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PASSING THROUGH THE DOOR:
SOCIAL MOVEMENT LITERATURE AND LEGAL SCHOLARSHIP

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INTRODUCTION

During the past three decades, the study of social movements has

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become a major area of social science research in both America and Continental Europe. As is often true, a different approach has been adopted in these two places, so that, in effect, there are two separate literatures on the subject. But the gap between American and Continental social movement literature is now widely recognized by sociologists and political scientists within the field, and, having been so noted, is being overcome by scholars who recognize the value to be gained from incorporating differing perspectives in their own research.¹ The subject matter of this Article is another gap, one that has been much less widely noted and less often bridged. This is the gap between legal scholarship and the social movement literature as a whole. As discussed below in Part I, these two fields display considerable overlap in both their subject matter and their methodology; they study the same phenomena and draw on the same theoretical sources in doing so. Yet, they communicate only fitfully, if at all, with one another. The social movement literature, although it pays some attention to law, makes little use of legal scholarship. In turn, and of more direct concern for present purposes, legal scholars seem largely oblivious to the extensive social science literature on social movements. Apparently, the narrow university paths that separate law schools from social science buildings are harder to cross than the Atlantic Ocean; the language barrier between legal and social science discourse is higher than the one between English and French, German or Italian; and the sense of foreignness that afflicts legal scholars and social scientists who belong to the same university, share the same political views, and live in the same neighborhoods is greater than that which divides inhabitants of different continents.

Part of this divergence between legal and social movements scholarship can be attributed to methodology; while the two fields draw on the same sources, they make use of them in distinctly different ways. A more important source of the divergence, however, is subject matter. While social movement and legal scholars study essentially the same phenomena, they restrict themselves to different parts of these phenomena. In particular, and as Part I discusses, social movement scholars study the way these movements are formed, organized, and operated, while legal scholars study the movements' specific effect on the decisions of courts, legislatures, and administrative agencies. Each field has its own reasons for the emphasis that it adopts. In the case of

¹ See *infra* Part I.B (demonstrating how scholars from each tradition have incorporated ideas and methodologies from the other tradition).

legal scholarship, the reasons are its essentially prescriptive stance and, more importantly, its unity of discourse with the judiciary, which creates a mentality that tends to assimilate the style of legal analysis to arguments before a court. The result, as Part III discusses, is that legal scholarship observes and analyzes the influence and impact of social movements, but tends to ignore their origins. The theme of this Article, and this Symposium, is that legal scholars have much to gain from broadening their perspective and making contact with the social movements literature. They would be able to improve their descriptions of the legal system, and would perceive additional distinctions that would enhance their prescriptions as well. Part IV shows that they would acquire, in addition, a new approach for understanding the origin and meaning of basic legal concepts.

No effort will be made in this Article to define the term “social movement,” any more than to define the term “law.” The topic of the Article is not social movements as such, but the field of social movements scholarship. That field, being a self-conscious enterprise, effectively defines itself, just as legal scholarship defines itself without an agreed-upon definition of law. For purposes of clarification, however, the concept of a social movement can be demarcated by referring to the familiar idea that society consists of three spheres—the political, the economic, and the social.² Each is capable of generating pro-

² The distinction between the political and economic spheres goes back at least as far as Aristotle, who distinguished between the *polis*, or city-state (the origin of our term “political”), and the *oikos*, or household (the origin of our term “economic”). ARISTOTLE, POLITICS: BOOKS I AND II 53-164 (Trevor J. Saunders ed., T.A. Sinclair trans., rev. ed. 1981). Certainly, it was clearly established by the time of Adam Smith. See ADAM SMITH, THE WEALTH OF NATIONS (David Campbell Publishers 1991) (1776) (studying the causes of increases in a nation’s wealth and considering the real wealth to be found in consumer goods). The concept of civil society probably originated with Hegel. G.W.F. HEGEL, PHILOSOPHY OF RIGHT 122-55 (T.M. Knox trans., Oxford Univ. Press 1967) (1821). As Hegel uses this term, however, it is one of the three divisions of ethical life (*Sittlichkeit*), the others being the family and the state, and includes within it things that we now associate with the political realm, such as the police and the administration of justice. For a discussion of Hegel’s conception of *Sittlichkeit*, see FREDERICK NEUHOUSER, FOUNDATIONS OF HEGEL’S SOCIAL THEORY 114-44 (2000); and CHARLES TAYLOR, HEGEL 365-88 (1975). The contemporary taxonomy is derived from the work of Talcott Parsons in the American tradition, see TALCOTT PARSONS, POLITICS AND SOCIAL STRUCTURE (1969) (setting forth the components of society and their interrelations); TALCOTT PARSONS, THE SYSTEM OF MODERN SOCIETIES (1971) (arguing that modern society emerged in the West), and Antonio Gramsci in the Continental tradition, see ANTONIO GRAMSCI, PRISON NOTEBOOKS (Joseph A. Buttigieg ed., Joseph A. Buttigieg & Antonio Callari trans., Columbia Univ. Press 1992) (discussing political systems and problems of history, culture, philosophy, and civil society). While the concept has become less prominent in the United States with the decline of Parsonian

grammatic initiatives of various sorts. The political sphere produces legislation, court decisions, and actions by administrative agencies. The economic sphere generates goods and services, typically through the modality of profit-making enterprises. The social sphere, also described as civil society, is the source of religious activity, fraternal organizations, and a variety of fads and fashions. Social movements belong to this third sphere of society. They can be regarded as coordinated, ideologically based efforts that originate within the social sphere or, in other words, as a self-conscious effort by previously unorganized individuals resulting in collective action.³

The prevailing view is that organizations or political parties are not the same as social movements. Rather, social movements are regarded as consisting of more diffuse agglomerations of individuals within civil society who are linked together by ideology, beliefs, or collective identities. Organizations may catalyze the creation of these agglomerations, or may be generated by them; in most cases, the relationship is probably co-causal.⁴ On occasion, these agglomerations

sociology, it remains central in much of Continental social thought. See, e.g., JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger trans., 1989) (1962) (examining the bourgeois public sphere through a liberal model that studies a transformation in the classic form of the public and private distinction); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984) [hereinafter HABERMAS, *THEORY OF COMMUNICATIVE ACTION*] (exploring approaches to the problem of rationality and preserving the distinction between the public and private spheres); NIKLAS LUHMANN, *SOCIAL SYSTEMS* (John Bednarz & Dirk Baecker trans., Stanford Univ. Press 1995) (1984) [hereinafter LUHMANN, *SOCIAL SYSTEMS*] (viewing modern society as a complex system of communications composed of subsystems with unique perspectives); NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* (Stephen Holmes & Charles Larmore trans., 1982) (studying modern society by way of a social differentiation approach); CLAUS OFFE, *DISORGANIZED CAPITALISM* (John Keane ed., 1985) (exploring the relationship between political power and authority and social authority). For general discussions of the concept, see NORBERTO BOBBIO, *THE FUTURE OF DEMOCRACY* (Richard Bellamy ed., Roger Griffin trans., 1987); JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992); ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1992); Charles Taylor, *Modes of Civil Society*, 3 *PUB. CULTURE* 95 (1990); Michael Walzer, *The Idea of Civil Society*, *DISSENT*, Spring 1991, at 293.

³ See COHEN & ARATO, *supra* note 2, at 492-563 (exploring the relationship between social movements, collective action, and civil society by looking at the "resource-mobilization" paradigm and the "identity-oriented" paradigm).

⁴ See DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* 16-19 (1999) (discussing the relationship and differences between social movements and political or religious organizations); John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 *AM. J. SOC.* 1212, 1218 (1977) (defining a social movement organization as a "complex, or formal, organization that identifies its goals with the preferences of a social movement or a countermovement and attempts to implement those goals"), reprinted in *SOCIAL MOVEMENTS*

will even generate a political party, although they are more likely to ally themselves with an existing one.⁵ The movement itself exists in the social sphere, however, while the organizations that created it or were created by it bridge the social and political spheres, translating the beliefs of the movement's participants into political action. Of course, the boundary between the spheres is entirely permeable, and it may be difficult to assign specific actions or events to one side or the other. The entire model is best treated as a heuristic, as a device for identifying and conceptualizing complex sociopolitical processes, rather than as a definitive explanation.⁶

I. OVERLAPS

A. *Subject Matter*

One event that catalyzed the modern social movement literature, in both the United States and Continental Europe, was the advent of environmentalism.⁷ Here was a rapid shift in social attitudes, wide-

IN AN ORGANIZATIONAL SOCIETY 15, 20 (Mayer N. Zald & John D. McCarthy eds., 1987).

⁵ See HERBERT KITSCHOLT, *THE LOGICS OF PARTY FORMATION: ECOLOGICAL POLITICS IN BELGIUM AND WEST GERMANY* (1989) (examining the formation of Belgian and West German ecology parties such as the Green, Ecolo, and Agalev parties); PHILIP LOWE & JANE GOYDER, *ENVIRONMENTAL GROUPS IN POLITICS* (1983) (exploring the relationship of the environmental movement to the political system).

⁶ *But see* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 2 (Gunther Teubner ed., 1988) (examining "the potential of autopoiesis for legal theory and . . . reformulat[ing] fundamental legal concepts in light of this theory"); LUHMANN, *SOCIAL SYSTEMS*, *supra* note 2 (presenting a theory of society based on self-referential, "autopoietic" systems); GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993) (asserting that law is an autopoietic system, which reproduces itself). Luhmann and Teubner regard the political, economic, and social systems, as well as the legal subsystem, as independent realms that are defined by distinctive, self-sustaining discursive practices, and that interact with each other only when each realm translates outside events into its own discourse.

⁷ *See generally* RUSSELL J. DALTON, *THE GREEN RAINBOW: ENVIRONMENTAL GROUPS IN WESTERN EUROPE* (1994) (exploring the effects that environmental interest groups have on the political process through the groups' creation of a force for change to society's new policy interests); MARIO DIANI, *GREEN NETWORKS: A STRUCTURAL ANALYSIS OF THE ITALIAN ENVIRONMENTAL MOVEMENT* (1995) (examining the social movement from a structural approach that focuses on the exchanges between organizations and individuals that create and shape the movement); *ECOLOGICAL RESISTANCE MOVEMENTS* (Bron Raymond Taylor ed., 1995) (describing the emergence, structure, and impact of popular ecological resistance movements through social movement theory); ANDREW JAMISON ET AL., *THE MAKING OF THE NEW ENVIRONMENTAL CONSCIOUSNESS: A COMPARATIVE STUDY OF THE ENVIRONMENTAL MOVEMENTS IN*

spread in its appeal, sustained in its operation, and profound in its effects, that contradicted all existing theories on the causes of mass movements. It neither seemed to arise from social frustration, dislocation, or anomie, nor express itself as either a series of spontaneous popular uprisings or as a blind obedience to demagoguery,⁸ nor con-

SWEDEN, DENMARK AND THE NETHERLANDS (1990) (studying, in a comparative manner, the development of environmental groups in order to bridge the gap between ideological and empirical analysis of social movements literature); GRANT JORDAN & WILLIAM MALONEY, *THE PROTEST BUSINESS? MOBILIZING CAMPAIGN GROUPS* (1997) (examining Friends of the Earth and Amnesty International in Britain but concluding that social movement literature adds little to the traditional political science approach); LOWE & GOYDER, *supra* note 5 (relating the social movement, organizational, and pressure group perspectives of environmental groups for a fuller understanding of their workings, significance, and prospects); GARETH PORTER & JANET WELSH BROWN, *GLOBAL ENVIRONMENTAL POLITICS* (1991) (describing the emergence, characteristics, and political context of world environmental politics); ANDREW SZASZ, *ECOPOPULISM: TOXIC WASTE AND THE MOVEMENT FOR ENVIRONMENTAL JUSTICE* (1994) (examining the circumstances leading to emergence and success of the movement concerning hazardous waste and other toxins).

⁸ See, e.g., ERICH FROMM, *ESCAPE FROM FREEDOM* (Discus Avon Books 1965) (1941) (arguing that the isolation of freedom is unbearable to people, causing anxiety and a desire to escape freedom by submission or entrance into dependencies); TED ROBERT GURR, *WHY MEN REBEL* (1970) (setting forth a theory of political violence in which discontent develops, is politicized, and finally results in violent action); RUDOLF HEBERLE, *SOCIAL MOVEMENTS: AN INTRODUCTION TO POLITICAL SOCIOLOGY* 93 (1951) (stating that "the broad masses are likely to be activated only if their immediate personal interests are affected by some measure taken by the government"); ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* 11 (1951) ("For men to plunge headlong into an undertaking of vast change, they must be intensely discontented yet not destitute, and they must have the feeling that by the possession of some potent doctrine, infallible leader or some new technique they have access to a source of irresistible power."); WILLIAM KORNHAUSER, *THE POLITICS OF MASS SOCIETY* 128 (1959) ("[M]ajor discontinuities in social process produce mass movements by destroying pre-established intermediate relations and by preventing the formation of new associations aligned with the social order."); GUSTAVE LE BON, *The Crowd*, in *THE MAN AND HIS WORKS* 57 (Alice Widener ed., 1979) (1909) (explaining that both remote and immediate factors shape the opinions and beliefs of crowds); GEORGE RUDÉ, *THE CROWD IN HISTORY, 1730-1848*, at 214-36 (1964) (analyzing the "pre-industrial" crowd and making a distinction between dominant and underlying motives, such as economics and politics); NEIL J. SMELSER, *THEORY OF COLLECTIVE BEHAVIOR* (1962) (arguing that many conditions need to come together in a specific pattern to cause collective behavior); PETER WORSLEY, *THE TRUMPET SHALL SOUND: A STUDY OF "CARGO CULTS" IN MELANESIA* (2d ed. 1968) (exploring movements in which there are expectations and preparations for a period of "supernatural bliss"); Joseph R. Gusfield, *Mass Society and Extremist Politics*, 27 *AM. SOC. REV.* 19 (1962) (stating that many hypothesize that social movements are the product of social change); Joseph R. Gusfield, *The Study of Social Movements*, in 14 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 440 (David L. Sills ed., 1968) (noting that some social movements entail "the emotional-affectual 'following' of a charismatic leader" by its members). Underlying this literature are a disparagement and fear of mass movements as the opposite of the reasoning and deliberation that was, and still is, associated with democ-

stitute an emergent collective behavior resulting from individual reactions.⁹ Indeed, the movement was remarkable for the diffuse and remote character of the concerns that animated its participants, for the lack of any particularized economic interests in its basic goals, and for the sophisticated organizational efforts that sustained it. For some reason, large numbers of people who were otherwise indistinguishable from the general population were moved to political action by incremental deterioration of the air that everybody breathed and the water everybody drank, the degradation of wilderness areas that they would never visit, and by the extinction in the wild of species that they would see only in zoos or picture books. By some mechanism, the environmental movement was able to generate stable, effective organizations

racy. The participants in social movements were seen either as being out of control, or victimized by strong emotions and thus too easily controlled by unscrupulous demagogues.

⁹ This was the approach adopted by the Chicago School of Sociology, which described its methodology as symbolic interactionism. See HADLEY CANTRIL, *THE PSYCHOLOGY OF SOCIAL MOVEMENTS* (4th ed. 1967) (explaining behavior as a function of the environment and the person's predispositions at that moment); KURT LANG & GLADYS ENGEL LANG, *COLLECTIVE DYNAMICS* 4 (1961) (describing social dynamics as "those patterns of social action that are spontaneous and unstructured inasmuch as they are not organized and are not reducible to social structure"); ROBERT E. PARK, *ON SOCIAL CONTROL AND COLLECTIVE BEHAVIOR: SELECTED PAPERS* 225-39 (Ralph Turner ed., 1967) (defining collective behavior as the behavior of individuals resulting from shared impulses that are common and collective to other members of society); ROBERT E. PARK, *THE CROWD AND THE PUBLIC AND OTHER ESSAYS* 22 (Henry Eisner, Jr. ed., Charlotte Eisner trans., Univ. of Chi. Press 1972) (1904) (explaining the crowd as a "psychic current, together with the individuals carried by it"); RALPH H. TURNER & LEWIS M. KILLIAN, *COLLECTIVE BEHAVIOR* 21 (1957) ("Unless there is a minimum of cultural homogeneity and a certain 'we'-feeling in a collectivity, there will not be a sufficient basis for the communication between individuals which is necessary for the development of collective action."); Herbert Blumer, *Collective Behavior*, in *NEW OUTLINE OF THE PRINCIPLES OF SOCIOLOGY* 199 (Alfred McClung Lee ed., rev. 2d ed. 1951) (viewing social movements as collective enterprises to establish a new order of life). The Chicago School did integrate some of the insights of European sociologists, such as Emile Durkheim and Georg Simmel, into the American empirical tradition, and it struggled with the issue of socially constructed identity that would come to play an important role in the Continental social movement literature. The work of Simmel was particularly influential in this regard. See Donald N. Levine et al., *Simmel's Influence on American Sociology* (pts. 1 & 2), 81 *AM. J. SOC.* 813 (1975), 81 *AM. J. SOC.* 1112 (1976) (tracing the three phases of Simmel's thought and its influence on theoretical orientations and research traditions). In this sense, the Chicago School can be regarded as paving the way for the integration of the Continental and American research on social movements. For discussions of the Chicago School, see MARTIN BULMER, *THE CHICAGO SCHOOL OF SOCIOLOGY: INSTITUTIONALIZATION, DIVERSITY AND THE RISE OF SOCIOLOGICAL RESEARCH* (1984); JAMES T. CAREY, *SOCIOLOGY AND PUBLIC AFFAIRS: THE CHICAGO SCHOOL* (1975); FRED H. MATTHEWS, *QUEST FOR AN AMERICAN SOCIOLOGY: ROBERT E. PARK AND THE CHICAGO SCHOOL* (1977).

and public demonstrations that were coordinated, well-managed, non-violent affairs.

The environmental movement was not unique in this respect. Simultaneously, or within a short period of time, the antinuclear and peace movements,¹⁰ the animal rights movement,¹¹ the prisoners' rights movement,¹² the anti-abortion and pro-choice movements,¹³ the direct action movement,¹⁴ and the resurgent human rights movement¹⁵ all displayed these same distinctive and unexpected characteristics. These anomalous phenomena, moreover, provided social scientists with a different perspective on other movements that had previously been understood in more conventional ways. The con-

¹⁰ See generally DAVID CORTRIGHT, *PEACE WORKS: THE CITIZEN'S ROLE IN ENDING THE COLD WAR* (1993) (assessing the peace movement's influence on the end of the Cold War through its impact on the general political climate); DAVID S. MEYER, *A WINTER OF DISCONTENT: THE NUCLEAR FREEZE AND AMERICAN POLITICS* (1990) (analyzing the nuclear freeze movement's origins, development, strategies, organization, and the political context in which it operated); THOMAS ROCHON, *MOBILIZING FOR PEACE: THE ANTINUCLEAR MOVEMENTS IN WESTERN EUROPE* (1988) (suggesting an approach to studying peace movements that incorporates and expands on the new social movement theory and resource mobilization approach); WOLFGANG RUDIG, *ANTI-NUCLEAR MOVEMENTS: A WORLD SURVEY OF OPPOSITION TO NUCLEAR ENERGY* (1990) (discussing the emergence and successes of the antinuclear movement); STATES AND ANTI-NUCLEAR MOVEMENTS (Helena Flam ed., 1994) (studying the interactions between antinuclear movements and pro-nuclear states by way of case studies).

¹¹ See generally HAROLD D. GUTHER, *ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT* (1998) (describing the history, scope, participants, and current status of the animal rights movement); JAMES M. JASPER & DOROTHY NELKIN, *THE ANIMAL RIGHTS CRUSADE: THE GROWTH OF A MORAL PROTEST* (1992) (exploring the moral basis for the animal rights movement).

¹² See generally BRADLEY STEWART CHILTON, *PRISONS UNDER THE GAVEL* (1991) (providing a case study of a prison reform lawsuit in Georgia and suggesting ways in which judges can become more effective in their capacity to intervene in prison reform litigation); STEVE J. MARTIN & SHELDON EKLAND-OLSON, *TEXAS PRISONS* (1987) (presenting a history of prison reform activities in Texas); JIM THOMAS, *PRISONER LITIGATION* (1988) (offering a social history of prisoner litigation).

¹³ See generally KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (exploring the ways in which people establish conflicting views on abortion); SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* (1991) (detailing the course of the pro-choice movement and the growth, maintenance, decline, and role of social movements generally in the political system).

¹⁴ See generally BARBARA EPSTEIN, *POLITICAL PROTEST AND CULTURAL REVOLUTION: NONVIOLENT DIRECT ACTION IN THE 1970S AND 1980S* (1991) (examining the direct action movement from an insider's perspective).

¹⁵ See generally LOUIS HENKIN, *THE AGE OF RIGHTS* (1990) (collecting essays addressing the implications of the internationalization of human rights); WARREN LEE HOLLEMAN, *THE HUMAN RIGHTS MOVEMENT* (1987) (examining the Western values and theological perspectives embedded in the human rights movement).

sumer movement, the welfare rights movement, the farm worker movement, the civil rights, women's rights, and gay rights movements could easily have all been regarded as expressions of direct self-interest, and as spontaneous, emotive uprisings. Having grappled with the ideological and well-organized character of environmentalism and its compatriots, however, social scientists were able to perceive the ideology and organization that motivated the members of these more familiar efforts.¹⁶ Most simply, they recognized that the

¹⁶ See, e.g., BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* (1987) (tracing the roots of the gay and lesbian movement through a "political process" model that takes explanations beyond an inexplicable evolution of ideas or events); RUFUS P. BROWNING ET AL., *PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS* (1984) (approaching minority mobilization through a theory of political incorporation in which members work to become part of liberal political coalitions); DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (1991) (presenting a theoretical study of the dynamics of public-spirited collective action and of the civil rights movement and the local and national politics that surrounded it); GARY DELGADO, *ORGANIZING THE MOVEMENT: THE ROOTS AND GROWTH OF ACORN* (1986) (discussing ACORN, a poor person's movement directed at banking practices, and its effectiveness due to its organizing drive); JOHN D'EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS AND THE UNIVERSITY* (1992) (surveying the gay rights movement and arguing that gay rights groups are complex and intricate organizations); SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* (1980) (depicting how women's experiences in the civil rights movement and New Left and the ideology of those movements spurred a feminist consciousness of equality); *FEMINIST ORGANIZATIONS: HARVEST OF THE NEW WOMEN'S MOVEMENT* (Myra Marx Ferree & Patricia Yancey Martin eds., 1995) (exploring the relationship of feminist organizations to the women's rights movement and how they provide the movement with an agenda and purpose and receive, in turn, resources and a supportive context); SUSAN HANDLEY HERTZ, *THE WELFARE MOTHERS MOVEMENT: A DECADE OF CHANGE FOR POOR WOMEN?* (1981) (studying the welfare mothers movement from the perspective of the women themselves and concluding that most members were recruited by canvassing and media attention and that success was due, in part, to opposition, which increases the commitment of members); CRAIG JENKINS, *THE POLITICS OF INSURGENCY: THE FARM WORKER MOVEMENT IN THE 1960S* (1985) (analyzing the United Farm Worker movement as exemplifying the basic goals and strategies of the social movements of the 1960s); ETHEL KLEIN, *GENDER POLITICS* (1984) (addressing how women developed a "group consciousness" that enabled political action); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986) (describing the forces of inclusivity and exclusivity that held the women's rights movement together); ROBERT N. MAYER, *THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE* 32 (1989) ("The fullest explanation of the cause of consumerism combines underlying social conditions with resource mobilization by effective political entrepreneurs."); DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, at 2 (1982) (arguing that "the emergence of widespread protest activity is the result of a combination of expanding political opportunities and indigenous organization, as mediated through a crucial process of collective attribution"); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984) (investigating the unfolding of the civil rights movement and demonstrating the impor-

consumer and welfare rights movements were often spearheaded by middle-class individuals who were not the movements' principal beneficiaries, that the civil rights movement included many whites, the women's movement many men, and the gay rights movement many straights. At a deeper level, they perceived, and were willing to take seriously, the desire of these movements to effect larger social transformations that were more closely linked to their members' beliefs than to their interests or immediate dissatisfactions.¹⁷

The overlap between the subject matter of this social movement literature and legal scholarship is immediately apparent, and was per-

tance of internal organization and African-American institutions, such as the church); FRANCIS PIVEN & RICHARD CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1979) (suggesting that lower classes became historical actors, not merely victims, through the poor people's movements); SASHA ROSENEIL, *DISARMING PATRIARCHY* (1995) (arguing for the integration of micro-level mobilization and macro-level social change in studying the emergence of social movements); *THE WOMEN'S MOVEMENTS OF THE UNITED STATES AND WESTERN EUROPE: CONSCIOUSNESS, POLITICAL OPPORTUNITY AND PUBLIC POLICY* (Mary Fainsod Katzenstein & Carol McClurg Mueller eds., 1987) [hereinafter *THE WOMEN'S MOVEMENTS*] (arguing that a feminist consciousness is central to the success of feminist movements). Even in cases where the direct economic stakes were readily apparent, scholars began to reinterpret interest groups and localized protests as social movements. *See, e.g.*, JANE CAMPBELL & MIKE OLIVER, *DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE* 23 (1996) (describing the British disability movement as a "new social movement in that it is beginning to offer disabled people a democratic and political voice"); EDWARD J. WALSH, *DEMOCRACY IN THE SHADOWS: CITIZEN MOBILIZATION IN THE WAKE OF THE ACCIDENT AT THREE MILE ISLAND* (1988) (utilizing social movement theory and, in particular, "frame alignment" to analyze social responses to the Three Mile Island disaster); Josh Gamson, *Silence, Death, and the Invisible Enemy: AIDS Activism and Social Movement "Newness"*, 36 *SOC. PROBS.* 351 (1989) (analyzing AIDS Coalition to Unleash Power (ACTUP), an AIDS activist movement, and noting that it shares many of the characteristics of new social movements); Richard K. Scotch, *Disability as the Basis for a Social Movement: Advocacy and the Politics of Definition*, 44 *J. SOC. ISSUES* 159 (1988) (discussing how barriers were overcome in the formation of a social movement of disabled people).

¹⁷ In this area, Charles Tilly's work, arguing that social protest and revolution were not correlated with economic conditions, was influential. *See* EDWARD SHORTER & CHARLES TILLY, *STRIKES IN FRANCE 1830 TO 1968* (1974) (portraying strikes in France as an instrument of working-class political action linked to changes in social structure and political participation); CHARLES TILLY, *THE CONTENTIOUS FRENCH* (1986) (examining how the contentions of the French people were changed by the development of capitalism and the concentration of power in the national state); Charles Tilly, *Food Supply and Public Order in Modern Europe*, in *THE FORMATION OF NATION STATES IN WESTERN EUROPE* 380 (Charles Tilly ed., 1975) (discussing the political importance of food rioters, whose treatment by European governments influenced their ability to achieve other objectives); *cf.* CHARLES TILLY, *AS SOCIOLOGY MEETS HISTORY* 215 (1981) (discussing methodologies for studying how the Western "growth of national states and the development of capitalism interacted to alter the ways in which ordinary people banded together to act on their interest").

ceptively described in Joel Handler's 1978 book, *Social Movements and the Legal System*.¹⁸ Handler discusses four major areas: environmentalism; consumer protection; civil rights; and social welfare. All these areas featured social movements that included, as a central aspect of their program, the creation of new laws or the reform of existing ones. These new laws and law revisions, moreover, had direct effects on the legal academy. The laws that were direct creations of the environmental movement, for example, became the subject of a new, highly popular course, and of a burgeoning field of scholarship.¹⁹ Handler's other areas of interest were also fecund sources of legislation, legal scholarship, and law school courses, as were a wide variety of other social movements, including women's rights, gay rights, and disability rights. Older law school subjects, such as labor law, antitrust, and civil rights, bear the imprint of earlier social movements. Even my seemingly dull teaching subject, administrative law, can be regarded as the product of the Progressive movement—a tempting thought, since it lends the subject a sense of drama that it would not otherwise possess. One could easily fill the remainder of this volume with a list of law review articles that address laws and court decisions that have resulted in some fashion from social movements.

This is not meant to suggest that social movements provide a golden key for understanding law in general. Much of our legal system is autonomously generated by the political sphere—the legislature, the courts, and, increasingly, the administrative agencies. To this category belong large areas of commercial and regulatory law, and virtually the whole of common law. The economic sphere also generates legal initiatives, although probably many fewer than either the Marxists or the public choice scholars would have us believe. The point, though, is that the social sphere is also an important source of law. And with the weakening of religious institutions and the increasingly interactive, or democratic, nature of society, this third category

¹⁸ JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

¹⁹ As examples of some of the existing casebooks on environmental law, all written since the advent of the environmental movement, see ROGER W. FINDLEY & DANIEL A. FARBER, *CASES AND MATERIALS ON ENVIRONMENTAL LAW* (5th ed. 1999); ELIZABETH GLASS GELTMAN, *MODERN ENVIRONMENTAL LAW: POLICY AND PRACTICE* (1997); FRANK P. GRAD & JOEL A. MINTZ, *ENVIRONMENTAL LAW* (4th ed. 2000); ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* (2d ed. 1998); JOHN-MARK STENSVAAG, *MATERIALS ON ENVIRONMENTAL LAW* (1999); WILLIAM MURRAY TABB & LINDA A. MALONE, *ENVIRONMENTAL LAW: CASES AND MATERIALS* (2d ed. 1997).

of laws is largely the product of social movements. Thus, while social movements are far from being the only forces that shape our legal system, the overlap is substantial. To a significant extent, then, social movement scholars and legal scholars are studying the same thing.

B. *Methodology*

Social movement literature and legal scholarship share more than a common subject matter, however. To a surprising extent, given their disparate intellectual origins, the two fields have approached their common subject matter with similar methodologies. As stated at the outset, the social movements literature was initially divided between the American and Continental approaches.²⁰ The American approach, often described as resource mobilization, developed during the 1970s and 1980s. It drew its initial inspiration from a 1965 work

²⁰ See, e.g., Jean L. Cohen, *Strategy or Identity: New Theoretical Paradigms and Contemporary Social Movements*, 52 SOC. RES. 663 (1985) (comparing how the resource-mobilization theory, the paradigm favored in the United States, and the identity-oriented paradigm, the theoretical response common in Western Europe, determine what is actually new in new social movements); Bruce Fireman & William A. Gamson, *Utilitarian Logic in the Resource Mobilization Perspective*, in THE DYNAMICS OF SOCIAL MOVEMENTS 8 (Mayer N. Zald & John D. McCarthy eds., Univ. Press of Am. 1988) (1979) (criticizing the utilitarian approach to collective action for focusing too heavily on self-interest as an explanation for mobilization and suggesting that the role of solidarity and principles should be examined instead in determining why people act as they do); *Introduction to CULTURAL POLITICS AND SOCIAL MOVEMENTS*, at vii (Marcy Darnovsky et al. eds., 1995) [hereinafter CULTURAL POLITICS] (tracing the separate developments of American and European social movement theory); Bert Klandermans, *New Social Movements and Resource Mobilization: The European and the American Approach*, 4 INT'L J. OF MASS EMERGENCIES & DISASTERS 13 (1986) [hereinafter Klandermans, *New Social Movements*] (noting that although Europe and the United States experienced similar growth in social movements, the two continents sought explanations from different directions); Bert Klandermans, *New Social Movements and Resource Mobilization: The European and the American Approach Revisited* [hereinafter Klandermans, *New Social Movements Revisited*], in RESEARCH ON SOCIAL MOVEMENTS: THE STATE OF THE ART IN WESTERN EUROPE AND THE USA 17 (Dieter Rucht ed., 1991) [hereinafter RESEARCH ON SOCIAL MOVEMENTS] (comparing the European and American approaches to explaining new social movements and reviewing new themes that emerge after criticizing both approaches); Sidney Tarrow, *Comparing Social Movement Participation in Western Europe and the United States: Problems, Uses, and a Proposal for Synthesis*, in RESEARCH ON SOCIAL MOVEMENTS, *supra*, at 392 (developing guidelines to compare social movement research from the European and American schools of thought); Louis A. Zurcher & David A. Snow, *Collective Behavior: Social Movements*, in SOCIAL PSYCHOLOGY: SOCIOLOGICAL PERSPECTIVES 447, 448 (Morris Rosenberg & Ralph H. Turner eds., 1981) (arguing that the study of social movements can function as "an important bridge for understanding the relation between the individual and society, between structure and process, and between psychology and sociology").

by Mancur Olson, *The Logic of Collective Action*.²¹ Proponents of this approach treat the members of social movements as instrumentally rational actors, and the leaders as policy entrepreneurs who follow coherent organizational and political strategies. In the place of vague generalities about collective dissatisfaction or rising expectations, they offer detailed accounts of the way social movements are mobilized, of the organizations that develop to sustain them, and of the movements' strategies for achieving their political effects.²²

The Continental approach, which dates from the 1960s, but reached its apogee in the following two decades, emerged from the neo-Marxist analysis of critical theory.²³ Society, according to this view,

²¹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). For Olson's influence on the American school of social movement theory, see SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS* 13-16 (1994); Carol McClurg Mueller, *Building Social Movement Theory*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 3, 6 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) [hereinafter *FRONTIERS*] ("[I]t would be difficult to overestimate the importance of [Olson's] rational choice model for the development of resource mobilization and collective action theory."); and Mayer N. Zald, *Looking Backward to Look Forward: Reflections on the Past and Future of the Resource Mobilization Research Program*, in *FRONTIERS*, *supra*, at 326, 332.

²² For characteristic statements of this approach, see WILLIAM A. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* (2d ed. 1990); GERALD MARWELL & PAMELA OLIVER, *THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY* (1993); JOHN D. MCCARTHY & MAYER N. ZALD, *THE TREND OF SOCIAL MOVEMENTS IN AMERICA: PROFESSIONALIZATION AND RESOURCE MOBILIZATION* (1973), *reprinted in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY*, *supra* note 4, at app.; ANTHONY OBERSCHALL, *SOCIAL CONFLICT AND SOCIAL MOVEMENTS* (1973); *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY*, *supra* note 4; *THE DYNAMICS OF SOCIAL MOVEMENTS*, *supra* note 20; CHARLES TILLY, *FROM MOBILIZATION TO REVOLUTION* (1978); and J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 *ANN. REV. SOC.* 527 (1983).

²³ *See, e.g.*, THEODOR W. ADORNO, *NEGATIVE DIALECTICS* (E.B. Ashton trans., 1973) [hereinafter *ADORNO, NEGATIVE DIALECTICS*] (giving reasons for deviating from some aspects of Marxist thought); THEODOR W. ADORNO, *THE JARGON OF AUTHENTICITY* (Knut Tarnowski & Frederic Will trans., 1973) (representing a Hegelian-Marxist response to the existentialist rejection of critical reason); MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (John Cumming trans., Continuum Publ'g 1987) (1972) (exploring the role of ideology in establishing and maintaining social classes and capitalist domination); HERBERT MARCUSE, *COUNTERREVOLUTION AND REVOLT* (1972) (exploring possibilities for social transformation and their relationship to ideology); HERBERT MARCUSE, *ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1964) (explaining that social movements as envisioned by Marx and critical theory require qualitative changes in society); FRANZ NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933-1944* (Harper & Row 1966) (1942) (analyzing process of control and mobilization in Nazi Germany); FREDERICK POLLOCK, *THE ECONOMIC AND SOCIAL CONSEQUENCES OF AUTOMATION* (W.O. Henderson & W.H. Chaloner trans., 1957) (reviewing the potential good and evil effects of automation on society and human

is divided into economically based classes and dominated by an elite that uses its leading role within the economic sphere to control the political one. The political sphere, in turn, controls society; crucially, however, the primary means of this control is ideological. Rather than governmental force or economic coercion, belief systems, and the asserted neutrality of those belief systems, are the sinews of social control. Social reform or transformation can be achieved and, indeed, can only be achieved, through counter-ideologies that arise from the social sphere, the one sector not dominated by the economically based elites. The crucial aspect of social movements, therefore, is that they enable people to generate new ideologies and re-define their own identities.²⁴

The distinction between the American and Continental ap-

freedom and stressing that the goal of economic planning should be to combine automation with a free and democratic society). The group of scholars who developed critical theory during the 1920s and 30s were associated with the Institute of Social Research, an affiliate of the University of Frankfurt, and are therefore known as the Frankfurt School. Jürgen Habermas became associated with the Institute when it was reconstituted after World War II, and most of his work can be regarded as a continued development of critical theory. See, e.g., JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., 1971) (1968) (undertaking a historically oriented attempt to reconstruct the prehistory of modern positivism with the systematic intention of analyzing the connections between knowledge and human interests); JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., 1973) (applying the Marxian theory of crisis to the reality of "advanced capitalism"); JÜRGEN HABERMAS, THEORY AND PRACTICE (John Viertel trans., 1973); HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 2 (presenting, in two volumes, a critical theory of modernity). McCarthy himself takes this position. See THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 136 (1978) (discussing the progression of Habermas's writings and observing that "this rather vague conception of critical theory gradually takes on the shape of a relatively differentiated research program"). For discussions of the Frankfurt School, see DAVID HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS (1980); MARTIN JAY, THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 1923-1950 (1973); ZOLTÁN TAR, THE FRANKFURT SCHOOL: THE CRITICAL THEORIES OF MAX HORKHEIMER AND THEODOR W. ADORNO (1977); ROLF WIGGERSHAUS, THE FRANKFURT SCHOOL: ITS HISTORY, THEORIES, AND POLITICAL SIGNIFICANCE (Michael Robertson trans., 1994).

²⁴ For some of the Continental works on social movements that reflect this view, see 2 MANUEL CASTELLS, THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE (1997); 2 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 2, at 301-403; HANSPETER KRIESI, POLITICAL MOBILIZATION AND SOCIAL CHANGE: THE DUTCH CASE IN COMPARATIVE PERSPECTIVE (1993); ALBERTO MELUCCI, NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY (John Keane & Paul Mier eds., Temple Univ. Press 1989) (1989); JAN PAKULSKI, SOCIAL MOVEMENTS: THE POLITICS OF MORAL PROTEST (1990); ALAIN TOURAINE, THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS (Alan Duff trans., 1981); Claus Offe, *New Social Movements: Challenging the Boundaries of Institutional Politics*, 52 SOC. RES. 817 (1985).

proaches to social movements should not, however, be overdrawn. While the two approaches may seem distinct when one compares their most determined members, such as McCarthy and Zald on the American side,²⁵ and Alain Touraine on the Continent,²⁶ many other scholars incorporated concepts from the opposite school quite early in the field's development, and soon began to undertake conscious, theoretical efforts to combine the two approaches.²⁷ Much of this has been inspired by the notorious macro-micro problem of the social sciences in general, the effort to develop explanations that link individual behavior to mass phenomena.²⁸ The unification of previously unorgan-

²⁵ See William A. Gamson, *Introduction to SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY*, *supra* note 4, at 1, 1 ("Zald and McCarthy represent one major tributary to a stream of revisionist thinking on social movements generally referred to as 'resource mobilization' theory.")

²⁶ See TOURAINE, *supra* note 24 (suggesting that the format of society is not based on intents or circumstances but on people's actions and interactions).

²⁷ See, e.g., CHALLENGING THE POLITICAL ORDER (Russell J. Dalton & Manfred Kuechler eds., 1990) (comparing findings by people with different methodologies and perspectives on social movements); CULTURAL POLITICS, *supra* note 20 (collecting essays originally prepared for a conference that aimed to promote discourse between the new social movement and resource mobilization perspectives); DELLA PORTA & DIANI, *supra* note 4 (contributing to the integration of the American and European traditions); RON EYERMAN & ANDREW JAMISON, SOCIAL MOVEMENTS: A COGNITIVE APPROACH (1991) (reconciling the resource-mobilization and identity-theory approaches to the study of social movements in order to enhance understanding of the field and avoid fragmentation); FRONTIERS, *supra* note 21 (presenting essays that incorporate a social psychology dimension to the traditional resource-mobilization approach); ALBERTO MELUCCI, CHALLENGING CODES (1996) (focusing on how actors in social movements construct their action); SOCIAL MOVEMENTS AND CULTURE (Hank Johnston & Bert Klandermans eds., 1995) (discussing the application of cultural analysis to interest-oriented perspectives in the study of social movements); TARROW, *supra* note 21 (presenting a theory of collective action that incorporates consideration of historical, sociological, and political factors); Bert Klandermans & Sidney Tarrow, *Mobilization into Social Movements: Synthesizing European and American Approaches*, in FROM STRUCTURE TO ACTION: COMPARING SOCIAL MOVEMENT RESEARCH ACROSS CULTURES 1, 3 (Bert Klandermans et al. eds., 1988) (integrating European and American approaches to studying social movements and suggesting methods for achieving this combination); Myra Marx Ferree & Frederick D. Miller, *Mobilization and Meaning: Toward an Integration of Social Psychological and Resource Perspectives on Social Movements*, 55 SOC. INQUIRY 38 (1985) (discussing the inability of resource mobilization to explain social movements without at least considering factors prominent in the motivational theories, such as ideology).

²⁸ See JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 1-23 (1990) (describing the gap between theory and research as the former centers on the behavior of social systems while the latter focuses on individual behavior); THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (1978) (exploring the analytic work done in social sciences regarding the relationship and interaction between individuals' behavior characteristics and the characteristics of the social aggregate to which they contribute); Randall Collins, *On the Microfoundations of Macrosociology*, 86 AM. J. SOC. 984 (1981)

ized individuals into a social movement on the basis of voluntary action, rather than external coercion, obviously raises the macro/micro problem in a particularly vivid way. Social movement scholars soon became aware that the resource-mobilization approach failed to account for the motivation of these individuals,²⁹ and that the Continental approach was equally inadequate in accounting for the mechanisms by which these individuals translated their shared identities into political or social action.³⁰ In response, they have developed several avenues of research that attempt to unify the two approaches. One

(suggesting a method for integrating micro- and macro-level research).

²⁹ See Fireman & Gamson, *supra* note 20 (criticizing the utilitarian approach to collective action for focusing too heavily on self-interest as an explanation for mobilization and suggesting that the role of solidarity and principles should be examined instead in determining why people act as they do); William A. Gamson, *The Social Psychology of Collective Action*, in *FRONTIERS*, *supra* note 21, at 53 (explaining the resurgence of social psychology in the resource mobilization field as a means to better understand why new social movements develop); Jenkins, *supra* note 22, at 549 ("The future of resource mobilization theory lies in . . . refining the basic mobilization model by developing a more sophisticated social psychology of collective action."); Sidney Tarrow, *Mentalities, Political Cultures, and Collective Action Frames*, in *FRONTIERS*, *supra* note 21, at 174 (suggesting that American social scientists are considering cultural values in explaining political outcomes because they are not satisfied with the results of the American theory of social movements); Zurcher & Snow, *supra* note 20, at 467 (noting that "resource mobilization theorists generally give little attention to the role of ideology, symbolization, and passion in relation to the emergence, operation, and decline of social movements"). As Gamson states, "[s]ocial psychology bashing among students of social movements is over." Gamson, *supra*, at 53.

³⁰ See DELLA PORTA & DIANI, *supra* note 4, at 13 ("The main problem which [the new social movement] approach leaves unresolved is the analysis of mechanisms which lead from conflict to action . . ."); Klandermans, *New Social Movements*, *supra* note 20, at 13 ("The new social movement approach has concentrated on factors that determine mobilization potential, but does not give an answer to the question of how these potentials are mobilized."); Klandermans, *New Social Movements Revisited*, *supra* note 20 (suggesting that the new social movement approach has focused too much on the structural preconditions of movements and has neglected the importance of organizations and resources); Bert Klandermans & Dirk Oegema, *Potentials, Networks, Motivations, and Barriers: Steps Towards Participation in Social Movements*, 52 *AM. SOC. REV.* 519 (1987) (suggesting that different theories, as well as practical efforts, are needed to explain and create mobilization of and participation in social movements); Hanspeter Kriesi, *The Organizational Structure of New Social Movements in a Political Context*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS* 152 (Doug McAdam et al. eds., 1996) (indicating that although the features of a political system are important in shaping new social movements, factors such as a group's internal structure and communications cannot be ignored in determining how social movements work); Alain Touraine, *Commentary on Dieter Rucht's Critique*, in *RESEARCH ON SOCIAL MOVEMENTS*, *supra* note 20, at 385 (explaining that both the European and American approaches to social movement research are valid, but that each school of thought is actually studying a different question and neither can fully answer how and why social movements occur).

example is frame analysis, derived from the work of Erving Goffman.³¹ A frame is a problem-solving scheme that individuals employ to make sense of their environment. For social movement scholars, frame analysis serves to explain how individuals develop shared perceptions that serve as a basis for action, thus melding individual motivation with organizational structures.³²

Legal scholarship, as it developed during the 1970s and 1980s, featured, in parallel form, these same two themes. They constituted the critique of the legal process movement that dominated the field for the quarter century after World War II. The first theme was law and economics, or, more precisely, rational actor theory. In the economic sphere, reliance on this theory allowed microeconomic analysis to be applied to legal problems;³³ in the political sphere, this reliance

³¹ See ERVING GOFFMAN, *FRAME ANALYSIS* 10-11 (1974) (explaining that the definition of a social event is based on principles of organization that govern the event and on individuals' shared perceptions of the event). In general, Goffman's work represents an important bridge between American and Continental sociology, in that he brings Continental and particularly phenomenological perspectives to bear on the sorts of detailed empirical studies of behavior that have been common in American sociology. In addition to *FRAME ANALYSIS*, see ERVING GOFFMAN, *INTERACTION RITUAL* (1967), which discusses face-to-face interactions in social settings; and ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959), which details how social life can be studied in domestic, industrial, or commercial social establishments.

³² See, e.g., COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, *supra* note 30, at 210 (explaining that there is a connection between forms of social organization and individuals' perspectives of social experiences); WILLIAM A. GAMSON ET AL., *ENCOUNTER WITH UNJUST AUTHORITY* (1982) (discussing strategies for organizing to deal with unjust authorities); William A. Gamson, *Political Discourse and Collective Action*, 1 INT'L SOC. MOVEMENT RES. 222 (1988) (stating that frames function to organize and guide collective and individual action); Hank Johnston, *A Methodology for Frame Analysis, from Discourse to Cognitive Schema*, in SOCIAL MOVEMENTS AND CULTURE, *supra* note 27, at 217 (defining frames as mental orientations that organize perception and interpretation); David A. Snow et al., *Frame Alignment Processes, Micromobilization and Movement Participation*, 51 AM. SOC. REV. 464 (1986) (stating that frame alignment explains how individuals' values and interests become congruent to social movement organizations' activities, goals, and ideologies); David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in FRONTIERS, *supra* note 21, at 133 (exploring the relation between master frames and cycles of protest by enumerating ten interconnected propositions).

³³ See generally ROBERT COOTER, *THE STRATEGIC CONSTITUTION* (2000) (analyzing constitutions by using models of strategic behavior created for markets and adapted to politics); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (2d ed. 1997) (explaining how economics can be used to explain legal rules and institutions); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) (explaining the rationales for rules of corporate law through economic principles); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) (asserting that theories of economic efficiency explain rules of tort law); JONATHAN R. MACEY & GEOFFREY P. MILLER, *COSTLY POLICIES: STATE REGULATION*

facilitated adaptation of microeconomics into what was soon called public choice theory.³⁴ Olson's *Logic of Collective Action* was one of the theoretical works that launched public choice theory, along with James M. Buchanan and Gordon Tullock's *The Calculus of Consent*³⁵ and William H. Riker's *The Theory of Political Coalitions*.³⁶ According to public choice theory, political actors behave in an instrumentally rational manner to maximize their material self-interests. Voters try to maximize their wealth, while elected politicians try to maximize their chance of re-election.

A second theme in legal scholarship was critical studies, that is the outsider scholarship initiated by the critical legal studies movement. Critical legal studies is derived from critical theory; it asserts that law is an instrument of social control by dominant economic interests that act through the political process.³⁷ Law functions, in part, as an in-

AND ANTITRUST EXEMPTION IN INSURANCE MARKETS (1993) (analyzing and offering solutions for problems of state and federal regulation of the insurance industry); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989) (explaining how economists analyze legal rules); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998) (applying an economist's view to various areas of the law, including tort damages, contracts, family law, and corporate finance).

³⁴ For general accounts of public choice, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); and DENNIS C. MUELLER, PUBLIC CHOICE II (1989). For applications of the approach, see, for example, WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

³⁵ JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

³⁶ WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

³⁷ See, e.g., MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at xvi (1977) (arguing that during the antebellum period legal regulations became a major instrument of powerful entrepreneurial and commercial groups); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975) (using critical theory to analyze law as a means of socio-economic domination); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 2 (1986) (asserting that accepted legal ideas do not allow for a just, defensible society); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1064 (1980) (asserting that current law is structured in a way that will continue to keep cities at a disadvantage because cities are often severely limited on the amount of tax they can impose on their residents); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (describing how the structure of the legal system, as reflected in Blackstone, leads to social domination); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 272 (1978) (arguing that big business was able to stop social reform during the early twentieth century); Gary Peller, *The Metaphysics of*

strument of pure coercion, but also, and much more importantly, as a crucial element in the ideology of liberal democracy. The older claims of legal scholars were that law was a neutral set of principles that existed apart from the political process and that law sets limits on that process. This absolute view, now known as legal formalism,³⁸ was somewhat undermined by the critique of legal realism, and eventually replaced by the legal process argument that law was a relatively neutral instrument deployed by political decision makers in certain circumstances.³⁹ In fact, critical legal studies scholars argued, law is a means of social control by the elite, and thus a means of social oppression; its assertion of neutrality, whether absolute or relative, is an ideological claim that makes the oppression more complete and even harder to combat. Critical legal studies scholars attempted to combat it by demonstrating that law's claimed neutrality was false and its supposed logic incoherent, thus revealing its role as an instrumentality of

American Law, 73 CAL. L. REV. 1151, 1194 (1985) (discussing how laissez-faire ideology dominated judicial decision making and politics during the *Lochner* era); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 22-23 (1984) (stating that it could easily be argued that the Constitution prohibits capitalism as it is presently practiced in the United States); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784 (1983) (asserting that, as a result of the first substantive due process era, it became clear that judges are political actors, motivated primarily by their own interests and values).

³⁸ For discussions of formalism, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196 (1995); and G. Edward White, *The Impact of Legal Science on Tort Law 1880-1910*, 78 COLUM. L. REV. 213 (1978).

³⁹ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 77 (1962) (stating that the political views of Supreme Court Justices can have a strong effect on how they interpret the law); CHARLES BLACK, JR., *THE PEOPLE AND THE COURT* 170-71 (1960) (arguing that judges should have the power of judicial review as well as the power to decide questions of policy); LON L. FULLER, *THE MORALITY OF LAW* 92-93 (1964) (stating that laws should be clearly expressed in general rules and made known to the public but that achieving and applying these rules is difficult for political decision makers); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 646 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (arguing that it is impossible to exclude from the concept of adjudication the function of exercising an ad hoc discretion by judges when framing a remedy for the claimant); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (arguing that adjudication of legal disputes loses its meaning if the arbiter of the dispute is prejudiced); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20 (1959) (arguing that the Supreme Court sometimes incorrectly bases decisions on value judgments rather than on reasoning, analysis, and proofs). For discussions of legal process, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra*; Kent Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); and Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

the dominant elite. Critical race scholars,⁴⁰ feminists,⁴¹ and gaylegal

⁴⁰ See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 63 (1987) (arguing that civil rights litigation promotes the interests of the white majority); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 1 (1996) (stating that racial identity was a prerequisite to citizenship in America from 1790 to 1952); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 50 (1991) (stating that the constitutional omission of African Americans was a part of the original intent of the Founding Fathers); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 543 (stating that white males are in the position to oppress black feminist writers, and black feminist writers must write with an empowering voice to prevent this oppression); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336-37 (1988) (arguing that the Reagan administration's colorblind view of civil rights was hostile toward the civil rights movement); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (contending that the phrase "We the People" in the United States Constitution silences the voices of black women); Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1611 (1995) (asserting that government lender policies discriminate against African Americans in the residential housing market); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (arguing that the government often makes unconscious racially discriminatory decisions, and that the Equal Protection Clause requires the elimination of all government decisions that take race into account without good reasons); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 327 (1987) (stating that law serves to legitimate existing unfair distributions of wealth and power). Critical race theory explicitly saw itself not only as an extension of critical legal studies' essentially critical stance, but also as a shift in both the causal explanation for oppression and the subject matter of concern. See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 986 (1990) (stating that the critical legal studies movement does not appreciate the role the state can play in eliminating racism); Harlan L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 436 (1987) (arguing that most critical legal studies theorists only seek to "trash" the "liberal legal consciousness" and that it is now also necessary to formulate a positive program to combat our dominant belief systems); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 315 (1987) (maintaining that critical legal studies theorists are wrong in assuming that racism is just another form of class-based oppression and that their focus on informed processes is unhelpful because a society that enacts formal rules and structures to prevent racism announces that racism is intolerable).

⁴¹ See, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 116 (1989) (asserting that male dominance may be the most pervasive system of power in history); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 42 (1990) (stating that although political struggles have persuaded legislatures and courts to reverse some legal restrictions against women, laws continue to exclude women from activities engaged in by men and to restrict women's decisions about their own lives); ROBIN WEST, CARING FOR JUSTICE 132 (1997) (stating that in many societies patriarchy is encoded in legal norms, and breaking those norms elicits legal sanctions); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 313 (1995) (asserting that the government is deeply implicated in the oppression of women); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 274-75 (1991) (proposing a system of feminist due process

scholars⁴² then followed suit by asserting that the law was an instrumentality of a white or male or heterosexual elite, and that its ideological hold must be undermined by the development of new identities on the part of the excluded groups, rather than the revelation of its internal contradictions.

jurisprudence that would facilitate fair and compassionate treatment of women and the poor by the government); Lucinda M. Findley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1120-21 (1986) (arguing that the American legal system subordinates women by not making the workplace more accommodating to pregnancy); Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 70 (asserting that decisions in Supreme Court sex discrimination cases reflect traditional male and female social roles); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984) (formulating a stronger constitutional framework of sex-based equality); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 10-11 (1991) (asserting that the law does not adequately recognize that over fifty percent of women are victims of domestic violence); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 40 (1987) (contending that the Supreme Court's treatment of pregnancy and workplace issues demonstrates the influence of the unstated male norm in analyses of gender discrimination cases); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 801 (1989) (arguing that the American labor system currently limits workers to two unacceptable choices: the traditional male life pattern or women's traditional economic vulnerability). Here, too, there was an explicitly voiced intention to reformulate the methodology of the critical theory studies critique to address different issues. See, e.g., Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 829-30 (1990) (offering a new feminist method to solve legal problems called "positionality," which states that truth is not final and feminists have an obligation to continue to extend truth); Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1373-74 (1986) (arguing that legal rules and doctrine, the traditional way for feminists to solve social problems, are inadequate for solving problems of inequality); Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 986 (1990) (stating that psychological and pluralist theories of law and the state are helpful in thinking about some feminist problems); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 71-72 (1988) (suggesting that for feminists to fight effectively the profound power imbalance between men and women, feminists must envision a postpatriarchal world and use that vision to formulate new goals and strategies).

⁴² See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 217 (1999) [hereinafter ESKRIDGE, *GAYLAW*] (arguing that states prefer traditional marriage in their laws and that some believe that gay lifestyles are not morally equal to heterosexual lifestyles); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 88-90 (1996) (examining the assumptions underlying mainstream objections to same-sex marriage); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 468-69 (1990) (stating that the law requires that a child has one parent of each sex and asserting that this policy does not necessarily serve children's best interests); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992) (arguing that laws against homosexual sodomy have been consistently supported by homophobic public officials). For discussions of methodology, see William N. Eskridge, Jr., *Gay-legal Narratives*, 46 STAN. L. REV. 607 (1994).

Reliance on the same underlying theory, and even the same specific sources for that theory, does not guarantee the mutual comprehensibility of two separate academic fields, of course. Atomic physics and medical research, while they share the same natural science epistemology, and recognize the same progenitors of this approach, are distinctly different fields. But when two fields are based on similar methodological foundations, and focus on the same subject matter, one would expect them to maintain a fairly direct discourse with each other. For example, it has been shown that atomic physicists and research physicians worked together in developing nuclear magnetic resonance devices, and that the two fields were readily able to understand the relevance of each other's work.⁴³ Social movement theorists and legal scholars, however, have been looking at the same things and sharing essentially the same methodology for doing so, for the last three decades, without finding very much in each other's work of perceived use. Even Joel Handler's lucid explication of the overlap between the fields failed to generate a body of research that joined the two.⁴⁴

II. METHODOLOGICAL DIVERGENCES

A. *Rational Actor Theory*

The most obvious explanation for the mutual isolation of social movements literature and legal scholarship is methodological. Although they draw their origins from the same sources, the two fields seem to have interpreted these sources differently, and drawn different lessons from them. With respect to rational actor theory, legal scholars bought into the pure version of Olson's theory, while social scientists never took it quite as seriously. Olson, like other adapters of microeconomics, believes that people's primary motivation is to maximize their material self-interest.⁴⁵ This motivation, when com-

⁴³ See generally JAMES MATTSON & MERRILL SIMON, *THE PIONEERS OF NMR AND MAGNETIC RESONANCE IN MEDICINE: THE STORY OF MRI* (1996) (profiling the key individuals responsible for the development of magnetic resonance scanning and imaging).

⁴⁴ See HANDLER, *supra* note 18 (setting forth a theoretical framework for evaluating the experience of social reform groups and law reform lawyers). Not only does Handler's book contain fairly complete citations to the resource mobilization literature that was available at the time, but the Foreword to the book was written by Mayer Zald. Mayer N. Zald, *Foreword to id.*, at ix. This indicates a level of mutual awareness that might have been expected to lead to further investigation and collaboration.

⁴⁵ See OLSON, *supra* note 21, at 60-65 (discussing profit-maximizing behavior in

bined with a theory of groups and organizations, will prevent ordinary people from organizing to lobby for desirable public policies. Olson begins by contesting “the traditional view . . . that private organizations and groups are ubiquitous, and that this ubiquity is due to a fundamental human propensity to form and join associations.”⁴⁶ In fact, since people are rational self-interest maximizers, they will not engage in collective action unless the benefits of such action exceed its costs. The result is that many economic interests will have too small an impact on the individual to produce the high levels of individual commitment needed to sustain organized efforts.⁴⁷ Many citizens would desire economic benefits from a law deregulating the insurance industry, for example, but the benefit would represent only a small proportion of their total wealth, and would thus receive a proportionately small share of their attention. They would vote in favor of this policy if it were presented to them in a referendum, and might even treat it as a decisive issue in voting for political candidates, but they would be willing to spend only limited amounts of time on more intensive political activities such as lobbying, and would contribute to such efforts only limited amounts of money.⁴⁸ Even these limited commitments will not materialize, however, because of the free-rider

large groups). Olson concedes that “[e]conomic incentives are not, to be sure, the only incentives; people are sometimes also motivated by a desire to win prestige, respect, friendship, and other social and psychological objectives.” *Id.* at 60. But he then tries to argue this concession away, first by asserting that these “social incentives” are individual, non-collective goods, then by asserting that they only operate in small groups, and finally by claiming that they tend to track economic efficiency. *Id.* at 64-65. With respect to the last point, he says: “Anyone who has observed a farming community . . . knows that the most productive farmer . . . is usually the one with the highest status.” *Id.* at 62. Based on this explanation, he then goes on to ignore non-economic incentives. *See id.* at 62 (“[T]here is no presumption that social incentives will lead individuals . . . to obtain a collective good.”). Most social scientists, however, would recognize social incentives that are not individual in Olson’s sense, such as altruism, cooperativeness, and ideology, and would argue that even individualized social incentives, such as the desire for prestige or friendship, do not track economic rationality very well at all.

⁴⁶ *Id.* at 17. To support his claim that this is the traditional view, Olson cites several sociologists, including Georg Simmel. *See id.* at 17 n.28 (citing GEORG SIMMEL, *CONFLICT AND THE WEB OF GROUP AFFILIATIONS* (Kurt H. Wolff & Reinhard Bendix trans., 1955)). As stated above, Simmel was a principal source of inspiration for the Chicago School of Sociology. *See supra* note 9 (highlighting Simmel’s influential role in the Continental social movement literature).

⁴⁷ *Id.* at 126 (“[I]f the individuals in any large group are interested in their own welfare, they will *not* voluntarily make any sacrifices to help their group attain its political (public or collective) objectives.”).

⁴⁸ *See id.* at 163-64 (noting the free-rider problem among political parties seeking collective benefits).

problem. Legislation deregulating the insurance industry will benefit the vast majority of citizens; the benefits of this presumably beneficial policy cannot be limited to those who worked for its enactment. This will encourage each citizen to free ride on the efforts of others, with the unfortunate result that no one will devote even limited efforts to this mutually beneficial goal.⁴⁹

The only interests that will coalesce into sustained lobbying efforts, in Olson's theory, are those that represent a large proportion of the individual's wealth and are shared by manageably small numbers of individuals. Insurance agents, for example, will favor regulatory legislation that provides them with rents; because these rents comprise a significant portion of their personal wealth, they will be prepared to devote significant amounts of time and money to this effort. Nonetheless, they would prefer to free ride on other's efforts, as do ordinary citizens. But because of their relatively small numbers, the policy entrepreneurs who organize them and derive their own livelihood from this activity can police them and compel them to participate. They can exclude non-participating insurance agents from the organizations they create, thereby threatening their jobs, the network of referrals from their colleagues, or the information sources on which they rely.⁵⁰

From this tale of untrammelled avarice, public choice-oriented legal scholars derived a theory of political market failure. Small groups of people with concentrated interests, such as independent insurance agents, would coalesce, exercising major effects on the political process. Large groups with diffuse interests—the many citizens who would desire significant, but proportionately smaller benefits from lower insurance rates—would not. The result is that the insurance agents will be able to extract rents from the political system by means of regulation that blunts the competitive market. This is a political market failure—the inability of an elected government to serve the interests of the majority that elected them. The normative conclusion legal

⁴⁹ See *id.* at 43-52 (discussing the effects of free riding on the collective good).

⁵⁰ See *id.* at 22-43 (describing how free riding works in small groups). Olson is realistic enough to recognize that there are organizations representing diffuse interests of large groups of people. But writing in 1965, just before the rise of environmentalism and other social movements, he took the political lobbying efforts of labor unions as the paradigmatic example of such groups. He was then able to maintain his theory by noting that these efforts were the by-product of an organization that had both the capacity to coerce and the ability to provide positive benefits. See *id.* at 132-37 (discussing the "by-product" theory of large pressure-group lobbying, particularly of labor unions).

scholars drew from this failure is that the public would be served only by deregulation, a reduction of the inevitably distorted political system, and a return to the undisturbed operation of the economic sphere. Beginning in the late 1960s and continuing until today, they have documented the special-interest origins of the administrative state and marked its ill effects.⁵¹

Social scientists drew rather different lessons from Olson's theory. Most of them were entirely unpersuaded by the claim that people are motivated exclusively by material self-interest. In their view, ideology was a crucially important factor.⁵² Their methodology recommended

⁵¹ See, e.g., Richard Doernberg & Fred McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987) (discussing the rate of tax reform as a function of endogenous legislative changes); Richard Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) (attacking the New Deal as inconclusive on the debate regarding the function of labor law); Jonathan Macey, *Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1 (1983) (examining the Glass-Steagall Act and the controversy surrounding commercial bank underwriting of commercial paper); Jonathan Macey & Geoffrey Miller, *America's Banking System: The Origins and Future of the Current Crisis*, 69 WASH. U. L.Q. 769 (1991) (predicting the inevitable demise of commercial banking); Jonathan Macey & Geoffrey Miller, *Origin of the Blue Sky Laws*, 70 TEXAS L. REV. 347 (1992) (commenting on the influence of special-interest lobbying during the creation of the blue sky laws); Geoffrey Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (outlining the history leading up to *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938)); Kenneth Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235 (1975) (discussing the decision-making process in bank regulation). See generally ROBERT MCCORMICK & ROBERT TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* (1981) (investigating the role of government as "brokers of wealth changes"); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (arguing against the assumption that statutes often have "the answer"); Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) (discussing the economic theory of legislative and constitutional interpretation).

⁵² See, e.g., GERALD MARWELL & PAMELA OLIVER, *THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY* (1993) (examining the interaction of ideology and opportunity among different components of social movements); DOUG MCADAM, *FREEDOM SUMMER* (1988) (interviewing 348 civil rights volunteers); ANDREW MCFARLAND, *COMMON CAUSE: LOBBYING IN THE PUBLIC INTEREST* (1984) (considering the ideological motivation of lobbying participants); OBERSCHALL, *supra* note 22 (analyzing the role of preexisting preference structures in creating social movements); JOHN WILSON, *INTRODUCTION TO SOCIAL MOVEMENTS* (1973) (discussing the role of socialization and personal identity); McCarthy & Zald, *supra* note 4, at 1217-18, *reprinted in* SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 20 (Mayer N. Zald & John D. McCarthy eds., 1987) (defining a social movement as "a set of opinions and beliefs in a population representing preferences for changing some elements of the social structure or reward distribution, or both, of a society"); Mayer Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 SOC. FORCES 327 (1966) (arguing that ideological factors disrupt Weber-Michels's iron law of oligarchy).

ideological explanations to them, and thus sensitized them to the empirical evidence that made such explanations appear unavoidable. They knew that the diffuse interests that, in Olson's view, could not coalesce, did so, and did so dramatically, a few short years after his book was published.⁵³ Nothing could be more diffuse than people's interest in cleaning up the water everybody drinks and the air everybody breathes, unless it is their interest in a wilderness that nobody ever visits, or the animal that nobody sees in the wild. Nothing could have less of an effect on people's material self-interest than the agonies to which mice and monkeys were subjected in the recondite chambers of academic laboratories. Yet people with these interests engaged in demonstrations, contributed time and money to organizations, and coordinated their votes, creating political forces as effective as the Independent Insurance Agents or the National Association of Lawn Decoration Manufacturers.⁵⁴

The opportunity to free ride on the efforts of committed participants not only failed to prevent these participants from continuing their efforts, but proved to be a major argument for their continuation. The organizing literature of virtually every modern social

Alternatively, they argued that movements survived by generating ideological commitments. See, e.g., Eric Hirsch, *The Creation of Political Solidarity in Social Movement Organizations*, 27 SOC. Q. 373 (1986) (examining incentive-based motivation at different levels of involvement in social movement organizations). This could be given a cynical spin that would be pleasant to microeconomists (movements are simply the result of efforts by self-interested policy entrepreneurs), but it still relies on the idea that people are motivated by ideology. In critiquing the value of the microeconomic model for social movement theory, Myra Marx Ferree states: "The superficial attractiveness of its empirically testable incentive formulations conceals theoretically dangerous assumptions, carried over uncritically from Olson, that threaten the ability of [resource mobilization theory] to explain what social movements are and do." Myra Marx Ferree, *The Political Context of Rationality: Rational Choice Theory and Resource Mobilization*, in FRONTIERS, *supra* note 21, at 29, 30. Her claim is that Olson's model may be a "Trojan Horse" that smuggles a material, self-interested image of human beings into a social movements literature that relies heavily on ideological motivations. *Id.* at 29.

⁵³ See ALBERT HIRSCHMAN, SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION 74-79 (1982) (discussing the influence of "selective incentives" to maintain social group membership); JAMES Q. WILSON, POLITICAL ORGANIZATIONS (1973) (theorizing on the behavior of formal organizations); Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. (1978) (outlining the utility of threshold models in sociological theory); Bert Klandermans, *Mobilization and Participation: Social-Psychological Expansions of Resource Mobilization Theory*, 49 AM. SOC. REV. 583 (1984) (making the case for social psychology in social movements).

⁵⁴ See *supra* notes 14-16 (citing sources). For discussions of the reason why social movements are able to overcome the free-rider problem, see RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS (1988); Fireman & Gamson, *supra* note 20; Marx Ferree, *supra* note 52.

movement is filled with calls to action on behalf of those who cannot, or will not, protect themselves. Wilderness areas, animals, uneducated consumers, oppressed women, fetuses, terrorized minorities, helpless prisoners of conscience, oblivious victims of a potential nuclear disaster, unborn generations, and insensate Mother Earth all figure as explicit beneficiaries of these organizing efforts. One can think of such ideologically motivated participation as providing psychological rewards, if one finds that discourse reassuring, but that is essentially indistinguishable from ideology itself. The social scientists who studied these movements never doubted that the movements were ideologically motivated, and never accepted Olson's model of material self-interest maximizing the way legal scholars did.

These social scientists, however, found Olson's work, and related rational actor theories, of great value for a different reason. Previous theories, relying on explanations such as social frustration, dislocation, anomie, or rising expectations, could not account for either the timing or the character of social movements.⁵⁵ Underlying these lacunae in the standard explanations of social movements was a more basic methodological dissatisfaction. These explanations dealt in rather gaseous generalities that did not even aspire to identify particularly convincing causal mechanisms.⁵⁶ As the successes of microeconomics began persuading social scientists that the best theories were those that linked large-scale events to individual behavior—those that adopted the epistemological stance of methodological individualism—the standard explanations for social movements seemed to explain less and less. Olson's theory offered an alternative approach. His starting point was the exact same dissatisfaction, that is, a dissatisfaction with those explanations of group behavior that were based on instinctive, irrational propensities.⁵⁷ His account of instrumental rationality, organizational dynamics, and free riders supplied the outlines of a more rigorous explanation for social movements, an explanation that social scientists could use if it were freed from its empirically unjustified insistence on material self-interest.

⁵⁵ See David Snyder & Charles Tilly, *Hardship and Collective Violence in France, 1830 to 1960*, 37 AM. SOC. REV. 520 (1972) (explaining how violence by social movements correlated with electoral opportunities rather than unfavorable economic conditions).

⁵⁶ See Doug McAdam, *Micromobilization Contexts and Recruitment to Activism*, 1 INT'L SOC. MOVEMENT RES. 125, 127 (1988) ("Movements may occur in a broad macro context, but their actual development clearly depends on a series of more specific dynamics operating at the micro level.").

⁵⁷ See OLSON, *supra* note 21, at 16-22 (asserting that human instinct to join associations does not explain social movements).

In developing a theory of social movements based on Olson's work, therefore, social scientists began with the well-founded assumption that people are regularly motivated by purely ideological concerns.⁵⁸ But once one adopts the epistemological stance of methodological individualism, even to a limited extent, it becomes apparent that such concerns do not translate directly into a social movement; people will not automatically take to the streets as soon as they develop some ideological commitment.⁵⁹ What they will do, as Olson suggests, is take instrumentally rational action to implement their ideology. If there is no organizational context that provides the opportunity to act in a politically effective way, they will simply maintain their commitments as a personal view and satisfy themselves by getting into political arguments with their relatives. But if such an organizational context is created, people with commitments will contribute money and effort. The creation of these organizations is often the work of committed leaders;⁶⁰ it is these leaders, therefore, who mobilize the resources needed to create an active social movement.⁶¹

⁵⁸ See *supra* note 52 and accompanying text (giving examples of ideological motivations throughout history).

⁵⁹ This is particularly the case when participation involves significant risk. See Doug McAdam, *Recruitment to High Risk Activism: The Case of Freedom Summer*, 92 AM. J. SOC. 64 (1986) (arguing that both structural and individual motivational factors are crucial for one to participate in high-risk activism); Zald, *supra* note 21, at 332 (noting that individuals make rational decisions concerning their participation in social movements).

⁶⁰ James Q. Wilson uses the term "policy entrepreneurs" for these leaders. See WILSON, *supra* note 53, at 196-98 (defining an entrepreneur of voluntary associations as a leader and recruiter of these organizations); James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 370 (1980) (discussing "policy entrepreneurs" in politics and business regulations). Wilson is generally not regarded as a social movement scholar, although he is clearly concerned with many of the same issues and shares some of the same insights. The difference lies in Wilson's tendency to devalue or ignore the motivations of the movement participants entirely, and to treat their involvement as the product of persuasion or manipulation by the leaders. His use of the term entrepreneurs for these leaders is indicative of this perspective.

⁶¹ See, e.g., MCCARTHY & ZALD, *supra* note 22, at 22 (stating that Ralph Nader's organizations have expanded due to the finances he has obtained through speaking fees, published reports, and private donations); Bert Klandermans, *The Formation and Mobilization of Consensus*, 1 INT'L SOC. MOVEMENT RES. 173, 184 (1988) (listing different ways a social movement leader can mobilize part of the population); Clarence Lo, *Mobilizing the Tax Revolt: The Emergent Alliance Between Homeowners and Local Elites*, 6 RES. SOC. MOVEMENTS CONFLICTS & CHANGE 293, 294-310 (1984) (explaining how community elites have initiated protest actions against taxes); Doug McAdam, *Tactical Innovation and the Pace of Insurgency*, 48 AM. SOC. REV. 735 (1983) (describing the tactical innovations of black civil rights leaders between 1955 and 1970); John McCarthy & Mark Wolfson, *Consensus Movements, Conflict Movements, and the Cooptation of Civic and State Infrastructures*, in FRONTIERS, *supra* note 21, at 273, 279 (stating that civic leaders must

Some of the resources that contribute to the creation of a social movement are the obvious ones provided by the movement's participants, namely effort and money.⁶² There is an incremental, or co-causal aspect to the utilization of these resources. A policy entrepreneur needs some sort of organizational structure to solicit funds or obtain voluntary efforts, and an even larger structure to convince her membership that she is using these resources to accomplish things she regards as desirable.⁶³ But the more money and funds and effort she obtains, the greater her ability to solicit further money and effort.⁶⁴ Her success will depend upon the complex interplay of risks and rewards for potential participants at each successive stage, a process described as micromobilization.⁶⁵ This process often leads to competition among policy entrepreneurs, the emergence of a few successful

mobilize resources and participate in order to bring social change); Sidney Tarrow, *States and Opportunities: The Political Structuring of Social Movements*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS*, *supra* note 30, at 41, 59 (stating that civil rights leaders mobilized college students and helped them create sit-ins).

⁶² See, e.g., John D. McCarthy, *Pro-Life and Pro-Choice Mobilization: Infrastructure Deficits and New Technologies*, in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY*, *supra* note 4, at 49, 50-59 (holding that the pro-life movement is stronger than the pro-choice movement because of the difference in efforts of the groups' members); John D. McCarthy et al., *The Institutional Channeling of Social Movements by the State in the United States*, 13 *RES. SOC. MOVEMENTS CONFLICTS & CHANGE* 45 (1991) (describing fundraising mechanisms of certain social movement organizations); Pamela E. Oliver & Gerald Marwell, *Mobilizing Technologies for Collective Action*, in *FRONTIERS*, *supra* note 21, at 251, 252 (stating that motivated activists are "willing to spend their own time and money on an issue"); Naomi Rosenthal & Michael Schwartz, *Spontaneity and Democracy in Social Movements*, 2 *INT'L SOC. MOVEMENT RES.* 33 (1989); Jack L. Walker, Jr., *The Mobilization of Political Interests in America*, in *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 33 (Joel D. Aberbach et al. eds., 1991) (stating the importance of wealthy individuals, corporations, foundations, and the federal government to interest groups because of the financial support they provide).

⁶³ See GAMSON, *supra* note 22, at 89-109 (describing the internal structure of social protest groups, including how bureaucratic organization prevents factionalism); Hank Johnston, *The Marketed Social Movement: A Case Study of the Rapid Growth of TM*, 23 *PAC. SOC. REV.* 333 (1980) (explaining how an internal grievance mechanism aided the transcendental meditation movement in accomplishing its goals).

⁶⁴ In addition, such organizational success may also elicit financial contributions from sympathetic outside sources. See J. Craig Jenkins & Craig M. Eckert, *Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement*, 51 *AM. SOC. REV.* 812 (1986) (describing how foundation grants to civil rights organizations followed effective social protest by these organizations, rather than catalyzing such protest).

⁶⁵ WILLIAM A. GAMSON ET AL., *ENCOUNTERS WITH UNJUST AUTHORITY* 1-12 (Robin M. Williams, Jr. & Charles M. Bonjean eds., 1982) (explaining micromobilization); OBERSCHALL, *supra* note 22, at 161-72 (analyzing the risks and rewards of participating in a social movement).

ones, and then the increasing institutionalization of their organizations.⁶⁶ A common pattern would be for the entrepreneur to obtain a small amount of funds, then to use those funds to organize voluntary efforts such as a protest march or demonstration,⁶⁷ and then to parlay the visibility obtained thereby to obtain additional funding.

Apart from the resources of the participants, other resources are available. First, there are resources from the political system.⁶⁸ At the most obvious level, the existing rules of the legal system are likely to favor certain movements, or certain types of action, and disfavor others.⁶⁹ Beyond this, the interactive nature of government in the United States and Western Europe provides innumerable opportunities for organized groups to influence elections, lobby elected officials between elections, and lobby appointed officials. Any impact upon elections or public decision making becomes a "deliverable" that policy entrepreneurs can use to increase the number or commitment level of their memberships.⁷⁰ Second, incidents can be used as resources—an environmental disaster, such as Three Mile Island;⁷¹ a political event,

⁶⁶ See MCCARTHY & ZALD, *supra* note 22, at 17-25 (describing the classical model for the rise and fall of social movements).

⁶⁷ On the use of protest marches and demonstrations as a strategic device, see JAMES DENARDO, *POWER IN NUMBERS: THE POLITICAL STRATEGY OF PROTEST AND REBELLION* (1985); BARBARA EPSTEIN, *POLITICAL PROTEST AND CULTURAL REVOLUTION: NONVIOLENT DIRECT ACTION IN THE 1970S AND 1980S* (1991); JOHN LOFLAND, *PROTEST: STUDIES OF COLLECTIVE BEHAVIOR AND SOCIAL MOVEMENTS* (1985); ROCHON, *supra* note 10, at 3-24; and TARROW, *supra* note 21, at 100-69.

⁶⁸ See generally MCADAM, *supra* note 16, at 36-59 (defining a social movement as a political process); TARROW, *supra* note 21, at 71-91 (demonstrating how political resources often provide important opportunities in politics for social movements); TILLY, *supra* note 17, at 58 (listing "voting, party work, holding office, and communicating with legislators" as resources in the American political system that are important to social movements); Charles Tilly, *Social Movements and National Politics*, in *STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY* 297 (Charles Bright & Susan Harding eds., 1984) (concluding that the success of a social movement partially depends on national politics).

⁶⁹ See John D. McCarthy et al., *supra* note 62 (describing the effect of postal and internal revenue regulations on social movements).

⁷⁰ See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, at 148 (1982) (theorizing that external support of the civil rights movement was a product of black protest activity); SIDNEY TARROW, *DEMOCRACY AND DISORDER: PROTEST AND POLITICS IN ITALY, 1965-1975*, at 217-90 (1989) (examining the role of social movement organizers in Italian protests during the late 1960s and early 1970s); J. Craig Jenkins & Charles Perrow, *Insurgency of the Powerless: Farm Worker Movements (1946-1972)*, 42 AM. SOC. REV. 249 (1977) (modeling the effect the political environment had on the success and failure of farm worker movements); Snyder & Tilly, *supra* note 55 (addressing the effects of hardship on collective violence in France).

⁷¹ See RAYMOND L. GOLDSTEEN & JOHN K. SCHORR, *DEMANDING DEMOCRACY AFTER*

like a reduction in welfare benefits;⁷² a dramatic legal case, such as one where a woman murders her abusive husband; an unplanned action by potential members, such as the Stonewall riot.⁷³ The Supreme Court's decision in *Roe v. Wade*⁷⁴ virtually created the anti-abortion movement.⁷⁵ A third, closely related resource is media coverage, which not only amplifies the effect of any incident, but also functions as an independent force. When the media cover a particular social movement organization in a news or feature story, they provide that organization with free publicity for recruiting new members and impressing its existing ones.⁷⁶ Many protest activities by these organiza-

THREE MILE ISLAND 157-65 (1991) (explaining that after the Three Mile Island nuclear accident, many residents mobilized by joining and establishing groups that organized meetings, rallies, and marches); WALSH, *supra* note 16 (providing a comprehensive study of post-accident mobilization); see also Paul Slovic et al., *Characterizing Perceived Risk*, in PERILOUS PROGRESS: MANAGING THE HAZARDS OF TECHNOLOGY 91 (Robert W. Kates et al. eds., 1985) (discussing study participants' perceptions of the risk of nuclear power).

⁷² See Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173 (2001) (describing the collaboration of a grassroots welfare rights organization and a law school clinic in the wake of the reduction of welfare benefits in the mid-1990s).

⁷³ See MARTIN DUBERMAN, STONEWALL (1993) (telling the stories of Stonewall riot participants and how the riot affected gay resistance); ESKRIDGE, GAYLAW, *supra* note 42, at 99 ("Literally overnight, the Stonewall riots transformed the *homophile reform movement* of several dozen homosexuals into a *gay liberation movement* populated by thousands of lesbians, gay men, and bisexuals who formed hundreds of organizations demanding radical changes in the way gay people were treated by the state.").

⁷⁴ 410 U.S. 113 (1973).

⁷⁵ See LUKER, *supra* note 13, at 37 (noting that pro-life group members "reported that they became mobilized to the cause on the very day the decision was handed down"); RAYMOND TATALOVICH & BYRON W. DAYNES, THE POLITICS OF ABORTION 149 (1981) (characterizing the pro-life movement "as a reaction" against the Supreme Court's decision in *Roe v. Wade*).

⁷⁶ See SZASZ, *supra* note 7, at 67 ("The period of most intense media coverage was followed by a surge of social movement activity."); William A. Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, 95 AM. J. SOC. 1, 6-7 (1989) (explaining that organizations sometimes sponsor media activities); William A. Gamson & Gadi Wolfsfeld, *Movements and Media as Interacting Systems*, 528 ANNALS AM. ACAD. POL. & SOC. SCI. 114 (1993) (illustrating social movements' dependence on the media to report their messages to the public); Harvey Molotch, *Media and Movements*, in THE DYNAMICS OF SOCIAL MOVEMENTS, *supra* note 20, at 71 ("For [social movements], the mass media represent a potential mechanism for utilizing an establishment institution to fulfill nonestablishment goals: communicating with movement followers, reaching out to potential recruits, neutralizing would-be opponents, and confusing or otherwise immobilizing committed opponents."); Harvey Molotch & Marilyn Lester, *Accidental News: The Great Oil Spill as Local Occurrence and National Event*, 81 AM. J. SOC. 235, 238-58 (1975) (describing how conservation groups and oil companies sought advantageous coverage of the Santa Barbara oil spill); cf. GAMSON, *supra* note 22, at 161 ("In addition to its use as a partial defense

tions are primarily designed to attract such coverage, rather than to produce any direct effect on political leaders. Fourth, alliances with other organizations, made in the political sphere, the social sphere, or even the economic sphere, can serve as a resource for a social movement organization. And fifth, but by no means finally, the competition among social movement organizations for the same members, the same political contacts, the same association with dramatic incidents, the same media coverage, and the same alliances means that having a leading position with respect to an issue can also function as a resource.⁷⁷

Nor is the resource-mobilization perspective limited to the actions of policy entrepreneurs. Other social scientists who have adopted this approach treat social movements as the product of more localized or indigenous organizing efforts, and emphasize the organizational capacities of the members themselves—their ability to mount protests, organize electoral campaigns, lobby politicians, react to dramatic incidents, and garner media coverage without an institutionally established leadership.⁷⁸ Here, the issue of opportunity looms even larger

against some repressive forms of social control, the media spotlight can be used proactively.”); TODD GITLIN, *THE WHOLE WORLD IS WATCHING* 251 (1980) (noting that journalists are susceptible to pressure from organizations).

⁷⁷ See Mayer N. Zald & John D. McCarthy, *Social Movement Industries: Competition and Conflict Among SMOs*, in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY*, *supra* note 4, at 161 (analyzing competition among social movements). In a similar manner, the existence of an influential social movement often serves as a resource for the creation of a countervailing social movement that mobilizes those in opposition. See LUKER, *supra* note 13, at 144 (noting that *Roe v. Wade* mobilized a stronger opposition to abortion reform); Clarence Y.H. Lo, *Countermovements and Conservative Movements in the Contemporary U.S.*, 8 ANN. REV. SOC. 107, 112-18 (1982) (discussing the countermovements of the pro-life, Stop ERA, and anti-busing movements); Tahi L. Mottl, *The Analysis of Countermovements*, 27 SOC. PROBLEMS 620 (1980) (analyzing the anti-busing counterreform movement in Boston); Bert Useem, *Center-Periphery Conflict: Elite and Popular Involvement in the Boston Anti-Busing Movement*, 6 RES. SOC. MOVEMENTS CONFLICTS & CHANGE 271 (1984) (using the center-periphery model to explain elite and popular participation in the movement); Bert Useem & Mayer N. Zald, *From Pressure Group to Social Movement: Efforts to Promote Nuclear Power*, in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY*, *supra* note 4, at 273 (describing how industry support for nuclear power mobilized antinuclear power social movements).

⁷⁸ See, e.g., JENKINS, *supra* note 16 (discussing how the resource-mobilization theory emphasizes the indigenous resources, organization, and strategic position of excluded groups); MCADAM, *supra* note 16, at 31 (“What the black movement shares in common with many other insurgent challenges is the existence of an indigenous organizational network in which it developed.”); MORRIS, *supra* note 16 (examining how many local organizations and movements helped to develop the civil rights movement); PIVEN & CLOWARD, *supra* note 16 (describing flaws inherent in the mass-based permanent organization model); Aldon Morris, *Black Southern Student Sit-In Movement: An Analysis of Internal Organization*, 46 AM. SOC. REV. 744 (1981) (theorizing on the effects of local

and explains how movements can be mobilized without relying on the proactive efforts of policy entrepreneurs. This localized perspective tends to give social movements a more indigenous and idealistic cast, and is thus favored by more left-oriented scholars such as Morris, or Piven and Cloward,⁷⁹ while the policy entrepreneur perspective has a more cynical tone and attracts less overtly political scholars, such as Oberschall or McCarthy and Zald.⁸⁰

Clearly, legal scholars and social scientists have used rational actor theory differently, and have drawn different conclusions from Olson's seminal work. These differences are significant, but they cannot be regarded as the source of the disconnection between legal and social science literature regarding social movements. The methodological difference is simply not that large. While most social scientists reject the idea that people are motivated solely by material self-interest, they are certainly familiar with this approach from the public choice litera-

movement centers on the sit-in movement); Osha Neumann, *Motherfuckers Then and Now: My Sixties Problem*, in CULTURAL POLITICS, *supra* note 20, at 55 (recounting the author's personal experiences as a member of the small Sixties activist group the Motherfuckers); Michael Schwartz & Shuva Paul, *Resource Mobilization Versus the Mobilization of People*, in FRONTIERS, *supra* note 21, at 205 (concluding that Mothers Against Drunk Driving (MADD) failed to be an instrument of social change because it did not rely on large-scale mobilization for support); David A. Snow et al., *Social Networks and Social Movements: A Microstructural Approach to Differential Recruitment*, 45 AM. SOC. REV. 787 (1980) (emphasizing the importance of social networks in accounting for differences in social movement recruitment), *reprinted in* SOCIAL MOVEMENTS: READINGS ON THEIR EMERGENCE, MOBILIZATION, AND DYNAMICS 122 (Doug McAdam & David A. Snow eds., 1997).

⁷⁹ See MORRIS, *supra* note 16 (analyzing the origins of the civil rights movement from an indigenous perspective); PIVEN & CLOWARD, *supra* note 16 (analyzing the origins of the unemployed workers', industrial workers', civil rights, and welfare rights movements from an indigenous perspective).

⁸⁰ See THE DYNAMICS OF SOCIAL MOVEMENTS, *supra* note 20 (examining the theory and conceptual development of social movements); McCarthy & Zald, *supra* note 4 (discussing and examining changes in the resource mobilization approach to social movements). The emphasis on outside funding, and the development of funded social movement organizations, comes close, at certain points, to a denial that the movements in question have any popular support apart from that which can be manufactured by well-funded elites.

Piven and Cloward argue that the resource mobilization approach, particularly the work of Charles Tilly and McCarthy and Zald, transforms social movements into mere interest groups, and acts of social resistance into normal politics. The result is to undermine the genuinely radical meaning of such movements, and the genuine grievances that give rise to them. See Frances Fox Piven & Richard A. Cloward, *Normalizing Collective Protest*, in FRONTIERS, *supra* note 21, at 314 ("In recasting collective protest as politics, however, [resource mobilization] analysts have normalized both the organizational forms typically associated with protests . . . and the political processes generated by protests.").

ture in political science, and have no trouble adapting the insights it provides, as indicated by their use of Olson's book itself. As far as legal scholars are concerned, one would think that they would have found great use for the detailed, empirically based application of rational actor theory to the mechanics of social movements, even if they wanted to reject the underlying ideological motivations that were attributed to the participants. Certainly, if one wants to assert the empirically implausible position that people who participate in social movements are really motivated by material self-interest, or if one wants to assert the empirically implausible and logically contradictory position that these people are systematically misled by materially self-interested policy entrepreneurs, one should be particularly interested in studies about the way these entrepreneurs make use of political, economic, and social resources.

B. *Critical Theory*

There is a methodological divergence of similar proportions in the use of critical theory by legal scholars and the Continental social scientists who study social movements. Once again, the difference is that legal scholars seem to take the sources of their intellectual inspiration somewhat more literally than the social scientists do. Because critical theory is a more diffuse, less comprehensive methodology than rational actor theory, neither group of scholars pursued its insights with the single-mindedness of the public choice or resource mobilization scholars. Instead, they have used critical theory to provide themselves with an interpretation of society, a diagnosis of the times, and then relied on other methodologies to advance their analysis and furnish their prescriptions.

The scholars who initiated the critical legal studies movement⁸¹

⁸¹ See, e.g., MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977) (laying the foundation for critical legal studies); ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975) (presenting a comprehensive critical legal studies doctrine); C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981) (proposing a unity thesis in which means and ends are united in the process of change); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (introducing a neo-Marxist method for comprehending the political significance of legal thinking); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (analyzing the trajectory of American labor law with a critical legal studies approach); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (denouncing theories of constitutional law from a critical legal studies perspective).

were strongly influenced by critical theory's emphasis on ideology.⁸² According to that theory, ideology and, in particular, claims that the scientific, instrumentally pragmatic ideology of modern elites represented objective truth, were the mechanisms by which those elites dominated society and controlled the disadvantaged majority. From this insight, critical legal scholars derived the idea that one could combat this domination by revealing that the asserted objectivity was false. Law was a natural target of such an effort, since its claim to objectivity, or neutrality, was quite explicit, extending all the way back to the legal formalists.

Even more enticing was the fact that this critique took direct aim at the legal process school, which was the dominant approach to legal scholarship when critical legal studies first developed.⁸³ Legal process was itself a response to legal realism, which had advanced an energetic, but less philosophically sophisticated critique of law's neutrality.⁸⁴ As discussed above, much of the legal process program involved rehabilitating the claims of the preceding school of thought, now known as formalism,⁸⁵ in light of the political and institutional insights of the legal realists. By doing so, legal process scholars were able to reconnect with the formalist themes that still constituted the core of legal teaching and scholarship in the United States. The whole idea of analyzing the internal logic of a judicial decision, and the underly-

⁸² See *supra* note 24 (citing sources).

⁸³ For leading examples of the legal process approach, see BICKEL, *supra* note 39; CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* (1960); LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); HART & SACKS, *supra* note 39, writing from 1955 to 1958; and Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978), writing from 1957 to 1961.

⁸⁴ For examples of realism, see JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930); and Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). For discussions of legal realism, see AMERICAN LEGAL REALISM (William Fisher et al. eds., 1993); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); and G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

⁸⁵ For discussions of formalism, see Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY (1995); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196 (1995); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995); and G. Edward White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213 (1978).

ing claim that there was such a thing as legal reasoning, depended on the formalist program and on the legal process school's ability to resurrect it. Critical theory's attack on objectivity and neutrality as instruments for social control, therefore, gave legal scholars who were so inclined a means of attacking the entire conceptual structure of American legal scholarship. It gave them a means of attack, moreover, that engaged legal scholarship on exactly its own terms. One need only demonstrate that law's claim to internal logic was false, that judicial decisions did not follow from precedent, or that legal principles did not produce their purported implications, and the ideological, oppressive character of law would be revealed.

The difficulty with this strategy, enticing as it seemed, is that the critical theory that inspired it provided relatively little guidance for its implementation. While critical theorists were quite insistent that prevailing ideologies of liberal democracy were instruments of oppression, they generally tried to demonstrate this point by tracing the linkages between the ideology and its general social implications, not by parsing its putative internal logic. This approach came naturally to them, since critical theory was directly drawn from Marx,⁸⁶ and it shared Marx's view that everything other than economic relations was the superstructure of society. Although it differed from Marx in arguing that this superstructure was extremely important in understanding mechanisms of social control, it ultimately relied on the same analysis of the economic base for its critique. Critical legal studies scholars concluded, quite correctly, that Marxism, and class analysis in general, was a losing argument in the American context. To provide a methodology for attacking the internal logic of legal decision making and

⁸⁶ See HABERMAS, *THEORY OF COMMUNICATIVE ACTION*, *supra* note 2, at 366-99 (elucidating the role of Marxist thought in the development of critical theory); HELD, *supra* note 23, at 19-23 (describing the development of critical theory in the Marxist tradition); MARTIN JAY, *MARXISM AND TOTALITY: THE ADVENTURES OF A CONCEPT FROM LUKÁCS TO HABERMAS* 196-275 (1984) (describing the development of critical theory in the Marxist Frankfurt School); PHIL SLATER, *ORIGIN AND SIGNIFICANCE OF THE FRANKFURT SCHOOL: A MARXIST PERSPECTIVE* 29 (1977) ("[I]t is the Marxian critique that forms the cornerstone of critical theory of society."); WIGGERSHAUS, *supra* note 23, at 9-41 (recounting the role of Marxism in the formation of the Frankfurt School of critical theorists). In his Introduction to Adorno's *Negative Dialectics*, E.B. Ashton says:

To follow the line of thought from detail to detail, you need to know Kant near-perfectly, Hegel perfectly, and Marx-Engels viscerally—not just "by heart."

If you twitch whenever a phrase in this book resembles one from the Marxist

Founding Fathers, then and not until then can you think along with Adorno.

Introduction to ADORNO, NEGATIVE DIALECTICS, *supra* note 23, at xii.

scholarship in its entirety, they turned, instead, to deconstruction.⁸⁷ This quickly proved to be a promiscuously corrosive instrument, however, since no legal argument has the logical density to withstand it.⁸⁸ Worse still, deconstruction lacked the kind of connection to American politics that Marxism bore to European politics; there were many names shouted in American streets during the stormy '60s and '70s, but Jacques Derrida and Paul deMan were not among them.

Both these defects were remedied by feminist theory⁸⁹ and critical race theory,⁹⁰ which abandoned deconstruction for a more socially based critique that was connected with widely recognized issues in American political life. Feminist and critical race theory, moreover, raised the issue of personal identity, tracing the oppressive effects of the dominant ideology on people's image of themselves, and not merely on their political opinions. These theories tended to rely on a false consciousness analysis, asserting that the dominant ideology con-

⁸⁷ Most notably, they turned to Derrida. *E.g.*, JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1997) (1967) (introducing deconstruction as a method of philosophy and criticism); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., Univ. of Chi. Press 1978) (1967) (using metaphysical deconstruction in a collection of essays analyzing philosophical texts); *see also* MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987) (providing a self-critical assessment of the early critical legal studies movement); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985) (employing deconstructive textual strategies to examine the inconsistencies of contract doctrine); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1276 (1984) (critiquing American legal doctrine that causes bureaucracy); Gary Peller, *The Metaphysics of American Law*, 73 *CAL. L. REV.* 1151 (1985) (considering the construction of legal thought during the liberty of contract era); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984) (rejecting the assertion that a rational foundation exists and is necessary for the development of morals). For discussions on deconstruction, *see* GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISM OF LAW* 378-461 (2000); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987); and J.M. Balkin, *Transcendental Deconstruction*, *Transcendent Justice*, 92 *MICH. L. REV.* 1131 (1994).

⁸⁸ *See* ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 130-71 (1990) (arguing that the critical legal studies claims concerning the doctrinal contradictions of liberal legal theory depend on questionable ideas about social reality and the structure of law); Donald F. Brosnan, *Serious but Not Critical*, 60 *S. CAL. L. REV.* 259 (1987) (arguing that deconstruction is not fully convincing when applied to legal as opposed to philosophical texts); Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 *U. MIAMI L. REV.* 505 (1987) (examining the implication of indeterminacy upon critical legal studies); John Stick, *Can Nihilism Be Pragmatic?*, 100 *HARV. L. REV.* 332 (1986) (claiming that the nihilist critique is conceptual rather than empirical).

⁸⁹ For examples of feminist theory, *see supra* note 41 (citing sources).

⁹⁰ For examples of critical race theory scholarship, *see supra* note 40 (citing sources).

ceals people's real interests from themselves, and that this effect can be combated by identity formation. Finally, these approaches focused directly on the scholar's role as a situated human being, rather than a detached observer who discerns eternal verities. This focus led to the use of narrative in legal scholarship, where feminist and critical race theorists would recount personal experiences or identify personal emotions, and then use these as a source for their critique.⁹¹

Feminist theory and critical race theory have been extensively criticized, by both sympathetic and hostile observers, as excessively subjective,⁹² a charge which its proponents generally do not answer by

⁹¹ See, e.g., BELL, *supra* note 40 (using the story of a fictitious character named Geneva Crenshaw as the basis for an examination of racial justice); RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995) (presenting a discourse on critical race theory through a narrative from the perspective of the author's alter ego); SUSAN ESTRICH, *REAL RAPE* 1-7 (1987) (detailing the author's personal rape experience to introduce an argument for changing the way the law treats "simple" rape); WILLIAMS, *supra* note 40 (examining the jurisprudence of rights from the perspective of an African-American female law professor); Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) (contextualizing an argument for the deregulation of pregnancy in a detailed account of the author's own birthing experience); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (reacting from a personal perspective to cases on the right to wear braided hair); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) (describing the experience of being an African-American law professor); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (reacting personally to the exclusion of minority legal scholarship); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) (using narrative and anecdotal forms of writing to convey the different quality of women's hedonic lives); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (providing an example from the author's own legal work to illustrate race, gender, and class subordination).

⁹² See, e.g., BINDER & WEISBERG, *supra* note 87, at 232-60 (analyzing the usefulness of narrative thinking in feminist theory to legal scholarship); DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* 95-117 (1997) (criticizing the radical narrative movement's hostility toward objective truths); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (discussing the response to feminist narrative legal scholarship); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997) (advocating a storytelling approach to legal analysis while doubting the possibility of objectivity and truth); Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995) (arguing in support of autobiographical narrative in scholarship, but acknowledging that the transformative impact may be greater on the storyteller than on the legal culture); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (discussing how to evaluate narratives considering problems such as the typicality of an author's personal experiences); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (analyzing the call to contextualize otherwise subjective

denial, but in terms of the importance of identity in law and legal scholarship.⁹³ They developed this response in a largely American

narratives); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (showing the need to improve the connection in legal stories for purposes of constitutional adjudication).

The use of narrative in legal scholarship should be distinguished from the claim that all legal discourse, including a judge's decisions, is a form of narrative. See, e.g., JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 231-74 (1984) (interpreting historical texts in a narrative form); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (“[N]o set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning.”); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, and Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1989) (arguing that classical property theory follows a narrative form); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985) (claiming that reading legal theory as narrative will allow theorists to realize their moral ideals). For an illuminating account of the relationship between these two bodies of scholarship, see BINDER & WEISBERG, *supra* note 87, at 283-87.

⁹³ See Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 260 (1994) (explaining that many stories told by feminist and critical race theorists recount real-life experiences “which the law can respect or deny”); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 689 (1992) (suggesting that a study of the issues raised by feminist and critical race theorists “may also help us understand the parallel issues that traditional legal scholarship has too long elided”); Richard Delgado, *Coughlin’s Complaint: How to Disparage Outsider Writing, One Year Later*, 82 VA. L. REV. 95, 95 (1996) (arguing that reading the autobiographies of women and writers of color can “provide unique insights” and “enable the reader to see the world through another’s eyes”); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (discussing the important constructive and deconstructive functions of feminist and critical race theorist stories); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 (1990) (arguing that “voice” does matter because many stories by feminists and scholars of color “reveal things about the world that we ought to know”); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 607 (1994) (asserting that “storytelling’s value is in expanding legal debate and driving social transformation by illuminating legal issues from the perspectives of nomic groups frequently excluded from political and academic debate”); Mark Fajer, *Authority, Credibility and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994) (explaining that women and writers of color, among others, must present more complete and accurate versions of their lives due to the existence of pre-understanding); Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377 (1996) (reviewing RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995)); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 809 (1994) (arguing that critical race theorists’ narrative form “powerfully explicates legal issues”); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (“To make sense of law and to organize experience, people often tell stories. And these stories are telling.”).

While these scholars often argue that the use of narrative in legal scholarship is justified by the fact that all legal discourse, including a judge's decisions, is a form of narrative, not all legal scholars who advance the latter claim necessarily rely on storytel-

context; while relying on critical theory's seminal insight that law and claims of neutrality in law could serve as means of oppression, they did not return to critical theory for their connection to politics, their analysis of identity, or their use of narrative.

The methodology of Continental social movement literature is distinctly different from critical legal scholarship in the United States. To begin with, it has retained contact with the Marxist analysis that underlies critical theory. While few of the Continental scholars in this field could be considered Marxists or even neo-Marxists, Marx's theory of class conflict and his teleological concept of history provide an intellectual framework for their work. This framework supports a focus on the structural aspects of society, such as the distribution of wealth, the extent and character of urbanization, the shift from industrial production to information, and the cultural impact of modernization. Some Continental social movement scholars, such as Klaus Eder,⁹⁴ continue to rely on traditional class analysis; others, such as Hanspeter Kriesi⁹⁵ and Alain Touraine,⁹⁶ have argued that class divi-

ling as a methodology. See, e.g., WHITE, *supra* note 92, at 231-74 (analyzing the Declaration of Independence, the Constitution, and Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and comparing the kinds of community and culture they each seek to establish); Cover, *supra* note 92 (illustrating the relationship of law and narrative in the normative world through the use of biblical texts); Rose, *supra* note 92, at 39-40 (discussing the relation of property to storytelling and describing "narrative as an exhortation to the listener to overcome a game-theoretic, self-interested 'nature,' and to follow instead the cooperative preference of orderings that a property regime requires"). There may well be differences, after all, between different types of narratives. For an illuminating account of the relationship between these two bodies of scholarship, see BINDER & WEISBERG, *supra* note 87, at 201-91.

⁹⁴ See KLAUS EDER, *THE NEW POLITICS OF CLASS: SOCIAL MOVEMENTS AND CULTURAL DYNAMICS IN ADVANCED SOCIETIES* (1993) (viewing class coalition and conflict as the key for explaining social developments); Klaus Eder, *Does Social Class Matter in the Study of Social Movements? A Theory of Middle Class Radicalism*, in *SOCIAL MOVEMENTS AND SOCIAL CLASSES* 21 (Louis Maheu ed., 1995) (concluding ultimately that class does matter in the new social movements).

⁹⁵ See KRIESI, *supra* note 24, at 52 (explaining that the "process of intergenerational value change . . . gradually transforms [a society's] politics and cultural norms," which in turn affects the society's class structure) (1993); Hanspeter Kriesi & Philip van Praag Jr., *Old and New Politics: The Dutch Peace Movement and the Traditional Political Organizations*, 15 EUR. J. POL. RES. 319, 320 (1987) (explaining that the new social movements, such as the Dutch peace movement, "are carried by new social strata quite distinct from the working-class—by professionals from the new middle strata—and directed towards the implementation of new, post-materialist values").

⁹⁶ See ALAIN TOURAINE ET AL., *SOLIDARITY: THE ANALYSIS OF A SOCIAL MOVEMENT: POLAND 1980-81* (David Denby trans., 1983) (analyzing the Solidarity movement and its effects on the class structure in Poland); ALAIN TOURAINE ET AL., *THE WORKERS' MOVEMENT*, at xv (Ian Patterson trans., Cambridge Univ. Press 1987) ("Our principal

sions in society are being restructured along different lines by modernization; still others, such as Manuel Castells⁹⁷ and Alberto Melucci,⁹⁸ believe that the whole theory has ceased to account for contemporary developments. But all these scholars, including Castells and Melucci, are centrally engaged in a debate about the role of social class, and all employ a structural analysis that has its source in Marxist class analysis.

A second, and in many ways conflicting theme that runs through Continental social movement scholarship is an emphasis on individual identity formation. This emphasis may be the principal theme that distinguishes the Continental approach from the resource mobilization perspective of American scholarship. The Continental concept of identity is derived largely from phenomenology, with its analysis of individual experience, intersubjective communication, and the social construction of meaning.⁹⁹ According to Continental scholars, participation in a social movement depends primarily on the individual's identity, or sense of self.¹⁰⁰ To participate in a labor movement, one

hypothesis is that trade unionism is . . . a movement defined by its position within class relations and which calls into question the social utilization of the productive forces of industrial society.”). See generally, TOURAINE, *supra* note 24, at xiii (presenting “the general orientations of a *sociology of action*,” developing a research method, and introducing “a set of interventions focussing primarily on social movements or struggles”).

⁹⁷ CASTELLS, *supra* note 24.

⁹⁸ See MELUCCI, *supra* note 24, at 185-92 (reproducing excerpts of an interview with the author in which he explains the inadequacy of the Marxian model of analysis for understanding contemporary social movements); MELUCCI, *supra* note 27.

⁹⁹ For basic statements of phenomenology, see EDMUND HUSSERL, *THE CRISIS OF THE EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* (David Carr trans., 1970); and EDMUND HUSSERL, *IDEAS* (W.R. Boyce Gibson trans., 1931). For the application of phenomenology to social science, see 1 ALFRED SCHUTZ, *COLLECTED PAPERS* (Maurice Natanson ed., 1973); and ALFRED SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (George Walsh & Frederick Lehnert trans., 1967). Phenomenology is the direct source of ethnomethodology. See HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY*, at vii (1967) (“[T]he objective reality of social facts as an ongoing accomplishment of the concerted activities of daily life . . . is the prevailing topic for ethnomethodological study.”).

¹⁰⁰ CASTELLS, *supra* note 24; DELLA PORTA & DIANI, *supra* note 4, at 83-109; ERNESTO LAGLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (Winston Moore & Paul Cammack trans., 1985); MELUCCI, *supra* note 24; ALAIN TOURAINE, *CAN WE LIVE TOGETHER? EQUALITY AND DIFFERENCE* 89-124 (David Macey trans., 2000); ALAIN TOURAINE, *RETURN OF THE ACTOR* (Myrna Godzich trans., 1988); TOURAINE, *supra* note 24; Bert Klandermans & Sjoerd Goslinga, *Media Discourse, Movement Publicity, and the Generation of Collective Action Frames: Theoretical and Empirical Exercises in Meaning Construction*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS*, *supra* note 30, at 312; Alberto Melucci, *The Global Planet and the Internal Planet: New Frontiers for Collective Action and Individual Transformation* [hereinafter Melucci, *The Global Planet*], in *CULTURAL POLITICS*, *supra*

must see oneself as a worker rather than a future manager; to participate in an environmental movement, one may need to see oneself as an urban resident, rather than a worker; to participate in a women's movement, one must see oneself as a woman, rather than a wife. As the examples indicate, these identities are dynamic and contingent. They are not the unalterable consequence of some structural factor such as one's economic status, as Marxist analysis would assert. Rather, they result from a complex interaction of one's personal experience, one's cultural milieu, and one's pragmatic circumstances. In short, they are socially constructed, and can change in response to changes in the individual's external circumstances or personal attitudes.

In order to constitute a social movement, people's individual identities must possess a collective element. This point is obviously necessary from a structural perspective, since only mass action is likely to produce political or cultural effects, but it also involves complex questions about the individual behavior that generates such action. The resource mobilization approach treats this collective element as the joint action or cooperation of individuals with pre-existing value preferences. The Continental approach, however, emphasizes two different, although generally interwoven, themes. First, participation in a social movement is a dynamic process in which the individual transforms and redefines herself in her interaction with others.¹⁰¹ Second, the movement as a whole develops a collective identity, an emergent self-definition that functions analogously to the way that self-definition functions for an individual.¹⁰² The interplay between the socially constructed identities of the individual and the movement is mediated by various mechanisms. One such mechanism particularly favored by Continental scholars is the social network of relationships among individuals, itself both a pre-condition for social movements

note 20, at 287; Alberto Melucci, *The Process of Collective Identity* [hereinafter Melucci, *The Process*], in *SOCIAL MOVEMENTS AND CULTURE*, *supra* note 27, at 41; Offe, *supra* note 24; Alessandro Pizzorno, *Political Exchange and Collective Identity in Industrial Conflict*, in 2 *THE RESURGENCE OF CLASS CONFLICT IN WESTERN EUROPE SINCE 1968*, at 277 (Colin Crouch & Alessandro Pizzorno eds., 1978).

¹⁰¹ See Melucci, *The Process*, *supra* note 100, at 43 ("The actors 'produce' the collective action because they are able to define themselves and their relationship with the environment. The definition that the actors construct is not linear but produced by interaction, negotiation and the opposition of different orientations.").

¹⁰² *Id.* at 46-47 ("[C]ollective identity [is] the ability of a collective actor to recognize the effects of its actions and to attribute these effects to itself. . . . Collective identity therefore defines the capacity for autonomous action, a differentiation of the actor from others while continuing to be itself.").

and a product of these movements.¹⁰³

Another less pervasive, but quite distinctive theme in Continental social movement scholarship is the self-conscious concern with the scholar's own role in the social movements that she studies. This is probably derived from Weber's idea that the observer can only achieve true understanding of social action by participating in the meaning structure of that action.¹⁰⁴ The most striking, and in some sense extreme response to this issue is Alain Touraine's. Abjuring the

¹⁰³ See, e.g., DONATELLA DELLA PORTA, *SOCIAL MOVEMENTS, POLITICAL VIOLENCE AND THE STATE: A COMPARATIVE ANALYSIS OF ITALY AND GERMANY* (1995) (comparing the histories of political violence in Italy and Germany and explaining them from a theory of mobilization, a theory of activism, and a theory of conflict); DIANI, *supra* note 7, at xiii (analyzing the Italian environmental movement and focusing on "the complex set of exchanges—between organizations as well as between individuals—that ultimately make up a social movement"); MELUCCI, *supra* note 24; Mario Diani, *Analyzing Social Movement Networks*, in *STUDYING COLLECTIVE ACTION* 107 (Mario Diani & Ron Eyerman eds., 1992) (outlining a framework for the empirical investigation of social movement networks); Mario Diani, *The Network Structure of the Italian Ecology Movement*, 29 *SOC. SCI. INFO.* 5 (1990) (analyzing the network structure of the ecology movement in Italy); Kriesi & van Praag, *supra* note 95 (analyzing the relationship between traditional organizations of political intermediation with the Dutch peace movement on the local level); Dieter Rucht, *Environmental Movement Organizations in West Germany and France: Structure and Interorganizational Relationships*, 2 *INT'L SOC. MOVEMENT RES.* 61 (1989). The use of networks as an explanatory mechanism is not limited to the Continental approach, however; resource mobilization scholars have also found it useful. See DAVID A. SNOW, *SHAKUBUKU: A STUDY OF THE NICHIREN SHOSHU BUDDHIST MOVEMENT IN AMERICA, 1960-1975* (1993) (emphasizing the role of social networks in the propagation and recruitment practices of this religious movement); Debra Friedman & Doug McAdam, *Collective Identity and Activism: Networks, Choices and the Life of a Social Movement*, in *FRONTIERS*, *supra* note 21, at 156 (analyzing the structural and rational choice accounts of participation in social movements, which locate "the causes of activism in structural proximity and network connections" and engage in cost-benefit calculations, respectively); David A. Snow et al., *supra* note 78 (asserting the importance of social networks in accounting for differential recruitment in social movements). In fact, networks can be added to frame analysis as a point of contact between the two approaches.

¹⁰⁴ See MAX WEBER, *ECONOMY AND SOCIETY* 8-22 (Guenther Roth & Claus Wittich eds., 1968) (explaining in detail the two kinds of understanding: "direct observational understanding of the subjective meaning of a given act as such" and "explanatory understanding"); MAX WEBER, "Objectivity" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (analyzing the *Archiv* and discussing in what sense there are "in general 'objectively valid truths' in those disciplines concerned with social and cultural phenomena"); MAX WEBER, *The Meaning of "Ethical Neutrality" in Sociology and Economics*, in *id.* at 1, 1 (discussing "whether in teaching one should or should not declare one's acceptance of practical value-judgments, deduced from ethical principles, cultural ideals, or a philosophical outlook"); see also FRITZ RINGER, *MAX WEBER'S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES* 6 (1997) (analyzing Weber's methodology and ultimately suggesting that "Weber's substantive achievements were thoroughly grounded in his methodological program").

entire concept of detached observation, and even, at times, of observation at all, Touraine works directly with the groups he studies.¹⁰⁵ The purpose of his work is to make group members aware of their highest purpose, that is, the historical role that their movement occupies. He does so by becoming a member of the group and then engaging in regular discussion with group members to elevate their historical consciousness. Alberto Melucci, while maintaining more distance from the group, has employed a similar approach. He enters into a contractual relationship with the group in which the group agrees to provide information about its activities in exchange for his assistance in the group's process of self-examination.¹⁰⁶ The information that the group provides concerns its actions, rather than its publicly stated positions, and these actions are revealed as the group works with the researcher.

As in the case of rational choice theory, American legal scholars and Continental social movement scholars are using critical theory rather differently. The legal scholars' concern with the internal logic of the elite's controlling ideology is largely absent from Continental social movement theory. Conversely, the Continental emphasis on social structure, and specifically on class conflict, is generally not found in critical legal studies, feminism, or critical race theory. Feminism and critical race theory seem to share the Continental concern with identity, but their concept of recognizing or asserting one's true identity, and often doing so through narrative, is quite different from the dynamic, socially constructed identity of Continental scholarship.¹⁰⁷

¹⁰⁵ See TOURAINE, *supra* note 24, at 21-28 (discussing anti-technocratic struggles); ALAIN TOURAINE ET AL., *ANTI-NUCLEAR PROTEST: THE OPPOSITION TO NUCLEAR ENERGY IN FRANCE* (Peter Fawcett trans., 1983) (analyzing the antinuclear struggle in France); TOURAINE ET AL., *supra* note 91 (analyzing the Solidarity movement in Poland). For discussions of this approach, see William Gamson, *Review of Alain Touraine, The Voice and the Eye: An Analysis of Social Movements*, 88 AM. J. SOC. 812 (1983); Dieter Rucht, *Sociological Theory as a Theory of Social Movements? A Critique of Alain Touraine*, in RESEARCH ON SOCIAL MOVEMENTS, *supra* note 20, at 355, 373-79; and Wolfgang Rudig & Philip Lowe, *The Unfulfilled Prophecy: Touraine and the Anti-Nuclear Movement*, 20 MODERN & CONTEMP. FR. 19 (1984).

¹⁰⁶ See Mario Diani & Alberto Melucci, *The Growth of an Autonomous Research Field: Social Movement Studies in Italy*, in RESEARCH ON SOCIAL MOVEMENTS, *supra* note 20, at 149, 162-64 (describing the original methodological contribution made by Melucci in the study on new forms of collective action in the Milan metropolitan area). The book that provides a detailed account of one such project, ALTRI CODICI (Alberto Melucci ed., 1984), does not appear to have been translated into English.

¹⁰⁷ Certain jurisprudential works that have no particular relevance to social movements make more direct use of the concept of identity that underlies the Continental social movement scholarship. See, e.g., Meir Dan-Cohen, *Between Selves and Collectivities:*

Some of the Continental writing on identity could be criticized for its emphasis on, or praise of, subjectivity, but not for the subjectivity of its technique; it speaks in the same theoretical voice as Continental structuralism or systems theory. For American legal scholars, identity is a truth that a person, including the scholar, discerns by escaping from oppressive modes of thought; for Continental scholars, it is a creation that one's subjects generate within a field of action. Finally, while these two legal approaches and Continental social movement theory also share a concern about the scholar's role, their methodologies for addressing this issue are distinct. The legal scholars reach inward, treating themselves as participants in order to document their own experiences, which they then take to be typical, or at least indicative, of some larger group's. In contrast, Continental social theorists reach outward, joining or interacting with actual social movements in order to inform themselves and simultaneously enlighten the group's members through the scholar's superior theoretical understanding.

Once again, however, these methodological differences do not seem sufficient to account for the relative insulation of social movements scholarship and legal scholarship from one another. While the Continental scholarship is heavily influenced by Marx, it is certainly not Marxist. Some of it may be neo-Marxist, but the critical legal studies movement itself was inspired by the neo-Marxist Frankfurt School, and many legal scholars not associated with this movement have made extensive use of neo-Marxists, particularly Jürgen Habermas.¹⁰⁸ The differences in the way legal scholars and Continental social movement scholars approach identity are significant, but the two are talking about the same thing, nonetheless. Race is a distinctively American issue, but feminism is a shared concern,¹⁰⁹ and one might expect that

Toward a Jurisprudence of Identity, 61 CHI. L. REV. 1213, 1220 (1994) (discussing the idea of constructing both selves and collectivities out of social roles).

¹⁰⁸ See, e.g., Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569, 575 (1992) (using Habermas's distinction between two kinds of discursive social action, "communicative action" and "strategic communication"); William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969, 972 (1998) (analyzing the strengths and weaknesses of Habermas's theories from a legal and social perspective); Francis J. Mootz, III, *Psychotherapeutic Practice as a Model for Postmodern Legal Theory*, 12 YALE J.L. & HUMAN. 299, 327-45 (2000) (criticizing as unsuccessful Habermas's attempt to "psychoanalyze" society); Edward Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 889 (1992) (applying the epistemological approach of modern continental philosophers, including Habermas, to recommend criteria on which scholarship can be judged).

¹⁰⁹ For legal sources, see *supra* note 41. For social movement literature, see THE NEW WOMEN'S MOVEMENT: FEMINISM AND POLITICAL POWER IN EUROPE AND THE USA

this specific issue would provide an entry for American legal scholars into the extensive Continental literature on identity formation. Finally, the narrative technique of American feminist and critical race theorists is not found on the Continent, but it is at least homologous to the phenomenological basis of Continental scholarship. In short, important differences are present, but they do not seem important enough to explain the remarkable extent to which Continental social movement theorists and legal scholars have been uninterested in each other's work.

III. SUBJECT MATTER DIVERGENCES

A. *The Nature of the Divergence*

If methodological differences cannot account for the mutual isolation of legal scholarship and social movement scholarship, then the explanation may be found in the differences between the subject matters of these two fields. At first sight, they seem to overlap considerably, but more detailed consideration reveals a marked divergence. This can be seen by separating a social movement into its existence and its actions.

As described in the preceding section, social movement scholarship, particularly when the American and Continental versions are taken together, addresses every aspect of a social movement's existence. It describes the preconditions, both individual and social, for the creation of a movement. It also addresses the way movements form, discussing individual motivations, both rational and identity-based, the importance of social networks and individual capacities, the role of leaders or policy entrepreneurs, and the external circumstances, such as political developments or dramatic incidents, that can play a catalytic role. The growth and continuation of movements have also received extensive attention. The resource mobilization approach has studied the way movements retain the loyalty of their members, obtain funds and volunteer work, and make use of political opportunities, media coverage, and alliances with other organizations. Continental social theory has studied the way movements express or create

(Drude Dahlerup ed., 1986); and Mario Diani & Alberto Melucci, *The Growth of an Autonomous Research Field: Social Movement Studies in Italy*, in RESEARCH ON SOCIAL MOVEMENTS, *supra* note 15, at 149, 158-59 (1991). See generally THE WOMEN'S MOVEMENTS, *supra* note 16, at 3-20 (comparing the feminist movements of the United States and Western Europe).

the identities of its members, how they interact with the social structure, and how they contribute to the historical development of the society. Both traditions discuss the institutionalization of social movements, and the changes in their commitments over time. Finally, there has been at least some discussion of the way social movements dissipate or are destroyed, thus completing the consideration of their life cycle.¹¹⁰

Discussion of the actions social movements undertake seems equally comprehensive. Virtually every kind of social movement has been studied, from pro-environment to anti-abortion, from human rights to animal rights, from bread-and-butter labor movements to quiche-and-cappuccino save-the-panda efforts. Attention has been focused on internal management and external action, on violent protest, peaceful protest, alliance formation, and on certain aspects of litigation and law reform efforts. There is, however, one aspect of action that does not appear to have been addressed by social scientists in much detail. This aspect is the substance of litigation and law reform efforts, the specific legal arguments that advocates for social movements advance in judicial proceedings, and the specific statutory language that they propose in legislative lobbying. The general position that the movement adopts has been extensively considered, but the particular litigation and legislative strategies of its agents have not.¹¹¹

¹¹⁰ See GAMSON, *supra* note 22, at 30-31 (describing three main conditions under which a period of challenge ends); Kim Voss, *The Collapse of a Social Movement: The Interplay of Mobilization Structures, Framing, and Political Opportunities in the Knights of Labor*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, *supra* note 30, at 227, 251-54 (explaining how some of the framing and organizational innovations that brought about the Knights of Labor social movement later contributed to the movement's decline).

¹¹¹ It is difficult to demonstrate a negative by specific citation. One simplistic, but revealing observation is that most leading monographs and edited volumes in the social movement literature do not include the terms "law," "legal system," or "legislation" in their indices. See, e.g., COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, *supra* note 30, at 419 (making no references to these terms); CULTURAL POLITICS, *supra* note 20, at 355 (same); EYERMAN & JAMISON, *supra* note 27, at 183 (same); SOCIAL MOVEMENTS AND CULTURE, *supra* note 27 (same); TARROW, *supra* note 21, at 247 (same); SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, *supra* note 4, at 428 (same); cf. DELLA PORTA & DIANI, *supra* note 4, at 323 (making two references to law and order, one involving unpoliced urban areas, the other involving coalitions favoring law and order); FRONTIERS, *supra* note 21, at 378 (making one reference to the legalization of protest by democratic regimes). Of these works, only one, edited by Mayer Zald and John McCarthy, cites Handler. SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, *supra* note 4, at 426. Even here, and despite the fact that Mayer Zald wrote the introduction to Handler's book, *supra* note 18, there are only two references, both attached to brief acknowledgments that social movement organizations sometimes rely

Turning to legal scholarship, one finds a much less extensive consideration of social movements. Very little is said about the existence of social movements; their formation, operation, continuation, and decline are all regarded as beyond the scope of legal scholarship. With respect to the actions of social movements, there is virtually no discussion of their internal management, their use of protest, or even the development of their litigation and law reform efforts. In fact, only one aspect of social movements appears in legal literature—the substance of these litigation and law reform efforts, the specific legal arguments that advocates for social movements advance in judicial proceedings, and the specific statutory language that they propose in legislative lobbying. This is true even of Joel Handler's book, which declares an interest in social movement literature, but provides only a brief, historical summary of each movement before proceeding to its analysis of the legal cases that each movement initiated.¹¹² In other

on litigation. See SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, *supra* note 4, at 259 (“The most highly structured type of an encounter setting is probably the court.”); *id.* at 310 (noting that “specific acts of legislation may make courts more or less available as avenues for social movement action”).

¹¹² See HANDLER, *supra* note 18, at 43-188 (examining the attempts of social movements to use the court system to bring about change in three areas of the law—environmental protection, consumer protection, civil rights, and social welfare). The goal of Handler's book is to identify the factors that secure success in public interest litigation. *Id.* at 1-5, 34-41. Handler identifies five such factors: the characteristics of the social reform group that is initiating the litigation, the distribution of benefits and costs from the litigation, the extent to which the decision or settlement must be implemented by an administrative agency, the effectiveness of judicial remedies, and the legal resources available to the reform group. *Id.* at 5-34. The last three factors are internal to the legal system and are commonly included in discussions of institutional reform litigation. See MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 297-323 (1998) (arguing that judges are active policymakers and will continue to be so in the modern administrative state); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1300-02 (1976) (concluding that the involvement of courts and judges in public law litigation is a necessary and unavoidable part of seeking justice in a regulated society); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-17 (1979) (arguing that judges are in the best position of all the agents of government to interpret the values of the Constitution, but are constrained in doing so). The distribution of the costs and benefits factor is derived from James Q. Wilson, not from social movements literature, see WILSON, *supra* note 53, at 331 (distinguishing between concentrated and widely distributed benefits, and between concentrated and widely distributed costs), and has been used fairly extensively in legal scholarship, see, e.g., NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 53-97 (1994) (presenting a “two-force” model to predict the conditions under which concentrated interests will have an advantage over dispersed interests); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 338 (1988) (arguing that public choice theory, which uses economic princi-

words, the only aspect of social movements that legal scholarship discusses is the only aspect of social movements that social science literature does not.¹¹³ That is the reason why there is very little overlap in the subject matter of their discussions.

We can imagine the social scientist assiduously following the career of a social movement such as environmentalism. She observes the way the movement forms—the triggering events such as the biological destruction of a river, the first efforts to organize public protests, the emergence of leaders, the tentative efforts at building organizations. She then tracks the way the movement develops, the way it mobilizes resources to create permanent, politically effective institutions, or the way it redefines the identity of its members as environmentalists and secures their continuing loyalty. Having done so, she can document the actions that the movement undertakes, such as continued protest, public education, recruitment, and, most significantly for present purposes, litigation and legislative or administrative lobbying. With respect to these last activities, the social scientist traces the way they are selected as strategies by the movement's organizations, the particular issues that they address, the content of these issues, and the way the organization manages them. In effect, she fol-

ples to analyze the political process, is a useful tool of statutory analysis because of its insight into the evolution of statutes). This leaves the first factor; while Handler does cite to social movements literature, the thrust of his discussion involves the free-rider problem, as developed by Olson. See HANDLER, *supra* note 18, at 5-14 (noting that Olson's theory of the free rider is the starting point for all social reform groups). While this indicates that he shares a common source of inspiration with social movement scholars, it does not represent an incorporation of their work, and, generally speaking, no such incorporation is made. Handler does not explore the ways that movements overcome the free-rider problem; rather, he takes the existence of that problem as an impediment to the success of the law reform effort.

¹¹³ In addition to Handler, see MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-50* (1987); and Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000). Seidenfeld's article discusses the effect of "public interest groups" on the collaborative governance strategies that have evolved in administrative law. While he does cite some social movement literature, see, e.g., Walker, *supra* note 62 (addressing the mobilization of political interests), most of his sources are discussions of interest groups, and he tends to assimilate social movements to an interest group model, see *infra* note 162 (citing sources that discuss an interest group model). Tushnet's book differs from most legal scholarship in that it discusses litigation as the coordinated strategy of an organization, not as a series of doctrinally connected cases. But he deals with the NAACP as an existing organization, rather than the product of a social movement, and his main concern with the NAACP involves its use of litigation and its relationship with the Garland Fund. TUSHNET, *supra*, at 1-20. While Tushnet is aware of the social movement literature, see *id.* at 167 n.6 (listing various studies on resource mobilization theory), he does not see it as relevant to his subject of inquiry.

lows the movement's litigators and lobbyists to the courthouse door, to the entrance to the legislative drafting room, or to the glass and metal door of the administrative agency. And at that point she loses sight of them.

On the other side of the door to the court, the legislature, or the agency is the legal scholar. She observes the movement's litigators and lobbyists as they enter, listens to their arguments, and notes their effectiveness in winning their case or influencing the public policy-maker. She attends to the precise claims that they advance in court, and also attends, albeit less assiduously, to the language of their statutory proposals. While she knows where these well-informed, well-funded representatives have come from—what organizations have provided them with information and funding—she tends not to examine the nature of these organizations, or the organic connection between them and their representatives. For some scholars, the lawyers and lobbyists are simply representatives of interest groups, like the representatives of the chemical or timber industry who oppose them.¹¹⁴ For others, they are public-spirited attorneys, animated by a commitment to justice, and funded by some like-minded organization.¹¹⁵ But the processes that have generated these organizations, the

¹¹⁴ See, e.g., BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 24-25 (1981) (describing the role of lawyers representing environmental interest groups in environmental litigation); Macey, *supra* note 51, at 1-3 (arguing that the passage of legislation can be motivated entirely by a desire to protect an interest group and that the judiciary simply executes the legislature's will as long as a statute is constitutional); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 144-65 (1996) (asserting that group norms play a greater role in shaping rules of conduct than do laws or the lawyers who represent interest groups in legal disputes); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 49 (1985) ("It is clear that constituent pressures play a significant role in many legislative decisions and that the federalist ideal of national responsibility to a national constituency does not exist in practice.").

¹¹⁵ See, e.g., GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 13 (1992) (describing a lawyer for Advocates for Justice as "thoroughly dedicated to winning legal rights for the poor, people of color, and other oppressed groups"); BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 81-106 (1978) (testing the hypothesis that public interest lawyers have more of a desire for work in which they can represent the interests of the poor than for high monetary income); Oliver Houck, *With Charity for All*, 93 YALE L.J. 1415, 1441 (1984) (noting that public interest organizations and their lawyers "did not simply seek compensation for their clients; increasingly they sought to change the law"); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 210 (1976) ("[T]he existence—as well as the success—of [public interest] organizations undoubtedly influenced the budding public interest

social movements that lie behind them, are part of the great outdoors of social science that is deemed to lie beyond the bounds of legal scholarship.

Social scientists and legal scholars are, then, studying the very same movements. While there are probably social movements that ignore the political sphere—one example that comes to mind is Trekkies—the great majority, and certainly the great majority that social scientists have studied, are deeply committed to law reform. The law reform-oriented groups, of course, are precisely the ones that legal scholars observe in their discussions of litigation, legislation, and administrative action. But the two groups of scholars stand on either side of the courthouse, legislative, or agency door; while they see the same movement, they do not see each other. Their isolation is preserved because neither group attempts to follow their subjects through that door. Social scientists do not involve themselves in the technical, seemingly arcane details of legal doctrine, legislative drafting, or administrative rulemaking. And legal scholars do not venture into the chaotic, empirical world of mobilization, recruitment, political strategy, and organizational behavior.

B. *The Causes of the Divergence*

1. Legal Scholarship in General

What is the cause of this disjunction between the social science study of social movements and the legal study of the judicial decisions, legislation, and administrative decisions that these movements influence? With respect to social science, the primary cause appears to be a failure, or refusal, to attach independent importance to legal doctrine, statutory language, and the details of administrative regulations. The general view seems to be that the content of decisions, statutes, or regulations is purely epiphenomenal; it is the product of the judge's or the policymaker's attitudes, and nothing more.¹¹⁶ These attitudes

law movement as its founders struggled to create a viable form for achieving law reform through litigation.”).

¹¹⁶ This is clearly true of general studies of the legislative and executive process. See, e.g., RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1-14 (1973) (contending that the policies of congressional committees are the result of committee members furthering their personal political goals); JOHN KINGDON, CONGRESSMEN'S VOTING DECISIONS 5 (3d ed. 1989) (reporting the results of an empirical study examining the factors influencing congressional representatives' voting decisions, including their sources of information, vote cues, constituents, interest groups, and administration); ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 3-31 (1983) (describing how rela-

themselves have complex causes, of course. They can result from personal predilection, ideology, rational computation of personal advantage, or the desire to be respected by one's colleagues. But once these causes have been canvassed, the explanation is generally regarded as complete. Neither legal reasoning, judicial precedent, the rules of legislative drafting, or the strategies for designing effective statutes and regulations are regarded as relevant considerations.

This view of legal doctrine and statutory drafting might seem natural for social scientists like Mancur Olson, who restrict human motivation to the maximization of material self-interest.¹¹⁷ From this perspective, doctrine can be little more than a facade for underlying economic interests. As discussed above, however, most social scientists, including those who have developed the social movements literature, reject this view. For them, the ideological beliefs of individuals and the content of the ideas expressed by social movements are cru-

tions between the President and Congress control congressional decision making); WILLIAM K. MUIR, JR., *LEGISLATURE* 201 (1982) (commenting that "the risks of legislative reform had to be undertaken by leaders as an act of selflessness, for the honor of it"); *cf.* NELSON W. POLSBY, *CONGRESS AND THE PRESIDENCY* (4th ed. 1986) ("[I]n order to understand contemporary policymaking by Congress and the Presidency, it is necessary to know that they bargain and search for coalitions."). It is equally true of works that recount the history of specific statutes. *See* STEPHEN KEMP BAILEY, *CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946*, at 235-40 (1950) (hypothesizing that congressional representatives' reactions to national policies are based at least in part on their personal histories and pressures from their home constituencies); SHERI I. DAVID, *WITH DIGNITY: THE SEARCH FOR MEDICARE AND MEDICAID* 17-47 (1985) (describing the struggles both within and between the House and Senate during the debate over the passage of Medicare and Medicaid); JOHN A. FERRELL, *PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION 1947-1968*, at 129-94 (1974) (examining how congressional policymaking is influenced by institutions such as the committee system, the seniority system, and the process of authorization and appropriations); ERIC REDMAN, *THE DANCE OF LEGISLATION* 98-162 (1973) (describing the political debates over the passage of the National Health Services Corporations Act). It is also true for social scientists who study courts. *See, e.g.*, SHELDON GOLDMAN & THOMAS P. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 190 (3d ed. 1985) (noting that a judge may act in a way "which manifest[s] his perceptions of what he ought to and can do (as well as the converse) as a judge"); DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 137-45 (1976) (describing values that motivate the actions of the Justices); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963*, at 22-43 (1965) (asserting an attitudinal theory of judicial decision making); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993) ("[T]he Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.").

¹¹⁷ *See* OLSON, *supra* note 21, at 60-65 (describing how even social incentives are motivating as individual, non-collective goods).

cial to an understanding of their subject matter.¹¹⁸ Most contemporary social scientists regard symbol systems, cultural values, and discursive practices as independent and important forces that shape social behavior.¹¹⁹ But when they confront legal doctrine, statutory language, and the detailed provisions of administrative regulations, they seem to abandon this approach and to embrace the reductionist stance that they reject in other areas. One possible reason why they do so is that legal doctrine and statutory language, unlike other discursive or symbolic practices, self-consciously proclaim their own importance, while traditional political authorities support these assertions with their own self-conscious declarations. For a social scientist to assert their importance, therefore, hardly seems like much of a discovery. Scholars want, above all, to say something new. Their devaluation of legal doctrine may simply represent the familiar pattern in which the interesting defeats the obvious.

Of greater relevance for purposes of this discussion is the reason why legal scholars have paid so little attention to the origins of the litigation and lobbying efforts that they have studied, and that have exercised such profound effects on the law. The most general answer is that legal scholarship is predominantly prescriptive.¹²⁰ As I have ar-

¹¹⁸ See *supra* text accompanying notes 52-54 (discussing how, under critical theory, belief systems are the mechanisms of social control).

¹¹⁹ See, e.g., COHEN & ARATO, *supra* note 2, at 2-3 (arguing that the current "discourse of civil society," which focuses on non-class-based forms of collective action, drives change in contemporary political culture); RANDALL COLLINS, *CONFLICT SOCIOLOGY* 89 (1975) (describing social behavior in terms of the conflict approach, which provides that people act to their greatest advantage in light of the resources available to them); WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 211-47 (3d ed. 1993) (arguing that the language of politics is an institutionalized structure of meanings that guides political behavior and thinking in society); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973) (advancing an interpretive theory of culture in assessing the impact of culture on human behavior); ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY* 9-48 (1979) (offering a critical analysis of structuralism and the theory of the subject); VICTOR TURNER, *DRAMAS, FIELDS AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY* 23-59 (1974) (examining how metaphors and paradigms conceived of by the social actor influences the actor's behavior).

¹²⁰ See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981) (discussing the recommendations of legal academia on how to conduct judicial review); Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 *U. PA. L. REV.* 933 (1991) (stating that the predominant mode of legal scholarship is normative in orientation); George Fletcher, *Two Modes of Legal Thought*, 90 *YALE L.J.* 970 (1981) (explaining the conflicting modes of thought of the legal scholarship, advocacy and neutrality); Pierre Schlag, *Normative and Nowhere to Go*, 43 *STAN. L. REV.* 167 (1990) (illustrating how the law is a product of normative legal thought); Pierre Schlag, *Norma-*

gued elsewhere, its defining theme is the effort to frame recommendations to public decision makers about the proper way for them to carry out their role.¹²¹ From this perspective, the essentially descriptive enterprise of social science is of secondary interest. Judges are supposed to decide contested cases on the basis of legal reasoning from authoritative sources, and can be criticized, or, less commonly, congratulated, on the basis of their ability to carry out this task correctly. Legislators and administrators are supposed to frame public policy on the basis of their judgment about the best way to achieve social welfare or some similar, public-oriented goal, and can be criticized or congratulated for their choice of goal or strategy. Neither of these scholarly enterprises depends on a descriptive account of the interests that attempt to influence these decision-making processes.

This explanation for legal scholars' lack of interest in social movements does not seem complete, however. Surely, prescription cannot be undertaken in a vacuum; one would imagine that scholars could only benefit from knowing something about the social movements that were generating many of the cases that judges adjudicate and much of the policymaking in which legislators and administrators engage. By drawing from the social movement literature, scholars might be able to augment their prescriptive efforts; they might be able to provide these public decision makers with a deeper understanding of the forces that act on them. Public policy analysts also define their field by taking a prescriptive stance that is similar to that of legal scholars, but they have been much more open to the descriptive efforts of social scientists.

One possible reason why legal scholars have remained insulated from social science scholarship such as the social movement literature is that their prescriptive stance is overlain by a closely related, but logically independent perspective. They direct a disproportionate amount of their prescriptions to judges,¹²² and adapt their methodol-

tivity and the Politics of Form, 139 U. PA. L. REV. 801, 808 (1991) [hereinafter Schlag, *Normativity*] ("The orientation of American academic legal thought is pervasively and overwhelmingly normative."); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981) (discussing the normative nature of legal scholarship).

¹²¹ See Edward Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 522 (arguing that legal scholarship provides recommendations and prescriptions to legal decision makers); Edward Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1848 (1988) [hereinafter Rubin, *Practice and Discourse*] (asserting that a "prescriptive voice distinguishes legal scholarship from most other academic fields").

¹²² See Charles Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 1991 DUKE L.J. 191 (analyzing the relationship between legal scholarship and the judiciary); Sanford Levinson, *The Audi-*

ogy to that of judges in what I have called a “unity of discourse.”¹²³ In other words, legal scholarship may be described as suffering from jurocentrism.¹²⁴ The result is a mind set in which an analysis of social movements is regarded not only as irrelevant, but as vaguely improper. Litigants present themselves to a court on the basis of their relevant factual assertions and attendant legal arguments; their identity and social origins are supposed to be irrelevant. The court, receiving these decontextualized litigants, evaluates their evidence and arguments and then proceeds to decide the case on the merits. Whether this is really true of courts is, of course, an open question;¹²⁵ it is, nevertheless, clearly a well-established aspirational norm in our society.

When legal scholars base their methodology on judicial discourse, they tend to adopt and internalize this norm. They will regard the social origin of the conflicting positions on an issue—all those actions that occur on the far side of the courthouse door—as irrelevant to their own assessment. What will matter to them is the legal validity of the arguments that these conflicting positions reflect, the extent to which they can be justified by legal reasoning on the basis of authori-

ence for *Constitutional Meta-Theory (Or Why, and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389 (1992) (discussing the difference between the practices of legal academics and judges); Rubin, *Practice and Discourse*, *supra* note 121, at 1847 (stating that the purpose of standard legal scholarship is to influence legal decision makers); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991) [hereinafter Schlag, *Problem of the Subject*] (discussing rules of interpretation promulgated by legal scholars, whose purpose is to constrain the judiciary); Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419, 421 (1992) (“[T]he prototypical Langdellian practice of writing for judges is increasingly beset with a kind of demoralization—a sense of futility and aimlessness.”).

¹²³ Rubin, *Practice and Discourse*, *supra* note 121, at 1859-65.

¹²⁴ The most notorious example of jurocentric scholars is Ronald Dworkin, who consistently expands rules for judicial decision making into general theories of law. See RONALD DWORIN, *LAW’S EMPIRE* 2 (1986) (stating that “the law often becomes what judges say it is,” and thus has broad and far-reaching ramifications); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977) (arguing that the process of judicial decision making should be aimed at discovering our basic rights). Richard Cappalli describes this approach as the “legal method.” Richard Cappalli, *The Disappearance of the Legal Method*, 70 TEMP. L. REV. 393, 395-96 (1997). Cappalli maintains that it is in decline in major law schools, *id.* at 395; his argument here is that its prior dominance continues to affect the approach of legal scholars, even when they no longer accept it.

¹²⁵ For arguments that it is not an open question, at least not all the time, see FEELEY & RUBIN, *supra* note 112, at 297-335; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1 (1985); Fiss, *supra* note 112; and Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975).

tative sources. Of course, legal scholars have long recognized that courts do not necessarily decide cases solely on the basis of legal reasoning, but that they also engage in policy analysis. Courts try to decide what is best for society, and then dress up their conclusion in the raiments of legal reasoning, or, less hysterically, integrate their policy judgments into the constraints imposed by legal reasoning.¹²⁶ Even more to the point, legal scholars have recognized that their own prescriptions for best deciding a case should be informed by policy considerations; that is, they have recognized that they should adopt the more policy-oriented style of judicial discourse.¹²⁷ But even this awareness has not induced them to go through the courthouse door and explore the social origins of the conflicting views. Rather, the jurocentrism of legal scholars leads them to assimilate policy-based assessments of litigants' positions to the judicial decision-making model. The litigants who come through the door present alternative policies to the decision maker, as well as alternative doctrinal arguments. These proposed policies are, however, assessed by the legal scholars in the same way that legal arguments are assessed—on their merits, and without regard to their origin.

Having employed this judicialized discourse for the policy argu-

¹²⁶ See PHILIP BOBBIT, *CONSTITUTIONAL INTERPRETATION* (1991) (analyzing the factors Justices consider when interpreting the Constitution); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 10 (1994) (asserting that "statutory interpreters in the United States routinely consider originalist factors, including statutory precedents, postenactment legal and social developments, and current values and social needs"); FEELEY & RUBIN, *supra* note 112, at 2 (stating that judges "are willing to acknowledge that they use social policy to inform interpretation, but usually insist that their interpretation, whatever its sources, constitutes the most valid reading of the text"); ROBERT POST, *CONSTITUTIONAL DOMAINS* 15-18 (1995) (discussing the nature of constitutional adjudication); CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 111-59 (1990) (discussing various approaches to statutory interpretation, of which public policy considerations is one); Chayes, *supra* note 125, at 1309 (asking whether "the disinterestedness of the judge [can] be sustained, for example, when he is more visibly part of the political process"); Fiss, *supra* note 112, at 9 (arguing that the proper function of a judge is not to become involved in interest group politics); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 706 (1975) (stating that a broad view of judicial review accepts "the courts' additional role as the expounder of basic national ideals of individual liberty and fair treatment").

¹²⁷ One could cite, as examples, a large proportion of modern legal scholarship including all of law and economics. The ubiquity of this stance is perhaps most clearly indicated by critiques of it. See, e.g., Cappalli, *supra* note 124, at 444 ("Are we all merely politicians making false claims to reason and craft as tools to subjugate the masses?"); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992) (asserting that law schools emphasize abstract theory over practical scholarship).

ments that are presented in litigation, or that are relevant to litigation, it is natural enough for legal scholars to adopt the same judicialized discourse when dealing with explicit public policymaking, that is, the drafting of statutes and regulations. Here, too, their general stance is that scholars should evaluate the arguments that lobbyists present to legislators or administrators on their own merits, as policy proposals, rather than treating some of them as the product of social movements. The policymaker, like the judge, ought to be a neutral decision maker according to this point of view. He should attend to the arguments of lobbyists in order to inform himself about the alternative solutions to the problem at hand, but he should then use his own judgment to select the best solution, without taking further consideration of its origin.

Whether policymakers actually behave in this manner is not an open question; everyone agrees that they do not. But the idea of evaluating policy alternatives on their merits, without attending to their social origin, is a well-established aspirational norm in our society, almost as well-established as the equivalent norm for judicial decision making. Certainly, it is a norm for scholars who are framing recommendations to policymakers. The idea of evaluating proposals on their merits is regarded as virtually equivalent to the idea of rational decision making, which is the primary basis on which a scholar can address a government official. Public policy scholars frequently adopt this same norm, although not as frequently as legal scholars.¹²⁸ Thus, there is much to be said for the legal scholar's approach to policy arguments, despite its jurocentric origins. The inevitable result of this approach, however, is the legal scholar's lack of interest in the social origins of lobbyists' positions, and in the social movements that represent an important part of these origins.

¹²⁸ See, e.g., STUART NAGEL, *POLICY EVALUATION: MAKING OPTIMAL DECISIONS* (1982) (discussing the ways in which policy is formulated and evaluated); CARL PATTON & DAVID SAWICKI, *BASIC METHODS OF POLICY ANALYSIS AND PLANNING* 24 (2d ed. 1993) (arguing that "prescriptive policy analysis involves displaying the results of analysis and making a recommendation"); EDITH STOKEY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* 3 (1978) ("The approach to policy analysis throughout this *Primer* is that of the rational decision maker who lays out goals and uses logical processes to explore the best way to reach those goals."); AARON WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS* 12-13 (1979) (asserting that "[n]o one can do analysis without becoming aware that moral considerations are integral to the enterprise").

2. Public Choice and Critical Studies

The jurocentric approach to legal scholarship is best exemplified by the legal process school. Public choice and critical studies, or outsider scholarship, as the primary antagonists of legal process, might have been expected to avoid this approach and to have placed themselves in a position to assimilate some of the lessons of the social movements scholarship. This would seem particularly true because these two bodies of legal scholarship, as described above, were precisely the ones that drew upon the same methodologies that inspired the social movements field. But neither public choice nor critical legal studies was able to escape from the jurocentric style of legal process; as so often is the case, they tended to shape themselves in the image of their enemies.

In opposition to legal process, public choice asserted that legislation and regulation were controlled by interest groups, and that legal changes did not reflect efforts to benefit the public, but only efforts to maximize the material self-interest of the decision makers who cater to well-organized special interests.¹²⁹ But this assertion was not motivated by any particular curiosity about the origin or character of special interest groups. Rather, what motivated public choice was, at least in part, the desire to discredit legal process, to reveal Wechsler, Bickel, Fuller, Hart and Sacks as a group of deluded Pollyannas.¹³⁰ Beyond this lay the grander, but no less combative aspiration of discrediting the regulatory process and perhaps the entire administrative state. For this purpose, it was enough that interest groups existed; there was little more that needed to be said about them. Consequently, public choice scholars did not concern themselves with the mobilization, organization, and action strategies of the special interest groups to which they attributed such profound effects. They simply assumed that there would be an effective lobby representing any special interest. They further assumed that any effect that can be theoretically attributed to special interest influence is in fact the product of such influence. Thus, they were not investigating the actual behavior and effect of special interests, or any other social movement, but were hypothesizing those behaviors and effects from their study of the legislation itself. For public choice scholars, therefore, the role of special interests was not a subject of empirical observation, but an interpretive

¹²⁹ See *supra* note 51 (citing sources).

¹³⁰ On the relationship between law and economics and the legal process school, see Rubin, *supra* note 39, at 1398-400.

device, an influence whose existence they assumed from their examination of legislative language and design.

The result of this approach was that public choice scholars remained on the inside—the doctrinal side—of the courthouse, legislature, and agency doors. It was sufficient for their purposes that special interest lobbyists came through the door and presented their arguments to the decision makers within. In fact, public choice scholars did not even watch the lobbyists come through the door; they conducted very few empirical studies about the impact of special interest groups. Instead, they simply assumed, by observing the nature of the decisions that were reached, that the lobbyists had had some impact. The primary thrust of their critique had nothing to do with the nature of the lobbyists, but with the reaction of the decision makers. While they were willing to assume that courts could remain neutral in the face of partisan arguments, they believed, in contrast to legal process scholars, that legislators and administrators could not do so. In assuming that any economic interest would generate an effective lobbying organization, public choice scholars were on reasonably safe empirical ground, although they themselves did not undertake the empirical work, or even attend to the empirical work of others in much detail. But this assumption, and the jurocentric perspective that gave rise to it, led them astray in another area. As stated above, public choice scholars, having accepted Olson's free-rider hypothesis in its entirety, were inclined to under-emphasize the ability of diffuse, ideologically motivated groups to mobilize. When the evidence became irresistible, they made the assumption that these groups were equivalent to special economic interests. In part, this was the result of their reluctance to concede the existence of noneconomic motivations. But a contributing factor was simply their tendency to regard all lobbyists as equivalent to one another. The environmentalists, animal rights activists, and consumer representatives who came through the legislator's or administrator's door were regarded as essentially the same as the business interests they opposed. In fact, if one were located exclusively on the inside of that door, they did not look very different; they were professional lobbyists, arguing their position with intelligence and single-mindedness. Only if one were to peer through the door, if one paid attention to the work of the social movement scholars, would one perceive that these lobbyists came from organizations with very different origins and that these origins implied very different social consequences.

Critical legal studies and its successors, which are sometimes

called outsider scholarship, and can be referred to here as critical studies, also became enmeshed in the approach they were attacking. In Pierre Schlag's terms, they have been colonized and domesticated by the Langdellian paradigm they were trying not only to escape, but to condemn.¹³¹ In fact, their methodological starting point was essentially the same as that of the public choice scholars. Rather than trying to determine how elites used the law as an instrument for social control, or drawing upon empirical sources that did so, critical legal studies scholars assumed, from an examination of the law itself, that this process was occurring. In other words, their approach was equally interpretive; they surmised the existence of the elite's control of law by studying law, not by studying elites. At this point, the critical legal studies approach diverged from public choice, but not in a direction that led them to the social movements literature. Public choice scholars began from the assumption that public decision makers were neutral, but self-interested; those decision makers would thus be influenced by the most powerful parties to come through the door. Critical legal studies assumed that public decision makers were part of the controlling elite, and were thus irretrievably committed to maintaining its control.¹³² Sometimes these decision makers could conceal this bias, from themselves as well as others, by relying on the neutrality of law; since law was itself biased in favor of the elite, however, this produced the same result. For critical legal studies scholars, then, there was no one coming through the door at all. The baneful effects that they perceived were programmed into the decision-making process itself.

On the basis of this analysis, critical legal studies scholars might have adopted the prescriptive stance of opening the door and inviting the public into the judicial, legislative, or administrative chambers. They might have explored methods by which social movements could undermine the elitist bias of the law through litigation or political action. A few attempts of this nature were made, most notably Roberto Unger's discussion of grass roots organizations in *False Necessity*.¹³³ For the most part, however, the prescriptive stance they adopted was to

¹³¹ See generally Pierre Schlag, "Le Hors de Texte, C'est Moi." *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) (analyzing the politics of deconstruction in legal theory); Schlag, *Problem of the Subject*, *supra* note 122 (analyzing Langdellian legal theory).

¹³² See *supra* note 37 (citing sources).

¹³³ ROBERTO UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987).

keep the door closed, and to appear before the decision maker themselves. The argument that they used was not drawn from social science, from some analysis of oppression and inequality within society, but from deconstructive theory.¹³⁴ They tried to prove to judicial decision makers themselves, and to those who shared the discourse of judicial decision makers, that legal doctrine was not coherent, thus revealing its true nature as an instrumentality of social control. In other words, they were framing arguments to courts, just as a litigant would. They were not assuming that the judges were neutral, but were trying to shame them into neutrality by demonstrating the incoherence of their reasoning.

The jurocentric quality of this approach is apparent; it lies not only in the stance of the scholar as a hypothetical litigant before a decision maker, but also in the use of deconstruction as an argument. This argument can only apply to judicial reasoning; legislators and administrators never claim that their decisions possess the kind of internal coherence that would be vulnerable to deconstruction. Instead, these legislative and administrative decisions are supposed to represent good social policy because they follow some pragmatic decision-making protocol, like cost-benefit analysis, or because they represent the will of the people as refracted through their representatives. These claims are quite vulnerable to a critical attack, and that attack has been vigorously pursued by many social scientists. But it is not vulnerable to deconstruction. The choice of deconstruction as a methodology thus restricted the critique to the judiciary. This contributed to the insulation of critical legal studies from social movement literature; when real forces of reform appear in critical legal studies scholarship, as opposed to the hypothesized forces of the scholars themselves, they appear only as litigants, and thus are conveniently viewed from the inside of the courthouse door.

Feminism and critical race theory might have been expected to escape this abstract and jurocentric approach, since they overlapped with real social movements in American politics. In fact, the social science literature on women's movements and civil rights or racial justice movements is enormous, but the contact between feminist and critical race legal scholarship and this literature has not been extensive. Despite its greater political realism, feminist and critical race scholars began by adopting the same stance as critical legal studies. They directed their arguments to judges, and tried to demonstrate

¹³⁴ See *supra* note 40 (citing sources).

that the judges' reasoning was defective and fraught with, or at least predicated on, underlying biases. While they made some use of deconstruction, many shifted to the less global critique of demonstrating that the judges' decisions violated their own principles, that their conclusions were in conflict with the legal system's underlying commitment to equality and human rights. This approach gave their efforts a directionality that critical legal studies lacked, and also promised greater chances of success, but it located feminist and critical race theory scholarship even more securely in judicial discourse, and forestalled the development of their connections to social movements scholarship.

Feminists and critical race theorists, however, did not restrict themselves to the methodology of critical legal studies; very quickly, they developed a distinctive methodology of their own—the use of personal narrative. This was, in effect, a form of testimony; scholars were using their own experiences as arguments to change judicial attitudes, or to persuade other scholars that such changes were desirable. It extended beyond the previous limits of legal scholarship, but not enough to alter that scholarship's quasi-litigative character. It was, in effect, arguing for the admission of another form of evidence into consideration. The use of narrative moved feminist and critical race legal scholarship even further from the naturally related social movements literature. Rather than discussing the mobilization of women and minorities, the growth of organizational structures to represent these groups, and their efforts to reform the law, legal scholars turned to their personal and largely individual experiences.

One methodological link between narrative scholarship and Continental social movement scholarship is that both drew on the Continental idea that the scholar can only understand her subject matter by being involved in it. But again, the jurocentric character of the legal approach maintained a separation between the two bodies of work. While Melucci and Touraine were engaged in extensive interaction with actual social movements, legal scholars were recounting their personal experience of pregnancy, or their mistreatment on the basis of race. This is not meant to criticize narrative legal scholarship, which produced some of the most eloquent and original writing in modern legal literature. The point is simply that narration of this kind is not likely to link this scholarship with the social science scholarship on social movements.

IV. THE POSSIBILITIES FOR CONNECTION WITH SOCIAL MOVEMENT LITERATURE

A. *Descriptive and Prescriptive Legal Scholarship*

Given the overlap in both subject matter and methodology between social movements literature and legal scholarship, the failure by legal scholars to make contact with this literature represents an opportunity that has been overlooked. There is much to learn from social movements literature. Making the effort to do so will not only enrich the study of law, but may also help it to escape its current methodological limitations.

Despite the essentially prescriptive character of legal scholarship, one benefit of making contact with social movement scholarship involves the descriptive enterprise. As a number of observers have pointed out, if one is going to frame prescriptions to legal decision makers, it is a good idea to know something about the subject matter of those prescriptions.¹³⁵ Unless the subject matter is entirely abstract—which law is certainly not—a prescriptive methodology depends upon persuasive descriptions of the relevant factual situations. Beginning with the legal realist movement, legal scholarship has undergone a gradual but continuous process of freeing itself from its formalist origins and of incorporating empirical data about the complex world in which its recommendations are necessarily embedded. It still reveals, however, the unfortunate tendencies of speaking about organizations without adducing data about organizational behavior, and of discussing social policy without offering a theory of society. Its failure to take account of social movements scholarship is one of several of its empirical lacunae, and one whose elimination would cast

¹³⁵ See, e.g., Lawrence Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 776 (1986) (stating that policymaking is better when based on an understanding of the legal system); Frank Munger & Carroll Seron, *Critical Legal Studies Versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL'Y, 257, 276-79 (1984) (calling for an understanding of the relational and contingent nature of group activity to give meaning to legal research); Schlag, *Normativity*, *supra* note 120, at 832-35 (theorizing that to understand that legal thought is a practice and a process is to understand that objectification is sedimented not only in normative legal thought but in humanity); Peter Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 334 (1989) (calling for academics to conduct empirical legal research in order to improve legal models and theories); David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 581 (1984) (asserting that "factual inquiry in legal studies is necessary because law cannot be defined other than by the difference it makes in society"); Tushnet, *supra* note 120, at 1209 (stating that policy prescription is based on common sense).

new light on many legal issues involving both litigation and administration.

A second and more readily recognized advantage of contact with social movement literature is that this literature could assist legal scholars in their prescriptive enterprise. Because of its unity of discourse with the judiciary, legal scholars have generally treated the existence of social movements as irrelevant to their prescriptions. It may be the case, however, that the existence of these movements would provide a basis for changing the rules that govern litigation or administration. Much of law, after all, confers normative significance on empirical distinctions. It has long recognized the difference between negligent and willful action, between modal and exceptional behavior, and between the competent and the incompetent. Contemporary law makes additional distinctions that were not previously recognized, such as the difference between merchants and consumers, or between compliant and disobedient corporations. It may be that social movements could be recognized as a legally significant category, and that legal rules could be explicitly designed with the role of social movements in mind.

With respect to description, much of our nation's legal history can be described as the product of social movements, and this perspective might provide new insights into otherwise familiar events. The American Revolution, like many revolutions, was a classic social movement, and the Boston Tea Party stands as a paradigmatic image of a mobilized, participatory populace.¹³⁶ As early as 1926, J. Franklin Jameson wrote *The American Revolution Considered as a Social Movement*,¹³⁷ in which he argued that the Revolution was a genuine social uprising, and had produced important effects on American society.¹³⁸ Some contemporary scholars, such as Jack Greene, see the Revolution in terms related to the resource mobilization literature, while others,

¹³⁶ See generally BENJAMIN WOODS LABAREE, *THE BOSTON TEA PARTY* (1964) (explaining the significance of the event in the arrival of the American Revolution). When the Dartmouth, carrying East India Company tea subject to the Townshend duty, docked in Boston, thousands of Bostonians gathered in a body, on a daily basis, to decide how to respond. Samuel Adams acted as moderator of the group. Whether this resulted from an indigenous effort or the leadership of policy entrepreneurs, it seems to fit the pattern of demonstrations generated by contemporary social movements.

¹³⁷ J. FRANKLIN JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* (1926).

¹³⁸ See *id.* (demonstrating how the Revolution altered the status of persons, their relationship with the land, industry and commerce, and popular thought and feeling in American society).

such as Bernard Bailyn, emphasize identity formation.¹³⁹ These themes continue in the literature about the Articles of Confederation period and the drafting of the Constitution.¹⁴⁰ In contrast, legal scholars have tended to regard the Constitution as a purely political act, a product of the Framers' deliberations during one summer in Philadelphia, and one subsequent set of pamphlets written by Madison and Hamilton.¹⁴¹

It might be illuminating for legal scholars to envision the Constitution as part of a larger social process, the product of a mobilized citizenry whose members were either attempting to achieve particular goals or to define their own identity. Those who adopt an originalist approach to constitutional interpretation might benefit from exploring the goal-seeking and identity-formation efforts of the people who supported the project of drafting a new constitution and then voted in favor of the result. Behind the language of the Constitution, and behind the compromises of the delegates to the Constitutional Convention, lies a vague but profound set of goals that animated the American people as individuals and as a group. This complex mixture included rational objectives such as a desire for liberty, for order, for economic growth, and for preservation of the status quo; it also included the desire, among the widely dispersed inhabitants of the separate states, to become Americans, members of a unified and powerful nation. It is these goals, embodied in the social movements of the time, that might fairly be described as the Constitution's true intent, not because the intent of the ratifiers counts more than the intent of the drafters, but because the drafters themselves can be regarded as policy entrepreneurs of the social movements that stood behind them, and because the drafters' understanding of their own language would have been determined by these movements.

In the era following the adoption of the Constitution, the growth of political parties and the advent of Jacksonian democracy could be understood in social movement terms,¹⁴² and such an understanding

¹³⁹ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (focusing on the content of the extensive pamphlet literature of the Revolution); JACK P. GREENE, *THE QUEST FOR POWER* (1963) (presenting the emergence of the lower houses of assembly in the southern royal colonies as a prelude to the Revolution).

¹⁴⁰ See, e.g., JACKSON TURNER MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* (1973) (adopting the resource mobilization view); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969) (emphasizing identity formation).

¹⁴¹ For a notable exception, see BRUCE ACKERMAN, *WE THE PEOPLE* (1991).

¹⁴² See GEORGE DANGERFIELD, *THE ERA OF GOOD FEELINGS* (1952) (describing the

might provide insight into some of the seminal Supreme Court decisions of the era.¹⁴³ Of much greater significance, from the constitutional perspective, was abolitionism, a classic social movement.¹⁴⁴ It would be difficult to argue that the abolitionists were motivated by economic interest or any other practical inducement; what impelled them was moral outrage and religious conviction. Their efforts, which can be usefully interpreted in terms of both resource mobilization and identity formation, led first to the gradual elimination of slavery in the North by statute,¹⁴⁵ and then, following the Civil War, to the Civil War Amendments and the abortive effort to reform the social structure of the South.¹⁴⁶ The darker side of social movements is revealed in the

personalities and events that enabled the American political transition from Jeffersonian democracy to Jacksonian democracy); DALL W. FORSYTHE, *TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION 1781-1833* (1977) (exploring the social and political developments underlying the initial period of expansion of the U.S. revenue system); RICHARD P. MCCORMICK, *THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA* (2d ed. 1973) (examining the social and historical circumstances leading to the emergence of the two-party system in America); ROBERT V. REMINI, *ANDREW JACKSON* (Johns Hopkins Univ. Press 1998) (tracing Jackson's life in the context of important national developments); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945) (providing a sweeping study of the first part of the nineteenth century); GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA, 1828-1848* (1959) (presenting the history of the pre-Civil War period).

¹⁴³ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (invalidating a New York statute granting exclusive navigational rights to two individuals on the grounds that it violates the Commerce Clause); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 313 (1819) (striking down a Maryland law taxing the Bank of the United States as unconstitutionally interfering with Congress's power to regulate interstate commerce). Justice Marshall's nationalist sympathies can be regarded as a matter of his nationalist predilections, but they can also be regarded as reflections of an emerging national identity.

¹⁴⁴ See generally LAWRENCE J. FRIEDMAN, *GREGARIOUS SAINTS: SELF AND COMMUNITY IN AMERICAN ABOLITIONISM, 1830-1870* (1982) (studying the first generation of immediatist abolitionists); EDWARD MAGDOL, *THE ANTISLAVERY RANK AND FILE: A SOCIAL PROFILE OF THE ABOLITIONISTS' CONSTITUENCY* (1986) (exploring the identity of the abolitionists); *THE ANTISLAVERY VANGUARD* (Martin Duberman ed., 1965) (containing essays on the abolitionist movement); WU JIN-PING, *FREDERICK DOUGLASS AND THE BLACK LIBERATION MOVEMENT* (2000) (reevaluating Douglass's place and role in American history).

¹⁴⁵ See generally IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 228-55* (1998) (detailing the slow death of slavery in the North, in part through emancipation legislation by Northern lawmakers); LEON F. LITWACK, *NORTH OF SLAVERY* (1961) (examining the position of African Americans in the antebellum North). This was not a minor matter, either conceptually or pragmatically. Conceptually, Vermont and Pennsylvania were the first two jurisdictions in the world to abolish slavery. Pragmatically, there were some 40,000 slaves in the North at the time the Constitution went into effect.

¹⁴⁶ See generally GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* (1955) (presenting an account of the efforts and motivations of the abolitionist group); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-*

Ku Klux Klan and the Redeemer movements that frustrated these reform efforts, and reestablished a modified form of the South's antebellum social structure.¹⁴⁷ Their impact on the American legal system did not dissipate until well after the enactment of the Civil Rights Act of 1964;¹⁴⁸ perhaps it has not dissipated yet.

The next major era in American history is defined by the social movements of Populism¹⁴⁹ and Progressivism¹⁵⁰. The Supreme Court's effort to quash Progressive legislation¹⁵¹ can be understood as part of

1877 (1988) (reconsidering the social, political, and economic developments of the era following the Civil War); LEON LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1980) (presenting an oral history of the experiences of newly freed slaves in the South after the Civil War).

¹⁴⁷ See generally EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* (1992) (examining society, politics, and the economy in the New South); FONER, *supra* note 146, at 564-601 (describing the backlash against reconstructionist efforts during the period surrounding the 1876 presidential election); MICHAEL PERMAN, *THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869-1879*, at 135-277 (1984) (covering the politics of divergence during the Redemption era); GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* (1984) (examining the activities of the Ku Klux Klan, among other groups, during the postbellum period); ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971) (tracing the development of the Klan from 1866 to 1872); C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, at 1-106 (1951) (analyzing the period immediately following Reconstruction in the South).

¹⁴⁸ Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

¹⁴⁹ See generally LAWRENCE GOODWYN, *THE POPULIST MOMENT*, at vii (1978) (writing about "the largest democratic mass movement in American history"); JOHN D. HICKS, *THE POPULIST REVOLT* (1961) (examining the roles of the Farmers' Alliance and the People's Party in the Populist movement); RICHARD HOFSTADTER, *THE AGE OF REFORM 23-130* (1955) (exploring the myths, folklore, and realities underlying the Populist movement). Populism has left an imprint on the financial services industry. Apart from that, its influence is unclear; in all likelihood, its political failure meant that it would have less impact than more successful social movements such as Progressivism, abolition, and Redemption.

¹⁵⁰ Cf. GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963) (arguing that the social movement of Progressivism failed, and that the legislation of the era was produced and enacted by propertied elites). See generally SAMUEL P. HAYS, *THE RESPONSE TO INDUSTRIALISM: 1885-1914* (1957) (studying the human responses, including Progressivism, to economic and social developments in the period between the end of Reconstruction and the outbreak of World War I); HOFSTADTER, *supra* note 149, at 131-271 (analyzing Progressivism as a national, urban, and middle-class phenomenon); *THE GILDED AGE* (H. Wayne Morgan ed., rev. ed. 1970) (printing papers presented at a symposium on the post-Civil War generation); *THE PROGRESSIVE ERA* (Lewis L. Gould ed., 1974) (containing essays on the achievements of this reform period).

¹⁵¹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum-hours legislation); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating legislation that prohibited contractual promises not to unionize); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage legislation); *Ribnik v. McBride*, 277 U.S. 350

the conflict between an enormous social movement and the forces that attempted to resist it. The defeat of this resistance in the Court,¹⁵² after a long battle that lasted until well into the New Deal era, has essentially defined contemporary constitutional jurisprudence. Legal scholars have tended to treat the Court's role in protecting human rights as primary, and tried to explain why this is a more valid intervention than the substantive due process cases that attempted to protect private property against Progressive legislation.¹⁵³ From a social movement perspective, however, the main story, in constitutional terms, may be the validation of Progressive legislation; the Court's human rights decisions, with their emphasis on disadvantaged minorities, could be viewed as a subsidiary theme that follows from the central act of siding with Progressivism.

A considerably more important effect of Progressivism upon American law was the creation of regulatory agencies, the enactment of social reform legislation, and the consequent advent of an administrative state. Treating the administrative state as the product of a powerful social movement, rather than a bleak necessity that was forced upon an unwilling populace, leads to the reinterpretation of many aspects of our law, and perhaps of our concept of law in gen-

(1928) (invalidating regulation of employment agency fees); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating restrictions on entry into business).

¹⁵² See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins*); *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Lochner*, effectively); *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik*); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (overruling *Coppage*); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (overruling *New State Ice* and condemning *Lochner*).

¹⁵³ See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 70-128 (1980) (assessing the substantive scope of individual rights and appraising the Court's record in protecting those rights); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (proposing a theory of judicial review that takes into account society's substantive value choices while respecting the underlying democratic assumptions of the American political system); Fiss, *supra* note 112 (discussing adjudication as structural reform and the theory of legislative failure). This is, of course, the theme of the famous "Footnote 4" in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985) (arguing for a reorientation of *Carolene's* operative terms as "America moves toward the participatory paradigm"); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) (discussing "the opinion as footnote" and the "footnote as opinion" through a discussion of the *Carolene* context); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV. 1291 (1986) (contending that *Carolene* is not adequately protective of the rights of insular and discrete minorities and that it effectuates an "unarticulated ideal of democratic theory" that is at odds with the Constitution). But see Geoffrey Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (contending that the statute at issue was irrational, special interest legislation).

eral.¹⁵⁴ Treating the statutes that Progressivism produced in this manner supports the argument recently advanced by William Eskridge and John Ferejohn that many of these were “super-statutes” that courts have treated, and should treat, as quasi-constitutional.¹⁵⁵ Subsidiary strands within the Progressive movement might provide similar insights into our legal system. The fact that our labor laws are the product of a social movement might suggest a different approach to their interpretation and administration; similarly, the social movement origins of women’s suffrage might have relevance for contemporary feminism.

This brings us to the modern era, and to the social movements that inspired the contemporary social science literature and that have already been discussed above. If an understanding of the American Revolution and the Constitution’s creation and ratification in social movement terms can inform an originalist interpretation of the Constitution, then an understanding of all these subsequent social movements can inform an evolving interpretation. These movements not only shed light on what our Constitution, when viewed as an evolving document, means, but also what it means to have a constitution. Abolitionism, progressivism, the civil rights movement, environmentalism, and consumerism have altered people’s conception about the proper role of government, and about the content of due process and equal protection. By enlisting government as a resource for broad-ranging social and economic goals, these movements have transformed that government; by developing a new conception of citizenship and American identity, they have transformed our conception of liberty and fairness. In their interaction with constitutional provisions over the course of our history, these movements have reinterpreted the Constitution itself from a document that creates an effective but delimited government to a body of doctrine that represents our evolving conception of ourselves as a moral community.

With respect to the prescriptive aspects of legal scholarship, social movement literature can be used in a more detailed, pragmatic way to generate ideas for the field’s quotidian task—framing recommendations for the reform of existing statutory and doctrinal rules. One area where contact with the social movements scholarship might offer

¹⁵⁴ I argue to this effect in a forthcoming work, Edward L. Rubin, *Onward Past Arthur: Rethinking Politics and Law for the Administrative State* (unpublished manuscript, on file with author).

¹⁵⁵ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

such prescriptive insights is the doctrine of standing. The Supreme Court's rulings in this area are not only incoherent, but, worse still, insincere.¹⁵⁶ The elaborate recitations of personal interest required of the plaintiffs in environmental cases such as *Lujan v. Defenders of Wildlife* bespeak a feigned obliviousness to the real world, since such suits can only be maintained by the Defenders of Wildlife and similar organizations.¹⁵⁷ On the other hand, it continues to be undesirable to have one person litigate an issue that is of greater concern to another. The matter has been ably analyzed by several scholars, including William Fletcher and Cass Sunstein,¹⁵⁸ but would probably benefit from a better understanding of the social movements that spawn public in-

¹⁵⁶ For the most notorious cases, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), appearing in discussion below; *Allen v. Wright*, 468 U.S. 737, 766 (1984), holding that parents of African-American children have no standing to challenge an IRS ruling that improperly grants tax-exempt status to segregated academies designed to exclude them; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 28 (1976), holding that welfare recipients have no standing to challenge an IRS ruling that improperly grants tax-exempt status to hospitals that refuse to serve them; *Warth v. Seldin*, 422 U.S. 490, 518 (1975), holding that inner-city residents who want to move to low-cost housing in a particular suburb, residents of a neighboring suburb that absorbs a disproportionate amount of low-cost housing, builders who want to build low-cost housing in that suburb, and a non-profit organization concerned about this issue all lack standing to challenge the suburb's restrictive zoning practices that preclude the construction of low-cost housing; and *United States v. Richardson*, 418 U.S. 166, 180 (1974), holding that a taxpayer has no standing to enforce a constitutional provision that requires all federal agencies to publish their budget for scrutiny by taxpayers. There are cases going in the opposite direction, which simply demonstrates that the Supreme Court's doctrine is incoherent. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211-12 (1995) (concluding that Adarand has standing to challenge the federal government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277-78 (1978) (allowing a white medical school applicant to challenge the school's admissions program as violative of his rights under the Fourteenth Amendment's Equal Protection Clause); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 675-76 (1973) (allowing environmental groups, including Students Challenging Regulatory Agency Procedures (SCRAP) and the Environmental Defense Fund, to challenge a U.S. regulatory scheme allowing railroads to impose higher rates).

¹⁵⁷ See 504 U.S. at 555 (holding that Congress may not confer jurisdiction on citizens to bring environmental enforcement actions unless those citizens would have standing under the Court's idiosyncratic interpretation of Article III); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) (holding that citizens who would have standing under *Lujan* still do not have standing if the Court cannot redress their injury).

¹⁵⁸ See William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 243-47 (1988) (examining "the apparent lawlessness of so-called third party standing"); Cass Sunstein, *What's Standing After Lujan: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 220-36 (1992) (discussing the effectiveness of the citizen suit).

terest litigation. Information on the way that social movements use litigation as a resource, or as a means of creating a collective identity, would shed light on the nature of this litigation, and on the role of social movements in it. This might lead, in turn, to recommendations for recognizing organizations as valid plaintiffs in actions that are relevant to their concerns.¹⁵⁹

Another litigation-related issue where legal scholarship would benefit from an understanding of social movements is the certification of class actions and the payment of attorney's fees.¹⁶⁰ To begin with, it would aid our understanding of class actions to know how social movements use them as resources for legal reform, and to what extent they depend upon the various forms of attorney's fee arrangements for this instrumentality to be viable.¹⁶¹ This descriptive information

¹⁵⁹ Of the cases cited *supra* note 156, all should be reversed because at least one institutional plaintiff was a valid representative of a readily recognized social movement that was perfectly capable of representing the asserted position; in most cases, only such a representative can represent the position. The basic case that would be overruled according to this consideration is *Sierra Club v. Morton*, 405 U.S. 727 (1972). This was not an unexpected or incoherent decision; the Sierra Club was trying to change the law and obtain recognition as an institutional litigant, and the Court refused to change the law. But a sensitivity to the real world, and the role of social movements in that world, suggests that the case was wrongly decided.

¹⁶⁰ For discussions of the representational issues in class actions, see John Coffee, *Class Wars: The Dilemmas of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); John Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987); Jonathan Macey & Geoffrey Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation*, 58 U. CHI. L. REV. 1 (1991); and David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987). For discussions of attorney's fees, see Mauro Capalletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Legal Rights Effective*, 27 BUFF. L. REV. 181 (1978); Kathryn Christie, *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 347 (1984); and Harold Krent, *The Fee-Shifting Remedy: Panacea or Placebo*, 71 CHI.-KENT L. REV. 415 (1995).

¹⁶¹ Macey and Miller condemn current class action rules for their "inappropriate attempt to treat entrepreneurial litigation as if it were essentially the same as standard litigation in which the client exercises substantial influence." Macey & Miller, *supra* note 160, at 3. One such rule is the requirement that the suit be brought on behalf of a named plaintiff, *see id.* at 61-96 (discussing the regulations governing the representative plaintiffs or persons who are allowed to be named in class and derivative litigation). Macey and Miller's recommendation that actions should be brought on behalf of the class itself parallels the suggestion that organizations should be granted standing without having to assert standing on the basis of a named individual. *See Sierra Club*, 405 U.S. at 740 (rejecting a suit brought by an organizational litigant, in its own name, on standing grounds); *see also* CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* 7-10 (1987) (arguing that organizations should be granted standing). More generally, the same observations that lead Macey and Miller to suggest an auction in class actions where money damages are available also suggest that organizations that represent a social movement be allowed to represent a class in

naturally leads to normative conclusions. Some legal problems can only be addressed through private law if they are the subject of class actions, and if prevailing plaintiffs' lawyers can be paid fees by the defendant; in other cases, however, class actions and attorney's fees are vehicles for personal gain and legal abuse. Taking account of the relationship between class actions and social movements may enable us to distinguish between these situations, and to alter our rules regarding class certification and attorney's fees to achieve particular social policy objectives. For example, social movements that engaged or transformed the identity of their members are more likely to use class action litigation as a means of law reform, and might be subject to more permissive class action rules.

More generally, many statutes or regulations that are enforced by privately initiated law suits may depend on the existence of a social movement for their effectiveness. Creating a cause of action to litigate complex environmental or consumer protection issues may be an empty gesture unless there is a social movement to initiate and support such litigation. On the basis of the social movements literature, scholars might be able to frame prescriptions about the kinds of social movements that can play this role, or the kinds of private law suits that must be authorized in order to enlist the efforts of these social movements. The relevant considerations may go well beyond the typical one of whether to grant attorney's fees. For example, a cause of action that allows for incremental but dramatic legal issues may aid a social movement's recruitment and mobilization efforts, thereby providing it with far more resources than attorney's fees could possibly provide.

In the administrative area, understanding the role of social movements might be even more useful for prescriptive purposes. Legal scholarship has already incorporated an analysis of interest groups into its discussion of legislative and agency decision making. As stated above, however, it tends to treat every lobbyist who comes through the door as the representative of an economic special interest. Additional descriptive accuracy might be obtained by distinguishing between special interests and social movements, between the relatively small, self-interested groups that are generated by the economic sphere, and the larger, ideological ones that the social sphere or civil society produces. This might enable legal scholars to frame prescriptions regarding the administrative procedures that are currently employed to gen-

erate new regulations, or to obtain compliance with those already made. The principal procedure for formulating agency regulations is notice and comment rulemaking,¹⁶² which provides that the agency must solicit comments from the general public on a proposed regulation. Comments are often received from both special economic interests and from social movements; an understanding of the latter might provide some basis for recommendations that these comments be assessed in different ways. Negotiated rulemaking is even more explicit in its recognition of interest group politics.¹⁶³ Rather than leaving formulation of the proposed regulation to agency staff, it establishes a procedure whereby representatives of conflicting interest groups meet together and attempt to reach consensus on the proposal. Here again, the social movement literature may suggest ways of identifying different negotiating parties, or alternate means of structuring the negotiations.¹⁶⁴ For example, the extent to which negoti-

¹⁶² See 5 U.S.C. § 553 (1994) (providing the details of this procedure). See generally CORNELIUS KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* (2d ed. 1999) (describing the procedure and significance of agency rulemaking, and acknowledging one scholar's assertion that notice and comment rulemaking is one of the greatest inventions of modern government); Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981) (arguing that the model of policymaking employed by agencies has shifted from a decentralized, gradual, and narrowly focused approach to a more structural, static, and expansive approach, clarifying the relationship between public participation and the substantive choices agencies must make); Peter Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986) (addressing the role of presidential supervision in the informal rulemaking process as shaping agency policy as opposed to usurping agency authority).

¹⁶³ See 5 U.S.C. §§ 561-570 (1994) (establishing a framework for the conduct of negotiated rulemaking in part to facilitate communication between parties with different interests). See generally Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997) (analyzing the use of regulatory negotiation by federal agencies over a thirteen-year period and evaluating its ability to save time and avoid legal challenges to promulgated rules); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (arguing for a collaborative administrative rulemaking process as forwarding the goals of efficiency and legitimacy, which are viewed as lacking); Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (advocating for a form of negotiation among interested parties to alleviate wastes in time and expense and dissatisfaction with other forms of agency rulemaking); Jeffrey Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165 (1994) (offering negotiated rulemaking as a positive alternative to notice-and-comment rulemaking, which encourages adversarial behavior); Henry H. Perritt, Jr., *Negotiated Rulemaking in Practice*, 5 J. POL'Y ANALYSIS & MGMT. 482 (1986) (proposing negotiated rulemaking as a realistic alternative to adversarial administrative procedures).

¹⁶⁴ Negotiated rulemaking has been criticized as ineffective. See Coglianese, *supra* note 163, at 1261 ("Despite all the postulations about how negotiated rulemaking will

ated rulemaking procedures are employed, or the amount of credence that negotiated rules are given in subsequent judicial review, may depend on the presence of a social movement that can reliably reflect diffuse concerns. On this criterion, negotiated rules in the environmental area would rank high, those in the consumer area would be in the middle, and those involving welfare would rank low. The Negotiated Rulemaking Act suggests that we have overcome our previous reluctance to acknowledge the role of lobbyists in the administrative process, and instead have adopted a more realistic approach. Social movement literature suggests that we need to overcome our remaining reluctance to distinguish among lobbyists on the basis that some are part of the economic system, while others represent social movements generated within civil society. This literature may also lead to more general prescriptions for the reform of rulemaking procedures. In place of the episodic contacts that exist under current procedures, it might suggest some sort of continuing, consultative relationship with representatives of broad-based movements.

save time and eliminate litigation, the procedure so far has not proven itself superior to the informal rulemaking that agencies ordinarily use."); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987) (arguing that negotiated rulemaking subverts the principles and values of administrative rulemaking by altering an agency's objective from serving the public interest to searching for a consensus among private parties); Jim Rossi, *Participation Run Amok*, NW. U. L. REV. 173 (1997) (arguing that public participation in agency decisions can have adverse effects); Seidenfeld, *supra* note 113, at 413 (arguing that collaborative regulation is incapable of resolving current regulatory ills because "they can succeed in overcoming the adversarial propensities of at least some stakeholders only within narrow regulatory environments"). Perhaps negotiation, in the structured manner prescribed by the Negotiated Rulemaking Act, is not the best way to involve citizens in general, or social movements in particular, in the rulemaking process. The idea, however, seems too promising to abandon without further exploration of its possibilities. The point here is that analysis of this, and other techniques for rulemaking, should be carried out with an understanding of social movements. Seidenfeld is certainly alert to this issue, and analyzes negotiated rulemaking with explicit reference to what he calls public interest groups. Rather than relying on social movement literature to describe these groups, however, he relies largely on the literature regarding interest groups. *E.g.*, INTEREST GROUP POLITICS (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986) (exploring the study of interest group politics); TERRY MOE, THE ORGANIZATION OF INTERESTS: INCENTIVES AND INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS (1980) (analyzing interest groups from the perspective of the individuals' decision to join, organizational formation and maintenance, and internal politics). This is a perfectly valid approach, but it restricts the analysis to the present scope of legal scholarship. *See* Seidenfeld, *supra* note 108, at 429 ("Literature on public interest groups has characterized the traditional interest group—the pure membership group—as the archetype of public interest groups."). Attention to the social movements literature, and the new perspective that would result, suggests that the condemnation of negotiated rulemaking has been premature.

any social movement.¹⁶⁹ By drawing on social movements literature, legal scholars might be able to frame recommendations for the design of statutes that will enlist social movements as part of their enforcement mechanism.

Beyond this, statutes and regulations sometimes have the effect of creating or amplifying social movements that can then play a role in the enforcement process. A statute may constitute a crucial resource for a nascent social movement, or may provide an opportunity for identity formation by a group of potential participants. This process needs to be understood in greater depth. Scholars might recommend to policymakers that they consciously try to create or encourage social movements in order to achieve particular types of enforcement; they might suggest that the effect on potential or actual social movements should be one of the issues that policymakers take into account. To be sure, there may be something disturbing about enlisting or unleashing social movements in support of a government initiative. But since this will occur whether it is planned or not, there is a strong argument for at least devoting some thought to the issue. The possibility of doing so, for legal scholars, depends on their ability to assimilate the social science research on social movements.

B. *The Social Construction of Law*

The distinction between description and prescription is a useful one, and is commonly invoked in legal scholarship. Because this Article is a discussion of the overlap between legal scholarship and social science, however, it is also useful to consider the contemporary social science position on the underlying issue. Most social scientists no longer accept the distinction between description and prescription, or

¹⁶⁹ The impetus for enactment of OSHA did not come from organized labor, but from officials in the Department of Labor. While the AFL-CIO ultimately supported the legislation, as did various public interest organizations, none undertook the task of enforcing OSHA the way ACORN undertook the enforcement of the CRA. See JOHN MENDELOFF, *REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH POLICY* 16 (1979) ("Since the failings of collective bargaining derived mainly from members' disinclination to give up much in return for greater safety, one might wonder whether [OSHA] reflected the preferences of union members or only of their leaders."); Steven Kelman, *Occupational Safety and Health Administration*, in *THE POLITICS OF REGULATION* 236 (James Q. Wilson ed., 1980) ("Labor criticized OSHA for not making rules fast enough and not being serious enough about enforcement."); Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, *MONTHLY LAB. REV.*, Mar. 1981, at 18 (explaining that the Department of Labor provided a model for a job safety and health program with President Johnson's backing).

The enforcement of statutes and regulations by administrative agencies raises other possibilities for prescriptive legal scholarship based on the social movements literature. Just as legal initiatives that are enforced by private lawsuits may depend on social movements for their effectiveness, other initiatives may depend on such movements for compliance with publicly initiated enforcement efforts.¹⁶⁵ The Community Reinvestment Act (CRA),¹⁶⁶ for example, lacked a legal enforcement mechanism, but turned out to be quite effective because groups concerned with community development in inner city areas were able to make an issue, in regulatory proceedings, of banks' compliance with the Act's provisions.¹⁶⁷ The Occupational Safety and Health Act (OSHA),¹⁶⁸ which includes enforcement mechanisms, may be less effective than it could be because of its failure to connect with

¹⁶⁵ On the issue of enforcement and compliance generally, see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); EUGENE BARDACH & ROBERT KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); ENFORCING REGULATION (Keith Hawkins & John Thomas eds., 1982); Freeman, *supra* note 163; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Robert A. Kagan, *Regulatory Enforcement*, in *HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW* 383 (David H. Rosenbloom & Richard D. Schwartz eds., 1994); John Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115 (1991); and John Scholz, *Voluntary Compliance and Regulatory Policy*, 6 LAW & POL'Y REV. 385 (1984).

¹⁶⁶ 12 U.S.C. §§ 2901-06 (1994 & Supp. V 1999). For discussions of this Act, see Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, but Strengthened Federal Enforcement is Needed*, 20 FORDHAM URB. L.J. 293 (1993); Michael Klausner, *Market Failure and Community Investment: A Market Oriented Alternative to the Community Reinvestment Act*, 143 U. PA. L. REV. 1561 (1995); Jonathan K. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291 (1993); Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349 (1993); and Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465 (1994).

¹⁶⁷ See DELGADO, *supra* note 16 ("[C]ommunity organizations were formed to address concerns specifically related to the delivery of services by the government and to the impact of housing, transportation, and education on the spatial and social structure of the city."); Fishbein, *supra* note 166, at 297 ("[T]he [CRA] has provided community groups with substantial leverage to end disinvestment practices and to obtain commitments from lenders to undertake new community reinvestment initiatives."); Macey & Miller, *supra* note 166 (stating that among the principal effects of the CRA is the enhancement of activist group power in promoting community development with agencies and encouraging meetings between institutions and groups mounting a CRA challenge to resolve the differences). Macey and Miller do not regard the CRA as efficient, but they do treat it as producing an impact; if it did not do so, that is, if it were purely nominal or symbolic legislation with no practical effect, it would not be inefficient.

¹⁶⁸ 29 U.S.C. §§ 651-78 (1994 & Supp. V 1999).

to put the matter in Hume's terms, between is and ought. The alternative that they employ is generally known as the social construction of reality, and is ultimately based on Husserl's phenomenology.¹⁷⁰ In essence, it argues that perception itself, and certainly all more abstract understanding, is the product of interpretation, of a culturally-specific set of commitments and procedures that give meaning to everything that we experience.¹⁷¹ There is thus no such thing as pure description, no unmediated access to the world around us, but rather an interpretive process that is imbued with our cultural values and predilections. Within this interpretive space, it may make sense for us to distinguish between efforts to describe the world and efforts to pass explicit judgments on it, but such a distinction can be regarded only as a culturally specific mode of discourse, and not as a defensible epistemological position.¹⁷²

This theory of knowledge is directly relevant to law; whatever one thinks about natural science or mathematics, law is recognized, even

¹⁷⁰ See *supra* note 99 (citing sources).

¹⁷¹ See, e.g., PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 1 (Anchor Books 1967) (1966) ("The basic contentions of the argument of this book are . . . namely, that reality is socially constructed"); RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* (1983) (arguing that the contrary notions of human rationality, objectivism, and relativism are converging to form a new understanding); NELSON GOODMAN, *WAYS OF WORLDMAKING* (1978) (exploring the idea of rightness when understanding is relative, based on one's frame of reference); *METATHEORY IN SOCIAL SCIENCE: PLURALISMS AND SUBJECTIVITIES* (Donald W. Fiske & Richard A. Shweder eds., 1986) (presenting several views concerning science and subjectivity-objectivity that respond to the rise in contemporary doubt about the possibility of "standards, canon, or methods definitive of scientific or rational thinking"); ALFRED SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (George Walsh & Frederick Lehnert trans., 1967) (analyzing the phenomenon of meaning in ordinary social life to arrive at an objective context that can be used by social science); PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958) (arguing that progress in social sciences need not come from emulating natural sciences but shares a valuable connection with philosophy concerned with the nature of reality in general).

¹⁷² See STANLEY FISH, *Is There a Text in This Class?*, in *CAMPUS WARS: MULTICULTURALISM AND THE POLITICS OF DIFFERENCE* 49 (John Arthur & Amy Shapiro eds., 1995) ("[M]eaning comes already calculated, not because of norms embedded in the language but because language is always perceived, from the very first, within a structure of norms . . . not abstract and independent but social."); J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 *CONN. L. REV.* 869, 871 (1993) ("[L]egal ideas and symbols will change their political valence as they are used over and over again in new contexts."); J.M. Balkin, *Ideology as Cultural Software*, 16 *CARDOZO L. REV.* 1221, 1221 (1995) ("[I]ndividuals are afflicted with beliefs that in some way mystify or obscure social reality."); Steven L. Winter, *Contingency and Community in Normative Practice*, 139 *U. PA. L. REV.* 963, 967 (1991) (arguing that all forms of normative behavior "must be understood in terms of the cognitive processes of internalization and imagination").

within the Anglo-American tradition, as a human construct. The natural law belief that legal rules have some transcultural or even transcendent content, that they lie beyond the reach of social evolution, is now generally rejected.¹⁷³ But there remains in American legal scholarship a certain tendency to treat basic concepts ahistorically, to view them as conceptually available at any given time, or, more circumspectly, at any given time in the two centuries of our own constitutional experience. The incorporation of social movements literature into law might facilitate a recognition of the social science approach to law, and of legal concepts as socially constructed—the product of an ongoing, historical process. Having done so, this literature might then suggest the particular historical processes that have generated many of our legal concepts. As noted above, social movements are one of the great motive forces of American law. The implication of legal scholarship that legal concepts exist in some sort of trans-historical storehouse, to be drawn out as the moral consensus of society and the exigencies of the time demand, distorts the actual process by which law develops. Not incidentally, it also devalues the effort and imagination of those who participate in social movements.

The topic is too large to be fully canvassed here. One example, suggested by the papers in this Symposium, is the concept of rights. Legal scholarship tends to treat rights as a universally available concept, and to analyze the actual availability of rights according to the descriptive-prescriptive dichotomy.¹⁷⁴ From this perspective, virtually

¹⁷³ Natural law continues to have a certain number of adherents. *See, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (describing natural law doctrine and responding to objections to natural law as a theory); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* (1999) (addressing criticisms of natural law theory and applying natural law to modern issues); LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* (1987) (arguing that justice is beyond the range of positive law); Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992) (examining the idea that there are objective moral truths). For most people, however, the attack on this concept that has been maintained throughout the course of the nineteenth and twentieth centuries has proven persuasive. In the United States, legal realism may be understood, in part, as an attack on the remnants of natural law thinking. The main target of the realists was what we now call formalism, but Anthony Sebok cautions against treating the formalists as natural lawyers. *See* Sebok, *supra* note 85, at 2057 (“American formalism may have been guilty of many sins, but natural law is not one of them.”). The realists’ desire to brand their enemies as natural lawyers is, however, certainly indicative of the general rejection of natural law.

¹⁷⁴ *See, e.g.*, JOEL FEINBERG, *SOCIAL PHILOSOPHY* (1973) (discussing both social ideals and normative principles); ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* (1996) (differentiating between positive and negative rights while arguing for the necessity of certain positive rights); JOHN RAWLS, *A THEORY OF JUSTICE* 195-257 (1971) (describing the theory of justice and stating what the ends of justice should be); JOSEPH RAZ, *THE*

everyone would agree that women should have been granted equal rights during the nineteenth century, as a normative matter, and that they were not granted these rights, as a descriptive matter. But what exactly does it mean to say that women should have had rights that they did not, or that they had rights that were not granted? Where were those rights, and how would people at the time have conceived them?

Social movements literature suggests a different way of looking at the situation. According to this view, the concept of women's rights, in the contemporary sense, did not exist in the early years of the American republic. It was created by a complex historical process in which social movements played a major role. The groups that were mobilized to fight for the legal status of women—for married women's property rights and women's suffrage in the nineteenth century, or for equality of opportunity and anti-rape, anti-abuse, and pornography laws in the twentieth—were doing much more than advocating law reform; they were contributing to the creation of the legal concepts that made such reform possible. The same may be said for the labor movement, the civil rights movement, the gay rights movement, and the children's rights movement.

It may be argued that all of these efforts were made possible by the underlying concept of a right, more specifically a human right. To the extent that this is true, however, it does not necessarily alter the conclusion that the concept is the product of social movements, but only refers us to some earlier period in history when the concept of human rights in general, rather than these rights in particular, took form. The contemporary view is that the idea of human rights is a lineal descendent of natural rights, and that the concept of the natural rights of man—and when natural rights theorists said "man," they meant only men—was a product of the fourteenth-century debate over apostolic poverty.¹⁷⁵ This debate pitted the Franciscan order

MORALITY OF FREEDOM 163-263 (1986) (arguing that certain rights should be given a preferred position in society); SAMUEL STOLJAR, *AN ANALYSIS OF RIGHTS* (1984) (investigating when a person should be able to claim a natural right regardless of actual laws); Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984) (examining the rights of moral and political independence).

¹⁷⁵ See ARTHUR STEPHEN MCGRADE, *THE POLITICAL THOUGHT OF WILLIAM OF OCKHAM: PERSONAL AND INSTITUTIONAL PRINCIPLES* 173-96 (1974) (discussing Ockham's conception of natural rights, including the right to be poor); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 17-31 (1979) (analyzing the conflict between Franciscan theory and the theory of Aquinas concerning the life of apostolic poverty); Jean Dunbabin, *Government*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* 477, 511 (J.H. Burns ed., 1988) ("[T]he natural right

against the Avignon Popes, particularly Pope John XXII, and it was the Franciscans who developed the idea of natural rights in an effort to escape papal condemnation. The Franciscans were an archetypal social movement, mobilized by a charismatic leader to rebuild a church and then to bring an emotive version of Christianity to the common people.¹⁷⁶ Their history reveals both the mobilization of resources and the transformation of personal identity into a collective effort characteristic of social movements.

Even if the primordial idea of human rights did not originate from a social movement—and this will obviously be the case for some ideas—it would not necessarily argue against the centrality of social movements in the subsequent development of particular rights. Just as the concept of human rights is not a transcendent truth, but a socially constructed and socially contingent concept, the relationship between this idea and its elaborations is constructed and contingent.¹⁷⁷ The connections that we now see as natural or implicit were highly contested at the time, and the concepts that now seem so capacious were jealously guarded against efforts to extend them. To us, it may seem astonishing that the Framers could declare human equality while owning slaves, or that the abolitionists could fight to free the slaves and yet keep their wives and daughters subjugated in their homes. Future generations—near future generations, it is to be hoped—will be equally astonished that current legal authorities refuse

to property was articulated by John Paris and then by Ockham's opponents in the course of the poverty conflict.”).

¹⁷⁶ See generally CAJETAN ESSER, ORIGINS OF THE FRANCISCAN ORDER (Aedan Daly & Irina Lynch trans., 1970) (tracing the early history of the Franciscan Order); JULIEN GREEN, GOD'S FOOL: THE LIFE AND TIMES OF FRANCIS OF ASSISI (Peter Heinegg trans., 1985) (examining the leadership of St. Francis of Assisi); JOHN MOORMAN, A HISTORY OF THE FRANCISCAN ORDER: FROM ITS ORIGINS TO THE YEAR 1517 (1968) (recounting the history of the Franciscan Order).

¹⁷⁷ This is not the same as Kelsenian positivism. Kelsen argued that law possessed no inherent morality, but was merely the command of a sovereign power. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 3-49 (Anders Wedberg trans., 1945) (presenting the theory that law is a coercive order); HANS KELSEN, PURE THEORY OF LAW 1-69 (Max Knight trans., 1967) [hereinafter KELSEN, PURE THEORY] (outlining a positive theory of law); see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 605 (1958) (“The effort to show that laws conferring rights are ‘really’ only conditional stipulations of sanctions to be exacted from the person ultimately under a legal duty characterizes much of Kelsen’s work.”). Kelsen’s concern is with the definition of law, not the definition of rights. He has no objection to the concept of rights, or even of natural rights; his only point is that this concept is part of private morality, and cannot be regarded as law unless enacted and enforced by the sovereign. See KELSEN, PURE THEORY, *supra*, at 59-69 (describing the relationship between law and morals).

to treat a person's choice of sexual partner as an aspect of autonomy. In fact, it may be the case that there is really no core concept of human rights at all, despite the antiquity of its antecedents.¹⁷⁸ Perhaps that concept is nothing more than the aggregation, the sum total, of the individual human rights that social movements have fought for so assiduously during the past two hundred years.

Thus, social movements literature offers a distinctive way of understanding legal concepts, and of placing them within a larger epistemological framework. The idea that these concepts are socially constructed is certainly not unknown to law, but social movements literature offers a powerful argument in favor of that still underemphasized idea, an argument of a different character from the existing ones. Of course, the project is not without its dangers and negative associations. Underlying this historical approach to legal concepts is a recognition of law's inevitably political character. The principal components of our legal system are not, according to this view, the products of reasoning or of neutral judgment by public decision makers, but hard-fought concessions won by battles in the lobbies and the streets. Thus, the elements of social movements literature that are incorporated into legal scholarship seem ultimately to align with those aspects of legal scholarship with which they share methodologies, that is, public choice and critical studies. But the enterprise escapes the cynicism of public choice and the infuriated condemnation of critical studies by virtue of its grounding in more general social science. What is absent from the social movements literature is the belief that law ought to be the product of reasoning or neutral judgment. Rather, the law is, and can only be, according to this approach, constructed as an evolving historical consciousness in which politics

¹⁷⁸ Some political philosophers argue that theories of rights cannot be developed abstractly, but depend on existing political practices. See RICHARD E. FLATHMAN, *THE PRACTICE OF RIGHTS* 219 (1976) ("[R]ights are a social phenomenon . . . [that] cannot be fully appreciated or evaluated apart from the ways in which the practice [of rights] fits into and contributes to the mix of rules, values, purposes, and institutions that constitute this or that society."); REX MARTIN, *A SYSTEM OF RIGHTS* 97 (1993) ("[T]he crucial issue [for theory of rights] is whether appropriate practices of social recognition and promotion are in place for that kind of right."); IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 304 (1986) (noting that a valid moral theory of rights can only be developed if we "come off the terrain of 'ideal theory' and get involved in factual arguments about the causal structure of the social world which is where problems of social justice arise"). Such views are certainly congenial with the idea of rights as socially constructed, but they are not quite the same thing; they still allow the concept of rights to exist independent of history. The idea is that one feature of this abstract, ahistorical concept of rights is that the actual content of the general concept depends on existing political practices.

plays a major role. Thus, law is free of that unexplained, pre-empirical cynicism that comes from frustrated expectations. According to the social movements literature, law finds its dignity in the ideological commitment and moral courage of the people whose efforts have generated so many of its doctrines. The politics that constitute it are not only the special-interest-group politics of public choice scholarship or the elitist oppression of critical studies—although both elements are undeniably present—but also the genuine idealism of the many nameless and otherwise powerless individuals who have joined together to fight for a new position in society, and to confer new positions on others.

This is not meant to suggest that social movements literature is free of unexplained, pre-empirical cynicism. Its particular brand of this affliction stems from its somewhat reductionist view of public decision makers. While it has developed a wonderfully complex and modulated picture of social movements, it does not always combine this with an equally sophisticated analysis of government. One of the leading accounts of government's reaction to social movements, for example, is William Gamson's. According to Gamson, social movements succeed when the government provides tangible benefits to their members that meet the movement's demands, or when it formally accepts the movement as a valid representative of its members' interests. In the confrontation between the government and a social movement, he continues, there are four possible outcomes: complete success; co-optation, where the government formally accepts the movement but provides no benefits; preemption, where the government provides the benefits but fails to accept the movement; and complete failure, where neither acceptance nor benefits are forthcoming.¹⁷⁹

The concepts of co-optation and preemption represent a useful beginning in analyzing the way public officials interact with social movements. In pursuing this important line of inquiry, legal scholarship may have something to teach social movements theory, and something to contribute to any collaborative effort. Legal scholars recognize that government is not a single actor, but a complex array of mutually supporting and conflicting institutions. What may look

¹⁷⁹ GAMSON, *supra* note 22. For other discussions of the relationship between state officials and social movements in the social movements literature, see, for example, J. Craig Jenkins & Charles Perrow, *Insurgency of the Powerless: Farm Worker Movements (1946-1972)*, 42 AM. SOC. REV. 249 (1977); McCarthy & Wolfson, *supra* note 61, at 273; and Tarrow, *supra* note 61.

like co-optation and preemption, when viewed from afar, turns out to be a process of compromise and accommodation, with real interests that are opposed to social movements, and that also have a claim on public decision makers. Moreover, the effort by legal scholars to find logic and reasoning in law is not at all misplaced once they free themselves of the expectation that these are the only things that one can or should find there. Although the structure of the law is largely built by politics, it is a structure nonetheless, and must possess a certain intellectual coherence if it is to function effectively. The recognition of human rights may be won by the activism of social movements, but this victory must be secured by the development of legal concepts that can be understood and used by public decision makers. Further, this work must be accomplished inside the courthouse, legislature, or agency door. While the process may have some elements of co-optation and preemption, it has other elements that reflect sustained efforts to incorporate new norms into the ongoing structure of the legal system.

The social construction of legal concepts can be combined with descriptive and prescriptive aspects of legal scholarship to suggest one further advantage of integrating that scholarship with the social movements literature. There is a tendency, in legal scholarship as in moral philosophy, to treat our deeply felt values as transcultural entities, as principles that gain dignity from being always true, or always present, although differentially perceived by different cultures. But this does not dignify these values; it demeans them. Social movements literature emphasizes that the ideas and values we care about most—equality, free speech, religious freedom, due process, the prohibition of slavery and torture—were fought for, bled for, and died for.¹⁸⁰ They are the glories of our current civilization, not because we possess the pallid virtue of perceiving these principles as they float about in some sort of transcendental nimbus, but because we possess the effulgent virtue of maintaining and re-creating them amid the chaos and danger of ongoing circumstances. Social movements literature alerts us to this process. In doing so, and in emphasizing the socially constructed character of legal concepts, it not only provides legal scholars with more accurate perspectives, but also reveals to them their own role in advancing our most treasured values.

¹⁸⁰ See, e.g., MCADAM, *supra* note 16 (tracing the history of black insurgency); MORRIS, *supra* note 16 (discussing the challenges faced in the civil rights movement); McAdam, *supra* note 59 (examining the 1964 Mississippi Freedom Summer project, which McAdam labels as “high risk/cost” activism).

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