CONSTITUTIONAL CHANGE, COURTS, AND SOCIAL MOVEMENTS

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CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD. By *Jack M. Balkin*. Cambridge: Harvard University Press. 2011. Pp. 298. $35.

INTRODUCTION

In *Constitutional Redemption: Political Faith in an Unjust World*, Professor Jack Balkin[1] furnishes a positive account of constitutional change, advances a normative vision of the relationship between popular mobilizations and evolving constitutional principles, and develops an interpretive theory aimed at fulfilling the Constitution's promise. Rather than take an internal perspective that asks how courts alter constitutional doctrine, Balkin decenters adjudication and instead views the role of courts in constitutional change through the lens of social movements. In doing so, he convincingly exposes the feedback loop between social movements and courts: courts respond to claims and visions crafted by movements, and court decisions in turn shape the claims and visions of those movements and alter the political terrain on which those movements operate. By placing social movements, rather than courts, at the center of his analysis, Balkin ultimately redeems courts, demonstrating their lively, legitimate, and contingent role in the process of constitutional and social change. In doing so, he challenges influential constitutional scholarship that takes a generally pessimistic view of courts.

Even though social movements are at the core of Balkin's analysis in *Constitutional Redemption*, he does not explicitly borrow from the extensive social movement literature in sociology and related disciplines. Social movement scholars analyze the development and operation of movements, including the ways in which movements mobilize constituents and persuade others to support their objectives.[2] As one social movement scholar explains,

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1. Knight Professor of Constitutional Law and the First Amendment, Yale Law School.

2. *See, e.g.*, FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS 4, 4–5, 24 (1977); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 528 (1983); David S. Meyer, *Protest and Political Opportunities*, 30 ANN. REV. SOC. 125, 125 (2004); David A. Snow et al., *Frame Alignment*

the field aims "to produce general knowledge on how, in what forms, and under what conditions social movements become a force for social and political change."[3] Understood in this light, social movement theory and Balkin's brand of constitutional scholarship both aim to unpack the processes of change and to explain how social movements contribute to and shape that change.

Legal scholars have increasingly focused on the role of social movements to understand both the way in which constitutional meaning is constructed and the role of courts in that process of construction.[4] This scholarship has persuasively demonstrated how the labor, civil rights, and women's movements, just to name a few, have shaped constitutional norms and in turn have been shaped by those norms.[5] Yet this body of work has largely located social movements within the process of constitutional change without drawing directly on the theoretical frameworks that have dominated the study of movements in the social sciences.[6] In this sense, Balkin's work is part of an influential body of legal scholarship that convincingly demonstrates the impact of social movements on constitutional

Processes, Micromobilization, and Movement Participation, 51 AM. SOC. REV. 464, 464 (1986).

3. Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1753 (2006).

4. *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135 (2007).

5. *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

6. There are important exceptions to this general trend. Most notably, Professors Reva Siegel and William Eskridge have each offered extensive analyses of constitutional change that draw on and incorporate important work in social movement scholarship. *See, e.g.*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 419–20 (2001) (drawing on resource mobilization and political process work in social movement theory); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1364 (2006) (referencing social movement work on movement moderation in the context of movement–countermovement conflict); *see also* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1501–11 (2005) (relying on a range of social movement theories to critique legal scholars' privileging of law in social movement activity); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Changes*, 94 MARQ. L. REV. 263, 280–84 (2010) (incorporating framing theory).

culture, yet does so without explicitly incorporating social movement theory.

Given the recent turn by constitutional scholars toward social movements, the time seems especially ripe to reframe constitutional analysis around theoretical concepts and empirical insights drawn from social movement scholarship.[7] In this Review, I argue that reliance on social movement theory could contribute to a more nuanced account of constitutional change by contextualizing courts within broader patterns of conflictual relations and locating courts as crucial sites for mobilization, contestation, and adjudication. Through greater interdisciplinary dialogue, legal scholars could better assess both the possibilities and the limitations of law and courts for contributing to social change. To show this, I connect Balkin's account of constitutional change to the three major theoretical frameworks in social movement theory: (1) framing, (2) resource mobilization, and (3) political process. These frameworks complement Balkin's account of constitutional change at the same time that they push constitutional scholars to tease out and specify the constraints imposed by court-based tactics.

Part I of this Review describes Balkin's remarkable contribution in *Constitutional Redemption* along three dimensions: his positive account, its normative implications, and his interpretive theory. In doing so, the discussion focuses on how Balkin locates courts and social movements within the process of constitutional change.

Part II delves into some of the most influential recent constitutional scholarship, which takes a generally pessimistic view of courts. Prominent legal scholars have articulated jurisprudential, institutional, and partisan critiques of courts—specifically of adjudication. These critiques animate models of legislative and popular constitutionalism that explicitly turn away from courts and advocate constitutional construction as an extrajudicial process.

Balkin rarely engages these critiques of courts in an explicit way, and his model of constitutional change makes ample room for—and, in fact, embraces—processes of legislative and popular constitutionalism. Yet by decentering courts in his analysis and instead looking to social movement contestation happening both in and out of court, Balkin advises us to be skeptical of the claims animating the turn away from courts. By constructing a more grounded and context-specific analysis of how social movements seize on constitutional principles and deploy court-based tactics, Balkin pushes constitutional scholars to develop a more bottom-up, decentered account of law and courts. In doing so, he encourages constitutional scholars to elaborate positive accounts and normative theories of constitutional

7. Professor Joel Handler's foundational work used social movement theory to understand court-based strategies. *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978). While legal scholars often turn to Handler's work, they rarely incorporate social movement theory directly. *See* Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 51 (2001).

change that identify courts as active and productive participants in political and constitutional conflict. Ultimately, Balkin's model of constitutional construction is one in which legislative and popular constitutionalism operate in conjunction with, rather than in the absence of or in opposition to, court-based change.

Even though Balkin's intervention creates a compelling case for more direct engagement between legal scholarship and social movement theory, *Constitutional Redemption* does not draw explicitly on insights from social movement work in sociology. In Part III, I argue that direct appeals to social movement theory could produce a more contextualized and dynamic understanding of courts and constitutional change and, ultimately, both support and hone Balkin's analysis. To that end, I suggest what a research agenda at the intersection of constitutional scholarship and social movement theory might look like. Such an agenda would incorporate the optimistic insights drawn from Balkin's work into an account of where and how courts function in the process of social change, and would endeavor to better understand the limitations of law and court-based tactics. In the end, the use of social movement theory in constitutional scholarship could help legal scholars develop a more nuanced, contingent, and robust model of the impact of law and courts on social change.

I. Constitutional Redemption

In *Constitutional Redemption*, Balkin offers an account of constitutional change that ties mobilization around the Constitution's text to changing constitutional (and cultural) norms both inside and outside the courts. First, he offers a positive account of how constitutional change occurs in the United States. Next, he endorses the normative dimensions of that account, embracing a process of change in which political and social mobilizations shape constitutional construction, and courts respond to claims constructed in the context of broader political and cultural struggles. Finally, Balkin sets out his interpretive theory of "framework originalism," in which the method of "text and principle" allows successive generations to interpret and contest constitutional commitments and ultimately make some of those interpretations part of our positive law. This Part describes Balkin's contribution in *Constitutional Redemption* along these three dimensions but does so by focusing on Balkin's attention to the relationship among the Constitution, social movements, and courts.

A. *A Positive Account*

The Constitution itself plays a central role in Balkin's story of redemption.[8] The Constitution serves as "basic law" (setting the framework of

8. Balkin's account resonates with Professor Robert Cover's work on "redemptive constitutionalism." *See* Robert M. Cover, *The Supreme Court—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 33–34 (1983). Cover analyzed "radical antislavery constitutionalism and the civil rights movement" to demonstrate the process by which groups draw on constitu-

governance), "higher law" (articulating the values to which the country aspires), and "our law" (connecting Americans to a common project) (p. 239). Thus, the Constitution, at least partly, sets the terms of debate both inside and outside the courts, furnishes ideals that Americans invoke in political and moral conflict, and provides the glue that binds us together. We work collectively to redeem our Constitution—making it live up to the values that we believe it represents (p. 10). All of us, then, have a stake in the constitutional project, and many of us participate in the process of constitutional construction.

In this sense, the judiciary is merely one of many players shaping constitutional meaning over time. Here, Balkin relies on Professor Sanford Levinson's concept of constitutional protestantism[9]—"the idea that no institution of government, and especially not the Supreme Court, has a monopoly on the meaning of the Constitution" (p. 10). Individuals may "refuse to defer to judges" and instead "assert a wide range of different meanings about the Constitution."[10] Accordingly, our constitutional culture is populated by multiple, competing, and inconsistent constitutional visions.

Individuals often make claims on the Constitution by organizing into social movements that construct, develop, and disseminate constitutional visions. These social movements are vital participants in our protestant constitutional culture (p. 71). If successful, these movements influence public opinion in their favor, changing the culture with which constitutional law interacts. Courts and other institutions absorb the resultant cultural shifts. At the same time, movements convince political parties to support their views, and those parties may ultimately appoint judges with similar outlooks (p. 71).

Even though Balkin focuses extensively on the impact of extrajudicial forces on constitutional construction (pp. 97–98), courts still play a significant role in the contest over constitutional meaning. As an initial matter, the claimsmaking process itself renders courts important venues in the process of constitutional and social change. In courts, constitutional meanings can be asserted and defended. Courts, therefore, offer opportunities for extrajudicial actors to articulate and hone a variety of constitutional visions.

Once courts intervene in favor of a social movement, Balkin's account stresses their responsiveness to broader cultural and political changes. He argues that "[w]hen social movement contestation succeeds in delegitimating a practice sufficiently, it also usually succeeds in getting courts to ratify that conclusion through their interpretations of the Constitution" (p. 70). Courts eventually validate meanings that have become reasonable through

tional visions to articulate and agitate for "transformational politics." *Id.* at 34–40. Cover also raised the dangers of courts, which may use the force of the state to suppress alternative visions. *Id.* at 40–44. Balkin relies on Cover's work to suggest that the continuation of a constitutional tradition requires the marginalization of alternative visions. P. 120 & n.25.

9. Sanford Levinson, Constitutional Faith 29 (1988).

10. P. 179. In this sense, Balkin's account finds common ground with Cover's claims regarding the contested nature of the Constitution and the importance of nonofficial constitutional visions. *See* Cover, *supra* note 8, at 17–25.

the course of continued debate and persuasion (p. 70). The new constitutional meaning becomes authoritative not because a court decided so independently, but because social movements have persuaded political forces, opinion leaders, the public, and judges that a new position is reasonable and, in fact, correct. In this way, constitutional change is a bottom-up process in which courts are not leading, but instead are responding to external changes (p. 246).

This is not to say that courts simply reflect what is happening in other locations. Rather, courts "are independent actors that mutually influence other actors in the political system."[11] Even though broader political changes affect what courts do, courts can and do stake out positions that depart from the views of the dominant political party and from public opinion.[12] Court decisions also "reshape the terrain of political combat and social movement activism," creating new opportunities for advocates both in and out of court.[13] Ultimately, while courts respond to new constitutional meanings asserted by social movement actors, they also shape those meanings going forward and influence the direction of political contestation.

Although Balkin deemphasizes adjudication as the central moment in constitutional change, he nonetheless identifies judicial decisions as crucial points in the ongoing process of constitutional redemption. Important decisions become part of a narrative in which social movement actors, among others, use such decisions to explain legitimate social change, repudiate past injustices, and justify calls for further development. Social movements may seize on canonical cases to articulate demands in the present day. *Loving v. Virginia*,[14] for instance, serves as a rallying cry for the marriage equality campaign. Cases that we now look at with collective regret and shame become equally significant. Part of our constitutional narrative requires disclaiming certain decisions—*Dred Scott v. Sandford*,[15] *Plessy v. Ferguson*,[16] and more recently, *Bowers v. Hardwick*[17]—as "wrong the day [they were] decided" (p. 185). Those decisions, we claim, were never true to the spirit of the Constitution.[18] In between, there are cases that have simply become "outmoded"—correct the day they were decided but no longer appropriate given contemporary circumstances (p. 185). For some, Balkin argues, *Lochner v. New York*[19] has shifted from "wrong the day it was decided" to simply "outmoded" (pp. 185, 199–200). All three categories of cases

11. *See* JACK M. BALKIN, LIVING ORIGINALISM 287 (2011).

12. *See id.* On these points, see Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. 583, 589–93.

13. *See* BALKIN, *supra* note 11, at 292.

14. 388 U.S. 1 (1967).

15. 60 U.S. 393 (1857).

16. 163 U.S. 537 (1896).

17. 478 U.S. 186 (1986).

18. P. 185; *see also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011).

19. 198 U.S. 45 (1905).

are crucial to the story of constitutional redemption and attest to the vital role that courts—and their rulings—play in the process of social change.

B. *The Normative Dimensions*

Balkin endorses, as a normative matter, his positive account of constitutional change. The influence of mobilizations outside the courts attests to the vibrancy and accessibility of the American constitutional project. Constitutional arguments rightly move from "off-the-wall" to "on-the-wall" through the process of social movement mobilization and political contestation (p. 181). Claims once thought unthinkable become reasonable, not because of the newfound wisdom of judges, but because of the ways in which social movement activism shapes popular and elite understandings of the meaning of American (and thus constitutional) values.[20]

Balkin links the process of constitutional construction to the democratic legitimacy of the Constitution itself. Through mobilizations "speaking in the name of the Constitution," we collectively redeem the Constitution over time—working to ensure that the Constitution-in-action "better approach[es] our ideals" (p. 10). Accordingly, constitutional redemption depends on individuals constructing and fighting over constitutional meaning, rather than simply submitting to the authority of judges or blithely accepting the equal worth of differing constitutional views (p. 184). Drawing on the work of Professors Robert Post and Reva Siegel, Balkin asserts that "democratic constitutionalism is not simply a fact of life; it is a responsibility" (p. 184).

That popular mobilizations shape the direction of official jurisprudence lends legitimacy not only to the constitutional project writ large, but also to the role of courts in that project. Because courts do not drive social and constitutional change, but instead respond to and advance changes emanating from outside the courts, they participate as legitimate actors in a democratic process of constitutional construction (p. 63). By pointing to their democratic responsiveness, Balkin's account legitimizes the role of courts in constitutional change.

C. *An Interpretive Framework*

Balkin's positive account and its normative dimensions connect to his interpretive theory. In his model of "framework originalism"—and the corresponding method of "text and principle"—the constitutional text plays a central role.[21] This interpretive approach distinguishes "hardwired rules," which "limit discretion," from "vague standards or abstract principles," which are intended "to channel political judgment but delegate the task of application to future generations" (p. 229).

20. *See* Balkin & Siegel, *supra* note 4, at 948.

21. *See* BALKIN, *supra* note 11, at 3–5.

Under this approach, constitutional interpretation is not an isolated or internal undertaking. Instead, "[c]hanging social, political, and historical conditions" influence the plausibility of constitutional claims (p. 176). In this way, framework originalism does not lead to a stunting originalism that repudiates change. Instead, it permits a textually grounded, living constitutionalism, in which open-ended constitutional principles are entrusted to future generations to resolve in the context of contemporary realities (pp. 6, 229).

Furthermore, framework originalism is not an elite theory reserved for judges and legal professionals; rather, it is available to social movements and individual citizens to press their constitutional visions (pp. 237–38). The constitutional text provides an understandable, common language on which Americans can make claims (p. 243). The principles underlying the text embody shared commitments, and each generation attempts to work those principles out in practice.[22]

II. The Contest over Courts in Constitutional Scholarship

Balkin's account challenges, often indirectly, influential constitutional scholarship that takes a more pessimistic view of courts in the process of constitutional and social change. Where Balkin sees courts as vital but largely responsive participants that facilitate dialogue in the process of constitutional construction, other scholars see courts as autonomous agents that push change to the point of squelching constitutional deliberation. Where Balkin sees courts' interventions as democratic and thus legitimate, others see courts as unaccountable in a way that renders their interventions illegitimate. Where Balkin sees courts as enacting progressive constitutional visions constructed through social movement contestation, others see courts as conservative institutions that hold only false promise.[23]

For the most part, Balkin does not directly engage these critiques of courts. In fact, in significant ways, his work resonates with some of the models of constitutional change animated by these critiques. Yet ultimately, his careful contextualization of courts in his vision of constitutional redemption undermines some of the central claims that have motivated legal

22. In his review of *Living Originalism*, Professor Neil Siegel explores the tension in a system in which social movement activists, who "may have little idea about the original semantic meaning of constitutional language," draw on constitutional commitments and ultimately influence constitutional construction. *See* Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 Mich. L. Rev. (forthcoming 2013).

23. For other commentary on the turn away from courts in constitutional scholarship, see Post & Siegel, *supra* note 5, at 391–406; Ziegler, *supra* note 6, at 269–77. In many ways, debates in constitutional scholarship over the role of courts are rooted in the "countermajoritarian difficulty" originally contemplated by Professor Alexander Bickel. *See* Alexander M. Bickel, The Least Dangerous Branch 16–23 (2d ed. 1986). On this point, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L.J. 153 (2002).

scholars' turn away from courts. In doing so, Balkin's analysis reveals the productive role of courts in constitutional and social change.

A. *The Turn Away from Courts*

A set of related claims—jurisprudential, empirical and institutional, and strategic or instrumental—about the capacity of courts to contribute to (presumptively progressive) social change has motivated the move away from courts in constitutional scholarship. I describe these claims, in an admittedly oversimplified and highly stylized form, to better understand how Balkin's account challenges, even if only by implication, the central arguments animating the turn away from courts.

First, the jurisprudential claim understands adjudication as conservative and formalistic, and is therefore skeptical of court-based social change. Professor Robin West, for instance, argues that "the progressive Constitution . . . will never achieve its full meaning . . . so long as it remains in an adjudicative forum."[24] In West's view, formal equality principles that structure adjudication also structure equality as a substantive matter, such that courts impose on lawmakers a stunted principle of nondiscrimination.[25] Accordingly, making equality the province of adjudicative law assures the preservation of inequality through conservative jurisprudential principles that come to govern substantive constitutional commitments.[26]

Next, the empirical and institutional claim maintains that courts rarely produce reform. Among legal scholars, Professor Michael Klarman has been the leading proponent of this claim, arguing that social change has occurred despite, and not because of, courts.[27] Klarman uses the civil rights movement—and *Brown v. Board of Education*[28] specifically—as the paradigmatic example of the powerlessness of courts. Despite the Supreme Court's decision, Klarman argues, "*Brown* had almost no immediate direct impact on desegregation."[29] In this account, not only did the Court fail to directly bring about school integration, but the decision also failed to produce positive

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24. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 651 (1990); *see also* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 219 (1994). While Balkin points to the limitations of a constitutionalism that prioritizes adjudication, pp. 245–46, he does not address West's critique. Instead, he cites West's work in his discussion of an aspirational theory of constitutional interpretation. P. 120 & 262 n.27.

25. *See* Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, at 79, 83 (Jack M. Balkin & Reva B. Siegel eds., 2009).

26. *See* WEST, *supra* note 24, at 282–84.

27. *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431 (2005) [hereinafter Klarman, Brown *and* Lawrence]; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996). While Balkin's account of courts in many ways responds to Klarman's critique, Balkin does not explicitly address Klarman's work in this regard. Rather, references to Klarman's work largely focus on his historical contextualization of issues relating to race. Pp. 208 & 282 n.148, 231 & 285 n.7.

28. 347 U.S. 483 (1954).

29. Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 84 (1994).

indirect effects that would have aided the civil rights movement.[30] The institutional claim not only highlights the constraints on courts' implementation and enforcement powers, but also focuses on the countermajoritarian nature of the judiciary. Through this lens, judicial decisions produce harmful backlash because individuals feel that the courts have taken decisions out of the hands of the more democratic branches of government.[31]

Finally, the strategic or instrumental claim lodges a partisan critique that laments the conservative stance of the federal judiciary, including, most prominently, the U.S. Supreme Court.[32] In this view, the federal courts, populated by Republican presidential appointees, will remain hostile to constitutional visions advanced by the left. Accordingly, progressives should turn away from strategies aimed at courts.[33] As West argues, "It is not at all clear, from a progressive political point of view, that the development of a progressive constitutional paradigm—to which a conservative Court will be openly hostile—is a worthwhile project."[34]

These generally pessimistic claims about the capacity of courts to advance social change have led to a number of influential constitutional models. West translates her case against adjudication and her observations about the judiciary's political orientation into a call for legislative constitutionalism, arguing that "[t]he progressive Constitution should be meant for, and therefore must be aimed toward, legislative rather than adjudicative change."[35] To that end, "progressive lawyers should take this opportunity of . . . respite from judicial power and attend to the development of that Constitution."[36] In this way, West explicitly turns away from courts.[37] Similarly, models of popular constitutionalism, such as those advanced by Professors Mark Tushnet and Larry Kramer, encourage taking the Constitution away from the courts and placing it more directly in the hands of the people.[38] To some extent, popular constitutionalists internalize the institutional claim's

30. *Id.* at 88, 90. Klarman makes the counterintuitive claim that violent resistance to *Brown* in the South ultimately aided the civil rights movement by mobilizing white Northern support for federal intervention. *Id.* at 116.

31. *See* Klarman, Brown *and* Lawrence, *supra* note 27, at 473.

32. *See* West, *supra* note 24, at 642.

33. *See id.* at 650.

34. West, *supra* note 24, at 218.

35. *Id.* at 218–19, 285–88.

36. West, *supra* note 25, at 79.

37. *See id.* at 85.

38. *See* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999). Tushnet's model explicitly includes a substantial component of legislative constitutionalism, seeing Congress as an important arena for constitutional deliberation. *See* Tushnet, *supra*, at 33–53. Balkin does not engage Tushnet's and Kramer's models of popular constitutionalism at length. Strikingly, Balkin's brief references to these models are generally positive, focusing on their arguments in favor of popular constitutional construction rather than on their repudiation of courts. Pp. 96 & 259 n.28, 246–47. Balkin's more extensive discussion of Tushnet's work relates to the concept of constitutional historicism. Pp. 212–19.

backlash concern, turning away from courts in an effort to produce democratically legitimate change.[39] It is important to note that these models of legislative and popular constitutionalism do not turn away from the Constitution itself, but rather from courts as authoritative interpreters of the Constitution.[40]

In a system of legislative or popular constitutionalism, courts would ideally play a largely deferential role, allowing constitutional meanings and policy solutions to be worked out in nonjudicial arenas and then deferring to those meanings and solutions. In other words, courts would exercise restraint in striking down congressional legislation and announcing rights that have not been identified through majoritarian political processes. In this way, models of legislative and popular constitutionalism envision a judicial role tied to theories of interpretation and adjudication that stress judicial minimalism. Professor Cass Sunstein advances a model in which courts do not reach out to decide controversial questions and instead show restraint when approaching potentially capacious and value-laden doctrines.[41] While grounded in the values of deliberative democracy, judicial minimalism is justified in part by instrumental concerns about conservative retrenchment.[42] Ultimately, judicial minimalists urge judges "to avoid taking stands on the largest and most contested questions of constitutional law."[43] By adopting a minimalist approach to interpretation and adjudication, courts would allow legislative and popular constitutionalism to thrive; constitutional change would occur outside the courts.[44]

This body of work, largely produced by scholars on the left, turns away from courts as important actors in the process of social change and encourages progressive activists and scholars to focus their attention on presumptively more democratic venues and more "political" tactics.[45] With these influential contributions in mind, we can see how Balkin furnishes a

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39. *See* TUSHNET, *supra* note 38, at 138–39; *see also* Cass R. Sunstein, *Backlash's Travels*, 42 HARV. C.R.-C.L. L. REV. 435, 444 (2007).

40. West, though, has questioned the progressive potential of constitutional politics. *See* WEST, *supra* note 24, at 155–89; Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1483–86 (2006).

41. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME 115–16 (1999). Balkin references Sunstein's work in his discussion of *Lochner*, pp. 204–05, but does not explicitly address Sunstein's model of judicial minimalism.

42. *See* Cass R. Sunstein, *The Minimalist Constitution*, *in* THE CONSTITUTION IN 2020, *supra* note 25, at 37–38 ("[M]inimalists reject the liberal activism of the Warren Court, and they are fearful that conservative activism of the most extreme sort may be the wave of the future.").

43. *Id.* at 41.

44. Post and Siegel argue that "Sunstein's embrace of minimalism epitomizes progressives' diminishing commitment to adjudication in American constitutionalism." Post & Siegel, *supra* note 5, at 402.

45. *See* Emily Zackin, *Popular Constitutionalism's Hard when You're Not Very Popular: Why the ACLU Turned to Courts*, 42 LAW & SOC'Y REV. 367, 371 (2008) (explaining that Tushnet and Kramer "are advocating for constitutional politics to be conducted not only outside courts, but largely without the courts").

competing account that argues against the move away from courts. While many constitutional scholars have turned their backs on courts—viewing their role as outsized, illegitimate, or simply unproductive—Balkin urges us to return to courts. By flipping the lens away from courts and toward social movements, Balkin constructs a more optimistic, and ultimately more realistic, account of courts.

This is not to deny the significance and utility of models that turn away from courts. Indeed, the critiques discussed above shed important light on courts' limitations and provide lessons for movements that pursue court-based strategies. But Balkin's account resists these arguments as comprehensive explanatory theories. Balkin himself envisions ample space for legislative and popular constitutionalism.[46] He observes and endorses constitutional construction occurring in nonjudicial arenas. In fact, he warns against a focus on adjudication as "constitution-making," since such a focus makes judges, rather than the public, the primary actors (p. 246). Yet, to the extent that models of legislative and popular constitutionalism move away from courts as a comprehensive matter and detach courts from the process of constitutional construction, Balkin's work marks an important departure, showing that such models overdetermine courts' role in constitutional and social change, and misapprehend the way in which litigation relates to other tactics.[47]

B. *Returning to Courts*

Balkin's account of courts in the process of constitutional change maps onto the empirical reality of social movements. As socio-legal scholars in the legal mobilization and cause-lawyering fields have demonstrated, contemporary social movement advocates neither put all their hope in courts nor look to courts to single-handedly produce change.[48] Instead, advocates view litigation as a significant but partial tactic—one that works in conjunction with other tactics, and aids rather than displaces other forms of mobilization. They see courts as opportunities, often providing the first official venue in which to articulate and hone the group's claims. In courts,

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46. Balkin notes that, like Tushnet, his "vision of the Constitution . . . is premised on the idea of popular participation in constitutional argument and belief in a constitutional project that spans generations." P. 246. Balkin, however, resists Tushnet's endorsement of a "thin Constitution," instead arguing that the entire constitutional text is crucial to the project of protestant constitutionalism. P. 247.

47. Post and Siegel argue that "the pendulum has swung too far, from excessive confidence in courts to excessive despair." Post & Siegel, *supra* note 5, at 374.

48. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK 11 (1994); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 6 (2009); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1317 (2010); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 181 (2009); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 968–69 (2011); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1612 (2006).

subordinated groups can announce their grievances, craft their visions, and force state actors to listen.[49] Such groups might also convert constitutional claims into legal entitlements.

Decentering adjudication and instead exploring how social movement activists approach courts, as Balkin does, pushes us away from a focus on the power of courts themselves to produce reform. If we attend to the constitutive nature of law—to the complicated symbolic and material indirect effects of claimsmaking and litigation—rather than simply to adjudication, we emerge with a more complex and contingent picture of the impact of courts on constitutional and social change.[50] In other words, instead of focusing on courts' lack of enforcement and implementation capacities and the measurable effects of courts' *decisions*, Balkin attends to the dynamic effects of the *process* of making constitutional claims and seeking judicial resolution. He resists drawing a straight line from a court decision to observable impacts, and in this sense, he views the entire process as much more complex and nuanced than the claims outlined in Section II.A permit. Moreover, because courts respond to, and ultimately adopt, constitutional visions originating in political, not simply legal, spaces, it is often impossible to separate constitutionalism inside and outside the courts.[51]

Accordingly, Balkin's redemption of courts is not a move toward judicial supremacy. He sees a role for constitutionalism both in and out of the courts, and primarily envisions courts as absorbing, rather than undermining, constitutional constructions emanating from nonjudicial actors (p. 39). By showing that courts operate in conjunction with other institutional branches and are influenced by—as well as influence—social and political mobilizations, Balkin exposes the need for a theory of constitutional and social change that locates courts in the process.[52] Just as other branches participate in a system of governance characterized by dispute and dissent, Balkin's account suggests that courts do as well. Accordingly, as Post and

49. Professor Emily Zackin argues that "litigation may not stunt popular constitutionalism, as Kramer and Tushnet argue, but on the contrary, it may promote the public consideration of politics through a constitutional lens." Zackin, *supra* note 45, at 386.

50. *See* Michael McCann, *Law and Social Movements*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 508 (Austin Sarat ed., 2004); *see also* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 553 (2009).

51. Balkin's defense of courts in some ways parallels Professor Orly Lobel's critique of the scholarly turn away from the legal system and toward extralegal activism. Lobel argues that law's effects are much more complex than many critics acknowledge and that "the very idea of opting out of the legal arena creates a false binary between social spheres that in reality permeate one another." Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 940 (2007).

52. Professor Neil Siegel characterizes the role of the Supreme Court as "engaged participant." *See* Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 712 (2007).

Siegel argue, rather than abandon courts, we should work toward a theory of constitutional change and adjudication under conditions of conflict.[53]

Therefore, for Balkin, constitutional redemption does not emerge from a theory of judicial minimalism or an instrumental emphasis on stare decisis that seeks to preserve gains from an earlier era.[54] Rather, productive constitutional change comes, over the long run, from robust, substantive constitutional visions pursued both in and out of court. As Post and Siegel insist, "Progressives . . . need substantive constitutional ideals."[55] Putting it more strongly, Balkin declares that "[c]laims of constitutional modesty are not a solution to the problem of constitutional evil; they are a restatement of it" (p. 137).

This is not to suggest that courts invariably make positive contributions to the process of constitutional and social change. Indeed, courts may suppress alternative constitutional visions, especially in a culture that prioritizes adjudication. Nor is it to deny the real limitations and constraints that courts face. Courts have relatively limited implementation and enforcement powers. Instead, it is to argue that the role of courts in constitutional and social change is dynamic, contingent, and context specific. In other words, rather than produce a unitary account of courts, Balkin's analysis points toward a more fine-grained theory. Such a theory would work to specify both the productive impact that courts may have on constitutional and social change, and the limitations that courts (and court-based strategies) impose on such change.[56]

Balkin's contribution in *Constitutional Redemption* joins a growing body of work that looks at constitutional change through the lens of social movement contestation, and in doing so, recognizes the multidimensional role of courts in social change.[57] By mapping the contours of a comprehensive theory of the relationship between courts and social movements, Balkin's contribution complements other influential accounts, most notably

53. *See* Post & Siegel, *supra* note 5, at 377; *see also* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1343 (2010); Siegel, *supra* note 12, at 593.

54. *See* BALKIN, *supra* note 11, at 125. For a critique of judicial minimalism suggesting the need for a more substantive theory of adjudication, see Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2014–15 (2005).

55. Post & Siegel, *supra* note 5, at 377. A growing body of scholarship, often labeled new textualism, articulates progressive visions stemming from the constitutional text itself. *See generally* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011). Balkin's framework originalism contributes to this work.

56. For insightful contributions in this vein, see Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153 (2009); and Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861 (2006).

57. *See, e.g.*, Eskridge, *supra* note 6; Eskridge, *supra* note 5; Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011); Siegel, *supra* note 6; Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

Post and Siegel's democratic constitutionalism, that acknowledge the dynamic and contingent effects of courts.[58] These models embrace important dimensions of legislative and popular constitutionalism,[59] but by devoting explicit attention to social movements' relationship to court-based tactics, they maintain a significant (and democratically legitimate) role for courts in the process of constitutional (and social) change.[60] In this way, these models reject the broad brushstrokes with which important iterations of legislative and popular constitutionalism paint courts, and therefore resist determining courts' influence ex ante. Instead, they integrate courts into broader political conflicts and assess the impact of courts in a contextual and contingent way. By doing so, they urge scholars and activists to engage—rather than abandon—courts.

III. SOCIAL MOVEMENT THEORY AND CONSTITUTIONAL SCHOLARSHIP

Even as Balkin's account of constitutional redemption places social movements at the center, he does not explicitly draw on theoretical concepts from the social movement literature in sociology and related disciplines.[61] In this sense, Balkin's work in *Constitutional Redemption* is consistent with much of the constitutional scholarship that adopts a social movement lens—while attention to social movements sheds important light on constitutional culture, legal scholarship has yet to directly incorporate concepts and frameworks from social movement theory in a sustained way.[62]

In this Part, I argue that adopting social movement theory to reframe some of Balkin's central contributions in *Constitutional Redemption* both lends support to Balkin's account of constitutional change, and suggests important limitations and complexities that constitutional scholars should address. Social movement scholarship points toward a bottom-up model of social change in which courts and social movements participate in the complex process of constitutional construction. In doing so, it challenges pessimistic accounts that turn away from courts and instead supports a more dynamic, contingent, and relational approach to constitutional change. That

58. *See* Post & Siegel, *supra* note 5, at 374; *see also* Guinier, *supra* note 4, at 57–58; Torres, *supra* note 4, at 136.

59. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, *in* THE CONSTITUTION IN 2020, *supra* note 25, at 93, 97.

60. Post and Siegel distinguish their theory of democratic constitutionalism from popular constitutionalism: "Unlike popular constitutionalism, democratic constitutionalism does not seek to take the Constitution away from courts. Democratic constitutionalism recognizes the essential role of judicially enforced constitutional rights in the American polity." Post & Siegel, *supra* note 5, at 379.

61. In *Living Originalism*, Balkin acknowledges the vast field of social movement theory. In suggesting the overlap between social movements and political mobilizations, Balkin notes that "there have been many different kinds of social movements, and there is a huge literature devoted to their study." BALKIN, *supra* note 11, at 82, 363 n.13.

62. To be clear, some prominent constitutional scholars have produced important contributions that incorporate social movement theory. *See supra* note 6.

is, an approach informed by social movement theory bolsters Balkin's account of courts and thereby strengthens arguments against the claims and models described in Section II.A. At the same time, social movement theory highlights the constraints imposed by strategies reliant on law and courts. Interestingly then, the more pessimistic accounts of courts may find some support in social movement scholarship but would be pushed to specify more carefully the conditions under which courts hinder social change. In other words, social movement theory would produce a more contingent and dynamic model of courts' limitations and, in this way, would reject a comprehensive turn away from courts.

To show this, I situate Balkin's account of constitutional change within the three major theoretical frameworks in social movement scholarship: (1) framing, (2) resource mobilization, and (3) political process. While each framework has been dominant at different times, more recent work has attempted to integrate them into a comprehensive approach.[63]

A. *Law as a Frame*

Framing theory draws attention to social movement actors' discursive and ideational work as they identify grievances and make demands.[64] Movements engage in "conscious strategic efforts . . . to fashion shared understandings of the world and of themselves that legitimate and motivate collective action."[65] Frames, therefore, identify problems, expose responsible parties, and suggest solutions.[66] Accordingly, scholars have focused on the use of frames both to mobilize movement members and to persuade bystanders,[67] and they have explored the relationship between frames and a variety of movement elements, including tactics, identity, and ideology.[68]

The Constitution offers resonant frames for social movement actors. In this sense, Balkin's interpretive method aligns with framing theory by attending to the impact of constitutional meanings constructed by movement activists (p. 236). His method of "text and principle" furnishes the tools with

63. *See, e.g.*, Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 23, 27 (Doug McAdam et al. eds., 1996).

64. *See* Snow et al., *supra* note 2, at 464.

65. Doug McAdam et al., *Introduction: Opportunities, Mobilizing Structures, and Framing Processes—Toward a Synthetic, Comparative Perspective on Social Movements*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, *supra* note 63, at 1, 6.

66. John A. Noakes & Hank Johnston, *Frames of Protest: A Road Map to a Perspective*, *in* FRAMES OF PROTEST 1, 5 (Hank Johnston & John A. Noakes eds., 2005).

67. *See* Shauna Fisher, *It Takes (at Least) Two to Tango: Fighting with Words in the Conflict over Same-Sex Marriage*, *in* QUEER MOBILIZATIONS 207, 208 (Scott Barclay et al. eds., 2009); Rhys H. Williams, *The Cultural Contexts of Collective Action: Constraints, Opportunities, and the Symbolic Life of Social Movements*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 91, 94 (David A. Snow et al. eds., 2004).

68. *See* Snow et al., *supra* note 2, at 464. For an important example of framing theory in legal scholarship, see Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

which individuals can "mobilize and persuade others by appealing to common values, symbols, and commitments."[69] Social movement activists draw on symbols that are accessible and resonant, and Balkin shows that the Constitution and canonical judicial decisions provide those symbols. Moreover, he underscores the contested nature of constitutional principles. In the terminology of framing theory, the Constitution allows movement actors to engage in frame alignment (linking movement orientations with individual values) by amplifying frames (elaborating specific values and beliefs) and extending frames (expanding movement values to appeal to a broader range of adherents).[70]

Viewing constitutional frames in this way suggests the importance of courts in movement conflict and yet also supports Balkin's move to deemphasize adjudication as the definitive moment in constitutional change.[71] Since constitutional frames are also political and moral frames, courts serve as venues in which movements can articulate, disseminate, and gain attention for their broader demands. Because frames are circulating both in and out of court, it is difficult to detach what happens in the courtroom from what is happening in the halls of Congress and in the streets.

Courts serve not only as venues for mobilization but also as sites of contestation and conflict. Social movement work on movement–countermovement struggles demonstrates the need for movement activists to meet their adversaries on all relevant battlegrounds.[72] If one movement is pushing its agenda in the courts, it is nearly impossible and also ill advised for the opposing movement to surrender that territory. Courts, therefore, provide venues in which to contest constitutional meanings that relate to and signify broader political and moral commitments.

Here, scholarship examining the impact of movement–countermovement struggles on frames could be applied to court-based interactions to better understand how constitutional and political meanings change through movement conflict.[73] Professor Shauna Fisher, for instance, analyzes the impact of movement–countermovement dynamics on the frames surrounding marriage for same-sex couples. She finds that while marriage equality proponents deploy "rights" frames, their opponents invoke "public" and "judges" frames to contest judicial authority over same-sex couples' claims.[74] That is, marriage equality opponents frame rights in ways that

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69. Balkin, *supra* note 4, at 520.

70. *See* Snow et al., *supra* note 2, at 464, 469, 472. Through Balkin's lens, these framing efforts are generally consistent with faithful constitutional interpretation to the extent they draw on the standards and principles identified in the model of framework originalism.

71. *See* Pedriana, *supra* note 3, at 1729.

72. *See* David S. Meyer & Suzanne Staggenborg, *Opposing Movement Strategies in U.S. Abortion Politics*, *in* 28 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 207, 213 (Patrick G. Coy ed., 2008).

73. In constitutional scholarship, Reva Siegel's work on constitutional change in the context of movement–countermovement struggles provides illuminating examples. *See* Siegel, *supra* note 57, at 243; Siegel, *supra* note 6, at 1364.

74. *See* Fisher, *supra* note 67, at 218–24.

argue against substantive judicial resolution even as they engage courts, meeting their adversaries at every turn. Both sides attempt to define the relevant stakes, and neither will surrender an opportunity to contest and supplant its opponent's framing. The framing contest, occurring both in and out of court on specifically constitutional terms, directly impacts policymaking. As Fisher concludes, "In a policy conflict, groups' issue definitions do not win or lose on their own merits but do so relative to other alternatives."[75]

Of course, courts also shape the conflict going forward. Legal frames serve both instrumental and substantive goals—the frame is both the mobilizing means and the articulation of the legal ends. In this sense, adjudication retains importance, strengthening some frames, foreclosing others, and providing opportunities for new frames. For instance, as Professor Nicholas Pedriana argues in his study of the women's movement, "[O]fficial endorsement of the equal treatment frame further emboldened the movement and allowed it to forge ahead with a set of legal resources—both symbolic and substantive—that could be successfully mobilized to other major issues, including the right to reproductive freedom."[76] The act of adjudication changed legal relationships in tangible ways while altering social and political relationships.[77]

Ultimately, attention to framing theory bolsters Balkin's account of constitutional change and identifies courts as vital arenas for mobilization, contestation, and adjudication. Yet social movement theory also alerts us to the dark side of legal framing. By exposing the constraints imposed by law, framing theory suggests how a turn toward courts may limit social change. Unlike the sweeping claims explored in Section II.A, however, social movement work would encourage a more limited and conditional critique.

Constitutional norms can constitute social movements and constituent identity in narrow and legalistic ways. Professor Anna-Maria Marshall shows how frames construct everyday experiences.[78] In the sexual harassment context, Marshall demonstrates that even as legal frames allow women to articulate grievances, they may produce an overly legalistic understanding and inhibit other interventions in workplace relations.[79] The legal frame might come to define, rather than merely illuminate and describe, wrongful behavior. As Marshall concludes, "*Sexual harassment* is both an empowering label that challenges male dominance of the workplace and a legal category that defines the limits of acceptable conduct among employees."[80] In this context, the legal frame may suggest remedies that "deemphasize collective solutions and instead encourage women to pursue more individu-

75. *Id.* at 230.

76. Pedriana, *supra* note 3, at 1753.

77. *See id.* at 1729.

78. *See* Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659 (2003). This point ties to socio-legal work on legal consciousness.

79. *See id.* at 661.

80. *Id.* at 684.

alistic strategies."[81] Nonetheless, legal frames do not necessarily produce these individualistic effects. In her study of the Family and Medical Leave Act, Professor Catherine Albiston shows that, rather than individualize grievances, "the *informal* process of mobilizing rights" may actually "set in motion a framing process that may lead to eventual collective action."[82] Accordingly, law's impact is contingent and context specific.

Still, the appeal to legal frames, which are almost by definition conventional frames, may limit the transformative vision and radical identity of a movement. As Professor Myra Marx Ferree argues in her work on prochoice organizing,

> Narrowing public framing . . . to those that are most *resonant* is expedient for purposes of influencing policy, gaining public support, and forestalling countermovement attacks; however, such strategic framing also excludes interests and needs that . . . are *radical*, that is, less defensible in that discursive context, but whose success implies more fundamental change.[83]

In this sense, constitutional frames may privilege more moderate movement factions, tactics, and goals over more radical ones.[84]

Not only may the substantive frames themselves constrain social movement visions, but the framing agents and intended audiences may also limit a movement's transformative aspirations. Lawyers and legal professionals act as framers, or in Balkin's terminology, they "translate" movement grievances into constitutional claims (p. 238). This process may change and limit the movement's vision, narrowing its grievances through recognizable legal language and converting its demands into legal remedies.

These observations would encourage constitutional scholars to dig below the surface of movements. While *Constitutional Redemption* tends to treat movements as fairly unified actors, greater attention to intramovement conflict and the radical frames with which legal frames compete would shed considerable light on the dark side of constitutional mobilization, as it constructs movement members' identities and silences resistant activists. Courts do not simply advance a social movement's vision and alter the movement's relationship to other institutional actors. By crediting legal frames and turning such frames into legal entitlements, courts may advance a particular faction's vision within a movement and reshape the terrain on which *intramovement* conflict occurs. Courts may alter a movement's agenda and reorient its demands. As Albiston claims, "Litigation can change social

81. *Id.* at 686.

82. Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 27 (2005).

83. Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOC. 304, 305–06 (2003).

84. *See* Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74–76 (2011), *available at* http://www.uiowa.edu/~ilr/bulletin/ILRB_96_Albiston.pdf.

movements from within in deeply constitutive ways even as they wield it to victory."[85]

A handful of constitutional scholars, to some extent, have internalized this social movement critique. Professor William Eskridge demonstrates that reliance on constitutional norms privileges moderate movement goals over more radical ones,[86] and Professor Reva Siegel shows how a movement moderates its constitutional vision as it attempts to convince the public and respond to countermovement activity.[87] Lodging a more forceful critique, Professor Tomiko Brown-Nagin concludes that "elite-dominated interest group litigation and progressive social movements aimed at accomplishing fundamental change are distinct and largely incompatible phenomena."[88] Legal historians have also observed law's narrowing effects on specific movements. Professor Risa Goluboff argues in the civil rights context that rights-claiming and litigation channeled movement demands into one-dimensional, moderate claims that served relatively elite constituents.[89] Professor William Forbath demonstrates that the labor movement's interaction with law—and particularly with courts—reshaped its consciousness in conservative ways, even as activists invoked more radical constitutional visions.[90] Indeed, Balkin himself acknowledges the constraints of law when he notes that "law is a compromise," not a fundamental reordering of society.[91] Even as law liberates and transforms, it limits.[92]

More work in this vein, with explicit reliance on the insights furnished by framing theory, could provide more textured accounts of law's impact on social change. Through qualitative analysis of particular social movement contexts and specific constitutional shifts, legal scholars could produce a multidimensional account of law and social change that teases out the relationship among intramovement conflict, opposing-movement conflict, constitutional frames, and courts.

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85. *Id.* at 77.

86. *See* Eskridge, *supra* note 6, at 487.

87. Siegel, *supra* note 6, at 1364.

88. Brown-Nagin, *supra* note 6, at 1445; *see also* DEAN SPADE, NORMAL LIFE 14–15 (2011).

89. *See* Risa L. Goluboff, *"We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 2015–17 (2003).

90. *See* FORBATH, *supra* note 5, 128–66.

91. P. 141. In fact, Balkin's historicist orientation recognizes both the law's possibilities and its constraints. P. 177. *See also* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1561 (2004) ("Focusing on particular legal rights often subtly reshapes the group, its goals, and its interests in terms of the right asserted.").

92. Balkin argues that in the very act of "declar[ing] what constitutes unequal treatment," the law "also states what is not unequal treatment." P. 141. Balkin relies on Reva Siegel's theory of "preservation-through-transformation," in which she exposes how the law maintains status hierarchies even as it dismantles them. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

B. *Mobilizing Elite Support*

The resource mobilization approach devotes significant attention to the ability of movement actors to garner external resources.[93] Such resources influence the development of "mobilizing structures," through which movements gain adherents, organize, and deploy their tactical repertoires.[94] In this model, the financial and rhetorical support of elite individuals and organizations aids movement work;[95] movement development and success relate to the ability to attract and leverage external resources.[96]

The resource mobilization approach suggests the importance of legal actors in circulating and validating new constitutional understandings and the significance of court-based tactics in attracting elite support.[97] Courts become venues in which to disseminate constitutional visions and gain backing for those visions. In this sense, social movement theory meets Balkin's account of constitutional change; what Balkin terms "nodes of power and influence," social movement scholars would likely call "elites" (p. 182). These nodes of power and influence affect the "plausibility" of constitutional claims (p. 182). Balkin notes that "[n]ot every person in a legal culture has the same degree of influence and authority in shaping constitutional common sense" (p. 182). Elites, in other words, "determine which ideas and positions ascend into plausibility and dominance and which are cast into the dustbin of history" (p. 183). Therefore, Balkin's account situates elites as key intermediaries between movements and courts, and as important agents of legitimation for movement claims.[98]

While the resource mobilization perspective adds support to Balkin's account, it also points toward the potential limitations of law. By pursuing elite support through constitutional claims and court-based tactics, a movement may narrow its agenda to fit the more moderate worldview of its new supporters.[99] In a more forceful iteration of this view, social movement scholars claim that elites quiet social unrest by absorbing movement actors into established institutional arrangements. In other words, elites co-opt movement leadership.[100] In more nuanced iterations, elites are more likely to support

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93. *See* Jenkins, *supra* note 2, at 533.

94. *See* McAdam et al., *supra* note 65, at 3 ("By mobilizing structures, we mean *those collective vehicles, informal as well as formal, through which people mobilize and engage in collective action*.").

95. *See* Jenkins, *supra* note 2, at 533.

96. *See id.* at 528.

97. *See* Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 714–18 (2012).

98. Professors Gerald Torres and Lani Guinier criticize Balkin's emphasis on "the subculture of legal professionals (including judges, lawyers, and legal scholars)." Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1067 (2012).

99. *See* DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970, at 27 (1982).

100. *See* PIVEN & CLOWARD, *supra* note 2, at xxii.

goals and tactics that they recognize as part of the established system in which they operate. Therefore, elites channel movements in moderate directions.[101] Professors J. Craig Jenkins and Craig Eckert, for instance, show in the civil rights context that elites were more likely to provide financial support to formalized and professionalized movement organizations that pursued relatively moderate goals and deployed institutional tactics.[102] Indeed, work on the radical-flank effect suggests that moderate movement factions benefit from their radical counterparts, which make them look less destabilizing than they would in isolation.[103] Therefore, to attract and sustain elite support, movement actors may organize around professional structures and pursue institutional tactics to achieve moderate objectives.

More recently, scholars have linked a movement's survival to the organization and professionalization associated with elite support, especially in moments of less conflict and activity.[104] Professor Suzanne Staggenborg demonstrates that the increasing institutionalization of the pro-choice movement facilitated the movement's longevity by helping it maintain funding and organization, even as such institutionalization may have narrowed the movement's agenda and tactical repertoire.[105] Part of the more general institutionalization of movements may relate to the proliferation and formalization of public interest lawyering. Professors Albiston and Laura Beth Nielsen document the expansion of the public interest law sector, showing that public interest law organizations have grown in size and budget and have shifted toward organizational structures that incorporate greater numbers of nonlawyer staff.[106] Ultimately, movement institutionalization, which at least to some extent may correlate with moderate legal claims and litigation tactics, may be an almost inevitable developmental feature for movements that manage to sustain their existence and influence mainstream politics.[107]

Constitutional scholars are well positioned to unpack the narrowing impact of elite support and movement institutionalization. An appeal to legal

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101. *See* McAdam, supra note 99, at 28.

102. *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, 821 (1986) (showing that during the 1960s and 1970s foundation funding aimed at civil rights work went disproportionately to the NAACP and other professional social movement organizations).

103. *See* Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957–1970*, 32 Soc. Probs. 31, 32 (1984) (distinguishing the negative radical-flank effect, in which radicals undermine moderates by discrediting movement goals, from the positive radical-flank effect, in which radicals provide a foil to moderates and provoke crises resolved in moderates' favor); *see also* Albiston, *supra* note 84, at 70–71.

104. *See* Daniel M. Cress & David A. Snow, *Mobilization at the Margins: Resources, Benefactors, and the Viability of Homeless Social Movement Organizations*, 61 Am. Soc. Rev. 1089, 1106 (1996).

105. *See* Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 Am. Soc. Rev. 585, 597 (1988).

106. Nielsen & Albiston, *supra* note 48, at 1605–10.

107. *See* Staggenborg, *supra* note 105, at 604.

elites and a turn toward courts may moderate a movement's agenda and vision. While such support may be a necessary component of a movement's success in altering constitutional meaning, more attention should be devoted to how movement claims change over time. Rather than merely connect a movement's vision to an eventual judicial decision and accepted construction, we should understand how the claims that enact that vision shift as elites pick up, translate, and fine-tune them.[108] Furthermore, legal scholars should look at intramovement competition, exploring the visions that are sacrificed in the quest for elite support[109] and how moderate movement actors negotiate relationships with their more radical counterparts. In the end, elite support, or access to "nodes of power and influence," may change and constrain the movement's agenda, from both inside and outside the movement, even as it facilitates the movement's advance.

C. *Courts as Political Opportunities*

The political process model explores the external political context and governmental structure to understand how and when movements press their demands.[110] Key to the political process framework is the concept of the political opportunity structure—"the political environment in which a movement operates and with which it interacts."[111] The political opportunity structure accounts for "the degree of openness of the formal political structure to advocacy efforts, the nature of alignments between powerful 'elites,' actual alliances between movements and these elites, and the state's ability and inclination to repress a movement."[112]

Work on political opportunity suggests the importance of courts in social movement contestation and underscores the need to assess the impact of courts in a highly contextualized and contingent manner. In this sense, political process theory counsels against a one-dimensional account of courts, whether positive or negative, in the process of social change. At the same time, political process work might further refine Balkin's account by identifying the conditions under which courts advance particular social movement claims. This would include analysis of structural conditions, such as the multilevel court system, and dynamic, culturally contingent conditions, such

108. *See* Torres & Guinier, *supra* note 98, at 1071 ("Greater elaboration of the interpretive process would reveal both the power of ordinary people to change constitutional meaning and the mechanism by which elites domesticate threatening popular interpretations.").

109. *See* Eskridge, *supra* note 6, at 460; *see also* Torres & Guinier, *supra* note 98, at 1067.

110. *See* McAdam, supra note 99, at 58–59 (1982); *see also* McAdam, *supra* note 63, at 27; Williams, *supra* note 67, at 95; Meyer, *supra* note 2, at 125.

111. Mark Wolfson, The Fight Against Big Tobacco 5 (2001); *see also* McAdam, *supra* note 63, at 27. Given criticisms of the political process model as excessively structural, more recent work has focused on the cultural and dynamic nature of political opportunity. *See, e.g.*, Jeff Goodwin et al., *Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory*, 14 Socio. F. 27 (1999).

112. Wolfson, *supra* note 111, at 5.

as the relationships between specific judges and a particular social movement. To better understand movement success and failure, including results in court, scholars must look beyond a single venue and instead relate activity in one venue to the broader, dynamic political context.

Attention to the position of courts in the more general political environment exposes the attractiveness of courts to nascent social movements.[113] Courts are relatively open compared to other institutional arenas.[114] In the legislative process, elected officials largely control whether to provide a forum for a movement to make demands and whether to consider those demands. By turning to courts, however, movements can gain a forum for claimsmaking—and, in many cases, a substantive resolution.[115] Furthermore, because federal judges (and some state judges) are relatively insulated from immediate political pressure, they may, as compared to elected officials, assess the movement's claims in a more substantive way.

Yet because the political and ideological composition of the federal judiciary changes over time, courts may be more hospitable to some movements than to others. It is no accident that conservatives, even while denouncing courts as activist, developed a robust public interest law infrastructure and encouraged Republican presidents to populate the federal bench with conservative judges.[116] The political composition of the bench matters. In an important way, then, the partisan critique of the current federal judiciary (set out in Section II.A) has explanatory power, even as it overdetermines courts' role.

Balkin's account of partisan entrenchment, which he developed with Professor Levinson, reflects the political location of judges and the relationship between political parties and the judiciary.[117] Balkin and Levinson argue that federal judges, especially Supreme Court justices, "are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution."[118] Yet, because of the lifetime tenure enjoyed by federal judges, the federal judiciary may represent a friendlier venue for movements that no longer find sympathetic leaders in the legislative and executive branches (p. 292). Indeed, the conservative effort to influence judicial appointments reflects an appreciation for the long-term impact of activism aimed at courts.[119] Accordingly, when assessing the effects of litigation tactics, constitutional scholars should at-

113. *See* Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506, 524 (2012) ("Members of disadvantaged groups have historically used American-style public interest law, particularly court-based litigation, to leverage policy gains that could not be effectively achieved through majoritarian politics.").

114. *See, e.g.*, HANDLER, *supra* note 7, at 22.

115. *See* NeJaime, *supra* note 97, at 688; *see also* Zackin, *supra* note 45, at 388.

116. *See* ANN SOUTHWORTH, LAWYERS OF THE RIGHT 23, 106, 168–69, 182–83 (2008); Post & Siegel, *supra* note 4, at 554–61.

117. Pp. 201–02; *see* Balkin & Levinson, *supra* note 4, at 1065.

118. Balkin & Levinson, *supra* note 4, at 1067.

119. *See* STEVEN P. BROWN, TRUMPING RELIGION 5, 23 (2002).

tend to the attractiveness of courts *in comparison to other institutional domains*.

While it is clear that courts may differ in their openness to a movement's claims vis-à-vis other institutional branches, there are significant differences across courts themselves. Federalism—a key structural feature of the court system—renders wholesale treatment of the courts particularly misguided.[120] With independent state court systems—and multiple levels of both federal and state courts—legal scholars should assess courts in a more specific and nuanced way, just as cause lawyers themselves do. It is no accident that LGBT rights advocates first asserted claims to marriage equality in state courts. Viewing the federal judiciary as largely hostile and seeing the Supreme Court as an especially dangerous venue, they sought more hospitable locations. Of course, they did not bring claims in all states. They selected venues with not only potentially supportive judges and doctrine, but also favorable conditions outside the courts.[121] Advocates chose states where elite support existed for LGBT rights, legislative progress undermined arguments against marriage equality, public opinion was becoming increasingly favorable to relationship recognition, and the state constitution was difficult to amend.[122] In other words, they viewed courts in a way that maps onto the political opportunity structure.

Of course, some LGBT gains were met with backlash and setbacks, but that is the constitutional and political system in which we live. A longer view suggests that constitutional and social change is always a process of push and pull, of intense conflict and contestation. Just as judicial decisions create opportunities for LGBT rights advocates, they may also create opportunities for countermovement activists.[123] Judicial decisions are significant points along the way to constitutional and social change, but they are only points.[124]

Ultimately, using the concept of political opportunity to reframe analysis of courts' capacities would help constitutional theorists develop a more contextualized and contingent account of courts. Some courts, at some points in time, may aid a movement's progress; others, at other points in time, may hinder that progress. Whether they do one or the other relates more to their location in the broader political environment than to inherent features of courts themselves.

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120. *See* Meyer & Staggenborg, *supra* note 72, at 213.

121. *See* NeJaime, *supra* note 97, at 688; *cf.* Balkin, *supra* note 91, at 1561 ("Social movements must choose their battles based on the existing political terrain and available opportunities for pressing their claims.").

122. *See* Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 8–21 (2005).

123. *See* NeJaime, *supra* note 48, at 1002.

124. *See* Mark A. Graber, *Hollow Hopes and Exaggerated Fears: The Canon/Anticanon in Context*, 125 HARV. L. REV. F. 33 (2011).

CONCLUSION

This Review has devoted significant attention to the way in which social movement theory may inform and supplement constitutional scholarship. Social movement work in sociology supports much of Balkin's account of constitutional change, counsels against a comprehensive turn away from courts, and suggests important constraints that may accompany the turn to law. But the benefits of cross-disciplinary fertilization run both ways. Balkin's account can provide significant lessons for social movement scholars, who have traditionally focused more heavily on confrontational tactics and in doing so, have marginalized litigation as an institutional tactic associated with movement moderation.[125] Legal scholars, therefore, might push social movement scholars to revisit some of the assumptions that have historically limited their attention to law and courts. Through more interdisciplinary dialogue, both constitutional theorists and sociologists might emerge with a more dynamic, multidimensional, and accurate account of law and social change.

125. *See, e.g.*, Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201, 1204 (1991).