

## SOCIAL MOVEMENTS EVERYWHERE

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In response to Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

Just five years ago—in the pages of this law review—Reva Siegel wrote an essay characterizing her focus on social movements as part of a “small but rapidly growing body of constitutional theory written in law schools that examines the life of the Constitution outside the courts.”<sup>1</sup> Today such a statement would be only half correct: the body of literature about the public’s role in constitutional interpretation may still be growing, but it is hardly small. The frame and focus of constitutional theory have changed in the past five years, in part because of the work of Balkin and Siegel themselves, along with other prominent constitutional law scholars.<sup>2</sup> These scholars, and newer entrants to the field, have collectively described, and often normatively advanced, a theory of constitutional change that rests in large part with “the People themselves.”<sup>3</sup> A study of the role of the elected institutions in government and the broader public in creating and shaping constitutional change is a central feature of much new scholarship.

This kind of thinking about the Constitution, most broadly called “popular constitutionalism,” is probably the most important development in the constitutional law academy over the past decade. It is itself a discernible kind of movement (though not one I would call a “social movement,” given its center of gravity in elite law schools). As someone who entered the constitutional law academy five years ago,

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<sup>1</sup> Reva B. Siegel, *Text in Contest: Gender and the Constitution From a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300-01 (2001).

<sup>2</sup> The literature is now voluminous, too much so to even summarize in this response. The field is now producing its own focused intellectual historiography, *see, e.g.*, Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 898-99 (2005) (noting that “‘the People’ have become constitutional theory’s hottest fashion,” and summarizing the major popular constitutionalist literature).

<sup>3</sup> This phrase by James Madison is, of course, borrowed from the title used by one of the genre’s leading exponents. *See* LARRY KRAMER, *THE PEOPLE THEMSELVES* (2004).

my own attitudes about the processes of constitutional change have been deeply shaped by this school of thought, as has the direction of some of my scholarship.<sup>4</sup> I thus approach Balkin and Siegel's current essay as a rather inadequate critic: more true believer than distanced skeptic. I endorse the basic points of their essay, about the importance of social movements in constitutional change, and (relatedly) about the manner in which social movements can provoke the intellectual discourse and theoretical innovation that is often a necessary precursor to such legal change. Taking on Balkin and Siegel's arguments point by point would be fruitless, given my general agreement. Instead, in a few pages here I use their essay and other related work as a starting point to discuss how social movement scholarship relates to broader currents of constitutional theory, and what it offers that more classical theories do not. I conclude by raising some questions of specification that the existing literature on social movements has tended to bracket, about the precise mechanisms for producing legal change that such groups employ.

Social movement analysis can be viewed as one subset of popular constitutionalism, a mode of analysis that explores and recognizes the role of the public in creating constitutional rules. Some popular constitutionalists, like Larry Kramer, are directly critical of judicial supremacy in constitutional interpretation, advancing a more central role for extrajudicial institutions and ultimately "the People" in settling constitutional meaning.<sup>5</sup> Other scholars seem more comfortable with judicial interpretive supremacy, but only so far as courts remain at least occasionally sensitive to evolving views of the people. I read Balkin and Siegel's essay to be in the latter school—accepting the centrality of federal judges as ultimate interpreters, so long as they are cognizant of, and responsive to, new principles and arguments offered by various groups in society. Judicial discretion is acceptable, so long as it is not too dismissive of public sentiment, whether expressed directly or funneled through the positions of elected institutions like Congress. Given the widely shared skepticism of judicial review that is too tone deaf to public attitudes, it is not surprising that the flourishing of popular constitutionalist writing in the legal academy has happened in the last decade, as it was triggered in large part by the "new Federalism" of the Rehnquist Court which appeared to disregard

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<sup>4</sup> See, e.g., Theodore W. Ruger, "A Question Which Convulses a Nation": *The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004) (exploring an intense episode of popular debate over judicial review in the 1820s).

<sup>5</sup> See KRAMER, *supra* note 3, at 246-48.

popular choices expressed by Congress. The most notable example is the case of *United States v. Morrison*,<sup>6</sup> where five Justices struck down a key component of the popular Violence Against Women Act despite strong support in both houses of Congress and from thirty-eight states' attorneys general.

Given the social movement framework's focus on the interrelationships between judicial decisions and the views of groups in society, it is also possible to place social movement scholarship within the broader current of a decades-long constitutional law debate about the "countermajoritarian difficulty." The "difficulty" is the vast discretion exercised by unelected judges in an electoral democracy—the solutions and responses vary dramatically. The traditional legal response, from Wechsler forward, has been to focus on minimizing the actual discretion in judicial decision making by propounding, and attempting to enforce adherence to, neutral rules of doctrine.<sup>7</sup> The "difficulty" is solved, if at all, by the constraints of formal legal rules.

Rather than constructing principles to reduce judges' discretion, popular constitutionalism in various forms responds to the problem in a different way, by attacking the "countermajoritarian" premise of the original "difficulty." What is so countermajoritarian about judicial review—even by unelected judges—if judicial decisions track general changes in popular sentiment? Judicial discretion itself is no longer the problem, so long as judges do not employ their discretion to consistently contravene popular understandings about the Constitution. Wechsler's endeavor to construct neutral principles is rendered less urgent by the Dahlian maxim: "the Court follows the election returns."<sup>8</sup>

The above is too simplistic, of course, both as a summary of the scholarship and a description of the mechanisms of constitutional change. Saying that the Court sometimes responds to deeply held public opinion says something so widely accepted as to not say much at all. It is here, in the inquiry into process, that social movement scholarship offers something new and important to the study of popular opinion and constitutional change. Most of the classic accounts of

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<sup>6</sup> 529 U.S. 598 (2000).

<sup>7</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>8</sup> Dahl never quite said this, though he is often cited as such. But his actual statement expresses the same sentiment. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (finding that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States").

popular constitutional change include central signifying mechanisms that are in some way majoritarian. Dahl's is the simplest: the results of national elections send signals to the courts. Similarly, Jack Balkin and Sandy Levinson have advanced a theory of "partisan entrenchment" that likewise focuses on national electoral results, and the consequent ability of presidents and senators to appoint like-minded federal judges and thus produce constitutional change over time.<sup>9</sup> Even a more multifaceted indicator of public endorsement of constitutional change, such as Bruce Ackerman's idea of constitutional moments, includes the criteria of a "triggering election" arising out of national majoritarian politics.<sup>10</sup> Despite their differences, all of these major theories of the public's involvement in constitutional change share one feature—the idea that the public speaks and is heard by courts, via the mechanism of national winner-take-all electoral politics.

Social movement analysis addresses a blind spot embedded in these broader theories. By recognizing the prospect that legal change sometimes is influenced by groups that *do not* comprise an identifiable national majority, a focus on social movements and legal change offers a more nuanced approach. To be sure, some social groups do attain a level of influence that is manifested in national electoral victories, and thus the majoritarian processes described above—such as Balkin and Levinson's partisan entrenchment—are apt descriptors of the mechanism of change. But not all groups that change the law do so by changing the (national) lawmakers through sweeping electoral success. Much constitutional change derives from more incremental and interstitial victories, and Balkin and Siegel's focus on social movements provides an appropriately nuanced framework for discussing this kind of constitutional development.

The examples they use in this essay and elsewhere illustrate this idea. Neither the movement against racial data collection nor the open source movement is the kind of movement that seems likely to achieve national majoritarian success in the foreseeable future. The dismal record of the movement against racial data collection when it has actually been put to a public election does not suggest eventual majoritarian success.<sup>11</sup> Similarly (though Jack Balkin may disagree) I do not imagine that the open source movement will gain majoritarian

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<sup>9</sup> Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

<sup>10</sup> BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 20, 26, 359 (1998).

<sup>11</sup> See Jack M. Balkin & Reva Siegel, *Principles, Practices and Social Movements*, 154 U. PA. L. REV. 927, 941 n. 49 (2006) (describing the defeat of a proposed California prohibition on racial data collection by almost a two to one margin).

support of the sort that will be crucial in a general election in the foreseeable future. Still, although neither of these social movements is majoritarian in nature, I share Balkin and Siegel's sense that both have the capacity to produce real constitutional change through discursive intellectual change and incremental judicial decision making. Reva Siegel's other work on the Equal Rights Amendment proves a similar point—although the feminist movement “failed” in a formal structural sense in its efforts to amend the Constitution, it nonetheless succeeded in achieving substantial legal change through more incremental steps.<sup>12</sup>

This idea that submajority movements can effect constitutional change is a signal contribution of the work by Balkin and Siegel and others on social movements. What their essay here—and the current literature in general—does not yet fully specify is how such change occurs. By what mechanisms do the Supreme Court and other federal courts which articulate constitutional law take account of groups whose victories are not clearly expressed in national politics? I will discuss two kinds of phenomena here, which are quite different in emphasis though not mutually exclusive.

The first idea, forming a large part of Balkin and Siegel's essay, is that social movements produce legal change by working at the level of discursive ideology—by transforming the framework, assumptions and applications of constitutional law discourse. This transformative function operates at the level of principled argument, and is thus above the formal majoritarian strictures of American politics, with its focus on binary results. This is not to say that tangible indicia of support for a new idea are irrelevant. To the contrary, support levels are crucial for sustaining momentum for new constitutional ideas, and for pushing new frameworks into a realm of broader acceptance. But a substantial, well-organized, and vocal minority can provide this legitimating discursive push, keeping ideas within the constitutional law conversation among the public, the academy and judges and other officials.

The ideational component of social movements facilitates their transformative impact on the law. As Balkin and Siegel note, ideas become “unstuck” from prior assumptions, thereby becoming an intellectual engine to drive legal change. Not surprisingly, that same dynamic by which new ideas can destabilize existing assumptions and

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<sup>12</sup> See Siegel, *supra* note 1, at 307 (suggesting that “during the 1970s, the federal judiciary adopted a new understanding of the equal citizenship norm, even though the amendment proposing this understanding was never ratified”).

produce change also operates to make social movements themselves unstable over time. Many social agreements that form the basis of popular movements are fundamentally unstable because they are “incompletely theorized” in the manner described by Cass Sunstein.<sup>13</sup> People might agree on an idea of intermediate abstraction (e.g., “the government should not discriminate based on race”) without full agreement on the higher-level theoretical justifications of that idea (e.g., distributive justice versus formal equality versus inherent human dignity) and without agreement on particular applications (e.g., whether affirmative action is permitted). Consequently, a movement that garners momentum for particular legal reform at a particular place and time may fracture when the object of reform shifts, thereby exposing differences in the group members’ conceptions of the higher-level foundations of the movement. The latent existence of these fractures within many social movements suggests that scholars should be sensitive to intragroup ideological differences that might become more pronounced upon the change of certain conditions. By way of example, I have in mind the sophisticated work Tomiko Brown-Nagin has done in exploring the internal dynamics of the civil rights movement during several recent historical episodes.<sup>14</sup>

I now move away from this discussion of ideas toward a brief focus on implementation and transmission. Social movements generate new ideas—but how is this ideational change, this change in “the conversation” of constitutional theory, converted into tangible constitutional law? This is another question that existing literature has not fully answered, and Balkin and Siegel’s essay here does not claim to explore this question in detail. Still, some mediating process is at work in most cases where social movements produce constitutional change. Rare indeed is the case where a Supreme Court Justice—or, more consequentially, five of them—will pluck an abstracted idea solely out of the intellectual ether and transplant it to make new constitutional law in a contested area. Justices are more likely to adopt a transformative new idea that has been legitimated by transmission into concrete “law,” not necessarily by a clear majority of the entire American public, but at least by some parts of the American polity.

Such legitimization can take multiple forms; an idea can be em-

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<sup>13</sup> See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

<sup>14</sup> See, e.g., Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV. 1913 (2003).

bodied in state laws, lower court decisions, or even in private law policies (think, for instance, about the key role the “General Motors brief” may have played in the *Grutter*<sup>15</sup> decision). But some such reflection of an idea in the stuff of recognizable law seems important for a principle’s acceptance by the Supreme Court. Here too, a focus exclusively or even primarily on national politics is misplaced, because much of this generative interstitial change occurs in the form of gradual state and local law reform. By pointing us to a process of change that often occurs first at these subnational levels, the social movement scholarship of Balkin and Siegel and others offer illumination that is not found in theories which recognize only national political signals.

All of this suggests that inquiry into the methods of successful social movements should take account of the way in which such movements take advantage of the multiplicitous structure of American lawmaking. The federal system, and the separation of powers within both levels of the system, provides a variety of legitimating outlets to potentially convert the transformative zeal of social movements into tangible legal change. Unless adopted nationally, such change will be interstitial, and perhaps even contradicted by law in other jurisdictions, but can provide indicia of concrete success that will both sustain movement supporters and in some cases catch the attention of national policymakers, including federal judges.

The existence of multiple outlets for legal change is important for these groups’ expression of their preferred ideology. Many groups which will be “losers” in the national forum will succeed at various state and local levels. The most successful social movements embrace this jurisdictional multiplicity and use it to their advantage. For instance, last year’s *Kelo v. New London*<sup>16</sup> Supreme Court decision catalyzed an intense and broad-based oppositional movement in support of stronger private property rights. A quick glance at one of the movement’s organizational websites (the Institute for Justice) reveals a successful multimodal strategy, entailing legislative initiatives in dozens of states plus Congress, as well as law reform litigation at the state and federal level.<sup>17</sup>

I conclude this brief response by restating two obvious points: social movements are a crucial component of constitutional change, and

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<sup>15</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the constitutionality of affirmative action as practiced by the University of Michigan Law School).

<sup>16</sup> 545 U.S. 469 (2005).

<sup>17</sup> See Institute for Justice, Property Rights, [http://www.ij.org/private\\_property/index.html](http://www.ij.org/private_property/index.html) (last visited August 30, 2006).

the study of such movements is at present a flourishing field of constitutional law scholarship. The work of Balkin and Siegel and others has brought the people back in to the study of constitutional transformation. It is now time for scholars to take up a number of more specific questions that I have touched on here. How do social movements succeed in converting their transformative ideas into tangible legal reform? Why do some movements fail where others succeed? And more fundamentally—given the new emphasis on social movement analysis—how do we recognize, and explain, meaningful episodes of constitutional change that are *not* driven by social movements?