To a great extent, this makes sense since, as pioneering cause lawyering scholars Professors Austin Sarat and Stuart Scheingold first defined it, cause lawyering “is frequently directed at altering some aspect of the social, economic, and political status quo.”²⁴ In this sense, “cause lawyers . . . are usually swimming against the prevailing political tide”²⁵ and therefore struggling against the power and preferences of the state. Indeed, some scholars have observed the tension in cause lawyers’ use of the legal system itself; lawyers appeal to law even as the legal system authorizes and perpetuates the unjust treatment they challenge.²⁶ In this view, the state, including the legal system, inflicts the harm cause lawyers oppose.²⁷

23. While I draw some insights from work on cause lawyering in other countries, my analysis is geared toward the domestic context.

24. Sarat & Scheingold, *Cause Lawyering*, *supra* note 4, at 4.

25. *Id.* at 8.

26. See, e.g., Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 730 (1991); cf. Terence C. Halliday, *Politics and Civic Professionalism: Legal Elites and Cause Lawyers*, 24 LAW & SOC. INQUIRY 1013, 1042 (1999). In an influential article on the difficult negotiation by lawyers representing causes with which they identify, Professor Nancy Polikoff discusses how lawyers for lesbian and gay activists planning civil disobedience might consider “honest discussion with police officers, prison guards, and court personnel . . . [to] educate these groups about the protestors’ motivation to break the law.” Nancy D. Polikoff, *Am I My Client? The Role*

Consistent with this picture of cause lawyers against the state, work on cause lawyers' roles and practice settings largely focuses on lawyers in nongovernmental settings: staff lawyers at movement organizations, independent cause lawyers who work on movement cases for a fee, private practice attorneys performing pro bono work, and lawyers who work for the cause in nonlegal roles.²⁸ Even as socio-legal scholars recognize the diversity of experiences and institutional locations that map onto cause lawyering practice,²⁹ they have not devoted sustained attention to cause lawyers in government.

Of course, government-funded legal services work has historically served as one of the most important settings for cause lawyering practice.³⁰ While these lawyers have a dependent relationship on state support,³¹ it is clear that they (ideally) operate with professional independence from the state

Confusion of a Lawyer Activist, 31 HARV. C.R.-C.L. L. REV. 443, 452 (1996). These groups, though, are characterized as “agents of an oppressive state,” such that “[t]hose who oppose advance discussion with officials are often offended by the concept of negotiating with the very people who embody the value system that they are opposing.” *Id.* at 452, 462.

27. Professor Sameer Ashar, however, makes the compelling point that with neoliberal shifts in governance, resistance that would have been aimed at the state may now target private third parties. *See* Ashar, *supra* note 20, at 1917. While Ashar’s focus on lawyers for “resistance movements” captures the confrontational relationship of cause lawyers to both the state and powerful private actors, *see id.* at 1879, his case study of immigrant worker mobilization in New York demonstrates that the state may at times serve more as an audience than as either a target or an ally. *See id.* at 1917–18.

28. *See* McCann & Silverstein, *supra* note 20, at 265 (concentrating on three types of cause lawyers, all of which operate outside the state); *see also* Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica, California*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 249, 258 (addressing multiple cause lawyer categories, all of which are outside the state); Marshall, *supra* note 20, at 164, 167–68 (describing practice settings outside the state in which cause lawyers work against the state). In addition, there is a robust literature on lawyers located in law school clinics, *see, e.g.*, Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 455 (2008), including some analysis of political pressure on clinics at public law schools. *See* David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 237 (2003).

29. *See, e.g.*, Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 4, at 230–31 (“It is in the course of engaging in various professional practices that the possibility of becoming or functioning as a lawyer for a cause is realized.”).

30. *See* Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, 415 (1996) (referring to lawyers at federally funded legal services offices as “the canonical model for social change lawyering”). On the rise of the Legal Services Program, *see* TELES, *supra* note 20, at 30–35.

31. Interestingly, according to Professor Gary Bellow, government lawyers, including Bellow himself, “orchestrated a set of conferences, speeches, alliances, meetings, and intra-agency agreements that led to the establishment of the federal legal services program under the Office of Economic Opportunity.” Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 298 (1996). In this sense, the legal services program itself, which facilitated cause lawyering *against* the state, emerged from cause lawyers *inside* the state.

and often in opposition to the state.³² Indeed, the assault on government-funded legal services underscores the oppositional position of these lawyers vis-à-vis the state. As Professor David Luban has documented, the conservative turn of the state brought with it an attack, both substantive and financial, on publicly funded legal services lawyers and effectively prevented such lawyers from using state funds to challenge state power.³³ In their empirical study of the public interest law sector, Professors Laura Beth Nielsen and Catherine Albiston show that while an increasing number of public interest law organizations receive a substantial amount of their funding from government agencies, these organizations have “become increasingly constrained”: they “largely provide direct legal services, and are statutorily prohibited from engaging in many law reform activities.”³⁴ Ultimately, conservatives successfully curtailed legal services lawyers precisely because of such lawyers’ inclination to launch structural attacks on state policies.

Socio-legal scholars have also treated public defenders as cause lawyers.³⁵ Subject to less political scrutiny than legal services work, the public defender’s office might represent a particularly attractive arena for cause lawyering.³⁶ Again, though, public defenders are salaried government employees who oppose the state by representing those accused in criminal proceedings. Qualitative work on public defenders confirms this oppositional orientation.³⁷ In the end, both legal services attorneys and public defenders, while funded by the government, frequently use those government funds, even with current constraints, to represent subordinated or vulnerable individuals and groups *against* the government.

32. See Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL’Y & L. 143, 148 (2003) (“[A] legal services lawyer speaks for the private client, not for the government.”); see also Stephen Meili, *Consumer Cause Lawyers in the United States: Lawyers for the Movement or a Movement unto Themselves*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 120, 124 (explaining how legal services lawyers funded by the government handled consumer protection issues); Corey S. Shdaimah, *Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 220, 235–37 (explaining how conservative-driven funding cuts to “left activist law organizations” were designed to prevent those organizations from representing subordinated groups against the state).

33. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 298–302 (1988); Luban, *supra* note 28. For a robust defense of political lawyering by legal services attorneys, see LUBAN, *supra* note 33, at 317–91.

34. Nielsen & Albiston, *supra* note 20, at 1619.

35. See Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT’L J. LEGAL PROF. 209, 229 (1998) (including two public defenders in their sample of salaried cause lawyers, a group that also included lawyers at “privately funded social action organizations”).

36. See *id.* at 232 (“[T]he public defender’s office has provided a relatively stable work site for transgressive cause lawyering. Indeed, the ever more punitive political climate has, in a perverse way, contributed to the attractions of public defense work.”). For an explanation of why “the public defender system is not nearly as controversial as the Legal Services Corporation,” see LUBAN, *supra* note 33, at 268.

37. See Scheingold & Bloom, *supra* note 35, at 231 (explaining that one of the lawyer subjects “sees his public defender work as ‘fighting the state’”).

B. Cause Lawyers with the State

Some cause lawyering scholars have complicated the traditional picture of lawyer-state opposition and instead have uncovered how cause lawyers interact with state actors. To the extent this work situates cause lawyers in closer proximity to the state, it moves away from the conventional picture of lawyer-state adversarialism. But it rarely situates lawyers as participants in state institutions. Instead, this work continues to locate lawyers outside the state, yet cooperating with the state in advancing the cause.³⁸

Many of the contributions identifying cause lawyer cooperation with the state emerge from less conventional lawyering contexts—those that defy the very assumptions of adversarial litigation characteristic of most lawyering scholarship. In other words, when scholars look to cause lawyers engaging in less conventional forms of lawyering more generally, they also may observe different relationships with the state. Studies of legislative lawyering, for example, suggest an interactive and collaborative, rather than purely adversarial, relationship between cause lawyers and the state.³⁹ In her study of the role of cause lawyers in the campaign for the ADA, Professor Neta Ziv shows the cooperative relationships between legislators, on one hand, and lawyers for the disability movement, on the other hand.⁴⁰ In fact, Ziv's 2001 study highlights leading disability rights lawyer Chai Feldblum, now an EEOC Commissioner, to understand the way in which legislative cause lawyers build bridges between their social movement clients and lawmakers whom they are attempting to persuade.⁴¹ Yet, in this view, cause lawyers remain outside the state, exerting influence on those in government positions.⁴²

New Governance regimes, in which lawyers participate in public-private partnerships in more flexible regulatory systems, also suggest a more cooperative lawyer-state relationship.⁴³ In the health care context,

38. Scheingold's concept of an "institutional continuum" provides a helpful way to conceptualize the various relationships between cause lawyers and the state. See Stuart A. Scheingold, *Cause Lawyering and Democracy in Transnational Perspective: A Postscript*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 4, at 382, 389 ("Positioning can be measured along an *institutional continuum*, ranging from participation in, and cooperation with, state structures to maintaining an arm's-length relationship with the state through construction of adversarial and confrontational strategies.").

39. See Ziv, *supra* note 20, at 214 ("Legislative cause lawyering stands in contrast to the archetypal cause-lawyering model in which the state is the central source of abuse against individuals.").

40. See *id.* at 214.

41. See *id.* at 211.

42. Professor Jennifer Gordon describes how a state-based labor movement became an inside player with influence over state decision making. See Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 277, 284 (explaining, "the [United Farm Workers] was able to make the law more advantageous by using its political clout to guide the choice of members for the first Agricultural Labor Relations Board (ALRB), resulting in a pro-UFW supermajority of four to one").

43. See Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 324–26 (2009).

Professor Louise Trubek explains how, rather than engage in traditionally adversarial activity, lawyers play more flexible and collaborative roles as they negotiate and manage relationships between public and private actors.⁴⁴ Similarly, in his study of community economic development (CED), Professor Scott Cummings explores the cooperative relationship between public entities and lawyers for marginalized groups.⁴⁵ In CED, lawyers “de-emphasize adversarial organizing in favor of *collaboration* with business and governmental partners.”⁴⁶ Still, the lawyers in these studies do not operate from inside the state; instead, they have episodic interactions with the state that are cooperative, rather than confrontational.

More recent scholarship analyzing traditional lawyer modes, such as litigation against the state, has acknowledged and explored the cooperative relationships between cause lawyers and government actors. For instance, in a case study of same-sex marriage litigation in Vermont, Professors Patricia Woods and Scott Barclay show that cause lawyers “worked in communication with key actors within the administrative and legislative arms of the state for several years in determining the most effective moment to bring the case to the Vermont Supreme Court.”⁴⁷ While this account makes a crucial advance by uncovering the collaborative relationship between cause lawyers and government actors, it nonetheless maintains distance between the movement and the state. That “cause lawyers and state actors may engage in mutually beneficial interactions”⁴⁸ suggests that these two groups remain distinct.⁴⁹

C. (Cause?) Lawyers Inside the State

To the extent that cause lawyering scholarship has devoted attention to cause lawyers occupying government positions, it has generally emerged from non-U.S. studies, particularly in countries with emerging democracies or with recent state transformations. The few scholars who have attended to government cause lawyers in the United States have focused on what I term

44. See Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575, 600; see also Ashar, *supra* note 20, at 1922 (documenting the work that lawyers do on behalf of “resistance movements,” Ashar acknowledges how lawyers help “movement organizations . . . facilitate fragile collaborations with agencies”).

45. See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 302.

46. *Id.* at 303.

47. See Patricia J. Woods & Scott W. Barclay, *Cause Lawyers as Legal Innovators with and Against the State: Symbiosis or Opposition?*, 45 STUD. L., POL., & SOC’Y 203, 219 (2008).

48. *Id.* at 205.

49. See *id.* at 215 (“[T]he particular state actors who join forces with cause lawyers may be wholly supportive of the normative agenda of the social movement at least vis-à-vis the specific issue at hand. It is in this sense that cause lawyers and state actors may engage in mutually beneficial interactions that serve one another’s goals (those goals may or may not be served entirely equally in each case).”).

occasional or newly minted cause lawyers—lawyers who come to the cause through their state positions and then leverage those positions to act on behalf of the cause. Important exceptions, however, emerge from studies of conservative cause lawyers.

1. Lawyers Abroad

Scholars exploring non-U.S. settings have devoted the most sustained attention to cause lawyers operating inside the state, and some have noted the way in which their insights depart from the oppositional assumptions of most cause lawyering scholarship.⁵⁰ Much of this attention abroad is attributable to lawyers' roles in state-building and democratization. Cause lawyers in repressive states may enter the state to strengthen the rule of law and build a more responsive and legitimate government.⁵¹ In other nations, state transformation may feature activist lawyers moving into the government apparatus they worked to construct. For example, South African cause lawyers entered their new democratic government to support and shape its institutions.⁵² These lawyers did not experience a contradiction between their former work against the state and their new work in government since, as Constitutional Court president Arthur Chaskalson put it, the “struggle was always for law.”⁵³

Cause lawyers inside the state have received scant attention in nations with long-term, stable democracies. In a rare exception, Professor Yoav Dotan explores the motivations and identities of cause lawyers in Israel who switch sides, or “cross[] the lines,” moving from public interest

50. See Yoav Dotan, *The Global Language of Human Rights: Patterns of Cooperation between State and Civil Rights Lawyers in Israel*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* note 4, at 244 (“[I]t is generally assumed that cause lawyers operate from within civil society, as opposed to operating from within the legal and professional apparatus of the state, which in their case becomes the object of their attacks in courts.”); Heinz Klug, *Local Advocacy, Global Engagement: The Impact of Land Claims Advocacy on the Recognition of Property Rights in the South African Constitution*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* note 4, at 264, 266 (“Unlike most assumptions about cause lawyering, which envisions the practice as oppositional, and the law as checking power, South Africa’s democratic transition provides an illustration of cause lawyering being transformed.”).

51. Professor Lucie White, for instance, explores the role of cause lawyers who “work as civil servants inside the state bureaucracy” in Ghana. Lucie White, *Two Worlds of Ghanaian Cause Lawyers*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* note 4, at 35, 36. By working in “state agencies that regulate domestic trade and development policies,” these lawyers occupy government locations in which they seek to promote “economic development policies that respond to the needs and aspirations of Ghana’s common people.” *Id.* at 35.

52. See Klug, *supra* note 50, at 265 (“Many of the most prominent cause lawyers who participated in the anti-apartheid movement as lawyers or activists have now gone into the new democratic state.”). Professor Heinz Klug describes this role transition: “If in the past their role and self-image were defined in opposition to the state, the task ahead is to build the institutions of the democratic state. Now this community works to shape the law and is engaging and wielding power in its attempt to further the cause.” *Id.*

53. *Id.* (quoting Interview by Heinz Klug with Arthur Chaskalson, President, Constitutional Court of Afr. (1998)).

organizations in civil society to state agencies defending the government, and vice versa.⁵⁴ Rather than ultimately characterize such lawyers as “side-switching” attorneys, Dotan understands them as lawyering for “the rule of law” in practice settings both inside and outside the state.⁵⁵ The cause, as Dotan conceptualizes it, is relatively diffuse and state-centered, rather than part of a social movement vision on behalf of a subordinated group. In this sense, Dotan’s cause lawyers share common ground with the rule-of-law advocates seen in studies of emerging or transformed democracies. They bear little resemblance to the U.S.-based cause lawyers working on behalf of discrete groups or overtly political causes.⁵⁶

2. Lawyers in the United States

The few scholars to focus on government lawyers in the U.S. context generally treat them as newly activated lawyers for the cause, rather than cause lawyers who enter the state. For instance, Professor Joshua Wilson’s event-centered approach, which identifies cause lawyers simply by their work “for or with a given movement or cause during a specific event,” conceptualizes government lawyers as occasional cause lawyers—lawyers associated with a particular event—rather than committed cause lawyers who change practice settings and, in doing so, move in and out of the state.⁵⁷ Indeed, Wilson asks how work on a particular event may lead a government lawyer to “becom[e] a cause lawyer.”⁵⁸ In this sense, the

54. See Dotan, *supra* note 50, at 245 (noting the “common phenomena of professional mobility . . . in which [lawyers] . . . ‘crossed the lines’”).

55. See *id.* at 250–51 (“[T]hey view themselves as cause lawyers whose causes are shared by the lawyers on both sides: a deep commitment to the idea of the rule of law and a commitment to assure the safeguards of fundamental human rights as officers of the court. The lawyers who moved from [the civil rights organization] to the government (or *vice versa*) did not, according to this line of reasoning, change their causes, but only their place of work.”).

56. To the extent Dotan’s lawyers find an analog in U.S. research, they resemble what Professor Thomas Hilbink has labeled “proceduralist” cause lawyers. Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 665 (2004) [hereinafter Hilbink, *You Know the Type*]. According to Hilbink, the proceduralist category “is marked by a belief in the separation of law and politics, and a belief that the legal system is essentially fair and just.” *Id.* Therefore, the proceduralist lawyer “emphasizes individual client representation by lawyers who purport neutrality and nonpartisanship in the execution of their professional duties.” *Id.* Unlike the other cause lawyering categories that Hilbink identifies—elite/vanguard and grassroots—the proceduralist lawyer may operate in closer proximity to the state as she seeks to preserve the rule of law. See Thomas Hilbink, *The Profession, the Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 60, 66. Yet Hilbink himself recognizes that “there are questions as to whether [proceduralist] lawyers engaging in this type of lawyering are cause lawyering at all.” Hilbink, *You Know the Type*, *supra* note 56, at 665. Without dedication to the substantive agenda behind a particular group, cause, or movement, the proceduralist lawyers—like the lawyers in Dotan’s study—seem to share little in common with the more ideologically driven and politically committed lawyers typically observed in cause lawyering studies.

57. Joshua C. Wilson, *It Takes All Kinds: Observations from an Event-Centered Approach to Cause Lawyering*, 50 STUD. L., POL., & SOC’Y 169, 171 (2009).

58. *Id.*

government lawyers are not cause lawyers before their exposure to—and work on behalf of—the cause.⁵⁹ Ultimately, Wilson argues that “if one takes a struggle-centered approach to cause lawyering, state lawyers are a relatively successful movement’s ultimate hired guns and cause lawyers.”⁶⁰ Under this view, the state attorneys function more as elite allies than as indigenous cause lawyers.⁶¹

Consistent with this approach, Professor Steven Berenson documents litigation campaigns led by government attorneys against powerful industries.⁶² The lawyers themselves are not movement lawyers newly occupying government positions. Rather, they are government lawyers, sympathetic to a particular cause, who take action to support that cause.⁶³ While the government lawyers use state power to advance a cause,⁶⁴ they neither emerge from a cause lawyering community nor move from movement organizations into the state.⁶⁵

Perhaps the gap in knowledge about cause lawyer movement into the state owes much to the association of cause lawyering with liberal and progressive activism.⁶⁶ Given the state’s pronounced turn toward the right over the past several decades, the state may seem particularly inhospitable to—and outright hostile toward—traditional cause-lawyering visions. If we look to lawyers inside the state in the mid-twentieth century, however, we might emerge with an appreciation for the occasionally productive relationship between cause lawyers and the state. During the New Deal, for instance, activist lawyers moved into the state to build and defend the new

59. *See id.* at 199 (“Lawyers for the State of Colorado were . . . not specifically cause motivated, but they . . . developed certain cause lawyer qualities through their work on the [cause litigation].”).

60. *Id.* at 189.

61. Underscoring the distance between the movement and the state attorneys, Wilson finds that while government lawyers in his case study of abortion-related litigation adopted movement rhetoric to some degree, they also employed “frames that provided distance from the case’s more political aspects.” *Id.* at 196.

62. *See* Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 *DENV. U. L. REV.* 457, 458–59 (2009) (documenting the Mississippi Attorney General’s suit against the tobacco industry, the New York Attorney General’s suit against Merrill Lynch, and the City of Chicago’s suit against the gun industry).

63. Of course, some lawyers may become government lawyers so that they can lawyer for a cause. Indeed, Berenson notes that then-New York Attorney General Eliot Spitzer entered his government position “with an ambitious vision for the office as an aggressive proponent of progressive legal reform advanced through both litigation and regulation.” *See id.* at 475.

64. *Id.* at 458.

65. Professor Lynn Mather’s study of the anti-tobacco movement also resonates with Berenson’s insights. *See* Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 *LAW & SOC. INQUIRY* 897 (1998). In our study of the California marriage equality movement, Scott Cummings and I included lawyers at the San Francisco City Attorney’s Office. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 *UCLA L. REV.* 1235, 1281–86 (2010).

66. *Cf.* Nielsen & Albiston, *supra* note 20, at 1598 (explaining that public interest law practice developed “largely on the left, based on the early models of effective litigation provided by civil rights organizations such as the NAACP”).

regime.⁶⁷ And crucial periods in the civil rights movement witnessed significant moments of cause lawyering activity within the state.⁶⁸ But as the state shifted to the right, it offered a less viable practice setting for lawyers associated with liberal and progressive causes.⁶⁹

To some extent, then, the gap in the cause lawyering literature on movement in and out of the state may stem from the conservative turn of the state itself and the traditional assumption that cause lawyering is a left-progressive project. Accordingly, recent scholarship on conservative cause lawyers may supply a fuller recognition of the way in which cause lawyers move in and out of government positions. When we broaden our understanding of cause lawyering to include lawyers for the right, we see that the federal government has continued to furnish not only a receptive site for conservative visions but also an important location for cause lawyering practice.

A growing body of socio-legal scholarship analyzes the rise of the conservative public interest law infrastructure.⁷⁰ Professor Ann Southworth provides a comprehensive and revealing study of lawyers for conservative causes.⁷¹ While she focuses on the nonprofit organizations and public interest law firms populated by conservative cause lawyers, at various moments she acknowledges the crucial relationship between the conservative movement and the state. Southworth identifies multiple intersections between the state apparatus and conservative lawyers, showing that lawyers held important positions within Republican presidential

67. See RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 152 (1995) (showing how academic lawyers both moved into the state and groomed younger lawyers to enter the state in defense of the New Deal); Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS*, *supra* note 20, at 37, 49 (explaining how “New Deal lawyers were joined in the 1950s and 1960s by a new generation of cause lawyers who, working both for governmental agencies and for public interest firms, practiced on behalf of the disadvantaged”); see also Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 *STAN. L. REV.* 409, 423 (2011).

68. See McCann & Dudas, *supra* note 67, at 44 (noting that during the Kennedy and Johnson Administrations, “the departments of Justice and Labor . . . provided critical incubators for progressive legal visions, training ground for cause-oriented lawyers, and allies on a variety of egalitarian projects”).

69. See *id.* (explaining that “as electoral trends shifted, this resource [that is, opportunities to undertake progressive lawyering in government agencies] dried up”).

70. See generally TELES, *supra* note 20; Kevin den Dulk, *In Legal Culture, But Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS*, *supra* note 20, at 197; Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 *HARV. J.L. & GENDER* 303 (2009).

71. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 *UCLA L. REV.* 1223 (2005); Ann Southworth, John P. Heinz, & Anthony Paik, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 *LAW & SOC’Y REV.* 5 (2003); Ann Southworth, John P. Heinz, & Anthony Paik, *Lawyers of the Right: Networks and Organization*, 32 *LAW & SOC. INQUIRY* 883 (2007).

administrations and, at other times, within conservative legal organizations.⁷²

Similarly, Professor Steven Teles documents the powerful relationships between the emerging conservative legal movement and Reagan Administration lawyers.⁷³ Conservative lawyers entered government service, sought to bring in additional lawyers who had worked for conservative causes, and wielded state power both to build the conservative legal movement and to advance its agenda inside the government.⁷⁴ Key figures in Teles's study moved between movement organizations and the state. Demonstrated commitment to—not simply affiliation with—conservative movement organizations served as an important qualification for government employment. All of the co-founders of the Federalist Society, for instance, were hired into the Reagan DOJ.⁷⁵ And Stephen Markman, who founded the Federalist Society's D.C. chapter, led the Office of Legal Policy (OLP), which became a significant force for long-term strategic planning during the Reagan Administration.⁷⁶

After government service, many of the lawyers from the Reagan Administration leveraged their government experience to build the conservative public interest law infrastructure that Southworth documents.⁷⁷ For instance, while serving in the Reagan Administration, Chip Mellor and Clint Bolick developed plans to build a successful

72. See SOUTHWORTH, *supra* note 71, at 23, 38 n.24. Edwin Meese III, who served as Attorney General in the Reagan Administration, founded the Pacific Legal Foundation and the Crime Victims' Legal Advocacy Institute; Michael Carvin, who served in the DOJ's Civil Rights Division, was a founding board member of the Center for Individual Rights; Roger and Nancy Marzulla, who both served in the Reagan DOJ, founded the Defenders of Property Rights; Kevin Hasson, who served as attorney-advisor for the DOJ's Office of Legal Counsel, founded the Becket Fund. *Id.* at 38 n.24.

73. See Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. POL. DEV.* 61, 69 (2009). Teles does not use a cause lawyering lens, but his work significantly contributes to our understanding of cause lawyers.

74. See *id.* at 62–63.

75. See TELES, *supra* note 20, at 141. While I am not considering mere affiliation with the Federalist Society a cause lawyering credential, I am considering Federalist Society leaders to be serving cause lawyering roles to some extent. Even though they did not engage in conventional legal advocacy in their Federalist Society roles, leaders of the organization played a crucial role in the development, organization, and success of the conservative legal movement and in the emergence of conservative legal principles. See *id.* at 135–80. Although the Federalist Society at one point considered starting a litigation center, the group ultimately rejected the idea and instead provides a pro bono clearinghouse to connect volunteer lawyers with conservative causes. See *id.* at 154–57. Some Federalist Society leaders rejected a plan to engage in direct litigation activity in part because it could have “jeopardized the participation of many of the Society's members, especially those in government.” *Id.* at 155. Indeed, one Reagan Administration official noted that he would have had to resign from the Federalist Society if it became a litigation center. See *id.*

76. See *id.* at 145.

77. See Teles, *supra* note 73, at 69.

conservative public interest law organization.⁷⁸ Eventually, they founded the Institute for Justice, an influential conservative public interest firm.⁷⁹

Ultimately, scholarship on conservative cause lawyers alerts us to the existence and importance of the movement of cause lawyers in and out of the state. The lawyers that Southworth and Teles identify influenced the government's relationship to the conservative movement and leveraged their government experience to strengthen and advance the movement itself. In both subtle and not-so-subtle ways, they built an administrative regime that could furnish a key site for conservative cause lawyering.

This work on the conservative legal movement provides an important map of individuals moving in and out of state service in a specific movement context. In doing so, it contributes to our understanding of both conservative movement mobilization and bureaucratic activity. Yet it focuses on different questions than those addressed in this Article. Southworth expertly charts the development of conservative cause lawyering, but does not devote sustained attention to the state. Teles explores the conservative transformation of the executive branch, but does not use a cause lawyering lens. This Article, in contrast, intervenes directly in cause lawyering scholarship to offer a more general exploration of the impacts cause lawyers in government positions may have on both the state and the movement. By attending to the overlapping and mutually constitutive relationship between movements and the state, the analysis that follows brings social movement theory to cause lawyering scholarship to better understand the phenomenon of cause lawyer movement into the state.

II. MOVEMENT-STATE OVERLAP IN SOCIAL MOVEMENT RESEARCH

A substantial amount of cause lawyering scholarship focuses explicitly on lawyers' roles representing social movements.⁸⁰ The tendency to see cause lawyers outside and against the state may be more pronounced when scholars specifically contextualize cause lawyers within movements.⁸¹ Like the cause lawyering literature detailed in Part I, social movement work has traditionally conceptualized the movement and the state as largely distinct

78. See TELES, *supra* note 20, at 79–82.

79. See *id.* at 82–85.

80. Indeed, one of the volumes of Sarat and Scheingold's cause lawyering series centers on "[c]ause [l]awyers and [s]ocial [m]ovements." CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20. Even outside that volume, a number of recent case studies of cause lawyers have looked to specific movement contexts. See, e.g., Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617 (2011); Cummings & NeJaime, *supra* note 65; Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287 (2012). See generally Ashar, *supra* note 20.

81. See, e.g., Susan Bibler Coutin, *Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 101; den Dulk, *supra* note 70, at 197; Marshall, *supra* note 20, at 164; Corey S. Shdaimah, *Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 220–21.

entities locked in oppositional, rather than cooperative, relations.⁸² In this view, movements agitate for change and seek to disrupt the status quo, while the state represses or resists the movement in an attempt to maintain existing power relations.⁸³ In fact, social movement scholars have viewed state support with suspicion, seeing the potential for cooptation, moderation, and demobilization.⁸⁴

Even when social movement scholars explore the benefits of work with the state, they typically portray state actors as allies—bystanders convinced to support some part of the movement’s agenda. These state allies may then use their privileged positions to advance the movement’s cause.⁸⁵ In this view, state actors are outside the movement, and the movement remains outside the state.⁸⁶ Accordingly, helpful government officials look much like the newly activated or occasional government cause lawyers observed in Wilson’s and Berenson’s cause lawyering studies.

More recent social movement scholarship complicates the conventional understanding of the movement and the state as distinct and mutually

82. See, e.g., Leo d’Anjou & John Van Male, *Between Old and New: Social Movements and Cultural Change*, 3 MOBILIZATION: INT’L J. 207, 207 (1998) (explaining that “movements concern the dynamics of challengers vs. authorities”); see also LEE ANN BANASZAK, *THE WOMEN’S MOVEMENT INSIDE AND OUTSIDE THE STATE 2* (2010) (“[T]he view that social movements are clearly and completely ‘outside the state’ prevails throughout both theoretical and empirical discussions of social movements generally.”).

83. See Wayne A. Santoro & Gail M. McGuire, *Social Movement Insiders: The Impact of Institutional Activists on Affirmative Action and Comparable Worth Policies*, 44 SOC. PROBS. 503, 503 (1997); see also John A. Noakes & Hank Johnston, *Frames of Protest: A Road Map to a Perspective*, in FRAMES OF PROTEST: SOCIAL MOVEMENTS AND THE FRAMING PERSPECTIVE 1, 18 (Hank Johnston & John A. Noakes eds., 2005). Social movement theory’s maintenance of movement-state opposition may reflect the field’s structural emphasis, which was dominant until relatively recently. See Jeff Goodwin & James M. Jasper, *Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory*, 14 SOC. F. 27, 34 (1999); John A. Noakes, *Official Frames in Social Movement Theory: The FBI, HUAC, and the Communist Threat in Hollywood*, in FRAMES OF PROTEST, *supra* note 83, at 89, 90. Indeed, the structural view correlates with social movement scholars’ traditional preference for confrontational, rather than institutional tactics—suggesting that a movement’s power resides in resisting, rather than working with, state power. See Goodwin & Jasper, *supra* note 83, at 34. More recently, the cultural turn in sociology has influenced social movement theory, and many scholars have taken a cultural lens to established frameworks for social movement analysis. See William A. Gamson & David S. Meyer, *Framing Political Opportunity*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 275, 279 (Doug McAdam et al. eds., 1996). Framing—the most recent major social movement theoretical intervention—makes culture an important dimension of movement activity. See Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. SOC. 1718, 1721 (2006).

84. See, e.g., FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* xi (1977).

85. See, e.g., SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 153 (1991).

86. See Santoro & McGuire, *supra* note 83, at 504 (“Implicit in resource mobilization theory is the view that movement actors and political opportunities are conceptually distinct and mutually exclusive.”).

exclusive entities. This work builds on a more complex understanding of the state itself, conceptualizing the state as disaggregated and dynamic.⁸⁷ A number of institutions and organizations constitute the state, and each presents different opportunities and constraints to social movements.⁸⁸ Furthermore, the state is composed of personnel—actual individuals—with different experiences, motivations, and goals.⁸⁹ And the individuals who occupy state positions respond to large-scale social and cultural shifts.⁹⁰ By stressing the fragmented institutional structure and changing personnel of the state, as well as the cultural dimensions of the state, recent social movement work rejects a monolithic treatment of the state and resists simply correlating political opportunity with the party in power.⁹¹ Instead, a variety of competing interests, arrangements, and individuals constitute the state. Therefore, opportunities for social movement activism vary across the state and change over time.⁹²

Social movement scholars increasingly use this more sophisticated understanding of the state to study specific movements and to suggest broader theoretical approaches with which to analyze social movement activity.⁹³ For instance, in their study of the women's rights movement,

87. See BANASZAK, *supra* note 82, at 16 (“[W]hile the state as a whole has specific interests, many of the organizations that comprise the state have additional interests, resulting in ‘a set of pluralistic goals.’ The plurality of goals can lead state actors to act in opposition to each other.”) (citations omitted); Sidney Tarrow, *States and Opportunities: The Political Structuring of Social Movements*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, *supra* note 83, at 41, 51 (“[S]tate elites are far from neutral between different social actors and movements.”); see also Catherine Albiston, *The Dark Side of Litigation As a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 72–73 (2011), http://www.uiowa.edu/~ilr/bulletin/ILRB_96_Albiston.pdf (positioning the state as dynamic and active).

88. BANASZAK, *supra* note 82, at 17–18.

89. See *id.* at 19–20.

90. See *id.* at 20.

91. See *id.* at 184.

92. See *id.* at 16–21. Some cause lawyering scholars have noted the fragmented nature of the state. See Sarat & Scheingold, *State Transformation*, *supra* note 4, at 4 (devoting a section to “[t]he [d]isaggregated [s]tate”); Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 4, at 69, 102 (“The state is not monolithic: power is divided among branches and within them; institutions and officials differ in incentive and culture.”). Unlike most cause lawyering scholars, Woods and Barclay center the state as an object of inquiry. See Woods & Barclay, *supra* note 47, at 205. They argue that “attention to the disaggregated state allows an opening for scholars to investigate a wider range of possible relations between cause lawyers and state actors than assumed by the oppositional/transgressive model at work in early research on cause lawyering.” *Id.* at 206. In other words, a more relational and contingent conceptualization of the state complicates the traditionally oppositional and adversarial account of cause lawyers. See *id.* Nonetheless, Woods and Barclay stop short of considering cause lawyers *inside* the state.

93. See BANASZAK, *supra* note 82, at 187 (arguing in her study of the women's movement that “we can better understand *all* social movements if we view the movement-state intersection as a central theoretical concept with identifiable dimensions”); MARK WOLFSON, *THE FIGHT AGAINST BIG TOBACCO: THE MOVEMENT, THE STATE, AND THE PUBLIC'S HEALTH* 13 (2001) (showing how the state became part of the anti-tobacco movement in a process he labels movement-state “interpenetration”). By focusing on

Professors Wayne Santoro and Gail McGuire argue that the inability to see the existence of movement actors inside the state obscures the movement's influence on comparable worth policies; the women's movement, they claim, shaped those policies "through institutional rather than non-institutional activists."⁹⁴ Their research uncovers the importance of institutional channels for movement advances and the benefits movements may reap by having activists operating in those channels. Yet institutional activism is not equally available to all movements and is not conducive to all issues.⁹⁵ Both the degree to which movements enjoy insider status in the political structure and the technical nature of the underlying issues influence the impact of institutional activism.⁹⁶

Professor Lee Ann Banaszak's study of the women's movement offers the most comprehensive treatment of the impact of movement activists inside the state. Banaszak stresses the close relationships and overlapping membership between indigenous movement organizations and feminist activists and organizations in the federal government.⁹⁷ She shows that some feminist activists inside the state were able to publicly pursue movement causes through government bodies dedicated to women's rights,⁹⁸ while others advanced the cause in less explicit and overt ways, sometimes operating "under the radar" of higher-level government officials.⁹⁹ All the while, the work of feminists in government responded to and shaped social movement activity outside the state. In the end, Banaszak's analysis constructs a dynamic and complex picture of movement-state intersections in which feminist activists in government positions harnessed (or limited) state power to help the women's movement advance.

lawsuits initiated by state Attorneys General, which placed government lawyers in collaboration with their nongovernment counterparts, Professor Mark Wolfson highlights the importance of legal arenas as venues for movement-state relationships. See WOLFSON, *supra* note 93, at 142–45. Yet rather than focus on movement activists moving into the state, Wolfson reconceptualizes allies in government as movement actors. In this sense, Wolfson's intervention recognizes the existence of the movement inside the state but maintains a separation between indigenous social movement organizations and state actors. For example, he notes that a lawsuit by the Minnesota Attorney General "was largely if not entirely self-initiated—that is, *not* a direct reaction to pressure from movement organizations." *Id.* at 142.

94. Santoro & McGuire, *supra* note 83, at 514.

95. See *id.* (finding that "institutional activists in the women's movement were important in determining comparable worth policies while non-institutional actors in the civil rights movement affected affirmative action policies").

96. See *id.*

97. See BANASZAK, *supra* note 82, at 63–91; see also Lee Ann Banaszak, *Moving Feminist Activists Inside the American State: The Rise of a State-Movement Intersection and Its Effects on State Policy*, in THE UNSUSTAINABLE AMERICAN STATE 223, 237–39 (Lawrence Jacobs & Desmond King eds., 2009); Lee Ann Banaszak, *Inside and Outside the State: Movement Insider Status, Tactics, and Public Policy Achievements*, in ROUTING THE OPPOSITION: SOCIAL MOVEMENTS, PUBLIC POLICY, AND DEMOCRACY 149, 164–65 (David S. Meyer et al. eds., 2005).

98. See BANASZAK, *supra* note 82, at 87.

99. See *id.* at 180–81.

Ultimately, Banaszak's work and other social movement scholarship on movement-state overlap suggest that movements actively alter and shape the political opportunity structure.¹⁰⁰ Movement activists themselves may help constitute the state apparatus, occupying locations in which they can use state power for movement purposes. And they may alter elite alignments both by assuming official state positions and by influencing other, non-movement state actors. In other words, by entering and shaping the state, the movement may create its own political opportunities and harness state power as an important movement resource.¹⁰¹

How, then, do cause lawyers fit into this complex picture of movement-state overlap? While Banaszak focuses on a range of bureaucrats in the federal government, her analysis sheds important light on the role of lawyers in particular. Many of the feminist activists in her study were attorneys and used legal reform and litigation to advance the movement cause.¹⁰² Given that legal actors function as important state actors¹⁰³ and litigation serves as a key institutional tactic,¹⁰⁴ attention to the work of lawyers in the study of movement-state overlap seems crucial. Once we have acknowledged that cause lawyers move into the state, we can begin to understand their impact.¹⁰⁵ We should ask, as Sarat and Scheingold do about cause lawyers more generally, what cause lawyers inside the state do *for* and *to* the movements with which they identify.¹⁰⁶ In doing so, we should explore the productive roles that cause lawyers play within the state, the delicate balance lawyers strike when they deploy state power in service of movement objectives, and the constraints imposed by such movement-

100. As leading social movement theorist Doug McAdam explains, political process scholarship has coalesced around the following dimensions of political opportunity:

1. [t]he relative openness or closure of the institutionalized political system[;]
2. [t]he stability or instability of that broad set of elite alignments that typically undergird a polity[;]
3. [t]he presence or absence of elite allies[; and]
4. [t]he state's capacity and propensity for repression.

Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, *supra* note 83, at 23, 27. McAdam notes that the political opportunity structure is dynamic. *See id.* at 37 (pointing out "the typically fluid, reciprocal, unpredictable, and crucially important relationship of social movements to structures of political opportunity").

101. *See* BANASZAK, *supra* note 82, at 196 (explaining that "some state-based political opportunities are in fact parts of the movement itself").

102. *See id.* at 31, 61, 124-48.

103. *See* WOLFSON, *supra* note 93, at 13 (identifying the Minnesota Attorney General as a "state agency that is heavily involved, in a proactive way, in tobacco control advocacy").

104. *See id.* at 209 (explaining the joint state-movement "litigation explosion" in the anti-tobacco movement).

105. The existence of cause lawyers in government relates to the more general absorption of social movements into political parties. *See, e.g.,* Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 215 (2008) (noting the incorporation of conservative movements into the Republican party).

106. *See* Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 20, at 1, 3.

state overlap. In Part III, I take up the positive effects that movements may experience when cause lawyers occupy government positions. In Part IV, I address limitations imposed by cause lawyer movement into the state.

III. CAUSE LAWYERS AND STATE POWER

This Part identifies four key impacts that cause lawyers who assume government positions *may* produce: (1) reforming the state itself; (2) shaping state personnel and priorities; (3) harnessing state power for shared movement-state goals; and (4) facilitating and mediating relationships between the movement and the state. The impacts I explore are not meant to be exhaustive. Cause lawyers inside the state may serve a variety of functions, and I point to only a handful in this Article. Nor are the effects identified meant to apply to all cause lawyers who enter the state. Some cause lawyers may do very little to assist their movement colleagues or press movement goals once they attain a government position. Moreover, I limit my analysis to lawyers in the federal bureaucracy, rather than include lawyers in other institutional branches, including elected officials and judges, or at state and local levels of government.¹⁰⁷ It is important to note at the outset that I am not making claims regarding cause lawyer identity or motivation, instead leaving such issues for future empirical work. Only through additional research, with interviews of lawyers from a range of government locations and with relationships to a variety of movements, will we develop a comprehensive and detailed account of cause lawyers inside the state.¹⁰⁸

A. *Reforming the State*

Because they occupy positions within the government, cause lawyers who have moved into the state enjoy institutional access that allows them to

107. For the most part, I focus on lawyers serving under more sympathetic administrations, neglecting the roles that cause lawyers working during more hostile administrations may play. For an analysis of the work of feminist activists during hostile presidential administrations, see BANASZAK, *supra* note 82, at 162–85. Professor Guinier also notes that during Republican administrations hostile to civil rights some members of the civil rights community “anonymously infiltrat[ed] sympathetic federal agencies.” GUINIER, *supra* note 16, at 33.

108. I do not directly address issues of lawyer accountability. When a lawyer who previously had an attorney-client relationship that ensured some degree of accountability to client interests seeks to advance those interests through government service, where she is now accountable to a government client, important issues relating to lawyer domination, ethical representation, and governmental legitimacy are implicated. Of course, even in the traditional public interest setting, accountability is a serious issue. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); see also Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008); Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511 (2003).

influence policy within the government.¹⁰⁹ That is, they may agitate for policy change relating specifically to government institutions and may shape that policy going forward.¹¹⁰ By moving into the state apparatus, government lawyers assume positions that offer opportunities to contest, create, and shape rules and norms governing the state itself.

When looking at activity occurring inside the government and aimed at the government itself, certain issues may rise to the fore. For this discussion, I focus on employment practices. The government acts as a (particularly large) employer. Government employees have a direct stake in government employment policies, and they may observe or experience discriminatory employment practices. Therefore, they have incentives to challenge government employment discrimination, and their government positions provide institutional locations in which to do so.

As Banaszak's study shows, the issue of employment was a shared concern for women inside the federal bureaucracy and constituted an issue on which they could collectively advocate for change, regardless of whether they worked in an agency that otherwise addressed women's rights.¹¹¹ Thus, activists inside the state could work to reduce and eliminate sex discrimination in government employment.¹¹² Of course, changes in employment practices within government influenced feminist activists and movement advances outside the state.¹¹³ Through mandates governing federal contractors, government practices directly impacted employment in important nongovernmental settings.¹¹⁴ And the strengthening of equal employment practices in government supported claims made by feminist activists in a variety of workplace settings.¹¹⁵ In this sense, while work inside the government aimed specifically at government practices may in some ways represent a fairly limited type of social-change work, such work may shape political opportunities for more far-reaching policy and may bleed into other arenas.

109. Indeed, given the large and diffuse make-up of the executive branch, they may do so even without direct support from the President or other top-level officials. Cf. Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW & CONTEMP. PROBS. 61, 70 (1998) ("Coordinating the activities of the thousands of executive branch employees who are lawyers or even of the hundreds who hold top political legal jobs is a difficult task for any administration; it is especially difficult with respect to legal policy issues.").

110. Banaszak, for instance, documents feminist activism within government agencies, including agencies originally quite hostile to women's rights. See, e.g., BANASZAK, *supra* note 82, at 111 (discussing the formation of the Ad Hoc Committee to Improve the Status of Women in the Foreign Affairs Agencies). She concludes that "insider feminist advocates organized themselves within government to help to create a state whose practices and policies better reflected feminist principles." *Id.* at 188.

111. See *id.* at 141.

112. See *id.* at 143.

113. See *id.* at 188.

114. See *id.* at 146, 188.

115. See *id.* at 146.

Although a variety of government employees can articulate claims of employment discrimination and press for change within the federal bureaucracy, lawyers are especially well situated to agitate for change in government policy and shape government employment practices. Government regulations and policy, especially those dictating employment, are often articulated through legal language, mandates, and norms. In this sense, “lawyers speak the same language as the state.”¹¹⁶ Not only do lawyers speak the legal language of state employment policies, but they also occupy positions charged with regulating employment practices. The EEOC, for instance, furnishes rules and regulations implementing employment discrimination laws and issues guidance for employers on legal compliance.¹¹⁷ The EEOC’s interpretations, therefore, have a significant impact on workplace equality and the viability of claims alleging workplace discrimination. In addition, within the federal government, the EEOC is the body before which federal employees can appeal certain claims of workplace discrimination after an adverse ruling from their agency. Having EEOC actors dedicated to strong norms of nondiscrimination provides opportunities for the articulation of capacious equality norms and improves the protection of federal employees in the workplace.

In January 2011, Berrien, the Chair of the EEOC, which includes Feldblum, a strong LGBT rights advocate, made clear that transgender EEOC employees are protected against discrimination under the rubric of sex discrimination.¹¹⁸ This EEOC statement came after the Office of Personnel Management (OPM) issued a memorandum in 2009 announcing that factors unrelated to job performance would not be used as a ground for employment decisions for federal employees.¹¹⁹ OPM Director (and nonlawyer) John Berry clarified that memorandum by telling journalists, “[g]ender identity is a non-work-related factor.”¹²⁰ Berry, the highest-ranking openly gay official in the Obama Administration, had long made his views on LGBT issues clear, and it was not surprising that the office which he heads would take a leading role on the issue of gender-identity discrimination within the government.¹²¹ Ultimately, in May 2011, OPM

116. Woods & Barclay, *supra* note 47, at 215; *cf.* Ashar, *supra* note 20, at 1922 (noting lawyers’ “technical skills that can be of use in policy advocacy”).

117. See *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Oct. 20, 2012).

118. See Memorandum from Jacqueline A. Berrien, Chair, EEOC, to All Employees (Jan. 31, 2011) (on file with author) (“EEOC employees are protected by federal laws prohibiting discrimination on the basis of race, religion, color, sex (including pregnancy and gender identity), national origin, age, disability, family medical history, or genetic information.”).

119. See Autumn Sandeen, *OPM Releases Policies on Trans People in the Federal Workplace*, LGBT WKLY (June 9, 2011), <http://lgbtweekly.com/2011/06/09/opm-releases-policies-on-trans-people-in-the-federal-workplace/>.

120. *Id.*

121. See Pam Wechsler & Aliza Marcus, *Gay Obama Nominee Succeeds as Values Turn on Rescuing Families*, BLOOMBERG NEWS (Mar. 20, 2009, 12:01 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayPMVbGij1KY>.

issued guidance making clear that transgender federal employees are protected against discrimination in the workplace and providing specific information on the contours of the nondiscrimination mandate.¹²²

Of course, in advising their constituents, movement advocates outside the government picked up the federal government's articulation of a nondiscrimination mandate for transgender employees. The National Center for Transgender Equality (NCTE), for instance, disseminated information on workplace rights in February 2012 that highlights the federal government's "new guidance and protections for transgender federal employees."¹²³ Movement advocates themselves likely had a role in pushing the government to take this position. LGBT media commentary specifically noted the role of NCTE's Mara Keisling in working with the government on its new gender-identity policy.¹²⁴

More recently, the EEOC issued a unanimous decision in *Macy v. Holder*,¹²⁵ clarifying that, under the rubric of sex discrimination, Title VII protects employees discriminated against based on their transgender status.¹²⁶ While the decision applies generally to Title VII, the facts involved an applicant for a position with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives.¹²⁷ That agency treated the applicant's complaint of discrimination based on transgender status as distinct from a Title VII (sex discrimination) claim and therefore not subject to the set of procedural and substantive rights afforded federal employees lodging claims under Title VII.¹²⁸ Accordingly, in addition to the broader holding on the coverage of Title VII for transgender employees, the EEOC decision extended important rights specifically to federal employees. The Commission concluded that, contrary to the agency's determination, the applicant possessed a right to request a hearing in front of an EEOC administrative judge and the right to appeal the final agency decision to the EEOC.¹²⁹ In this way, the decision provides important rights to federal

122. U.S. OFFICE OF PERS. MGMT., GUIDANCE REGARDING THE EMPLOYMENT OF TRANSGENDER INDIVIDUALS IN THE FEDERAL WORKPLACE (2011), available at <http://www.opm.gov/diversity/Transgender/Guidance.asp> [hereinafter GUIDANCE REGARDING THE EMPLOYMENT OF TRANSGENDER INDIVIDUALS].

123. NAT'L CTR. FOR TRANSGENDER EQUAL., *Transgender Federal Employees: Your Workplace Rights* (Feb. 2012), <http://transequality.org/Resources/FederalEmployeesFeb2012.pdf>.

124. See Sandeen, *supra* note 119 ("We have Mara Keisling and the staff of the National Center for Transgender Equality to thank for their input to the federal government, most of which was adopted by the OPM.").

125. EEOC Appeal No. 0120120821 (Apr. 20 2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

126. See *id.* The substantive dimensions of the decision are discussed more fully in Part III.C, *infra*.

127. See *id.* at 1.

128. See *id.* at 3.

129. See *id.*

transgender employees and assures that federal employees may ultimately appeal an agency decision to the EEOC, which includes Feldblum.¹³⁰

Feldblum herself recently received the first annual EEOC Pride Award from the EEOC's LGBT employee organization.¹³¹ The group recognized her contributions to significant legal developments, including the *Macy* decision, describing her as “the driving force behind many of our recent advancements.”¹³² And it praised Feldblum as a “strong supporter” of the employee group, noting that “many of [its] members have attributed to her their comfort with being out in the workplace.”¹³³ A few days later, Berrien, the EEOC Chair, recognized Feldblum's contributions and congratulated her on the Pride Award in a letter highlighting LGBT-related developments at the EEOC.¹³⁴ In her EEOC role, Feldblum has not only contributed to an LGBT-friendly work environment in her own agency but has also, along with her colleagues, secured important nondiscrimination rights for LGBT federal employees.

B. Shaping State Personnel and Priorities

In addition to influencing government employment norms and regulations to make the government a more open environment for movement constituents, cause lawyers inside the state may facilitate the hiring of specific movement actors into government positions. That is, through more informal mechanisms, cause lawyers inside the state may promote the movement of additional cause lawyers into the state.¹³⁵ This may occur through networks that share information about government hiring, provide advice and mentorship during the selection process, and furnish references and recommendations.¹³⁶ Ultimately, these informal processes may lead to more movement actors entering government service, thus allowing change within the government to continue (even during more hostile administrations¹³⁷) and perhaps creating additional opportunities for such change.¹³⁸

130. *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Oct. 20, 2012).

131. See EEOC Pride's Presentation of the First “EEOC Pride Award” to Commissioner Chai Feldblum (on file with author).

132. *Id.*

133. *Id.*

134. See Letter from Jacqueline A. Berrien, Chair, EEOC, to Colleagues (June 18, 2012) [hereinafter June 18 Berrien Letter].

135. See BANASZAK, *supra* note 82, at 100 (explaining how a feminist activist inside the state “was often consulted on who should serve in government commissions dealing with ‘women’s issues’”).

136. See INSPECTOR GENERAL'S REPORT, *supra* note 3, at 22–23 (describing the informal ways in which job applicants are referred to DOJ officials).

137. See BANASZAK, *supra* note 82, at 181 (explaining how “activists[] take actions to help the movement within the bureaucracy even under adverse political conditions”).

138. See Teles, *supra* note 73, at 70 (finding that populating “agencies with young movement conservatives was also a way to ensure greater control over agencies that the White House could only exercise distant supervision of”).

While efforts to shift movement lawyers into government may occur sporadically and without coordination in some contexts,¹³⁹ they may in other instances constitute part of a more deliberate and widespread strategy of recruitment. Teles shows how conservative movement actors shaped the federal government in their favor by moving the next generation of movement conservatives into lower-level government positions and grooming them for eventual leadership.¹⁴⁰ Indeed, Teles argues that Reagan Administration officials engaged in a “very conscious effort . . . to build up and burnish the credentials of a new generation of young conservative lawyers, both through hiring and mentoring them, as well as helping to support the nascent Federalist Society—all of whose founders were hired by the [DOJ].”¹⁴¹ In this way, conservative movement lawyers in high-level government positions worked to mold the federal bureaucracy in their own image.

Ultimately, Reagan Administration lawyers in the DOJ transformed both the federal government and the external environment by implementing a long-term, law-centered agenda.¹⁴² After incorporating movement lawyers into the federal bureaucracy, DOJ officials relied on movement organizations like the Federalist Society to connect government lawyers with one another.¹⁴³ More importantly, they used state power to articulate, develop, and attempt to entrench a more enduring conservative vision of law and politics, both inside and outside the state.¹⁴⁴

Attorney General Edwin Meese III and his colleagues brought to the DOJ significant organizational innovations aimed at long-term change in line with conservative movement ideas. The DOJ engaged in strategic planning, focusing on goals oriented toward future administrations, and devoted resources to the emergence and development of broader conservative legal and constitutional theories.¹⁴⁵ Meese chose Stephen Markman, who founded the D.C. chapter of the Federalist Society, to lead the Office of Legal Policy (OLP). Markman in turn ran the department like a social movement organization, focusing on coordinating government efforts to achieve “a consistent conservative voice in [government] litigation.”¹⁴⁶ Indeed, Meese described OLP as “an in-house think tank.”¹⁴⁷ With *Guidelines on Constitutional Litigation*, OLP lawyers charted a clear course for government litigation aimed at influencing constitutional construction

139. Feldblum, for instance, recounts how Professor Paul Miller, an important disability rights advocate who also served as an EEOC Commissioner, aided her rise to the EEOC through his work in President Obama’s presidential appointments office. See Chai R. Feldblum, *Following in Paul Miller’s (Very Large) Footsteps*, 86 WASH. L. REV. 702, 702 (2011).

140. See Teles, *supra* note 73, at 62.

141. See *id.* at 63.

142. See *id.* at 62–63.

143. See *id.* at 71–72.

144. See *id.* at 75–78.

145. See *id.* at 67.

146. See *id.* at 68 (quoting Kenneth Cribb).

147. See *id.* at 69 (quoting Edwin Meese III); see also *id.* at 81.

on issues important to conservative movement groups.¹⁴⁸ And with *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, government lawyers communicated that vision and path both to movement leaders outside the state and to ground-level constituents.¹⁴⁹ DOJ leaders articulated a conservative new direction for government litigation and laid the groundwork for both legal and political mobilization around a conservative ideology that would touch on a number of issues to which movement conservatives had dedicated themselves. Moreover, by working to populate the federal bench with movement conservatives, executive branch lawyers ensured that the courts would be receptive to their new vision.¹⁵⁰ Ultimately, conservative movement lawyers in the DOJ actively shaped both the government's agenda and the broader legal environment to align government power with conservative ideals for years to come.¹⁵¹

C. Harnessing State Power to Advance Shared Movement-State Goals

Lawyers in public enforcement positions are uniquely situated not simply to shape the agency in which they serve but also to undertake work that more directly interacts with the social movement's substantive agenda.¹⁵²

148. See generally U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, GUIDELINES ON CONSTITUTIONAL LITIGATION (Feb. 19, 1988) (covering constitutional interpretation, standing, limits on federal power, individual liberties, and statutory interpretation). Even as the Guidelines invited outside engagement, they explained that they were "promulgated solely for the purpose of facilitating internal deliberations within the Executive Branch itself." *Id.* at iii.

149. See U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POL'Y, REPORT OF THE ATTORNEY GENERAL: THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (Oct. 11, 1988); Siegel, *supra* note 105, at 221; Teles, *supra* note 73, at 81. For Attorney General Meese's views on the role of nonjudicial branches in constitutional construction, see Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

150. See TELES, *supra* note 20, at 157–59; Siegel, *supra* note 105, at 216–17; cf. Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 284–85 (2003); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 367 (2003).

151. While Teles's study of conservative movement lawyers shows a carefully orchestrated and comprehensive effort by government lawyers to shape the state in a direction favorable to the movement, government lawyers in other contexts may influence the state's agenda in more limited—and less ideological—ways. Executive branch lawyers, especially those in public enforcement positions, inhabit positions that furnish access to government agenda setting and provide publicity and credibility to the issues and strategies they push. See Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 437 (2007); see also GUINIER, *supra* note 16, at 32.

152. Given barriers to private enforcement, public enforcement may be especially important. As Professors Catherine Albiston and Laura Beth Nielsen argue, the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), disincentivized private civil rights litigation by encouraging strategic capitulation by government defendants. See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007). The effects of *Buckhannon*, they claim, "herald a shift from private rights enforcement

By taking steps that advance the movement's substantive priorities and by using their governmental positions to press state action favorable to the movement, cause lawyers inside the state may play a significant and often public role in advancing the cause with which they identify.¹⁵³ Put another way, these lawyers occupy law-making institutions in ways that allow them to create a favorable legal environment, constructing a doctrinal and regulatory framework that supports the movement.¹⁵⁴

In this context, attention focuses on movement actors occupying positions *dedicated to issues important to the movement*. Accordingly, cause lawyering experience is especially relevant to the individual's ability to gain the government position. Previous advocacy work serves as a qualification for the government enforcement role.¹⁵⁵ Yet, while movement advocates enter the government based on their expertise springing largely from movement work, these government lawyers are generally not understood as cause lawyering inside the state. Instead, they are seen as implementing governmental policy in their area of expertise. Unlike in the context of government reform, where in some cases activists dispersed throughout the federal bureaucracy can impact policy inside the government, here government employees are specifically occupying positions charged with influencing issues that relate to the movement. In this sense, while they use state power to move the cause forward, they do so from positions that align the government with the cause. In other words, the government and the movement have an overlapping agenda, and the government lawyer may now use state power to push shared goals.

toward more government power both to resist rights mandates and to control the enforcement—and ultimately the meaning—of civil rights.” *Id.* at 6.

153. Banaszak explains that some feminist activists inside the state worked in agencies geared towards women's policy issues, thereby “allow[ing] them to engage in feminist activity as *government employees*.” See BANASZAK, *supra* note 82, at 59.

154. This resonates with Professor Marc Galanter's foundational work on how “the ‘haves’ come out ahead.” See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124–25 (1974). By constructing a system of rules and principles that advance the movement's goals, government lawyers may create a regime that favors the movement's long-term interests. See *id.*

155. Work on international feminist legal organizing—and specifically what Professors Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas have labeled “governance feminism”—explores the process by which feminism becomes an “expertise.” Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 345 (2006). They explain that governance feminism has “worked hard to get its people hired by governments where they participate in the bureaucracy of power.” *Id.* They note, for instance, that “[s]pecial advisors on gender-related violence constitute one strategy” and that “international feminist activism has been recognized as a *qualification* for sitting on the bench in the [International Criminal Tribunal for Yugoslavia].” *Id.*; see also Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, 18 (2004) (explaining how the ICTY Appeals Chamber found that a trial judge's “expertise in women's issues and gender crimes made her exceptionally qualified,” rather than unfairly biased, “to sit as a judge on cases adjudicating sexual violence”).

Work by antidiscrimination scholars on public enforcement is instructive. Professor Michael Waterstone argues for greater federal enforcement of existing statutory antidiscrimination law and, in doing so, sees a significant role for cause lawyering activity inside the state.¹⁵⁶ By acknowledging that the opportunities for effective enforcement change with a new administration, Waterstone's account suggests that a new set of political actors brings with it new lawyers with different priorities.¹⁵⁷ And in times of more liberal administrations, cause lawyers from traditional civil rights organizations may be called on to carry out the government's enforcement efforts.¹⁵⁸ Waterstone urges these lawyers to more aggressively pursue their enforcement obligations. Yet, by dealing primarily with government lawyers authorized to initiate litigation in the public interest under existing statutory schemes,¹⁵⁹ his account conceptualizes government lawyers more as experts implementing public policy than as advocates moving forward a social movement's agenda. Accordingly, because these lawyers occupy positions charged with public enforcement, they may carry out their duties, which may coincide with movement priorities, without compromising their own professional legitimacy or the legitimacy of the government agency in which they work.

Of course, Waterstone acknowledges that even though these government lawyers are enforcing existing laws, they may use a variety of tools and resources to broaden implementation and enforcement.¹⁶⁰ Indeed, he urges them to do just that.¹⁶¹ Clearly, the experience these new government actors gained through their cause lawyering work impacts the forcefulness and creativity with which they carry out their public enforcement duties. In considering these duties, it is useful to distinguish government actors' distinct roles in regulation, litigation, and adjudication.

156. See Waterstone, *supra* note 151.

157. See *id.* at 436 (“[E]xisting academic accounts tend to treat public enforcement as chronically ineffective and incapable of improvement. In the current political environment, it may seem naïve or overly ambitious to talk about a more systemic and effective role for public enforcement authorities. But administrations do not last forever, and when the pendulum swings back in a more pro-civil rights direction, it is important to have models of more proactive public enforcement behavior.”) (footnote omitted). Even when criticizing the power of public enforcement, antidiscrimination scholars recognize the political contingency of legal action by the government. For instance, Professor Michael Selmi observes some changes in enforcement patterns when a new administration from a different political party takes power. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1422–23 (1998). Yet Selmi also shows that the EEOC did not enforce civil rights laws, as a general matter, under the Clinton Administration with any greater vigor than it did under earlier Republican administrations. See *id.* at 1430.

158. See Stein et al., *supra* note 8, at 1697. Indeed, Professor Guinier, who had worked at LDF, describes the way in which her civil rights colleagues supported her nomination to serve as Assistant Attorney General for Civil Rights. See GUINIER, *supra* note 16, at 32.

159. See Selmi, *supra* note 157, at 461.

160. See Stein et al., *supra* note 8, at 1697–1702.

161. See Waterstone, *supra* note 151, at 437.

1. Regulation

First, government lawyers may develop and promulgate regulations governing statutes.¹⁶² In this role, they can shape legal implementation and influence doctrinal developments over the long run.¹⁶³ And they can do so without official judicial or legislative changes. Even during more hostile administrations, this regulatory function may allow some lawyers to preserve earlier movement gains. On one hand, government lawyers can alert movement activists to proposed regulatory changes that might otherwise escape notice.¹⁶⁴ On the other hand, the very technical and burdensome nature of regulatory governance may insulate sympathetic lawyers' work from careful scrutiny by high-level officials and political activists.¹⁶⁵

Lawyers who served as legislative advocates or lobbyists may play a particularly significant role in this more regulatory capacity.¹⁶⁶ Their prior experience may have produced dexterity with the relevant legislation and familiarity with the legislative history, both of which may inform their work inside the government. More generally, government lawyers who served in legislative roles may possess greater expertise on the day-to-day operation of agencies and the relationship of the federal bureaucracy to the political process. In other words, former legislative cause lawyers may enjoy a smooth transition into government practice and may find regulatory work especially well-suited to their skill sets.¹⁶⁷

In more forceful regulatory efforts, government lawyers can shape the development of novel theories of discrimination. Professors Nicholas Pedriana and Robin Stryker show how, in its early years, the EEOC pushed

162. In a related vein, Professor Charles Epp shows at the local bureaucratic level that “[t]he interaction between . . . activist pressure from the outside and reform ideas from the inside . . . generated enormous pressure for reform.” CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* 3–4 (2009). The system of “legalized accountability” that Epp identifies is most meaningful “where agencies are closely connected to professional networks.” *Id.* at 4.

163. Bagenstos, for instance, promulgated the 2010 Americans with Disabilities Act regulations. *See Samuel Bagenstos, supra* note 7. And the EEOC, where Feldblum serves, issued regulations implementing the ADA Amendments Act of 2008. *See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 76 Fed. Reg. 58 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630). For a historical analysis revealing how regulatory determinations shape the content of civil rights laws, see Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

164. *See BANASZAK, supra* note 82, at 146–47, 177–78.

165. *See id.* at 180–81.

166. Cause lawyering scholarship more generally would benefit from greater attention to lawyers in regulatory and legislative roles.

167. They may also move into explicitly legislative roles. *Cf.* Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for “Statutory Housekeeping”:* *Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 139–40 (2007).

more expansive interpretations of Title VII.¹⁶⁸ Even when faced with doctrinal constraints and pressure from employers, the EEOC worked with civil rights advocates to “target institutionalized seniority and testing practices” and ultimately to “expand[] the concept of discrimination to prohibit not just discriminatory *intent*, but also discriminatory *consequences* of institutionalized employment practices.”¹⁶⁹ In fact, the agency used its limited internal capacities to conduct its own studies and eventually issue guidelines on employment testing that solidified the agency’s broad interpretation of Title VII’s prohibition on discrimination.¹⁷⁰ While Pedriana and Stryker do not focus on movement actors at the EEOC—instead showing that EEOC officials during the agency’s early years were pressured by cause lawyers outside the government—other scholars have shown how feminist attorneys working at the EEOC pressed the concept of systemic discrimination.¹⁷¹ These insiders used existing legal norms to push more capacious understandings of sex discrimination.¹⁷²

Government lawyers may also use their regulatory authority to develop more creative approaches to civil rights enforcement. Indeed, with the neoliberal turn of the state, state actors may increasingly fill more collaborative, and less authoritative, roles in relation to regulated entities.¹⁷³ Waterstone, for instance, advocates New Governance solutions in which government lawyers work more collaboratively with regulated parties to ensure ADA compliance.¹⁷⁴ He cites the DOJ’s Project Civic Access, in which DOJ officials conduct compliance reviews of state and local governments, as an example of flexible regulatory enforcement.¹⁷⁵ Ultimately, he proposes more capacious efforts that seek to harness the federal government’s authority in disability rights domains characterized by

168. See Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOC. 709 (2004).

169. *Id.* at 727.

170. See *id.* at 734. Pedriana and Stryker do not characterize EEOC lawyers as cause lawyers, instead showing that in the early years of the agency’s existence, the EEOC felt pressure to “legitimize its existence,” which it could do through accepting and pushing civil rights groups’ broad doctrinal positions. See *id.* at 748.

171. See BANASZAK, *supra* note 82, at 145. Movement activists in government, including at the EEOC, also were vital to the development of comparable worth policies. See MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 129–30 (1994); Santoro & McGuire, *supra* note 83, at 511.

172. More recently, as discussed above, government actors have included gender identity as a prohibited ground of discrimination in federal employment, and, in doing so, have pressed a transgender-inclusive concept of sex discrimination. See GUIDANCE REGARDING THE EMPLOYMENT OF TRANSGENDER INDIVIDUALS, *supra* note 122.

173. On the relationship among New Governance, neoliberalism, and legal liberalism, see Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357. On lawyers’ roles in these regimes, see NeJaime, *supra* note 43, at 338; see also Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 546 (2008).

174. See Waterstone, *supra* note 151, at 488–96.

175. See *id.* at 490.

underenforcement of fairly generalized norms.¹⁷⁶ Through this lens, DOJ lawyers are not litigators but facilitators.¹⁷⁷

2. Litigation

Next, in more traditional litigation efforts, government lawyers can stake out a strong role in civil rights enforcement, both through the level of enforcement and the articulation of specific legal theories. With power to initiate litigation and with resources for more large-scale suits, government lawyers may develop types of cases they may not have had the capacity or latitude to pursue in other practice settings. They may also use the government's resources and enforcement powers to point law and policy in new directions.¹⁷⁸ Therefore, the presence of cause lawyers in positions with litigation authority may combine with the government's vast capabilities to produce an especially powerful resource.

Waterstone argues that, in the disability context, government lawyers should bring "structural litigation"—"large systemic cases"—in the areas of failure-to-hire and physical accessibility.¹⁷⁹ The government, he suggests, is well-suited to pursue this large-scale litigation.¹⁸⁰ Indeed, Bagenstos's appointment to the DOJ gave Waterstone and his colleagues hope for increased ADA enforcement.¹⁸¹ Bagenstos, in turn, focused on enforcement regarding both public accessibility¹⁸² and integrated placements for individuals with disabilities.¹⁸³ In his powerful government position, his decisions on how to prioritize the Civil Rights Division's enforcement capacities shaped the effectiveness of disability rights laws.

While government lawyers may step up enforcement of established statutory rights, they may also press more expansive definitions of rights so as to protect groups otherwise left with uncertain coverage. For instance, after LGBT rights lawyers filed suit against the Anoka-Hennepin School District in Minnesota on behalf of LGBT students subject to harassment,

176. *See id.* at 491–92.

177. *See id.* at 493.

178. *See* GUINIER, *supra* note 16, at 34 ("I accepted the nomination with a dual sense of mission. I believed it was critical to enforce existing laws. I also wanted to change direction in the fight for civil rights. I was not sanguine about simply recommitting the federal government and its resources to enforcing a 1960s vision of formal equality. I believed that innovative remedies were needed to address a different, more complex set of problems.").

179. *See* Waterstone, *supra* note 151, at 436–37.

180. *See id.* at 461.

181. *See* Stein et al., *supra* note 8, at 1697.

182. *Deputy A.G. for Civil Rights, on Enforcing the Promise of the ADA, and Beyond*, HARV. L. SCH. (Sept. 14, 2009), http://www.law.harvard.edu/news/2009/09/14_civil_rights.html (quoting Bagenstos: "One of the priorities in the civil rights division of the Justice Department is enforcing the rights of access to public places close to home, and in the world—such as stores and restaurants.").

183. *See Samuel Bagenstos, supra* note 7. This enforcement effort draws on the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), upholding a decision finding that the failure to discharge institutionalized individuals into integrated, community-based settings constituted discrimination under the ADA.

the DOJ filed its own complaint against the school, thereby staking out an important enforcement role for the federal government.¹⁸⁴ Strikingly, DOJ attorneys argued that the “students . . . experienced and reported verbal and physical sex-based harassment because of their gender nonconformity.”¹⁸⁵ By conceptualizing harassment against LGBT students, including the use of antigay epithets, as harassment based on gender nonconformity, government attorneys pushed a definition of statutory and constitutional gender-nondiscrimination norms that included sexual orientation and gender identity.¹⁸⁶ In doing so against a legal backdrop hostile—especially outside the educational context—to the use of sex-discrimination norms to frame sexual-orientation-based claims, DOJ attorneys provided important credibility to the interpretations advanced by LGBT rights lawyers.¹⁸⁷ In the end, the DOJ’s enforcement action may influence the development of the law in this area and possibly bleed outside the educational context.

3. Adjudication

Finally, lawyers who enter government service may also serve enforcement roles with adjudicative responsibilities.¹⁸⁸ While this suggests the importance of attention to the movement of cause lawyers into judicial positions, here I am addressing only those lawyers in executive branch positions with some adjudicative duties.¹⁸⁹ When acting in this capacity, concerns about legitimacy are especially pronounced. As neutral decision makers without agendas influenced either by social movements or political leaders, government lawyers exercising adjudicative powers are perhaps most constrained in their ability to push movement priorities. Therefore, it is important to attend to the background conditions that may allow

184. See Chris Geidner, *DOJ Files Civil Rights Lawsuit Against MN School District; Settlement Proposal with DOJ, Students Follow*, METROWEEKLY (Mar. 5, 2012, 10:00 PM), <http://www.metroweekly.com/poliglot/2012/03/doj-files-civil-rights-lawsuit.html>.

185. Complaint-in-Intervention at 20, *Doe v. Anoka-Hennepin School District No. 11*, No. 11-cv-01999 (D. Minn. Mar. 5, 2012), available at <http://www.justice.gov/crt/about/edu/documents/anokacompint.pdf>.

186. See, e.g., *id.* at 6–7.

187. Schools constitute one of the rare domains in which courts have favorably treated sex discrimination claims by lesbian and gay plaintiffs. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). In the contexts of Title VII and constitutional equality, courts historically have been much more hostile to these claims. See, e.g., *Anderson v. Napolitano*, No. 09-60744-CIV, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010); *Trigg v. N.Y. City Transit Auth.*, No. 99-CV-4730, 2001 WL 868336 (E.D.N.Y. Jul. 26, 2001); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 495 (2007) (analyzing the failure of sex discrimination claims in same-sex marriage cases).

188. Looking outside actual adjudication, Luban argues in his critique of OLC lawyers during the Bush Administration that executive branch lawyers’ opinions “binding entire departments of the government” are “quasi-judicial.” DAVID LUBAN, *LEGAL ETHICS & HUMAN DIGNITY* 203 (2007).

189. For a discussion of the relationship between social movements and judges, see Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 731–33 (2012).

government officials to make crucial decisions favorable to a cause in their adjudicative roles.

In *Macy*, a case brought by lawyers at the Transgender Law Center (TLC), the EEOC recently ruled that Title VII's prohibition on sex discrimination protects employees discriminated against based on their transgender status.¹⁹⁰ While the EEOC includes Feldblum, an experienced LGBT advocate and scholar whose confirmation social conservatives attempted to block, the timing and framing of the EEOC's decision shields the agency, at least to some extent, from attacks on its neutrality and allows it to maintain its legitimacy. First, the EEOC acted as a unified, bipartisan body, issuing a unanimous ruling; Feldblum, the only commissioner with significant LGBT rights experience, was merely one of the commissioners who reached the decision.

Next, and more importantly, the EEOC intervened at a moment when the law surrounding coverage of transgender employees under Title VII—and antidiscrimination law more generally—had developed significantly. A growing body of federal case law supported the EEOC's conclusion and thereby allowed the EEOC to frame its ruling not as an expansion of rights but as an affirmation of existing judicial constructions. Not only have those circuit courts seen as more liberal issued sex discrimination decisions in favor of transgender litigants,¹⁹¹ but traditionally more conservative circuit courts also have made sweeping pronouncements that include transgender employees under the rubric of sex discrimination. The EEOC quoted at length from the Eleventh Circuit's recent opinion in *Glenn v. Brumby*¹⁹² and the Sixth Circuit's landmark decision in *Smith v. City of Salem*.¹⁹³ By relying on a growing body of federal case law, the EEOC's decision built on the accomplishments of movement lawyers who litigated some of these cases in the federal courts. The EEOC also rooted its reasoning in the Supreme Court's foundational decision in *Price Waterhouse v. Hopkins*,¹⁹⁴ holding that discrimination based on failure to conform to sex stereotypes violates Title VII.¹⁹⁵ Indeed, the EEOC explained how the federal court decisions in favor of transgender employees grew out of *Price Waterhouse*.¹⁹⁶ In addition to a growing body of federal case law, the EEOC could look to its own internal guidance and other recent guidance

190. See *Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

191. See *id.* at 8–9 (citing decisions from the First and Ninth Circuits).

192. See *id.* at 10 (quoting *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (applying Fourteenth Amendment constitutional principles governing sex discrimination)). It is worth noting that the Eleventh Circuit decision was written by Judge Rosemary Barkett, who has demonstrated a commitment to LGBT equality. See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 377 F.3d 1275, 1290–1313 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

193. See *Macy*, EEOC Appeal No. 0120120821, at 9 (quoting *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (applying Title VII sex discrimination principles)).

194. 490 U.S. 228 (1989).

195. See *Macy*, EEOC Appeal No. 0120120821, at 7.

196. See *id.* at 8.

within the federal government to support its reasoning. That is, the internal developments identified in Part III.A laid the groundwork for the EEOC to issue a broad ruling on the coverage of transgender employees under Title VII's prohibition on sex discrimination.

All of these earlier developments, both within the federal bureaucracy and in the federal courts, allowed the EEOC to explain that its decision "clarifie[d]," rather than newly announced, "that claims of discrimination based on transgender status . . . are cognizable under Title VII's sex discrimination prohibition."¹⁹⁷ Indeed, NCTE's Keisling described the EEOC decision as "an inevitable step touched off by" earlier federal court decisions.¹⁹⁸

Even though the EEOC situated its decision as a clarification and an affirmation of the majority position in the federal courts, its decision is highly significant and will have an important impact inside the government, in the government's relationships with private actors, and in private workplaces. LGBT rights advocates have hailed the EEOC's ruling as "a real sea change."¹⁹⁹ TLC's Masen Davis celebrated the decision as a "big leap forward" and a "game-changer," explaining that it "creates a whole new fabric of legal support for our community."²⁰⁰ The decision governs other federal agencies and departments,²⁰¹ and Williams Institute researchers have suggested that the EEOC's reasoning will be extended to federal contractors.²⁰² More importantly, since the EEOC's decision applies to the agency's general enforcement and litigation work,²⁰³ Davis noted that "transgender people can [now] bring claims at EEOC offices across the country."²⁰⁴ In fact, Davis advised constituents, "If you think you are being targeted with harassment or discrimination at work, I urge you to contact your local EEOC office and file a complaint."²⁰⁵ Moreover,

197. *Id.* at 5–6.

198. See Chris Geidner, *DOJ Accepts EEOC Ruling that Trans Bias is Covered by Title VII, ATF Begins Investigation*, METROWEEKLY (May 21, 2012, 11:55 PM), <http://www.metroweekly.com/poliglot/2012/05/the-department-of-justice-has.html>.

199. See Chris Geidner, *Transgender Breakthrough*, METROWEEKLY (Apr. 23, 2012, 10:38 PM), <http://www.metroweekly.com/news/?ak=7288> (quoting Shannon Minter of the National Center for Lesbian Rights).

200. *Id.*

201. See *About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Oct. 20, 2012) (explaining that the "EEOC assures federal agency and department compliance with EEOC regulations").

202. See Press Release, Williams Inst., *Recent EEOC Ruling Likely Prohibits Federal Contracts from Gender Identity or Expression Discrimination* (May 4, 2012), available at <http://williamsinstitute.law.ucla.edu/press/press-releases/eeoc-ruling-likely-prohibits-federal-contractors-discrimination/> (explaining that the Office of Federal Contract Compliance Programs, an agency within the Department of Labor, interprets the executive order prohibiting sex discrimination in compliance with Title VII and has followed the EEOC's guidance in doing so).

203. See Geidner, *supra* note 199.

204. *Id.*; see also *Enforcement*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/enforcement/index.cfm> (last visited Oct. 20, 2012) (explaining the EEOC's private sector enforcement program).

205. See Geidner, *supra* note 198.

Berrien, the EEOC Chair, noted that in the wake of *Macy*, the agency “provided legal training on the treatment of various forms of discrimination against LGBT persons under the sex discrimination prohibition of Title VII” and “provided cultural competency training to enforcement personnel across the country.”²⁰⁶ Not only will EEOC investigators accept claims by transgender employees, but the EEOC can also use its litigation capacities to pursue claims against discriminatory employers.²⁰⁷ Courts, in turn, may give weight to the EEOC’s interpretation.²⁰⁸ Perhaps most importantly, the EEOC’s decision may affect private workplace norms even without litigation; lawyers will advise employers on the EEOC’s interpretation, and those employers may internalize the norm of nondiscrimination.²⁰⁹

Even when dealing with far-reaching government enforcement, in which government actors in regulatory, litigation, and adjudicative roles use state power in service of movement goals, it is important to note the extent to which such activity relies on existing laws, draws on statutory authority, and emerges from dedicated government locations. Bagenstos, for instance, worked in an agency with a disability section and was charged with enforcing an omnibus federal statute prohibiting discrimination.²¹⁰ Indeed, Waterstone makes clear that he is “advocating that public enforcement agencies *perform the role that they are already tasked with more effectively.*”²¹¹ Accordingly, the existence of statutory frameworks and dedicated roles and agencies significantly impacts the availability and viability of opportunities to advance movement priorities from inside the state and, to some extent, mediates the legitimacy and neutrality concerns implicated by cause lawyer movement into the state.²¹² These government lawyers use state power to advance goals that the movement and the state are understood to share.

206. June 18 Berrien Letter, *supra* note 134.

207. See Geidner, *supra* note 199; see also *Litigation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/litigation/index.cfm> (last visited Oct. 20, 2012) (explaining that the “EEOC has the authority to sue nongovernmental employers for violations of Title VII”).

208. See Geidner, *supra* note 199.

209. See *id.*

210. Cf. BANASZAK, *supra* note 82, at 160 (“The creation, combination, or elimination of specific departments or agencies . . . opens or closes opportunities for movement activists to enter the state.”).

211. Waterstone, *supra* note 151, at 452 (emphasis added).

212. Like Waterstone’s, other arguments in favor of increased public enforcement implicitly recognize the cause lawyering potential of government lawyers but nonetheless hew to a view in which government lawyers are merely carrying out their assigned duties rather than pursuing social movement goals from within the state. See, e.g., Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ’s Pattern or Practice Authority Is the Most Effective Tool to Control Racial Profiling*, 13 GEO. MASON U. C.R. L.J. 311 (2003) (arguing for greater use of DOJ authority to investigate racial profiling); Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinventing the Role of the Federal Government in the Aftermath of Alexander v. Sandoval*, 3 YALE J. HEALTH POL’Y L. & ETHICS 215 (2003) (arguing for increased public enforcement of Title VI).

Government actors enjoy considerably less leeway to pursue more confrontational activism from within the state and to stake out movement positions in the absence of an existing statutory framework or dedicated agency. Nonetheless, in more limited circumstances, government lawyers may push an agenda that, instead of merely enforcing existing rights (even if broadly construed), seeks to recognize and secure new rights. For instance, DOJ lawyers' refusal to defend the federal Defense of Marriage Act²¹³ (DOMA) constitutes a bold step in favor of federal rights for same-sex couples in direct contravention of a federal statute withholding such rights. This example is less a story of public enforcement and more a story of movement-state interactions producing a realignment of government policy to match more closely movement positions. In the next section, I turn to this more complicated and nuanced movement-state intersection.

D. Facilitating and Mediating Movement-State Relationships

Cause lawyers who move into the state may facilitate and shape relationships between the movement, including cause lawyers outside the state, and the government, including allies and potential allies.²¹⁴ This intermediary role implies interactions both with those outside the state and with new colleagues in the government. On one hand, cause lawyers who move into government positions continue to interact with their movement colleagues, providing information that may inform movement goals and tactics. On the other hand, through internal government interactions, they furnish expertise and knowledge to government officials and create and seize on opportunities in the government.²¹⁵ By doing so, they may advance movement goals from inside the state and push the government toward official positions more favorable to the movement. This function is more subtle than the enforcement role,²¹⁶ which relies on the public dimensions of action by cause lawyers who have moved into government positions.²¹⁷

213. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

214. See BANASZAK, *supra* note 82, at 102 (“[I]nsider feminists helped to connect feminists both with each other and with people within the federal system who would be helpful with feminist causes.”).

215. See *id.* at 102 (“[I]nsider feminist activists were well placed to build connections the women’s movement needed to mobilize and to affect government policy.”).

216. Indeed, Banaszak goes further, addressing feminist activism inside the state that operated “under the radar.” See *id.* at 20 (“Movement activists in the federal bureaucracy often operated ‘under the radar’—in ways that never attracted the attention of their supervisors, the media, or opponents and occasionally even went unnoticed by other feminists—but their actions did alter public policy in ways that aided movement goals.”).

217. See Waterstone, *supra* note 151, at 436 (explaining that government action sends a message); see also Feldblum, *supra* note 139, at 702 (describing Paul Miller’s work at the EEOC as “very public”).

1. Turning Outward

First, cause lawyers inside the state may quite literally facilitate movement-state interactions by providing a forum in which movement actors and government officials can discuss and consider issues of importance to the movement. For instance, the EEOC sponsored a “brown bag session on transgender issues in the workplace” that featured movement activists outside the state, state actors, and movement lawyers who had moved into the government.²¹⁸ Keisling, the executive director of NCTE, and Lisa Mottet, a lawyer at the Transgender Civil Rights Project of the National Gay and Lesbian Task Force, spoke along with Louis Lopez, the Deputy Chief of the Employment Litigation Section of the DOJ’s Civil Rights Division, and Sharon McGowan, a former litigator with the ACLU’s LGBT Rights Project who had moved into the appellate section of the DOJ’s Civil Rights Division.²¹⁹ At the ACLU, McGowan had successfully litigated a landmark transgender rights case under Title VII,²²⁰ and she has written about transgender rights litigation.²²¹

Next, cause lawyers inside the state may regularly communicate with movement actors outside the state and in doing so may, both intentionally and unintentionally, share information.²²² Chai Feldblum’s social media work provides an important illustration. In her role as commissioner, Feldblum maintains a public Facebook page and Twitter feed from which she communicates information about EEOC work and provides her own thoughts on more general antidiscrimination efforts and issues.²²³ Not only does this send an important message of public enforcement that resonates with the discussion in the previous section, but it also provides a link between Feldblum as an EEOC Commissioner and her colleagues, who benefit from her flagging of EEOC developments. Feldblum’s followers not only receive concrete information, but they gain from her thoughts on those developments.²²⁴

218. *Brown Bag Session on Transgender Issues in the Workplace: Speaker Bios*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www1.eeoc.gov/federal/training/brown_bag_transgender_bios.cfm?renderforprint=1 (last visited Oct. 20, 2012).

219. *Id.*

220. *See* *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

221. *See* Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205 (2010).

222. *See* BANASZAK, *supra* note 82, at 7 (“[M]ovements are likely to have more complete information about state actions and policies through intersections with the state.”). Banaszak quotes Catherine East, a feminist activist inside the state: “I think the role that I kind of played, was that of catalyst, in furnishing information and knowing who knew what, and where you went for information.” *Id.* at 99.

223. *See* *Commissioner Chai R. Feldblum*, FACEBOOK, <http://www.facebook.com/pages/Commissioner-Chai-R-Feldblum/266878386664198> (last visited Oct. 20, 2012); @*chaifeldblum*, TWITTER, <http://twitter.com/#!/chaifeldblum> (last visited Oct. 20, 2012).

224. Legislative lawyers, as opposed to litigators who focus on impact cases, may have a stronger relationship with movement constituents on which to build. Indeed, Feldblum worked as a legislative advocate and expert.

Cause lawyers inside the state may filter information through their own movement lens and provide insights based on their government experience.²²⁵ For movement advocates outside the state, this may signal the government's openness to particular movement goals. For instance, Paul Miller wrote important scholarly accounts of ADA enforcement while serving on the EEOC, drawing on his experiences to respond to critiques of the ADA and create a compelling case for strong public enforcement.²²⁶ His contributions aided the work of other disability advocates and signaled the EEOC's commitment to antidiscrimination enforcement.

To be clear, none of this is to suggest that cause lawyers inside the state are serving a covert movement role or are funneling government information to movement actors.²²⁷ Rather, it is to say that because of their ties to movement actors, they likely will continue to interact with the movement and circulate information to movement activists outside the state. By doing so, they communicate information and impressions about the relationship of the state to the movement.²²⁸

Finally, movement actors outside the state may provide opportunities for movement-state interactions. Movement-sponsored conferences and events may draw actors in government to the external movement community.²²⁹ These interactions offer important moments of information sharing and thought development, send signals of support from the Administration, and likely provide insights with which movement actors outside the state can develop strategy.²³⁰ In some instances, cause lawyers inside the state may essentially represent the Administration when they speak at movement events, thereby strengthening ties between the state and the movement and

225. See BANASZAK, *supra* note 82, at 188 (noting insider feminists' "keen sense of both the political opportunities available through the American state, and when and how outside forces could successfully assert their influence on government actors").

226. See Michael E. Waterstone & Michael Ashley Stein, *A Tribute to Paul Miller: A Beloved Friend and Colleague*, 86 WASH. L. REV. 706, 707 (2011).

227. Banaszak, however, shows that many feminist activists inside the state, particularly during hostile administrations, advanced movement goals "under the radar." See BANASZAK, *supra* note 82, at 177.

228. See *id.* at 101 (quoting a feminist inside the state: "'We furnished papers to all the women's movements by the thousands. They called in when they were having conferences or when they were making up packets for the state legislators'").

229. Feldblum, for instance, moderated a panel, *New Research on LGBT Employment Discrimination*, at the Williams Institute's 10th Anniversary Conference at UCLA School of Law in 2011. See *10th Anniversary Celebration*, WILLIAMS INST., <http://williamsinstitute.law.ucla.edu/10th-anniversary-celebration/> (last visited Oct. 20, 2012).

230. The interactive relationships between government lawyers and their movement colleagues are consistent with observations made by Woods and Barclay. They show that cause lawyers regularly communicated with government actors at conferences and through professional associations and, by doing so, learned about the state's openness to the movement's challenges. See Woods & Barclay, *supra* note 47, at 219. Rather than suggesting that cause lawyers are outsiders interacting with non-cause lawyer government officials, I am showing that cause lawyers move inside the state and continue to interact with colleagues outside the state through the types of conferences and associations that Woods and Barclay identify.

signaling the Administration's openness to the movement's advocacy.²³¹ For example, both Feldblum and Attorney General Eric Holder spoke at the 2012 Lavender Law Conference, the National LGBT Bar Association's annual conference, which attracts lawyers from across the LGBT rights movement. Feldblum, along with DOJ attorney McGowan and other government lawyers, participated on a panel titled, "LGBT Issues in Federal Anti-Discrimination Law: An Inside Perspective from EEOC and DOJ Attorneys."²³² Holder delivered the conference's keynote address, declaring that "at every level of the Obama Administration, [LGBT rights] work has long been a top priority—and . . . has resulted in meaningful, measurable, and enduring change."²³³

Government lawyers' relationships with movement organizations may raise those organizations' stature and increase their influence. For instance, conservative movement lawyers inside the federal government drew attention to conservative organizations, most notably the Federalist Society, by giving speeches at their events.²³⁴ Attorney General Meese gave his landmark speech on originalism to the Federalist Society's D.C. chapter, thereby generating useful publicity for the organization.²³⁵ In other words, movement lawyers who have assumed prominent government positions may strengthen the external movement infrastructure by drawing both mainstream and movement attention to select organizations.

Movement organizations, in turn, may facilitate the organization and coordination of government lawyers spread across the federal bureaucracy. This networking effect is an important way in which cause lawyers who have moved into the state can more effectively advance movement ideas and priorities. As Teles explains in his account of the conservative legal movement, the Federalist Society's D.C. chapter, itself started by a lawyer in the federal government, became a mechanism for connecting conservative lawyers operating across the executive branch, often simply by holding meetings, organizing events, and hosting lunches.²³⁶ In this sense, the Federalist Society "reduced the transaction costs of governing as a conservative."²³⁷ Movement conservatives had a mechanism "to identify

231. Cf. BANASZAK, *supra* note 82, at 133 (explaining that "when political appointees participated in protests, they usually did so both as individuals and as spokespeople for the administration").

232. See 2012 ANNUAL LAVENDER LAW CONFERENCE PROGRAM BOOK, NAT'L LGBT BAR ASS'N 34, available at <http://www.lgbtbar.org/annual/wp-content/uploads/2012/08/2012-Lavender-Law-Program-Book.pdf>.

233. Eric Holder, U.S. Att'y Gen., Remarks as Prepared for Delivery by Attorney General Eric Holder at the 2012 Lavender Law Conference (Aug. 23, 2012), reprinted in Chris Johnson, *Holder Calls on LGBT Attorneys to Advance Cause of Equality*, WASH. BLADE (Aug. 23, 2012), <http://www.washingtonblade.com/2012/08/23/holder-calls-on-lgbt-attorneys-to-advance-cause-of-equality/> [hereinafter Holder Remarks].

234. See Teles, *supra* note 73, at 62, 74.

235. See *id.* at 74.

236. See TELES, *supra* note 20, at 147.

237. *Id.*

allies in other agencies, thereby facilitating the flow of information [and] helping ideas to germinate and spread.”²³⁸

2. Turning Inward

While the preceding discussion stressed government lawyers’ interactions with other movement actors, cause lawyers inside the state also provide information and expertise to their non-movement government colleagues. The presence of cause lawyers inside the state may furnish points of pressure within the government and provide expertise to allies and potential allies in government positions. In this way, cause lawyers who have moved into the state may shape political opportunities in positive ways for cause lawyers outside the state. The DOJ’s recent activism around DOMA provides a helpful context in which to consider these more subtle effects.

To understand the intermediary role served by cause lawyers who move into the state, I highlight three important aspects of the developments surrounding the DOMA litigation. First, cause lawyers outside the state, aware of the favorable environment inside the government, created opportunities to pressure the government to move toward a pro-LGBT position. Second, lawyers inside the state had significant LGBT rights experience and expertise upon which other government officials could draw as they grappled with LGBT rights issues. Third, the government’s new position on DOMA activated some government lawyers as cause lawyers, thus aligning them with the cause and encouraging them to take additional steps in support of the LGBT rights movement. This final aspect resonates with cause lawyering scholarship that features government lawyers as new or event-centered cause lawyers.²³⁹ It also suggests that through these more subtle movement-state interactions, the movement and the government can develop overlapping agendas that ultimately position some government lawyers in a role that more closely approximates the public enforcement role described in Part III.C. Once the government makes an official policy change that aligns the movement with the state, government lawyers advance movement goals in carrying out the new state policy.

LGBT cause lawyers outside the state pressed DOMA claims in the context of a more sympathetic presidential administration.²⁴⁰ For the LGBT rights movement, the Obama Administration provided a more hospitable environment, with more sympathetic personnel, than the Bush

238. *Id.*

239. See discussion *supra* Part I.C.2.

240. For instance, Thomas Perez, Assistant Attorney General for the Civil Rights Division, has a strong record of public service in favor of civil rights protections. See *Meet the Assistant Attorney General*, U.S. DEP’T JUST., <http://www.justice.gov/crt/aag/> (last visited Oct. 20, 2012). Indeed, in May 2012, President Obama announced his support of marriage for same-sex couples. See Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

Administration.²⁴¹ Circumstances were more favorable for the LGBT rights movement to affirmatively push an anti-DOMA campaign.²⁴²

Cause lawyers outside the state created the opportunity to leverage the more favorable environment inside the state.²⁴³ After a positive district court opinion in *Gill v. Office of Personnel Management*,²⁴⁴ the organized movement's first DOMA challenge, advocates filed two additional suits. Gay & Lesbian Advocates & Defenders (GLAD) filed suit in federal district court in Connecticut,²⁴⁵ and the ACLU filed suit in federal district court in New York.²⁴⁶ While *Gill* moved forward in the First Circuit, where precedent dictated that sexual orientation-based-classifications be subjected to rational-basis review,²⁴⁷ LGBT rights lawyers filed the new cases in the Second Circuit, where no such precedent existed. Therefore, according to Holder, "the Administration face[d] for the first time the question of whether . . . a more rigorous standard . . . should apply."²⁴⁸ In this way, movement lawyers outside the government filed the cases that would pressure the Administration to clarify its position on the constitutionality of sexual-orientation-based classifications.

We do not at this point know the details of how the President and the DOJ reached the decision not to defend DOMA and to make the case for heightened scrutiny for sexual-orientation-based classifications. What we do know is that significant discussions and negotiations occurred inside the government, and that up to that point the Obama Administration had been negotiating a fairly tense relationship with the LGBT rights movement. After government lawyers filed a brief defending DOMA based on

241. Of course, this also suggests the increasingly close relationships between some social movements and political parties.

242. Cf. BANASZAK, *supra* note 82, at 23 ("The story of feminist activists within the state and their effects is a tale of a confluence of factors—the nature of the U.S. women's movement, historical social trends, and the nature of the state itself were all important in these feminists' ultimate effects.").

243. See *id.* at 3 ("[I]t is precisely where movements overlap with the state that one can see most clearly how social movements can mold the state to their own political advantage—creating political opportunities that can help them in the future."); see also Goodwin & Jasper, *supra* note 83, at 40 (analyzing political opportunities as strategic rather than structural); McAdam, *supra* note 100, at 37 (pointing out "the typically fluid, reciprocal, unpredictable, and crucially important relationship of social movements to structures of political opportunity").

244. 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012), *petitions for cert. filed*, Nos. 12-13 (U.S. June 29, 2012), 12-15 (U.S. July 3, 2012), and 12-97 (U.S. July 20, 2012).

245. See First Amended Complaint for Declaratory and Injunctive Relief at 2, Pedersen v. Office of Pers. Mgmt., No. 10-1750-VLB (D. Conn. Jan. 14, 2011).

246. See Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310, (2d Cir. Oct. 18, 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012).

247. See Cook v. Gates, 528 F.3d 42 (1st Cir. 2008).

248. *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. DEP'T JUST. (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> [hereinafter Statement of the Attorney General].

arguments that offended LGBT activists,²⁴⁹ administration officials met with leading movement advocates.²⁵⁰ The Administration removed such arguments in a subsequent brief and announced limited policy changes on other LGBT issues.²⁵¹

This episode demonstrated that the issue of DOMA defense was clearly on the table in the Administration, and the movement and the Administration were developing a relationship through which advocates could pressure the government on key issues. Unlike during the Bush Administration, in which the LGBT rights movement was in a largely defensive posture vis-à-vis the federal government, the Obama Administration offered opportunities in which LGBT rights advocates could press their case and pressure the government to take substantive positions on key LGBT issues.

When the DOJ announced its determination that DOMA is unconstitutional and accordingly that it would no longer defend the statute, *The New York Times* reported that the new position “followed weeks of high-level deliberations, first in the Justice Department’s Civil Division, and then at the White House.”²⁵² Indeed, President Obama had explained, “I have a whole bunch of really smart lawyers who are looking at a whole range of options” to end DOMA.²⁵³ Lawyers who had worked on LGBT rights issues likely had discussions and participated in deliberations in which their LGBT movement experience and expertise provided important insights.²⁵⁴ Without speculating as to direct linkages between specific

249. See Defendant United States of America’s Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof, *Smelt v. United States*, No. 09-00286 (C.D. Cal. 2009); Jessica Garrison, *Obama Policy is Outreach to Gays*, L.A. TIMES, June 17, 2009, at A1; Press Release, Nat’l Ctr. for Lesbian Rights, LGBT Legal Groups Decry Obama Administration’s Defense of DOMA (June 12, 2009), available at http://www.nclrights.org/site/PageServer?pagename=press_DOMAstatement061209.

250. See *Administration DOMA Brief a Mixed Bag*, LAMBDA LEGAL (Aug. 17, 2009, 5:11 PM), available at https://www.facebook.com/note.php?note_id=114555268466.

251. See Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss at 2, *Smelt*, No. 09-00286; Mark Z. Barabak, *Obama’s Benefits for Gays Limited*, L.A. TIMES, June 18, 2009, at A14; Jake Sherman, *White House Looks to Include Same-Sex Couples in Census Count*, WALL ST. J., June 19, 2009, at A4.

252. Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

253. Charlie Savage, *Suits on Same-Sex Marriage May Force Administration to Take a Stand*, N.Y. TIMES, Jan. 29, 2011, at A14.

254. *Politico* speculated that there was a link between the shift in the Obama Administration’s position on DOMA and the contemporaneous appointment of Matt Nosanchuk, who had worked at the ACLU and served on the Obama campaign’s LGBT policy committee, as Senior Counselor to the Assistant Attorney General for Civil Rights. See *Biography of Matt Nosanchuk, Senior Counselor to the Assistant Attorney General*, U.S. DEP’T JUST., <http://www.pennpresents.org/tickets/documents/BioofMattNosanchuk.pdf> (last visited Oct. 20, 2012); Josh Gerstein, *Justice Civil Rights Hire to Handle Gay Liaison*, POLITICO: UNDER THE RADAR (Aug. 17, 2009, 10:05 PM), http://www.politico.com/blogs/joshgerstein/0809/Justice_civil_rights_hire_to_handle_gay_liaison.html. However, little in the public record substantiates this claim. Nonetheless, Nosanchuk had a role in the earlier briefs that removed offensive arguments while continuing to defend DOMA. See Ryan J. Reilly, *DOJ Liaison: LGBT Community Has ‘Seat at the Table’*, MAIN JUST. (June 11, 2010,

lawyers and the change in DOMA policy, we can nonetheless understand the government's new position as a result of a confluence of factors, including increasing pressure from LGBT rights lawyers outside the state, action by sympathetic government allies, and the use of LGBT rights expertise inside the state. Government lawyers with significant LGBT rights experience could furnish knowledge, both doctrinal and policy-oriented, as administration officials considered the best way to approach the newly filed DOMA suits.

Crucially, though, those leading the Administration's change in position on DOMA were neither former LGBT rights lawyers nor openly LGBT individuals. Instead, high-profile LGBT allies, such as Holder, were the public face of the Administration's new position. The announcement of the decision, including statements regarding the deliberative process, focused exclusively on the President and the Attorney General. Holder explained the President's decision on the matter:

After careful consideration, including a review of *my recommendation*, *the President* has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. *The President* has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, *the President has instructed the Department* not to defend the statute in [such cases]. *I concur* in this determination.²⁵⁵

Holder described a top-down process, in which the President, in consultation with the Attorney General, changed administration policy and subsequently instructed lower-level employees to carry out the policy change, in this case by no longer defending DOMA.²⁵⁶ Only recently has an openly gay DOJ attorney assumed a leading public role in the government litigation against DOMA. Stuart Delery, who while in private practice had challenged the military's discriminatory "Don't Ask, Don't Tell" policy on behalf of the Servicemembers Legal Defense Network, became the head of the DOJ's Civil Division.²⁵⁷ In his new role, Delery

1:31 PM), <http://www.mainjustice.com/2010/06/11/doj-liaison-lgbt-community-has-seat-at-the-table/> ("Nosanchuk indicated he has had input into several Justice Department briefs defending [DOMA and Don't Ask, Don't Tell] to make sure they didn't use offensive language or arguments.").

255. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives 2 (Feb. 23, 2011) (emphasis added), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter Holder Letter].

256. Of course, the decision by the Administration was not limited to the Second Circuit cases. Holder explained that he would "instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

257. See Chris Geidner, *With West's Promotion, Out Gay Lawyer Delery to Take Helm of Justice Department's Civil Division*, METROWEEKLY (Feb. 27, 2012, 9:30 PM), <http://www.metroweekly.com/poliglot/2012/02/with-west's-promotion-out-lawyer.html>.

argued the Administration's position in *Gill* at the First Circuit.²⁵⁸ Oral argument featured a lengthy colloquy between the court and Delery but only a few minutes of argument by Mary Bonauto, the lead plaintiffs' attorney from GLAD.²⁵⁹ Delery's familiarity with LGBT rights law and his dedication to the issue aided both the movement and the government.

Unlike in the public enforcement context, movement lawyers inside the state were not, at least early on, the face of the government's movement-friendly position. Their cause lawyering experience was not publicly touted as neutral expertise. It would have been substantially less likely and significantly more risky and costly—for both the specific lawyers and the government itself—for a former LGBT rights lawyer to have taken the lead on the initial decision *not to defend* an existing federal statute.²⁶⁰ Unlike in the public enforcement context, where former cause lawyers are specifically authorized in their government positions to enforce existing statutory rights, the nondefense scenario presents more complications for cause lawyers inside the state and for the state itself.²⁶¹ In such a situation, it is more difficult to identify and defend shared movement-state goals. If a former LGBT rights lawyer were to initiate, announce, and execute the decision, she would be subject to charges of wielding raw political power in favor of her own agenda. And, in the eyes of some, she would threaten the legitimacy of the DOJ.²⁶² Accordingly, in these types of situations, cause lawyers inside the state may be less likely to assume prominent, public roles—at least early on—and may instead serve as important sources of knowledge and expertise regarding both the substantive issues and the

258. See Lisa Keen, *DOMA Case Heard in Federal Court*, WINDY CITY TIMES (Apr. 4, 2012), <http://www.windycitymediagroup.com/lgbt/DOMA-case-heard-in-federal-court/37124.html>.

259. See *id.*

260. In fact, Nosanchuk had previously commented in the context of DOMA that “[t]he Department of Justice has a historic and traditional obligation to defend the laws that Congress passes.” Reilly, *supra* note 254.

261. Walter Dellinger, who served as Assistant Attorney General and head of OLC during the Clinton Administration, acknowledged the importance of the public governmental message communicated through lack of defense of a statute's constitutionality. In arguing that President Obama should stop defending the constitutionality of the military's “Don't Ask, Don't Tell” policy, while continuing to enforce the law, Dellinger claimed that such a move by the President would send a clear, unified message that the government does not support the law and would make courts more likely to defer to the government's position. See Walter Dellinger, Op-Ed, *How to Really End 'Don't Ask, Don't Tell'*, N.Y. TIMES, Oct. 21, 2010, at A39 (“[T]he president could increase the chances that the appellate courts would agree with him by following a deliberate process that gives consideration to the views of the military leadership, some of whom have already come out against the policy. The courts would be more likely to defer to such a clear, unified position.”).

262. For compelling arguments that the decision not to defend a federal statute, including DOMA, threatens to unsettle executive branch practice and further politicize legal interpretation, see Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012).

tactical calculations involved in government action.²⁶³ Delery, for instance, only assumed a leading public role more than a year after the Administration had taken its anti-DOMA position. In this sense, he simply carried out his new duties on behalf of the government, articulating and defending the DOJ's position. Ultimately, the willingness of government allies to take leadership roles in staking out and executing pro-movement positions is essential.

While the Administration continues to enforce DOMA even as it no longer defends its constitutionality,²⁶⁴ the DOJ's DOMA activity has had a tremendous impact on the LGBT rights movement. The government's new position opened up additional avenues for activism by cause lawyers outside the state and provided opportunities for the movement and the state to cooperate in their work against DOMA. Lawyers at Lambda Legal refiled an employee-benefits case, *Golinski v. Office of Personnel Management*,²⁶⁵ as an explicit challenge to DOMA.²⁶⁶ Instead of defending DOMA, DOJ attorneys were now arguing against the law. Tara Borelli, who handled the case for Lambda Legal, remarked on the fact that Tony West, Delery's predecessor at the DOJ's Civil Division,²⁶⁷ argued the Administration's position in the district court. Judge White, she noted, "thanked the DOJ for having sent the head of the civil division' to argue the case himself, adding that it made 'a statement of the significance that DOJ and the administration place on this question.'"²⁶⁸ Under an event-centered approach, high-profile DOJ lawyers have assumed important cause lawyering duties from within the government. Ultimately, the government's legal position influenced the court's decision. In holding DOMA unconstitutional, Judge White agreed with the Administration's

263. Cf. BANASZAK, *supra* note 82, at 25 (emphasizing the importance of "looking not just at the top layer of policy makers, but also at their subordinates who do not get to determine the general policies of a particular government").

264. See Statement of the Attorney General, *supra* note 248, at 2. ("Section 3 of DOMA will continue to remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down, and the President has informed me that the Executive Branch will continue to enforce the law."). This is not unprecedented. See Letter from Andrew Fois, Assistant Att'y Gen., to Orrin G. Hatch, Chairman, Comm. on the Judiciary, U.S. Senate (Mar. 22, 1996) (detailing instances in which the DOJ has declined to defend a statute's constitutionality). The DOJ under the Clinton Administration refused to defend a statutory provision requiring the discharge of HIV-positive individuals from the military. See *id.* at 1.

265. 824 F. Supp. 2d 968 (N.D. Cal. 2012).

266. See Second Amended Complaint at 1–2, *Golinski*, 824 F. Supp. 2d 968 (No. 3:10-cv-0257).

267. In February 2012, West was named Acting Associate Attorney General. See Mike Scarcella, *Attorney General Holder Names Tony West Third in Command at DOJ*, BLT: BLOG LEGALTIMES (Feb. 27, 2012, 4:04 PM), <http://legaltimes.typepad.com/blt/2012/02/attorney-general-holder-names-tony-west-third-in-command-at-doj-.html>.

268. Chris Geidner, *Golinski Has Her Day in Court, DOJ Sends Senior Lawyer to Argue DOMA's Unconstitutionality*, METROWEEKLY (Dec. 16, 2011, 5:10 PM), <http://metroweekly.com/poliglot/2011/12/golinski-has-her-day-in-court.html>.

position and relied on the DOJ's reasoning regarding heightened scrutiny.²⁶⁹

Furthermore, the DOJ's policy change affected more than DOMA. By articulating arguments in favor of heightened scrutiny for sexual-orientation-based classifications, the DOJ built the foundation on which to challenge other antigay laws.²⁷⁰ Almost a year after the DOJ changed its position, Holder announced that the Defense and Veterans Affairs departments would not defend the unequal treatment of servicemembers with same-sex spouses.²⁷¹ In his letter to House Speaker John Boehner, Holder relied explicitly on his earlier decision in the DOMA litigation. He explained the DOJ's view that, "like Section 3 of DOMA, 38 U.S.C. § 101(3) and 38 U.S.C. § 101(31) [the relevant statutory provisions] cannot be constitutionally applied to same-sex couples who are legally married under state law."²⁷² The DOMA position became the basis for taking additional steps in favor of same-sex couples. The earlier conclusion that sexual-orientation-based classifications deserve heightened scrutiny provided the impetus for, and reasoning in support of, the DOJ's decision not to defend additional antigay laws.²⁷³

Now, the DOJ's stated position—that DOMA is unconstitutional—aligns the executive branch with the LGBT rights movement and facilitates DOJ activity in service of shared movement-state goals. The movement and the state agendas, which only a few months earlier were opposed in significant ways, now overlap. Accordingly, government lawyers use state power to press goals shared by the movement and the state. Indeed, speaking to the National LGBT Bar Association, Holder remarked on the "shared commitment to advancing the cause of equality for [LGBT] individuals."²⁷⁴

269. See *Golinski*, 824 F. Supp. 2d at 989 (relying on the DOJ's determination regarding the political powerlessness of lesbians and gay men). The district court in *Gill* had ruled DOMA unconstitutional based merely on rational basis grounds. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012), *petitions for cert. filed*, Nos. 12-13 (U.S. June 29, 2012), 12-15 (U.S. July 3, 2012), and 12-97 (U.S. July 20, 2012). On the influence of the Attorney General's legal positions, see NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 7-8 (1992) (explaining that courts "treat [an attorney general's legal opinion] with deference, occasionally adopting the law officer's reasoning" such that "executive interpretation may influence subsequent judicial interpretation of the law").

270. As the executive director of the ACLU declared, the DOJ's policy "will reach into issues of employment discrimination, family recognition and full equality rights for lesbian and gay people." Savage & Stolberg, *supra* note 252.

271. See Chris Geidner, *DOJ Won't Defend DOMA, Other Laws Preventing Equal Treatment for Servicemembers With Same-Sex Spouses*, METROWEEKLY (Feb. 17, 2012, 4:11 PM), <http://www.metroweekly.com/poliglot/2012/02/doj-wont-defend-laws-preventin.html>.

272. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives 2 (Feb. 17, 2012), *available at* <http://www.justice.gov/ag/boehner02-17-12.pdf>.

273. See *id.* at 1-2 (applying the heightened-scrutiny reasoning from the earlier decision not to defend section 3 of DOMA).

274. Holder Remarks, *supra* note 233.

He concluded his keynote address by noting that with movement-state “partnership,” lawyers both inside and outside the government will “continue the work that has become both our shared priority and common cause.”²⁷⁵

Ultimately, even though cause lawyers inside the state with experience on LGBT rights issues did not assume strong public advocacy roles during the government’s deliberations and change of policy on DOMA, they likely provided expertise and consultation and may have facilitated discussion between movement representatives and government officials. The less public role played by some DOJ lawyers with LGBT rights legal experience remains an important dimension of the movement-state overlap that contributed to the Administration’s work on behalf of married same-sex couples. Future research, including interviews of cause lawyers who have worked in government positions, will be especially crucial in teasing out the specific dimensions of this role.

IV. THE LIMITATIONS OF CAUSE LAWYER MOVEMENT INTO THE STATE

At the same time that movement-state overlap—and particularly the movement of cause lawyers into the state—benefits the movement by facilitating significant advances and making the government a more favorable movement force, it may also limit and constrain the movement in particular ways. Some of these constraints relate to the limits of law more generally, which other scholars have elaborated, but in this Part I focus on constraints that relate to the specific dimensions of work inside the government.²⁷⁶ Social movement scholarship on movement-state overlap shows that while the existence of activists inside the state may provide important openings for movement advances,²⁷⁷ it also may promote moderate, rather than radical, movement demands and encourage institutional, rather than confrontational, tactics.²⁷⁸ By harnessing government power for the movement’s benefit, cause lawyer movement into the state may privilege goals and tactics oriented toward the state itself.²⁷⁹ In pointing to these limitations, I am drawing two related distinctions—one based on the nature of the cause and the other based on the tactics used to pursue the cause. The movement of cause lawyers into

275. *Id.*

276. As David Luban puts it, “[w]hat happens when [a cause lawyer] decides to use the Ring of Power?” David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 FORDHAM L. REV. 705 (2012).

277. See Santoro & McGuire, *supra* note 83, at 505 (“Institutional activists are important in policy outcomes because of their direct access, influence, and control over government resources.”).

278. See *id.* at 503 (“Institutional activists . . . pursue social movement goals through conventional bureaucratic channels.”).

279. Professor William Eskridge has argued that social movement reliance on law pushes the movement in an assimilative direction and favors movement moderates over radicals. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423 (2001).

the state may correlate with reformist, rather than radical, conceptions of the cause, and may privilege more conventional legal tactics, such as impact litigation, over techniques that locate lawyers in roles subordinate to movement organizing.²⁸⁰

Even though I am suggesting the potentially conservatizing impact of cause lawyer movement into the state, I do not want to overstate the extent to which cause lawyers in government hew to moderate movement visions and limit themselves to institutional tactics.²⁸¹ Movement actors inside the state may hold a range of ideological views and movement positions. Indeed, the government has not been off-limits to lawyers with more radical views on both the left and right.²⁸² Furthermore, government actors may deploy confrontational tactics—or provide information that aids confrontational tactics²⁸³—in service of more radical movement goals.²⁸⁴ Nonetheless, by working within the existing state structure and filling

280. See Luban, *supra* note 276. For examples of lawyers serving in roles that facilitate, rather than lead, collective action, see Ashar, *supra* note 20; Cummings, *supra* note 80; Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

281. Banaszak finds that

a large proportion of . . . “insider” feminists held very inclusive views of feminism, believing that a range of issues should be included under the banner of feminist politics. These findings suggest that assumptions that feminist activists inside the state represent only less radical feminist ideologies, or that they hold a narrow view of feminism can be rejected.

BANASZAK, *supra* note 82, at 83.

282. See Luban, *supra* note 276. On the left, Professors Jean and Edgar Cahn helped create the National Legal Services program through President Kennedy’s Office of Economic Opportunity. They had co-authored a seminal article, *The War on Poverty: A Civilian Perspective*, that became the blueprint for the program. See TELES, *supra* note 20, at 31. On the right, some Republican administrations have featured lawyers opposed to the very positions to which they were appointed. For instance, controversial United Nations envoy John Bolton had said that “there’s no such thing as the United Nations.” Steven R. Weisman, *Bush Nominates Weapons Expert as Envoy to U.N.*, N.Y. TIMES, Mar. 8, 2005, at A10. Critics accused William Bradford Reynolds, who served as Assistant Attorney General for Civil Rights in the Reagan DOJ, of showing “contempt for the civil rights he is supposed to enforce.” Kenneth R. Noble, *Washington Talk: Justice Department; Reynolds’ Remarkable Rise*, N.Y. TIMES, Oct. 20, 1987, at A32 (quoting Senator Howard Metzenbaum). And Anne Gorsuch Burford, an Environmental Protection Agency official during the Reagan Administration, was accused of dismantling environmental advances. See Douglas Martin, *Anne Gorsuch Burford, 62, Reagan E.P.A. Chief, Dies*, N.Y. TIMES, July 22, 2004, at C13; cf. Teles, *supra* note 73, at 65 (discussing the failed nomination of Robert Zumbun, the founder of the Pacific Legal Foundation, to head the Legal Services Corporation with the goal of eliminating the agency). More recently, as Professor Norman Spaulding notes, controversial Bush Administration lawyers working on issues of national security and executive authority “acted as moral activists or ‘cause lawyers,’ seeking to vindicate . . . their own strongly held moral, political, and legal views.” Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1975 (2008).

283. See BANASZAK, *supra* note 82, at 130 (“Insider activists often saw their role as providing the information that was necessary to mobilize and coordinate confrontational tactics.”).

284. See *id.* at 188.

professionalized, institutional roles, cause lawyers inside the state are more likely, as compared to other movement activists, to pursue moderate, reformist goals and deploy conventional, institutional tactics. In fact, with few exceptions, they are, by their mere employment, suggesting some degree of commitment to reforming existing institutions, rather than transforming the system in which those institutions reside.²⁸⁵ Therefore, this Part highlights the limiting effects that cause lawyer movement into the state may produce while also being attentive to the range of views—on both goals and tactics—held by state-based movement actors.

A. Goals and Tactics

As an initial matter, the large number of legal positions in the federal bureaucracy makes space for cause lawyers' entrance into the state. This means that lawyers—merely one segment of a particular movement—likely have greater access to government positions.²⁸⁶ Lawyers possess the educational credentials, expertise, and work experience that qualify them for government employment.²⁸⁷ Accordingly, those who enter the state may represent a particularly privileged demographic in the broader movement. Feminist activists who entered government positions, including political appointees and civil service employees, were less racially diverse, more educated, and had higher incomes than their movement peers.²⁸⁸ Similarly, as attorneys, cause lawyers who enter the state are likely to be, as a general matter, less diverse along several dimensions, have higher levels of education, and have higher incomes than the movement population from which they emerge. Moreover, government lawyer positions such as those in the DOJ are highly coveted and extremely prestigious. They are generally reserved for those lawyers coming from the most elite law schools and legal organizations. In fact, a study of DOJ Civil Rights Division hiring under the Obama Administration demonstrates that a majority of hires came from highly selective schools and worked at prestigious civil rights organizations.²⁸⁹ These dynamics further reduce the likelihood that cause lawyers inside the state are representative of the general movement population.

285. They could, of course, seek to enter the particular agency to completely disable it. On this point, see *supra* note 282.

286. See Calabresi, *supra* note 109, at 70 (“[A]ll Presidents must make use of the assistance of thousands of lawyers in the Justice Department, the White House Counsel’s Office, and the Cabinet Departments and agencies.”).

287. See BANASZAK, *supra* note 82, at 4 (“Because some women are better able to enter the state than others, the part of the women’s movement that intersects the state is not representative of the whole movement.”). Furthermore, there are simply more lawyers who have worked at public interest law organizations, and these organizations now cover a wider range of substantive issues relevant to government policy. See Nielsen & Albiston, *supra* note 20, at 1605–08, 1615.

288. See BANASZAK, *supra* note 82, at 90–91.

289. See Savage, *supra* note 3.

The demographic make-up of cause lawyers entering the state has implications for the priorities of those lawyers once inside the government. Certain issues, which affect them and their peer group most significantly, may rise to the fore while other issues, which may figure prominently in the lives of more vulnerable movement members, may attract little attention. Banaszak, for instance, finds that feminist activists inside the state “largely focused on those aspects of the feminist agenda that reflected the needs of middle-class white women: equal opportunity issues, rather than issues of poverty for example.”²⁹⁰ Similarly, the more recent government action on LGBT issues has focused on military service (repeal of the “Don’t Ask, Don’t Tell” policy), marriage (the decision not to defend DOMA), and employment discrimination (employment practices within the government and Title VII antidiscrimination more generally). While these issues remain significant LGBT movement priorities, scholars and activists have criticized their prominence by arguing that they serve the most privileged LGBT constituents.²⁹¹ Poverty, which empirical research has demonstrated is a major issue in LGBT communities,²⁹² receives relatively scant attention as an LGBT issue.

Nonetheless, cause lawyers inside the state may possess robust and inclusive movement visions and may attempt to improve the lives of more vulnerable movement populations. Both Feldblum and McGowan, for instance, were vocal transgender rights advocates outside the state, and activity inside the state suggests that they maintain this commitment. The federal government has pursued nondiscrimination norms for transgender employees, and publicly available documents indicate that Feldblum has played a significant role on this issue. Yet this more inclusive agenda attempts to work through institutional channels to integrate vulnerable populations into the existing state-centered project. In this sense, LGBT rights work inside the state appears more assimilative and reformist than transformative and radical. Professor Dean Spade, for instance, criticizes prioritizing employment discrimination in transgender activism, arguing that even expansive employment nondiscrimination mandates “would not scratch the surface of trans poverty.”²⁹³ For Spade, law reform projects, of

290. BANASZAK, *supra* note 82, at 189.

291. See generally DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Darren Hutchinson, “*Gay Rights*” for “*Gay Whites*”? : *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000); Melissa Murray, *Marriage As Punishment*, 112 COLUM. L. REV. 1 (2012); Cathy Cohen, *The Price of Inclusion in the Marriage Club*, 21 GAY COMMUNITY NEWS 27 (1996); Lisa Duggan, *The Marriage Juggernaut*, 21 GAY COMMUNITY NEWS 5 (1996).

292. See RANDY ALBELDA ET AL., WILLIAMS INST., *POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 15, (Mar. 2009), available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/poverty-in-the-lesbian-gay-and-bisexual-community>.

293. SPADE, *supra* note 291, at 83.

which state-centered antidiscrimination law is a part, “merely tinker[] with systems to make them look more inclusive while leaving their most violent operations intact.”²⁹⁴ Even without accepting the breadth of Spade’s critique, at a minimum we see that cause lawyers inside the state may aid the movement while integrating it into existing institutional arrangements.²⁹⁵

Moving from substantive goals to tactical possibilities, when cause lawyers enter the state, their new institutional location dictates a more bounded tactical repertoire, favoring conventional legal tactics over more disruptive, extralegal tactics.²⁹⁶ Once cause lawyers enter the government, they may find it increasingly difficult to engage in movement work focused on mobilizing and organizing constituents. When appointed to DOJ positions, for instance, lawyers for the most part are expected to participate in conventional tactics—namely litigation—rather than deploy a more multidimensional approach.²⁹⁷ Even among types of conventional legal tactics, certain models, such as impact litigation, fit better with the lawyers’ government positions than others, such as direct legal services.²⁹⁸ In this sense, operating inside the state apparatus not only constrains the character of the available tactics—institutional over confrontational—but also the specific delivery of those tactics.

B. Effects on the Movement

By absorbing movement actors who deploy institutional tactics in favor of relatively moderate goals, the state aids those tactics and goals relative to their alternatives.²⁹⁹ In this sense, in the intra-movement contest, the government provides a significant push to one faction—likely the less transformative one—over another. A particular vision and ideological orientation may prevail and gain power as specific movement

294. *Id.* at 91.

295. See WOLFSON, *supra* note 93, at 200. Even with relatively moderate substantive issues amenable to lawyers inside the state, some lawyers may gravitate toward less capacious, and correspondingly less risky, cases. That is, the lawyers’ new professional setting may incentivize work on cases with relatively little potential for large-scale effects. *Cf.* Scheingold, *supra* note 38, at 390 (explaining how proximity to the state has a moderating effect and forces compromises); Selmi, *supra* note 157, at 1441.

296. See WOLFSON, *supra* note 93, at 201 (“[A] high level of state-movement interpenetration may facilitate the institutionalization of a limited number of approaches to collective action.”).

297. See Santoro & McGuire, *supra* note 83, at 505. *But see* Waterstone, *supra* note 151, at 493 (discussing government lawyers as facilitators in New Governance regimes).

298. In their study of the public interest law sector, Nielsen and Albiston show that public interest law organizations funded by the Legal Services Corporation (LSC) “are far more likely to perform direct services than their non-LSC-funded counterparts.” Nielsen & Albiston, *supra* note 20, at 1618. Accordingly, some lawyers from non-LSC-funded organizations may transition into government service with less disruption to their tactical repertoire, while lawyers from LSC-funded organizations may find government service less amenable to the type of legal practice in which they have developed expertise.

299. See WOLFSON, *supra* note 93, at 201 (arguing that state-movement interpenetration “may discourage the use of ‘radical’ or ‘unruly’ tactics, such as protests and boycotts”).

representatives take up positions inside the government.³⁰⁰ Ultimately, movement work by government actors influences intra-movement conflict to the extent that government action may advance and entrench a particular brand of movement activism and ideology to the detriment of competing models.

For instance, the DOJ's important shift on DOMA and its subsequent litigation efforts privilege marriage as a path to LGBT equality. Scholars and activists have criticized the marriage-centric push of the LGBT rights movement, arguing that positioning marriage as the key to relationship equality marginalizes nonmarital families and sacrifices a more progressive vision of family law reform.³⁰¹ By focusing on DOMA and the rights of married same-sex couples and thereby increasing the salience of this issue and the publicity surrounding it, the government action makes less tenable an LGBT rights project focused on the rights of families regardless of marital status.³⁰² Government support incentivizes additional movement activism aimed at marriage and specifically DOMA's denial of federal recognition to married same-sex couples.³⁰³

Accordingly, the exercise of state power on behalf of the movement may influence both substantive and tactical contests *inside the movement*. Movement organizations may be more likely to use institutional tactics in pursuit of moderate objectives when they have colleagues and allies in government. With a favorable political environment, institutional tactics may hold promise, and moderate goals may become more realizable. In a repressive political environment—with fewer movement actors inside the state—the futility of pursuing even moderate goals and using conventional tactics may render transformative movement visions and confrontational tactics less costly.³⁰⁴ Therefore, the existence of cause lawyers inside the state, during generally hospitable administrations, may channel movement resources toward state-centered institutional tactics aimed at substantive goals that the Administration likely supports or that key actors in the federal bureaucracy can advance. Ultimately, while cause lawyer movement into government positions aids movement progress, it may circumscribe that progress in a way that privileges and incentivizes state-centered tactics and goals.

300. See Halley et al., *supra* note 155, at 340.

301. See, e.g., NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (2008); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Melissa Murray, *What's So New About the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 431–35 (2012); Paula Ettelbrick, *Marriage Must Not Eclipse Other Family Organizing*, 21 GAY COMMUNITY NEWS 25, 25 (1996).

302. See, e.g., Murray, *supra* note 301, at 433; Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722–23 (2012).

303. On the channeling effects of marriage activism more generally, see NeJaime, *supra* note 189.

304. See BANASZAK, *supra* note 82, at 28 (“[A]t several crucial points within the history of the women’s movement, feminist insiders initiated confrontational action precisely because they knew that the government was closed to certain types of issues.”).

Nonetheless, social movements rely on a variety of tactics, and contrary to traditional assumptions in social movement theory, recent socio-legal scholarship demonstrates the productive relationship between institutional and confrontational tactics.³⁰⁵ Accordingly, direct action and protest by movement activists may, in some circumstances, influence and aid the insider tactics of government lawyers.³⁰⁶ While I am highlighting the constraints imposed by government service, future work should also explore the potentially productive relationship between government work and confrontational movement tactics.

CONCLUSION

By uncovering and exploring the role of cause lawyers who move inside the state, this Article attempts to fill a significant gap in socio-legal scholarship. In doing so, it points toward a more dynamic relationship among cause lawyers, social movements, and the state. Instead of using a one-dimensional lens that constructs cause lawyers in opposition to the state and sees the state as resistant, attention to cause lawyers in government positions suggests that social movements and the state are engaged in a mutually constitutive relationship. At times, lawyers may occupy both the movement and the state. The moments when they do—and their actions in those moments—have significant consequences for movement progress and impact the direction of the movement—and the state—going forward.

Only through future empirical research that examines the incidence of cause lawyer movement into the state and the experiences of those lawyers before, during, and after government service will we build a more comprehensive and accurate account of cause lawyer movement in and out of the state. Future research should focus not simply on the way that cause lawyers impact the movement and influence the government, but also the ways in which government service changes the lawyers themselves. What compromises has the government lawyer made in her new position? How, if at all, has movement into the state changed her ideological views and strategic calculations? How has her government service affected her post-government life?³⁰⁷ Has it limited her willingness to oppose her former colleagues? Have ethical rules governing confidentiality and conflicts of interest prevented her from subsequently serving the cause with which she identifies?³⁰⁸ Qualitative work on cause lawyers themselves could provide important material with which to work through the multiple dimensions of these questions and many others.

305. See Marshall, *supra* note 20; Lynn C. Jones, *Exploring the Sources of Cause and Career Correspondence Among Cause Lawyers*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 203, 203–04 (Austin Sarat & Stuart Scheingold eds., 2005).

306. Cf. EPP, *supra* note 162, at 3 (explaining how reform-minded bureaucrats have used external pressure from outside activists to push change inside agencies).

307. See Luban, *supra* note 276.

308. Here the distinction between lawyers serving in traditional legal roles and lawyers serving as legislative advocates or lobbyists will be important.