SYMMOYSIS

SOCIAL MOVEMENTS AND LAW REFORM

ARTICLES

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. 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 In its Part I B (demonstrating how scholars from each tradition have incorporated ideas and methodologies from the other tradition).
legal, scholarship, the reasons are its essential 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 argumentum 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 origins 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 movement 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. Each is capable of generating pro-

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1 The distinction between the political and economic spheres goes back at least as far as Aristotle, who distinguished between the path 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 53-54 (Stevens J. Saunders ed., T.A. Sinclair trans., rev. ed. 1961). 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 income in a nation's wealth and considering the civil wealth to be founded in consumer goods). The concept of civil society probably originated with Hegel. C.W.F. HEGEL, PHILOSOPHY OF RIGHT 122-55 (T.M. Knox trans., Oxford Univ. Press 1967) (1821). A Hegel uses this term, however, it is one of the three divisions of civil life (Staatlichkeit), the others being the family and the state, and includes within it things that we now associate with the political—such as the police and the administration of justice. For a discussion of Hegel's conception of Staatlichkeit see FREDERICK NEUMANN, FOUNDATIONS OF HEGEL'S SOCIAL THEORY 114-41 (2005); and CHARLES COLKOR, HEGEL, 599-99 (1975). The contemporary terminology is derived from the work of Talcott Parsons in the American tradition, see TALCOTT PARSONS, POLITICS AND SOCIAL STRUCTURE (1966) (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 GRAUZIA, PRAXIS NOTOPHRAS (Joseph A. Brattling ed., Joseph A., Buntting & Antonio Casillo 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 Parmelian
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.  

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.  

On occasion, these agglomerations...
will even generate a political party, although they are more likely to ally themselves with an existing one. 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.

1. OVERLAPS

A. Subject Matter

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


See ROBERT JACOBSON, THE LOGIC OF PARTY FORMATION: ECOLOGICAL POLITICS IN BELGIUM AND WEST GERMANY (1990) (examining the formation of Belgian and West German ecology parties such as the Green, Ecologic and Agave parties); PIET ROYSENS & JUDE GEMAL, ENVIRONMENTAL GROUPS AND POLITICS (1988) (exploring the relationship of the environmental movement to the political system).

But an AUTOPOIETIC LAW AND POLICY AND SOWING 2 (Gunter Teubner ed., 1980) (explaining the potential of autonomous legal theory and self-sustaining legal systems); ARMIN SCHÖN, SOCIAL MOVEMENTS AGAINST THE 2 (protesting a 2% of society based on an autochthonous, "autopoietic" system); GUNTER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Zdeněk Husakowski et al., Anne Bankowska & Ruth Olley eds., 1993) (asserting that law is an autopoietic system, which reproduces itself. Tohm, movements regard the political, economic, and social spheres as different from those of environmentalism, as independent entities that are defined by distinct, self-sustaining discourse practices, and that interact with each other only when each realm reproduces outside events into its own discourse.

See generally RUSSELL J. BALDWIN, THE GREEN RAINBOW: ENVIRONMENTAL GROUPS IN WESTERN EUROPE (1986) (exploiting the effects that environmental interest groups have on the political process through the groups' creation of a link for change to society's new policy goals); MARCO DIAMO, GREEN NETWORKS: A STRUCTURAL ANALYSIS OF THE ITALIAN ENVIRONMENTAL MOVEMENT (1986) (analyzing the social movement from a structural approach that focuses on the transformations between organizations and individuals that create and shape the movement); ECOLOGICAL MOVEMENTS (Ann Raymond Tversky ed., 1985) (describing the emergence, structure, and impact of popular ecological resource 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 ef-
fects, that contradicted all existing theories on the causes of mass
movements. It neither seemed to arise from social frustration, dislo-
cation, or anomie, nor express itself as either a series of spontaneous
popular uprisings or as a blind obsession to demagoguery, nor con-

SWEDEN, DENMARK AND THE NETHERLANDS (1990) (studying, in a comparative man-
ner, the development of environmental groups in order to bridge the gap between
ideological and empirical analysis of social movements literature); GRANT JORDAN &
(destigmatizing Friends of the Earth and Amnest International in Britain but concluding
that social movement literature adds little to the traditional political science app-
proach); LORIE & GUDER, 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 SIAK, 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 issues).

See, e.g., ERLICH FROMM, ESCAPE FROM FREEDOM (Diasc Avon Books 1965
(1941) (arguing that the illusion of freedom is unbearable to people, causing anxiety
and a desire to escape freedom by submission or entrance into dependency); THE
ROBERT GURK, WHY MEN REBEL (1970) (setting forth a theory of political violence in
which discontent develops, is politicized, and finally results in violent action); RUDOLPH
HEBREEL, 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
HOPPER, THE TRUE BELIEVER: TOTAL AXIS ON THE NATURE OF MASS MOVEMENTS 11
(1951) ("For men to plunge headlong into an undertaking of such change, they must
be intensely discontented yet not desolate, 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 KORNEHAGA, THE POLITICS OF MASS
SOCIOLOGY 128 (1959) ("[M]ajor discontinuities in social process produce mass
movements by destroying pre-established intermediate relations and by presenting the
formation of new associations aligned with the social order"); GIOVANNI LA BON, THE
CROWD, IN THE MAN AND HIS WORKS 57 (Alice Wildner ed., 1979) (explaining
that both remote and immediate factors shape the opinions and beliefs of crowds);
GEORGE RICH, THE CROWD IN HISTORY, 770-1948, at 914-56 (1964) (analyzing the
"pre-industrial" crowd and making a distinction between dominant and underdaring
motives, such as economics and politics); N. J. SIEGEL, THEORY OF COLLECTIVE
BEHAVIOR (1955) (arguing that many conditions need to come together in a specific
pattern to cause collective behavior); PETER WORLICH, THE TRUMPET SHALL SOUND: A
STUDY OF "CABALISTIC" IN MELNICK (2d ed. 1966) (exploring movements in which
there are expectations and preparations for a period of "supernatural bliss"); JOSEPH R.
GALIFIELD, MASS SOCIETY AND EXTERNAL POLITICS, 27 AM. SOC. REV. 19 (1962) (noting
that many illusorily that social movements are the product of social change); JOSEPH R.
GALIFIELD, THE STUDY OF SOCIAL MOVEMENTS, in 14 INTERNATIONAL ENCYCLOPEDIA OF
THE SOCIAL SCIENCES 449 (David L. Sible ed., 1968) (noting that some social movements
entail "the emotional-affective following" of a charismatic leader" by its members).
Underlying this literature are a disappointment and fear of mass movements as the op-
posite of the reasoning and deliberation that was, and still is, associated with demo-
stitute an emergent collective behavior resulting from individual reactions.' Indeed, the movement was remarkable for the diffuse and remote character of the concerns that animated its participants. For the sake of any particularized economic interest in its basic goals, and for the sophisticated organizational efforts that sustained it. For some reason, a large number of people who were otherwise indistinguishable from the general population were moved to political action by inter- mental deterrence 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 species that they would see only in zoos or picture books. By some mechanism, the environmental movement was able to generate stable, effective organizations.

nary. The participants in social movements were taken either in being out of control, or victimized by strong emotions and too easily controlled by continguous deter- gencies."

This was the approach adopted by the Chicago School of Sociology, which described its methodology as symbolic interactionism. See MALCOLM COCHRAN, THE PHYSIOLOGY OF SOCIAL MOVEMENTS (4th ed. 1967) (explaining behavior in a fiction of the environment and the person's perspectives as in that moment); KURT LANG & THOMAS ENGELS, LAND, COLLECTIVE DYNAMICS 4 (1961) (describing social dynamics as "the unique pattern of social action that are spontaneously and unstructured into what they are not organized and are not reducible to social structure"); ROBERT E. PARK, ON SOCIAL CONTROL AND COLLECTIVE BEHAVIOR: SELECTIVE PAPERS 225, 29 (Ralph Turner ed., 1967) (defining collective behavior as the behavior of individuals resulting from shared impulses that are common to members of a group or institution); ROBERT E. PARK, THE GROWTH AND THE PUBLIC AND OTHER ESSAYS 22 (Henry Eisen, Jr. ed., Charlotte Emmer ed., Univ. of Chi. Press 1970) (explaining the word as a "collective current, together with the individuals carried by it"); RALPH H. TURNER & LEAN M. KILLIAN, COLLECTIVE BEHAVIOR 21 (1957) ("unable there is a minimum of cultural homogeneity and a certain 'coalescing in a cohesive group, and not be a suf- ficient basis for the communication between individuals which are necessary for the development of collective action"); MARVIN BERKOVITZ, COLLECTIVE BEHAVIOR, IN NEW OUTLINE OF THE PRINCIPLES OF SOCIOLOGY 599 (Alfred McClung Lee ed., rev. 24 ed. 1951) (citing social movements as collective enterprises to establish a new order of life). The Chicago School did integrate some of the insights of European socialists, such as Helmut Duckstein and Georg Simmel, into the American empirical tradition, and it struggled with the issue of who controlled 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 L. Levine ed., Simmel's Influence on American Sociology gen. 1 & 2, 81 AM. J. SOC. 133 (1975), 81 AM. J. SOC. 1112 (1975) (tracing the three phases of Simmel's thought and its influence on theoretical orienta- tions 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 BLUMER, THE CHICAGO SCHOOL OF SOCIOLOGY (1966); DENNIS H. PAULSON, THE CHICAGO SCHOOL OF SOCIOLOGY 377 (1972); FRED H. REID, THE AMERICAN SOCIOLOGICAL RESEARCH 1964; JAMES J. CARIN, SOCIOLOGY AND PUBLIC AFFAIRS THE CHICAGO SCHOOL (1975); FRED H. MATHEWS, QUEST FOR AMERICA: 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, the animal rights movement, the anti-abortion and pro-choice movements, the direct action movement, and the resurgent human rights movement 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) (showing 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, developmental strategies, organization, and the political context in which it operated); Thomas R. Gaten, Mobilizing for Peace: The Antinuclear Movements in Western Europe (1988) (suggesting an approach to studying peace movements that incorporates and extends to the new social movement theory and resource mobilization approach); Wolfgang Rein, 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 Form ed., 1994) (studying the interactions between antinuclear movements and pro-nuclear states by way of case studies).


12 See generally Bradley Stewart Culp, Prisoners Under the Guilt (1991) (providing a case study of a prison reform activist in Georgia and suggesting ways in which judges can become more effective in their capacity to intervene in prison reform litigation); Jeffery J. Martin & Sherrilyn Elden Olson, Texas Prison Reform (1987) (presenting a survey of prison reform activities in Texas); Jim Thomas, Prisoner Litigation (1988) (offering a social history of prisoner litigation);

13 See generally Kristina Lusk, Abortion and the Politics of Motherhood (1984) (exploring the ways in which people establish, confronting issues 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).


super 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 in spontaneous, emotive uprisings. Having grappled with the ideological and well-organized character of environmentalism and its companions, however, social scientists were able to perceive the ideology and organization that motivated the members of these more familiar efforts. Most simply, they recognized that the

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 de-emphasizes beyond the irrefutable evidence of ideas in general, RITCHIE POIETIS et al., PROTEST IS NOT ENOUGH: THE STRUGGLES OF BLACKS AND HISPANICS FOR EQUITY IN CIVIL RIGHTS POLITICS (1984); encouraging political mobilization through a theory of political incorporation in which members work to become part of liberal political coalitions; DAVIS, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT (1993) presenting a theoretical study of the dynamics of public-spirited collective action and the civil rights movement and the liberal and national politics that surrounded it; Gary Ragas, ORGANIZING THE MOVEMENT: THE ROOTS AND GROWTH OF ACORN (1986) (examining ACORN, a poor people's movement directed at tackling poverty and its effectiveness as it organizes direct); John D'Emilio, MAKING TROUBLE: ISSUES IN GAY HISTORY, POLITICS AND THE UNIVERSITY (1990) (analysing the gay rights movement and arguing that gay rights groups are complex and often-organized); Sara Evans, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT (1986) (depicting how women's experiences in the civil rights movement and New Left and the ideology of those movements shaped a feminist consciousness of equality); FEMINIST ORGANIZATIONS: HARVEST OF THE NEW WOMEN'S MOVEMENT (Myra Marx Ferree & Patricia Ramsey Martin, editors, 1986) (exploring the relationship of women's quest for equality to the women's rights movement and how they provide the movement with an agenda of purpose and benefit, in turn, provoking and supporting consciousness); Susan Hagon Herz, THE WELFARE MOTHER MOVEMENT: A DECADE OF CHANGE FOR POOR WOMEN (1997) (studying the welfare mothers movement from the perspective of women themselves and concluding that poor members were often excluded by the 'moralizing and negative attention that a woman was subjected to, in part, to anticipate, which incurs the consciousness of members); Craig Jenkins, THE POLITICS OF INSURGENCY: THE FARM WORKER MOVEMENT IN THE 1960s and 1970s (1986) (analyzing the United Farm Workers movement as accomplishing the basic goals and strategies of the social movements of the 1960s); U.S. LAW, GENDER POLITICS (1984) (discussing how women developed a 'group consciousness' that led to a political action); Jane J. Mansbridge, Why We Lost the ERA (1980) (emphasizing the forces of inclusivity and exclusivity that held the women's rights movement together); Robert N. Myer, THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE (1986) ("the fullest explanation of the cause of consumerism, centered on the need for social conditions with the moralization mobilization to effective corporate entrepreneurs."); Doug McAdam, POLITICAL PROTEST AND THE DEVELOPMENT OF BLACK MAJORITY, 1850-1970, at 2 (1982) (arguing that the emergence of widespread protest activity is the result of a combination of expanding political opportunities and ideological organization, in combination through a crucial process of collective attribution); Alison D. Mosher, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984) (examining the mobilization of the civil rights movement and demonstrating the impar-
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 dissatisfaction.

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

ance of internal organization and African-American institutions, such as the church); FRANCIS PYLE & RICHARD CLAYWORTH, 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); SAPPA ROBINEE, DISARMING PATRIARCHY (1995) (arguing for the integration of micropower 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 Faimed Kazen-stein & Carol McChesney Mueller eds., 1987) (hereinafter THE WOMEN'S MOVEMENTS) (arguing that a feminist consciousness is central to the success of feminist movements).}
ceptively described in Joel Handler's 1978 book, *Social Movements and the Legal System.* 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 often creations of the environmental movement, for example, became the subject of a new, highly popular course, and of a burgeoning field of scholarship. 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 reviews, articles that address law 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 court, 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

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20 As examples of some of the existing casebooks on environmental law, all written since the advent of the environmental movement, see ROGER W. FINLEY & DANIELA A. FISHER, CASES AND MATERIALS ON ENVIRONMENTAL LAW (5th ed. 1999); ELIZABETH CLARKE-GETMAN, MODERN ENVIRONMENTAL LAW: POLICY AND PRACTICE (1997); FRANK P. ORO & JOEL A. MINTZ, ENVIRONMENTAL LAW (6th ed. 2006); JOHN N.D. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURAL LAW AND SOCIETY (2d ed. 1998); JOHN MARK, STROVAVG, MATERIALS ON ENVIRONMENTAL LAW (1999); WILLIAM MURDOCK TAYLOR & LINDA A. MASON, ENVIRONMENTAL LAW: CASES AND MATERIALS (3d 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.29 The American approach, often described as resource mobilization, developed during the 1970s and 1980s. It drew its initial inspiration from a 1965 work

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29 See, e.g., Jean L. Cohen, Strategy or Identity: New Theoretical Paradigms and Contemporary Social Movements, 59 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 Firestone & William A. Camann, Utilitarian Logic in the Resource Mobilization Perspective, in THE DYNAMICS OF SOCIAL MOVEMENTS (Mayer N. Zald & John D. McCarthy eds., Univ. Prs. of Am. 1988) (1970) (critiquing the utilization 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 vi (Mancy Darnovsky et al. eds., 1995) [hereinafter CULTURAL POLITIC] (tracing the separate development of American and European social movement theory); John D. McCarthy, New Social Movements and Resource Mobilization: The European and the American Approaches Revised, 4 INTL. J. OF MASS EMERGENCIES & DISASTROUS EM 15 (1986) [hereinafter RENBERG], New Social Movements (noting that although Europe and the United States experienced similar growth in social movements, the two continue to offer explanations from different directions); Benn Klandermans, New Social Movements and Resource Mobilization: The European and the American Approaches Revised [hereinafter KLANDERMAN], in RESEARCH ON SOCIAL MOVEMENTS: THE STATE OF THE ART IN WESTERN EUROPE AND THE USA 17 (Zacher Riech ed., 1991) [hereinafter RESEARCH ON SOCIAL MOVEMENTS] (comparing the European and American approaches to explaining social movements and reviewing new themes that emerge after critiquing both approaches); Sidney Tarrow, Comparing Social Movements Participation in Western Europe and the United States: Problems, Use, and a Proposal for Students, in RESEARCH ON SOCIAL MOVEMENTS, supra, at 392 (developing guidelines to compare social movement research from the Ecu-Spots and American schools of thought); Louis A. Zurcher & Jürgen A. Sales, Cybriotic Behavior: Social Movements, in SOCIAL PSYCHOLOGY: SOCIOLOGICAL PERSPECTIVES 447, 448 (Morris Rosenberg & Ralph P. Turner eds., 1981) (arguing that the study of social movement can function as "an important hedge" 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*. 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.

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

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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 sine qua non 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.23

The distinction between the American and Continental ap-
proaches to social movements should not, however, be overdrawn. While the two approaches may seem distinct when one compares their most deterministic members, such as McCarthy and Zald on the American side, and Alain Touraine on the Continent, many other scholars incorporate 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. 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. The unification of previously unorgan-

25 See William A. Gamson, Introduction to Social Movements in an Organizational Society, supra note 4, at 1. ("Zald and McCarthy represent a major substitute to a stream of environmental 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 interests or circumstances but on people's actions and interactions).

See, e.g., Challenging the Political Order (Russell J. Dalton & Manfred Rueckel eds., 1986) (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 two social movements and resource mobilization perspectives); Bella Porta & Eriani, supra note 4 (contributing to the integration of the American and European traditions); Ron Eyerman & Andrew Jamison, Social Movements: A Countercultural Approach (1991) (proposing 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); Alcide Melucci, Challenging Global (1995) (focusing on how social movements construct their consciousness); Social Movements and Culture (Heinz Kohrman & Bert Klandermans eds., 1985) (addressing the application of cultural analysis to intercultural perspectives in the study of social movements); Touraine, supra note 24 (presenting a theory of collective action that incorporates consideration of historical, sociological, and political factors); Bert Klandermans & Steven Tarrow, Mobilization into Social Movements: Synthesizing European and American Approaches, in FROM STRUGGLE TO ACTION: COMPARING SOCIAL MOVEMENTS IN EUROPE AND CULTURES 1, 3 (Bert Klandermans et al. eds., 1988) (integrating European and American approaches to studying social movements and suggesting methods for achieving this coordination); Mya Marx Ferree & Frederick O. Mogge, Mobilization and Marginality: Toward an Integration of Social Psychological and Resource Perspectives on Social Movements, 55 SOC. PROB. 39 (1965) (discussing the interdependence of resource mobilization to explain social movements against at least considering factors prominent in the motivational theories, such as ideology).

27 See James N. Coleman, Foundations of Social Theory 1-83 (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. Scheiling, Microfoundations and MacrobEHavior (1979) (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 belong); Ramello Collins, On the Microfoundations of Macro-instability, 86 AN. J. SOC. 984 (1981)
ized individuals into a social movement on the basis of voluntary action, rather than external coercion, obviously raises the micro/macro 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, and that the Continetal approach was equally inadequate in accounting for the mechanisms by which these individuals co-opted their shared identities into political or social action. In response, they have developed several avenues of research that attempt to unify the two approaches. One

suggesting a method for integrating micro and macrolevel research.

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 emergence of social psychology in the resource mobilization field to a means to better understand why new social movements develop); Jeffrey, supra note 22, at 569 (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, Manifest Political Culture, 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). Further & Knowles, supra note 20, at 407 (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, "(social psychology) thinking among analysts of social movements is over." Gamson, supra, at 33.

See Della Porta & Tarrow, supra note 4, at 13 (The main problem which the new social movements 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 quantitatively on factors that deter- mine mobilization potential, but does not give an answer to the question of how these potentials are mobilized.); Klandermans, New Social Movements Revised, 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 organiza-
tions and resources); Bob Klandermans & Dirk Oegema, Political Sociology, New York: Mouton, and Buenos Aires: Siglo: Towards Participation in Social Movements, 56 AM. SOC. REV. 315 (1991) (suggesting that different theories, as well as practical efforts, are needed to explain and create mobilization of and participation in social movements); Hartmut Weiler, The Organizational Structure of New Social Movements, in S. Political Theory, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 192 (Doug McAdam et al., eds., 1986) (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 com-
gestivations cannot be ignored in determining how social movements work); Alan Touraine, Commentary on Jurgen H. D. Caplow's Critique of Research on Social Movements, supra note 26, at 585 (explaining that both the European and American approaches to social movement research are valid, but that each school of thought is actually asking a different question and neither can fully answer both and the social movement oc-
cur).
example is frame analysis, derived from the work of Erving Goffman. \(^2\)

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 yielding individual motivation with organizational structures. \(^3\)

Legal scholarship, as it developed during the 1970s and 1980s, focused, in parallel form, on two major themes. They constitute 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. \(^4\) In the political sphere, this reliance

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\(^2\) 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 viewed in domestic, industrial, or commercial social establishments.

\(^3\) See, e.g., COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, supra note 30, at 210 (explaining that there is a confluence between forms of social organization and individuals' perceptions of social experiences); WILLIAM A. GAMSON ET AL., ENCOUNTER WITH UNLEASHED AUTHORITY (1982) (discussing strategies for organizing to deal with unjust authorities); WILLIAM A. GAMSON, POLITICAL DISCOURSE AND COLLECTIVE ACTION, 1 SOC. MOVEMENT RES. REV. 222 (1988) (demonstrating that frames function to organize and guide collective and individual action); HANK JOHNSON, A METHODOLOGY FOR FRAME ANALYSIS, FROM DISCUSSION TO COGNITIVE SYMURA, IN SOCIAL MOVEMENTS AND CULTURE, supra note 27, at 217 (defining frames as mental categories that organize perceptions and interpretation); DAVID A. SIRBOU ET AL., FUTURE OF PEACEFUL PROTEST, PROTESTMUTUALIZATION AND MOWMENT SYNCHRONIZATION, 51 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. SIRBOU & ROBERT D. BRUNFELD, MASTER FRAMES AND CYCLES OF PROTEST, IN FRONTIERS, supra note 30, at 133 (exploring the relations between master frames and cycles of protest by enumerating six interconnected propositions).

\(^4\) See generally ROBERT COOTE, THE STRATEGIC CONSTITUTION (2000) (analyzing constitutions by using models of strategic behavior created for markets and adapted to politics); ROBERT COOTE & THOMAS CLINN, LAW AND ECONOMICS (2nd ed. 1997) (explaining how economics can be used to explain legal rules and institutions); FRANK M. EREDLINGER & DANIEL M. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (explaining the rationale for rules of corporate law through economic principles); WILLIAM M. LANDERS & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (exploring how theories of economic efficiency explain rules of tort law); JONATHAN R. MIZE & GEOFFREY P. MILLER, COSTLY POLICIES: INCREASING REGULATION
facilitated adaptation of microeconomics into what was soon called public choice theory.\textsuperscript{7} Olson’s Log of Collective Action was one of the theoretical works that launched public choice theory, along with James M. Buchanan and Gordon Tullock’s \textit{The Calculus of Consent}\textsuperscript{6} and William H. Riker’s \textit{The Theory of Political Coalitions}.\textsuperscript{7} 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.\textsuperscript{7} Law functions, in part, as an in-
strumen 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 set limits on that process. This absolute view, now known as legal formalism, 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. 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 intransigent of...
the dominant elite. Critical race scholars, feminists, and gay and lesbian scholars have contributed important perspectives to this debate.
judgmen__e would facilitate fair and compassionate treatment of women and the poor by the government's1134. M. Findley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Embattles" 69 COLUM. L. REV. 1199, 112021 (1996) (arguing that the American legal system subjugates women by not making the workplace more accommodating to pregnancy); Amer. Hist Rev. Month of Equality, 1980 I. H. L. REV. 39, 76 (asserting that decisions in Supreme Court of discrimination cases reflect traditional male and female social roles); Sylvia A. Law, Reforming Sex and the Constitution, 70 U. PA. L. REV. 855, 856 (1971) (formulating a strategy constitutional framework of sex-based equality); Martha R. Mahoney, Legal Images of Feminist Women-Inflicting the Ache of Separation, 30 HASTING'S L. J. 1, 3012 (1991) (asserting that the law does not adequately recognize that more than fifty percent of women are victims of domestic violence); Martha Minow, The Supreme Court, 1986 "From-Feminist Justice: Engendered, 101 REV. L. REV. 49, 187 (1987) (contending that the Supreme Court's treatment of pregnancy and workplace issues demonstrates the influence of the asserted male norms translate of gender discrimination cases); Joan C. Williams, Dismantling Gen- der, 17 MICH. J. L. & SOC. 757, 811 (1989) (arguing that the American legal system ex- ceedingly limits women to no unacceptable choices, the traditional male职能 pattern of women's legal constitutional vulnerability). Here too, there was an explicitly voiced intent to reformulate the methodological of the crying theory studies critical to iden- tify different uses. See, e.g., Nanneriet J. Barret, Feminist Legal Method, 16 J. MARX. L. REV. 805, 1020 (1990) (offering a new feminist model to solve legal problems called "positional," which states that truth is not final and feminism have an obligation to continue to revoir truths); Joan C. Scop, The Emancipator of a Breastfeeding Lite: An Essay, 30 YALE L. J. 773, 777-784 (1961) (arguing that legal rules and ex- cept, the traditional way for feminism to solve social problems, is inadequate for solv- ing problems of inequality); Carol Weisbrod, Practical Pragmatism: Theories of the Just- and-Feminist Jurisprudence, 44GA. L. REV. 985, 986 (1990) (stating that praxiologial and functional theories of law and the, the are helped in thinking about some feminist problems); Robin West, Jurisprudence and Gender, 25 U. Chi. L. REV. 1, 71-72 (1988) suggesting that for feminism to fight effectively the equal protection imbalance be- tween men and women, feminism must envision a postgenitual world and use this vi- sual to formulate new goals and strategies.)

1. See, e.g., WILLIAM N. TAKRIDGE, JR., CULWAN, CHALLENGING THE MARRIAGES OF THE MIND 217 (1999) [hereinafter ESQUIRE, GAY!], arguing that many peer pre- traditional marriage in their lives and yet some believe that gay liberties are not mor- ally equal to heterosexual marriage]. WILLIAM N. TAKRIDGE, JR., THE CASE FOR AN OPEN-LAW: SEX MARKET: FROM SOCIAL LEXIS TO CIVILIAN COMMITMENT 884-88 (1991) (ex- amining the assumptions underlying mainstream objections to same-sex marriage); Nancy D. Pelkeff, THIS Child's Dual Use Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Untraditional Families, 76 COLUM. L. REV. 1059, 1061-1069 (1989) (asserting that the law requires that a child have two parents if each sex and asserting that this policy does not necessarily serve children's best interests); Kenneth Thomas, Beyond the Procrustean Principle, 59 EMORY. L. REV. 431, 435 (1992) (arguing that law against homosexuality have been consistently supported by homopho- nistic public officials). For discussion of methodology, see William N. Takridge, JR., GAY LITIGATION, 46 REV. L. REV. 997 (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 scholars 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. 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.

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’ interest in the pure version of Olson’s theory, while social scientists’ interest in the more sophisticated version, Olson, like other adapters of microeconomics, believes that people’s primary motivation is to maximize their material self-interest. This motivation, when combi-
timed with a theory of groups and organizations, will prevent ordinary people from organizing to lobby for desirable public policies. Olson began 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." 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 effort. Many citizens would desire economic benefits from a law deregulating the insurance industry, for example, but the benefits 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 the 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 intense political activities such as lobbying, and would contribute to such efforts only limited amounts of money. 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, noncollective goods, then by asserting that they only operate in small groups and finally by claiming that they tend to make economic efficiency. Id. at 65-66. 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 ("There 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 as Olson's sense, such as status, cooperation, 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.

2 Id. at 17. To support this claim that this is the traditional view, Olson cites several sociologists, including Georg Simmel. See id. at 17 n.28 (citing GEORG SIMMEL, CONSUMER AND THE WHOLE GROUP AS IMITATION (Kurt H. Wolff & Bernard 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 tradition).

3 Id. at 129 ("If the individuals in a large group are interested in their own welfare, they will not voluntarily make sacrifices to help their group gain in political (public or collective) objectives.").

4 See id. at 165-68 (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.\footnote{See id. at 145-52 (discussing the effects of free riding on the collective good).}

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 others' 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.\footnote{See id. at 22-43 (describing how free riding works in small groups).}

From this tale of unrammed 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 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 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 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.

\footnote{See id. at 145-52 (discussing the effects of free riding on the collective good).}
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 all effects.1

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. To their view, ideology was a crucially important factor.2 Their methodology recommended


2 See, e.g., GERALD MARX, E. PAMELA OLIVER, THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY (1982) (examining the interaction of ideology and opportunity among different components of social movements); DOUG McLEOD, FREDSONBURGER (1980) (investigating social movements); ANN MICHENER, COMMON CAUSE: ORIGINS IN THE PUBLIC INTEREST (1981) (considering the ideological motivation of lobbying participation); OVERGOM, supra note 22 (analyzing the role of pressure groups in creating social movements); JOHN WILSON, INTRODUCTION TO SOCIAL MOVEMENTS (1973) (discussing the role of socialization and personal identity); McCormick & Zeld, supra note 6, at 217–18, re- peated in SOCIAL MOVEMENTS: A SOCIOLOGICAL PERSPECTIVE 30 (Melvin N. Zald & John D. McCarthy eds., 1982) (defining a social movement as “as set of opinion 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 Organiz- ations: Emergence, Identity and Change, 44 SOC. PSYCH. 747 (1966) (arguing that ideological factors disrupt Weber-Michel’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. 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.

The opportunity to free ride on the effects 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. 575 (1996) (examining incentive-based motivation at different levels of involvement in social movement organizations). This could be given a critical spin that would be plausibly microcosmic (movements are simply the result of effects of self-interest—policy entrepreneurs), but it still relies on the idea that people are motivated by ideology. In critiquing the value of the microcosmic model for social movement theory, Myra Marx Ferree notes the "spurious circularity of its empirically unstable incentive formulations consorts theoretically dangerous assumptions, carried over unthinkingly from Olson, that (breathes the spirit of [resource mobilization theory]) to explain what social movements are and do." Myra Marx Ferree, The Pathology of Consent: Rational Choice Theory and Resource Mobilization, in FRONTIERS, supra note 21, at 29, 30. Her claim is that Olson's model may be a "Tojan Horse" that smuggles a material, self-interested image of human beings into a social movements literature that relies heavily on ideological motivations. Id. at 39.


See supra notes 14-16 (using sources). For discussions of the reasons why social movements are able to overcome the free-rider problem, see RICK FANTER, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS (1988); Freeman & Gamson, supra note 21; Myra Ferree, supra note 32.
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 ensnared 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. 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 constraining causal mechanisms. As the successes of microeconomics began persuading social scientists that the best theories were those that linked large-scale events to individual behavior—that 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. 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.

56 See David Snyder & Charles Tilly, Hardship and Collective Violence in France, 1830 to 1960, 87 AM. SOC. REV. 529 (1972) (explaining how violence by social movements is related to electoral opportunities rather than unfavorable economic conditions).
57 See Doug McAdam, Mobilization Contexts and Recruitment to Activism, 1 INT’L SOC. MOVEMENTS 81, 125, 127 (1989) (“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.”).
58 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. But once one adopts the eustenotypical 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. What they will do, as Olson suggests, is take instrumentally rational action to implement their ideology. If there is no organizational contest 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; if it is these leaders, therefore, who mobilize the resources needed to create an active social movement...
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. 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. But the more money and funds and effort she obtains, the greater her ability to solicit further money and effort. Her success will depend upon the complex interplay of risks and rewards for potential participants at each successive stage, a process described as micromobilization. This process often leads to competition among policy entrepreneurs, the emergence of a few successful models and participants in order to bring social change. 

Sidney Tarrow, States and Opportunity: The Political Structuring of Social Movements, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, supra note 30, at 41–49 (citing that civil rights leaders mobilized college students and helped them create sit-ins).

See, e.g., John D. McCarthy, Pro-Life and Pro-Choice Mobilization: Infrastructure Deficit and Soc 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 REV. SOC. MOVEMENTS CONFLICT & CHANGE 45 (1991) (describing functioning mechanisms of certain social movement organizations); Pamela E. Oliver & Gerald Marxell, 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 Rosenbluh & Michael Schwartz, Austerity and Democracy in Social Movements, 2 INT’L SOC. MOVEMENT RES. 35 (1989); Jack L. Walker, Jr., The Mobilization of Political Interest in America, in BUILDING INTEREST GROUPS IN AMERICA: PATTERNS, PROFESSIONS, AND SOCIAL MOVEMENTS 53 (John D. Abelson 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).

See GAMBON, supra note 22, at 98–109 (describing the internal structure of social protest groups, including how bureaucratic organization prevents factionalism); Hank Johnston, The Market Social Movement: A Case Study of the Rapid Growth of TM, 23 PAC. SOC. REV. 535 (1986) (explaining how an internal grievance mechanism aided the transcendental meditation movement in accomplishing its goals).

In addition, such organizational success may also result in financial contributions from sympathetic outside sources. See Craig Jenkins & Craig M. Eckert, Channelling Black Insurgency: Elite Patronage and Professional Social Movement Organisations in the Development of the Black Movement, 31 AM. SOC. REV. 812 (1966) (describing how foundation grants to civil rights organizations followed effective social protest by these organizations, rather than catalyzing such protest).

William A. Gamson et al., ENCOUNTERS WITH UNPREDICTABLE AUTHORITY 1–12 (Robin M. Williams, Jr. & Charles M. Bonjean eds., 1982) (explaining micromobilization); Oberschall, supra note 22, at 101–12 (analyzing the risks and rewards of participating in a social movement).
ones, and then the increasing institutionalization of their organization. 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, 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. 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. 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. Second, incidents can be used as resources—environmental disaster, such as Three Mile Island, a political event, ...
like a reduction in welfare benefits, 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. The Supreme Court’s decision in Roe v. Wade virtually created the anti-abortion movement. 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. Many protest activities by these organiz-

THERE MILE ISLAND 157-67 (1991) (explaining that after the Three Mile Island nuclear accident, mass was mobilized by joining and establishing groups that organized meetings, rallies, and marches); WALK, supra note 16 (providing a comprehensive story of postaccident mobilization); see also Paul Shaw et al., Charting Present Risk, in DANGEROUS PROGRESS: MANAGING THE HAZARDS OF TECHNOLOGY 95 (Robert W. Kates et al. eds., 1985) (discussing study participants’ perceptions of the risk of nuclear power). 30. See Stephen Loffredo, Poverty Law andz Community Action: Nuns from a Law School Class, 150 U. PA. L. REV. 175 (2001) (describing the collaboration of a grassroots welfare rights organization and a law school class in the wake of the reduction of welfare benefits in the mid-1990s). 31. See MARTIN deBRABAND, STONEWALL! (1995) (filing the stories of Stonewall riot participants and how the riot affected gay resources); BRIDIGE, GAYLAW, supra note 42, at 99 (“Literally overnight, the Stonewall riot transformed the haphazard shop movement of several dozen bar regulars into a gay liberation movement preferred by thousands of lesbian gay men, and bisexuals who formed hundreds of organizations demanding radical changes in the gay/gay people were treated by the state.”). 32. 410 U.S. 113 (1973). 33. See LEE, supra note 13, at 37 (noting that pro-life group members “repeatedly that they became mobilized to the cause on the very day the decision was handed down”); RAYMOND TATAOVIY & BERNARD W. DAVIES, THE POLITICS OF ABORTION 149 (1985) (characterizing the pro-life movement as a reaction against the Supreme Court’s decision in Roe v. Wade). 34. See SZEKET, supra note 7, at 57 (“The period of mass-media media coverage was followed by a surge of social movement activity”); WILLIAM B. GIBSON & ANDREW MEL- glan, Media Discourse and Public Opinion on Nuclear Power: A Constructivism Approach, 95 AM. J. SOC. 5, 677 (1986) (explaining that organizations sometimes sponsor media activities); William A. Gibson & Gail Woolfield, Mass Media and Civil Rights Movement in the Seventies, 50 ANNALS AM. ACAD. POL. & SOC. SCI. 114 (1985) (illuminating 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 30, at 21 (“For social movements, the mass media represent a powerful mechanism for mobilizing an establishment reaction to fulfill nonestablishment goals, communica-

cating with movement followers, reaching out to potential recruits, intimidating would-be opponents, and confining or aborting mobilizing concerted opponents.”); Harvey Molotch & Matthew Lester, Accidental News: The Good Oil Spill in Local Governance and National Policy, 91 AM. J. SOC. 235, 250-68 (1975) (describing how conservation groups and oil companies sought advantageous coverage of the Santa Barbara oil spill); GIBSON, supra note 22, at 160 (“In addition to its use as a partial defense...
ions 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.

Nor is the resource-mobilization perspective limited to the action of political entrepreneurs. Other social scientists who have adopted this approach treat social movements as the product of more localized or indigent 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. Here, the issue of opportunity looms even larger against some repetitive forms of social control, the media spotlight can be used provocatively.”

See Marv N. Zald & John D. McCarthy, Social Movement Induced Competition and Conflict Among SSOs, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, supra note 4, at 101 (referencing 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 countermovement social movement that mobilizes those in opposition. See LUKER, supra note 15 at 144 (noting that the anti-Wade mobilized a stronger opposition to abortion reform); Clarence Y.B. Li, Grassroots Movements and Countermovements, in CONTEMPORARY U.S., 8 ANN. REV. SOC. 107, 119-18 (1982) (discussing the countermovements of the pro-life, Stop ERA, and anti-mobber movements); Zald, L. Mood, The Analysis of Countermovements, 27 SOC. PROBLEMS 202 (1980) (analyzing the antibusing countermovement in Boston); Bent Uthmen, Count-Periphery Conflict: Elite and Popular Involvement in the Boston school-Busing Movement, 6 REV. SOC. MOVEMENTS COMPLIES & CHANGE 271 (1984) (using the center-periphery model to explain elite and popular participation in the movement); Bent Uthmen & Maurer N. Zald, Two Pressure Gambre in Social Movement: Efforts to Promote Nuclear Power, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, supra note 4, at 275 (describing how industry support for nuclear power mobilized an antinuclear power social movement).

See, e.g., Jenkins, supra note 18, discussing how the resource-mobilization theory emphasizes the indirect resources, organization, and strategic position of excluded groups; ACCXAN, supra note 16, at 31 ("What the black movement shares in common with many other insurgent challenges is the existence of an informal organizational network in which is developed."); MORRIS, supra note 16 (examining how many local organizations and movements helped to develop the civil rights movement); Phelan & Clore, supra note 16 (describing how the main-based permanent organization model); Alden Morris, Black Southern Labor Movement: An Analysis of Formal Organization, 46 AM. SOC. REV. 744 (1981) (detailing the effects of local
and explains how movements can be mobilized without relying on the
proactive efforts of policy entrepreneurs. This localized perspective
leads to give social movements a more indigent and idealistic
face, and is thus favored by more left-oriented scholars such as Morris, or
Piven and Cloward, while the policy entrepreneur perspective has a
more cynical tone and attracts less overtly political scholars, such as
Oberschall or McCarthy and Zald.

Clearly, legal scholar 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 issue movement); Osha Neumann, Motherfuckers Then and
Now: My Nation’s Problem, in CULTURAL POLITICO, supra note 20, at 55 (recounting
the author’s personal experience as a member of the skinhead activist group the
Motherfuckers); Michael Schwartz & Shira Paul, Federal Mobilization Versus the
Mobilization of People, in FRONTIERS, supra note 21, at 260 (concluding that Modern 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 Ressources, 45 AM. SOC.
REV. 787 (1980) (emphasizing the importance of social networks in accounting for differ-
ences in social movement recruitment); READING ON THEIR EMERGENCE, MOBILIZATION, AND DYNAMICS 122
(Oak McAlpine & David A. Snow eds., 1997).

26See Morris, supra note 16 (analyzing the origins of the civil rights movement from
an indigent perspective); Piven & Cloward, supra note 16 (analyzing the ori-
gins of the unemployed workers', industrial workers', civil rights, and welfare rights
movements from an indigent perspective).

See THE DYNAMICS OF SOCIAL MOVEMENTS, supra note 20 (examining the theory
and conceptual development of social movements); McCarthy & Zald, supra note 4 (dis-
cussing and explaining changes in the resource mobilization approach to social move-
ments). 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-financed elites.

Piven and Cloward argue that the resource mobilization approach, particularly the
work of Charles Tilly and McCarthy and Zald, transforms social movements into more
interest groups, and away from social resistance into societal politics. The result is to
undermine the genuinely radical meaning of such movements, and the genuine gener-
ators that gave rise to them. See Francis Fox Piven & Richard A. Cloward, Normalizing
Collective Protest, in FRONTIERS, supra note 21, at 314 ("In recasting collective protest as
politics, however, [resource mobilization] theorists have normalized both the organiza-
tional forms typically associated with protest ... and the political processes generated
by protest.")
tate 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 systemically misled in 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.

8. 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, another 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 movement

were strongly influenced by critical theory’s emphasis on ideology.24 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 at 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.25 Legal process was itself a response to legal realism, which had advanced an energetic, but less philosophically sophisticated critique of law’s neutrality.26 As discussed above, much of the legal process program involved rehabilitating the claims of the preceding school of thought, now known a formalism, 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-

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24 See supra note 24 (citing sources).
27 See supra note 9 (citing sources).
ing claim that there was such a thing as legal reasoning, dened on the
formalist program and not the legal process school’s ability to re-


correct it. Critical theory’s attack on objectivity and neutrality as in-
struments 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 princi-
ples did not produce their purported implications, and the ideologi-
cal, oppressive character of law would be revealed.

The difficulty with this strategy, as it seemed to most, is that the
critical theory that inspired it provided relatively little guidance for its
implementation. While critical theorists were quite insistent that pre-
valing ideologies of liberal democracy were instruments of oppres-
sion, 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, and is
shared Marx’s view that everything other than economic relations was
the superstructure of society. Although it differed from Marx in argu-
ning 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 Marxist, and class analysis in general,
was a losing argument in the American context. To provide a meth-
ology for attacking the internal logic of legal decision making and


86 See HERMANN, THEORY OF COMMUNE/ACTION, supra note 2, at 366-69
(discussing the role of Marx in the development of critical theory); FIEHE,
supra note 23, at 19-23 (discussing the development of critical theory in the
Marxist tradition); MARTIN JAY, MARXISM AND LOGIC 210 (1984) (discussing
the development of critical theory in the Marxist-Frankfurt School); PETER
SCHÜTTE, ORIGINS AND SIGNIFICANCE OF THE FRANKFURT SCHOOL: A
MARXIST PERSPECTIVE 29 (1975) (“[T]he Marxists critics that Marx in the critical
texture that Marx in the formation of the Frankfurt
School of critical theories,” in his Introduction to Adorno’s Negative Dialectics, E.B.
Adorno wa

To follow the line of thought from detail to detail, you need to know Kant
not perfectly, Hegel perfectly, and Marx imperfectly — not just “by heart.”
If you bitch whenever a phrase in this book resembles one from the Mar

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

Introduction to ADORNO, ‘NEGATIVE DIALECTICS,’ supra note 23, at 18.
scholarship in its entirety, they turned, instead, to deconstruction. This quickly proved to be a promiscuously corrosive instrument, however, since no legal argument has the logical density to withstand it. 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 de Man were not among them.

Both these deictics were remedied by feminist theory and critical race theory, 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-...
Seals 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 truths. This focus led to the use of narrative in legal scholarship, where feminism and critical race theorists would recount personal experiences or identify personal emotions, and then use these as a source for their critique.11

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


12 See, e.g., BINDER & WUSMANN, supra note 87, at 138 (analyzing the usefulness of narrative shifting in feminist theory to legal scholarship); DANIEL A. FABER & SUZANNA SHERRY, BEYOND ALL REASON 95-117 (1997) (critiquing the radical narrative movement's hostility toward objective truth); Kathryn Alberts, Hearing the Call of Suresh, 79 CAL. L. REV. 971 (1991) (discussing the response to feminist narrative legal scholarship); Jane B. Bacon & Julie Epstein, In Law Narratives, 45 BUFF. L. REV. 111 (1997) (advocating a story-telling approach to legal analysis while resolving the possibility of objectivity and truth); Anne M. Cloppen, Reappraising the Self: Autobiographical Performances in Outside Scholarship, 81 VA. L. REV. 1229 (1995) (arguing in favor of autobiographical narrative in scholarship, but acknowledging that the transformative impact may be due to the story-teller, rather than on the legal culture); Daniel A. Faber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narrative, 45 STAN. L. REV. 907 (1993) (discussing how to evaluate narratives considering problems such as the typology of an author's personal experiences); Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wound?, 87 WM. & M. L. REV. 2699 (1995) (analyzing the call to contextualize otherwise subjective
denial, but in terms of the importance of identity in law and legal scholarship. They developed this response in a largely American

narratives); Mark Tushnet, The Degradation of Constitutional Decisions, 83 GEO. L. J. 523 (1992); (showing the need to improve the correction in legal stories for purposes of


See Jane B. Baron, Resistance to Stories, 67 S. CAL. L. REV. 255, 256 (1994) (explaining that many stories told by feminists and critical race theorists recount real-life experiences "which the law can respect or ignore"); Mary I. Coombs, Outside Scholarship, The Law Review Stories, 11 U. CHICAGO L. REV. 693, 689 (1992) (suggesting that a study of the issues raised by feminist and critical race theories "may also help us understand for parallel issues that traditional legal scholarship has too long elided"); Richard Delgado, Coping with the Uncomfortable: How to Expose Outside Writing, One Year Later, 82 VA. L. REV. 95, 90 (1996) (arguing that reading the autobiography of women and writers of color can "provide unique insights" and "enable the reader to see the world through another's eyes"); Beth and Delgado, Narrating for Oppression and Power: A Plea for Narrative, 87 MICH. L. REV. 2411 (1989) (discussing the important constructive and deconstructive functions of narratives in critical race theoretic stories); Richard Delgado, When a Story Is Not a Story (Your Voice Must Matter), 76 VA. L. REV. 95, 95 (1989) (arguing that "narrative" does matter because many stories by feminists and scholars of color "reveal things about the world that we ought to know"); William S. Felkinger, Jr., Gaping Narratives, 49 STEN. L. REV. 607, 607 (1994) (asserting that "narrative[s] is in expanding legal debate and driving social transformation by illuminating legal issues from the perspectives of ethnic groups frequently excluded from political and academic debate"); Mark Fizer, Authority, Credibility, and Prejudgment: A Defense of Outside Narrative in Legal Scholarship, 82 GEOR. L. J. 1484 (1994) (explaining that women and writers of color, among others, must present more complex and accurate versions of their lives due to the existence of pre-understandings); Robert L. Fieldman, Jr. & Nancy Levis, The Tale of White Folks: Narrative, Narrative, and the Reconstruction of Social Reality, 84 CAL. L. REV. 577 (1996) (reviewing RICHARD DELGADO, THE RIGHTEOUS CHEF (1995)); Alex M. Johnson, Jr., Defending the Use of Narrative and Gaping G closure: The Voice of Color: Replying to the Impression of Pervasive Theory in Legal Scholarship, 79 GEO. L. REV. 805, 809 (1994) (arguing that critical race theorists' narrative form "powerfully explicates legal issues"); Kim L. Ola Scheperle, Forw ard: Telling Stories, 87 MICH. L. REV. 2073 (1989) ("To make sense of law and to organize experience, people rely on stories. And these stories are telling").
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 conflicts 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, continue to rely on traditional class analysis; others, such as Hamperter Kriesl and Alain Touraine, have argued that class divi-


See KRIESL supra note 24, at 92 (explaining that the "process of intergenerational value change . . . gradually transforms a society's politics and cultural norms," which in turn affects the society's "inner structure") (1993); Hamperter Kriesl & Philip van Poppel Jr., Old and New Politics, in THE DUTCH POWER MOVEMENT AND THE TRADITIONAL POLITICAL ORGANIZATIONS, 15 EUR. J. POL. RES. 319, 320 (1987) (explaining that the new social movements, such as the Dutch power movement, are carried by new social strata quite distinct from the working-class—by professionals from the new middle strata—and directed toward the implementation of new, post-materialist values.

sions in society are being restructured along different lines by modernization; still others, such as Manuel Castells and Alberto Melucci, 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 America 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. According to Continental scholars, participation in a social movement depends primarily on the individual's identity, or sense of self. To participate in a labor movement, one

hypothesis is that socialization 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."

Seelye, TOULOS, supra note 24, at 125 (Commencing interpretation of an interview with the author in which he explains the inadequacy of the Marxist model of analysis for understanding contemporary social movements); MELUCCI, supra note 27.

For basic statements of phenomenology, see EDWARD HUSSEY, THE CRIME OF THE EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY (David Carr trans., 1970); and EDWARD HUSSEY, 1946 (W.R. Boyce Gibson Trans., 1931). For the application of phenomenology to social science, see ALFRED SCHÜTZ, COLLECTED PAPERS (Maurice Natanson ed., 1971); and ALFRED SCHÜTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD (George Walsh & Ferdinand Kronish trans., 1971). Phenomenology is the direct source of ethnomethodology. See PARDOI GABRIEL, STUDIES IN ETHNO-METHODOLOGY AT 16 (1967) ("The objective unity of social facts as an emerging accomplishment of the concerted activities of daily life . . . is the prevailing recipe for ethnomethodological study.");


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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 women, 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. 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. 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

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note 20, at 387; Alberto Melucci, The Process of Collective Identity (hereinafter Melucci, The Process), in SOCIAL MOVEMENTS AND CULTURE, supra note 27, at 41; ORF, supra note 24; Alessandro Pizzorno, Political Partisanship and Collective Identity in Industrial Conflict, in THE RESOLVING OF CLASS CONFLICT IN WESTERN EUROPE SINCE 1968, at 277 (Colin Crouch & Alessandro Pizzorno eds., 1979). 10 So Melucci, The Process, supra note 20, at 4 ("The actors 'produce' for collective action because they are able to define themselves and their relationship with the environment. The definition that the actors construct is not futile but produced by interaction, negotiation and the opposition of different orientations.").

11 Id. at 464-47 ("[C]ollective identity is the ability of a collective actor to recognize the effects of its action 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.30

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. The most striking, and in some sense extreme response to this idea is Alain Touraine’s. Analyzing the

30 See, e.g., DONATELLA DELLA PORTA, SOCIAL MOVEMENTS, POLITICAL VIOLENCE AND THE STATE: A COMPARATIVE ANALYSIS OF ITALY AND GERMANY (1995) (compiling the histories of political violence in Italy and Germany and exploiting them from a theory of mobilization, a theory of action, and a theory of conflict); DIETRICH, supra note 7, at 221 (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”); MILIGI, supra note 24; MARIOS DIARI, ANALYZING SOCIAL MOVEMENT NETWORKS, in STUDIES IN COLLECTIVE ACTION 107 (Marios Diari & Ben Eyben eds., 1992) (outlining a framework for the empirical investigation of social movement networks); MARCIA DIARI, THE NETWORK STRUCTURE OF THE ITALIAN ECOLOGY MOVEMENT, 29 SOC. SCI. INFO. 1 (1999) (analyzing the network structure of the ecology movement in Italy); KREN & van PRAG, supra note 95 (analyzing the relationship between traditional organizations of political intermediation and the Dutch peace movement on the local level); DIETRICH RICHTER, ENVIRONMENTAL MOVEMENT ORGANIZATIONS IN WEST GERMANY AND FRANCE: STRUCTURE AND HOMOGENIZATION IN RELATIONSHIP, Z ENTW. SOC. MOVEMENT RES. 61 (1986). The use of networks as an explanatory mechanism is not limited to the Continental approach, however: resource mobilization scholars also have found it useful. See DAVID A. SNOW, SHALOM HURWITZ, A STUDY OF THE GREAT SMOKEOUT: HOMOGENIZATION IN AMERICA, 1966-1975 (1993) (emphasizing the role of social networks in the coordination and recruitment practices of this religious movement); DEBRA FRIEDMAN & DONALD MACKAY, COLLECTIVE IDENTITY AND CRITICISM: NETWORKS, CHANGING AND THE LIFE OF A SOCIAL MOVEMENT, in FRONTIERS, supra note 21, at 156 (analyzing the structural and temporal choice accounts of participation in social movements, which locate “the causes of action in structural proximity and network connections’ and engage in cost-benefit calculations, respectively); DAVID A. SNOW et al., supra note 78 (assessing 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.

31 See MAX WEBER, ECONOMY AND SOCIETY 2:122 (Gerhard Richter & Claus Wittich eds., 1968) (explaining in detail the two kinds of understanding: “subjective-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 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (analyzing the sciences and discussing in what sense there are “in general...
entire concept of detached observation, and even, at times, of observation at all, Tournai works directly with the groups he studies.19

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 a 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. 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.20


20 See Mario Diani & Alberto Melucci, The Growth of An Autonomous Research Field: Social Movement Studies in Italy, in RESEARCH ON SOCIAL MOVEMENTS, supra note 29, at 149, 102-64 (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, AUDI CODEX (Alberto Melucci ed., 1994), does not appear to have been translated into English.

21 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., Miet Dan-Cohen, Between Subjects 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 expressive 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 with 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 isolation of social movement scholarship and legal scholarship from one another. While the Continental scholarship is heavily influenced by Marx, it is certainly not Marxian. 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. 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 distinctly American issue, but feminism is a shared concern, and one might expect that


66 For legal sources, see infra note 41. For social movement literature, see THE NEW WOMEN'S MOVEMENT: FEMINISM AND POLITICS 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

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.120

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 forgotten 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.121

120 See GAMON, supra note 22, at 58-59 (describing three main conditions under which a period of challenge ends); KIM VASS, The Collapse of a Social Movement: The Rebirth 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's social movement later contributed to the movement's decline).

121 It is difficult to demonstrate a negative by specific citation. One explicit, but revealing observation is that most leading monographs and edited volumes in the social movement literature do not include the terms "legal realism," "legal pluralism," or "legalization" in their indices. See, e.g., COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS, supra note 30, at 419 (listing no references to these terms); CULTURAL POLITICS, supra note 20, at 255 (same); EBENST & JANIN, supra note 27, at 185 (same); SOCIAL MOVEMENTS AND CULTURE, supra note 47 (same); TAKAH, supra note 21, at 217 (same); SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, supra note 4, at 428 (same); DELLA PORTA & DIAN, supra note 4, at 328 (making no references to law and other, more abstract, political roles outside the areas, the latter involving mobilization against law and order); POINTERS, supra note 21, at 278 (making one reference to the legitimation of protest by democratic registries). Of these works, only one, cited by Meyer "Talld and John McCarthy, cited Handler's SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, supra note 4, at 428. Even here, and despite the fact that Meyer "Tald and John McCarthy, cited Handler's SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, supra note 4, at 428.
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. In other

See SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, supra note 4, at 239 ("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."). See Handler, supra note 18, at 43-488 (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 15-34. Handler identifies for 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 FELLEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PENALTY 297-325 (1988) (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, 1306-09 (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, 95 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 55, at 331 (distinguishing between concentrated and widely distributed benefits, and between concentrated and widely-distributed costs), and has been used extensively in legal scholarship, see, e.g., Neil K. Komai, Imperfect Alternatives: Choosing Institutions in Laws, Economies, and Public Policy 55-97 (1994) (presenting a "boadicea" model to predict the conditions under which concentrated interests will have an advantage over dispersed interests); William N. Eskridge, Jr., Public 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. 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 scientific 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 statute. This leaves the final 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.

In addition to Handler, see Mark Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-50 (1987); and Mark Seidenfeld, Engaging Stakeholders: Limits on Collaboration as the Basis for Effective 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 interest), most of his sources are discussions of interest groups, and he seeks to assimilate social movement to an interest group model, see supra 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, 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.
loss 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. But others, they are public-spirited attorneys, animated by a commitment to justice, and funded by some like-minded organization. But the processes that have generated these organizations, the

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13 See, e.g., BRUCE A. ACKERMAN & WILLIAM T. HARBER, CLEAN AIR/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MILLION-DOLLAR BATTLE FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 2425 (1981) (describing the role of lawyers representing environmental interest groups in environmental litigation); MACY, supra note 31, at 1-5 (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, 65 U. CHI. L. REV. 153, 144-65 (1998) (asserting that norm groups play a greater role in shaping rules of conduct than do laws in the lawyers who represent interest groups in legal disputes); CAS R. SUMMERS, INTEREST GROUPS IN AMERICAN PUBLIC LAW, 58 STAN. L. REV. 39, 49 (1953) ("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.")

14 See, e.g., GERALD P. LÓPEZ, REBELLIOUS LAWYERS: ONE CIRCUS'S VISION OF PROGRESSIVE LAW PRACTICE, 15 (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"); BOSTON A. WILDEBOO 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 H. HARK, WITH CLEARITY FOR ALL (STATE I.L.), 1435, 1441 (1984) (noting that public interest organizations and their lawyers "did not simply seek compensation for their clients' litigating they sought to change the law"); ROBERT L. RABIN, LAWYERS FOR SOCIAL CHANGE: PERSPECTIVES ON PUBLIC INTEREST LAW, 19 STAN. L. REV. 217, 210 (1979) ("[I]t seems— as well as the acceptance of public interest organizations undoubtedly strengthened the building 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 Trek-kers—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 detail 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.

9. The Causes of the Disjunction

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 context of decisions, statutes, or regulations is purely epiphenomenal; it is the product of the judge's or the policymaker's attitudes, and nothing more. 16 These attitudes

16 This is clearly not of general sadness of the legislative and executive process. See, e.g., Richard F. Fenno, Jr., CONGRESSMEN IN COMMITTEES 1-14 (1975) (examining and the policies of congressional committees are the result of committee members furthering their personal political goals); John Kingdon, CONGRESSMEN'S VOTING DECISIONS: A (1989) (reporting the results of an empirical study examining for factors influencing congressional representatives' voting decisions, including their sources of information, social ties, constituents, interest groups, and administration); Arthur Mand, CONGRESS AND THE CONGM GROUPS 3-5 (1985) (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. 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-

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ions between the President and Congress control congressional decision making; WILLIAM K. KNEEN, LEGISLATIVE 201 (1982) (commenting that "the rules 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."); SHEILA L. DAVID, ETHIC DIGNITY: THE SEARCH FOR MEDICARE AND MEDICAID 17-47 (1985) (describing the struggle both within and between the House and Senate during the debate over the passage of Medicare and Medicaid); JOHN A. FERGUSON, POLITICAL SCIENCE: THE IMPACT OF LEGISLATION 1947-1969, at 129-94 (1971) (examining how congressional policymaking is influenced by institutions such as the committee system, the seniority system, and the process of authorization and appropriation); ERIC DREMAN, THE DANCE OF LEGISLATION 98-102 (1975) (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. Jannone, The Federal Courts as a Political System 199 (3d ed. 1985) (noting that a judge may act in a way "which manifests[] his perceptions of what he ought to and can do (as well as the converse) as a judge"); DAVID W. ROHDE & HAROLD J. SPATHE, SUPREME COURT DECISION MAKING 137-45 (1976) (describing values that motivate the actions of the Justices); GLENDON SCHLESKE, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1965, at 22-43 (1965) (assessing an individualistic theory of judicial decision making); JEFFREY A. SEGAL & HAROLD J. SPATHE, THE SUPREME COURT AND THE ATTITUIONAL MODEL, 63 (1995) ("[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 OLSER, supra note 23, at 60-65; (describing how even social incentives are motivating as individual, non-collective goods).
cial to an understanding of their subject matter." Most contemporary social scientists regard symbolic systems, cultural values, and discursive practices as independent and important forces that shape social behavior. 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 discourses of symbolic practice, 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 judicature and老百姓 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. As I have ar-

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

129 See e.g., COHEN & AMATO, supra note 1, at 2-3 (arguing that the current "disorder of civil society," which focuses on non-compliance-based forms of collective action, driven 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 231-37 (3rd ed. 1990) (arguing that the language of politics is an institutionalized structure of meanings that guides political behavior and thinking in society); EDMOND GREAVES, THE INTERPRETATION OF CULTURES 5 (1975) (advancing an interpretive theory of culture in assessing the impact of culture on human behavior); ANTHONY GIDDENS, GENERAL PROBLEMS IN SOCIAL THEORY 91-8 (1979) (offering a critical analysis of structuralism and the theory of the subject); VICTOR FURGER, DRAMA, FIELDS AND MASTERS: SYMBOLIC ACTION IN HUMAN SOCIETY 25-59 (1974) (examining how metaphors and paradigms conceived of by the social sciences influence the actor's behav-

130 See Paul Brest, The Fundamental Rights Controversy: The Essential Confrontations of Normative Constitutional Scholarship, 90 YALE L.J. 1965 (1981) (discussing the recommendations of legal academics on how to conduct judicial review); Richard Delgado, Values and Normal Science: Toward a Critique of Neutrality in Legal Thought, 133 U. PA. L. REV. 975 (1985) (noting that the predominant model of legal scholarship is normative in orientation); George Fletcher, Two Modes of Legal Thought, 90 YALE L.J. 970 (1981) (explaining the conflicting motives of thought of the legal scholarship, advocacy and neutrality); Pierre Schlag, Normative and Academic Gl. 83 STAN. L. REV. 167 (1981) (investigating how the law is a product of normative legal thought); Pierre Schlag, Norm-
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. 113 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 effects of social scientists.

One possible reason why legal scholars have remained insulated from social science scholarship is that the social movement literature itself is that their prescriptive stance is overlaid by a closely related, but logically independent perspective. They direct a disproportionate amount of their prescriptions to judges, 114 and adapt their methodol-

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114 See, e.g., Richard W. Rubinfeld, Law and the Methodology of Law, 197 Wash. L. REV. 521, 522 (arguing that legal scholarship provides recommendations and prescriptions to legal decision makers); Richard W. Rubinfeld, The Practice and Discourse of Legal Scholarship, 96 MICH. L. REV. 1035, 1048 (1998) (hereinafter Rubinfeld, Practice and Discourse) (asserting that a "prescriptive voice" distinguishes legal scholarship from most other academic fields.")

115 See Charles Guille, The Use and Abuse of Homosocial Theory in Law: Recasting the Assumptions of Interdisciplinary Legal Scholarship, 1991 30 U. ILL. L. REV. 191 (analyzing the relationship between legal scholarship and the judiciary); Sanford Levinson, The Author...
ogy to that of judges in what I have called a "unity of discourse." 116 In other words, legal scholarship may be described as suffering from jurucenism. 117 The result is a mind set in which 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; 118 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-

116 Ruben, Provisional Documents, supra note 21, at 1550-65.
117 The most notorious example of proceenonic scholars is Ronald Dworkin, who famously expanses rules for judicial decision making in general theories of law. See Ronald Dworkin, Law's Empire 2 (1986) (quoting that "the law often becomes what judges say it is," and this has broad and far-reaching consequences); Ronald Dworkin, Taking Rights Seriously 86-118 (1977) (arguing that the process of judicial decision making should be aimed at discovering certain basic rights). Richard Capelli describes this approach as the "legal method." Richard Capelli, The Dilemma of the Legal Method, 20 Temple L. Rev. 395, 395-96 (1957). Sappelli maintains that it is, in reality, in public, if not private schools, of which 395, his argument here is that an inordinate concentration to affect the approach of legal scholars, even when they no longer accept it.

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. 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. 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 jurcecratism 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-

105 See Philip Bobbitt, Constitutional Interpretation (1993) (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”); Feinberg & Ruben, 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 in source, 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 Reign Revolution: Reconceiving the Regulatory State 111-9 (1996) (discussing various approaches to statutory interpretation, of which public policy considerations is one); Chaves, supra note 125, at 1509 (asking whether “the disinterestedness of the judge [can] be sustained, for example, when he is more visibly part of the political process?”); Fis, supra note 112, at 9 (arguing that the proper function of a judge is not to become involved in interest group politics); Thomas Greve, Do We Have an Improvised Constitution?, 27 Stan. L. Rev. 769, 796 (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”).

One could cite, as examples, a large proportion of modern legal scholarship, including all of law and economics. The ubiquity of this issue is perhaps most clearly indicated by critiques of it. See, e.g., Lappi, supra note 134, at 544 (“Are we all merely politicians making toxic claims to reason and craft as tools to subjugate the masses?”); Harry T. Edwards, The Growth, Projection Between Legal Education and the Legal Profession, 91 Minn. L. Rev. 54 (1952) (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, these general sages 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. Certain 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. Thus, there is much to be said for the legal scholar’s approach to policy arguments, despite its jurisprudential 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.

See, e.g., STUDY SAGE, POLICY EVALUATION: MAKING OPTIMAL DECISIONS (1982) (discussing the ways in which policy is formulated and evaluated); CARL PASRANT & DAVID SANDS, BASIC METHODS OF POLICY ANALYSIS AND PLANNING 24 (2d ed. 1995) (arguing that “prescriptive policy analysis involves displaying the results of analysis and making a recommendation”); COURT STUDY & RICHARD ECKHOLM, A PAPER FOR POLICY ANALYSIS 3 (1976) (“The approach to policy analysis throughout this paper 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 WILKINSON, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS 127-35 (1979, inserting that “[p]olicy 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.16 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.17 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

16 See supra note 51 (citing sources).
17 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 at the empirical work of others in much detail. But this assumption, and the jurocentric perspective that goes with 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 underemphasize 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 encrusted in the approach they were attacking. In Pierre Schlag’s terms, they have been exiled from the world by the Langdellian paradigm they were trying not only to escape, but to condemn. 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 interpretative; 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 irremediably committed to maintaining its control. 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 beneficial 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 elite 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*. For the most part, however, the prescriptive stance they adopted was to


16 See supra note 37 (citing sources).

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. 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 jurisprudential 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 jurisprudential 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

14 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 de-
construction, many resorted to the less global critique of demonstrating that the judges' decisions violated their own principles, that their con-
clusions were in conflict with the legal system's underlying commit-
ment to equality and human rights. This approach gave their efforts a directional in 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 fores-
stalled 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 atti-
uitudes, 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 move-
ments 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 Con-
ontinental social movement scholarship is that both drew on the Conti-
nental idea that the scholar can only understand her subject matter by
being involved in it. But again, the parocentric 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 schol-
arship 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 movements 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. 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 addressing 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

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62 See, e.g., Lawrence Friedman, The Law and Society Movement, 58 Stan. L. Rev. 703, 716 (1966) (asserting that policymaking is better when based on an understanding of the legal system); Enid Manger & Carroll Secor, Critical Legal Studies Utopia Critical Legal Theory: A Comment on Method, 6 Law & Pol'y, 257, 268-269 (1984) (calling for an understanding of the relational and contingent nature of group activity in the move to legal research); Schlag, Normativity, supra note 120, at 825-826 (characterizing that so understood legal thought as a practice and a process is so undermined that objectification is sustained not only in nonnormative legal thought but in humanitiy); Peter Schuck, Why Don’t Law Professors Do More Empirical Research?, 39 J. Legal Educ. 322, 323 (1986) (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, 96 Yale L.J. 575, 581 (1987) (asserting that “factual inquiry in legal studies is necessary because law cannot be delivered other than by the differences it makes in society”); Tushnet, supra note 120, at 1259 (stating that policy prescription is based on empirical sources).
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. As early as 1926, J. Franklin Jameson wrote The American Revolution Considered as a Social Movement, in which he argued that the Revolution was a genuine social uprising, and had produced important effects on American society. Some contemporary scholars, such as Jack Greene, see the Revolution in terms related to the resource mobilization literature while others.

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65. See generally BERNARD WOODS LAURER, THE BOSTON TEA PARTY (1964) explaining the significance of the event in the arrival of the American Revolution. When the Dutch, 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.


67. 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. These themes continue in the literature about the Articles of Confederation period and the drafting of the Constitution. In contrast, legal scholars have tended to regard the Constitution as a pure political act, a product of the framers' deliberations during one summer in Philadelphia, and one subsequent set of pamphlets written by Madison and Hamilton.

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, 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, and such an understanding

121 For a notable exception, see Bruce Ackerman, *We the People* (1991).  
122 See George Dangerfield, *The Era of Good Feelings* (1942) (describing the
might provide insight into some of the seminal Supreme Court decisions of the era.\[10\] Of much greater significance, from the constitutional perspective, was abolitionism, a classic social movement.\[11\] 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 as terms of both resource mobilization and identity formation, led first to the gradual elimination of slavery in the North by statute,\[12\] and then, following the Civil War, to the Civil War Amendments and the abortive effort to reframe the social structure of the South.\[13\] The darker side of social movements is revealed in the

personality and events that enabled the American political transition from Jeffersonian democracy to Jacksonian democracy: DALL W. FORBUSH, TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION, 1791-1833 (1977) (exploring the social and political developments underlying the initial period of expansion of the U.S. revenue system); RICHARD P. MCCONNELL, THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA (2d ed. 1976) (examining the social and historical circumstances leading to the emergence of the two-party system in America); ROBERT V. REMINE, 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 (1946) (presenting a sweeping study of the first part of the nineteenth century); GORDON G. VAN ES, THE JACKSONIAN ERA, 1828-1848 (1959) (presenting the basics of the post-Civil War period).

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.) 317 (1819) (striking down a Maryland law taxing the Bank of the United States as constitutionally interfering with Congress’s power to regulate interstate commerce). Justice Marshall’s nationalist sympathies can be regarded as a matter of his nationalist credo; but they can also be regarded as reflections of an emerging national identity.


\[10\] See generally IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 228-35 (1998) (detailing the slow death of slavery in the North, in part through emancipation legislated by Northern lawmakers); LEON F. IPWICH, 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 400,000 slaves in the North at the time the Constitution went into effect.

We generally GEORGE R. BENJAMIN, A HISTORY OF THE FREEDOMS’ BUREAU (1955) (presenting an account of the efforts and motivations of the abolitionist group); ERIC Foner, RECONSTRUCTION: AMERICA’S UNFINISHING REVOLUTION, 1865-
The Ku Klux Klan and the Redeemer movements that frustrated these reform efforts, and reestablished a modified form of the South's antebellum social structure. Their impact on the Annex legal system did not dissipate until well after the enactment of the Civil Rights Act of 1964; perhaps it has not dissipated yet.

The next major era in American history is defined by the social movements of Populism and Progressivism. The Supreme Court's effort to quash Progressive legislation could be understood as part of

1877 (1888) (reconsidering the social, political, and economic developments of the era following the Civil War); LEON WIEGAND, RISE IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1988), (presenting an oral history of the experiences of n-eth slaves after the Civil War).

17 See generally EDWARD L. ARNOLD, THE PROMISED LAND AFTER RECONSTRUCTION (1992) (examining society, politics, and the economy in the New South); FOWLER, supra note 146, at 56469 (describing the backlash against reconstruction efforts during the period surrounding the 1876 presidential election); MICHAEL PERMAN, THE ROAD TO REDemption: SOUTHERN POLITICS, 1869-1879: a. 135-277 (1984) (covering the politics of divergence during the Reconstruction era); GEORGE C. RABLE, BUT THERE WERE 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. TREMAN, WHITE TERROR: THE KU KLUX KLAN AND SOUTHERN RECONSTRUCTION (1971) (tracing the development of the Klan from 1865 to 1872); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, ch. 1 (1951) (analyzing the period immediately following Reconstruction in the South).

18 The N. No. 88,552, 78 Stat. 241 (codified in scattered sections of 42 U.S.C).


20 Populism has left an impact on the financial services industry. Apart from that, its influence is weaker, in all likelihood, in political future meant that it would have less impact than more successful social movements such as Progressivism, abolition, and Reconstruction.

21 G. CARRILL BOLAND, 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 progressive elites). See generally Samuel P. Hahn, The RESPONSE TO INDUSTRIALISM: 1885-1914 (1957) studying the human responses, including Progressivism, to conflict and social developments in the period between the end of Reconstruction and the outbreak of World War I; HOFFMANN, supra note 140, at 131-271 (analyzing Progressivism as a national, urban, and middle-class phenomenon); THE COLD AGES (H. Waye Morgan ed., rev. ed. 1974) (printing papers presented at a symposium on the post-Civil War generations); The Progressive Era (Lewis L. Gould ed., 1974) (containing essays on the achievements of this reform period).

the conflict between an enormous social movement and the forces that attempted to resist it. The defeat of this resistance in the Court, after a long battle that lasted until well into the New Deal era, has essentially defined contemporary 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. 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 general.

(1928) (invalidating regulation of employers' agency loans); New State Ice Co. v. Lehnert, 286 U.S. 262 (1932) (invalidating restrictions on entry into business).

3 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 Jacobson, effectively); Oklahoma v. Neighbors, 315 U.S. 587 (1942) (overruling Adkins); Lincoln Fed. Labor Union v. Northwestern Iron & Steel Co., 335 U.S. 525 (1949) (overruling Cipollone); Ferguson v. Skaggs, 352 U.S. 726 (1957) (overruling New State Ice and concurring Justice). See also, JEROME H. JORDAN, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 70-719 (1980) (examining the substantive scope of individual rights and apportioning the Court's record in protecting those rights); JOHN H. HAY, DEMOCRACY AND DISTRUST (1969) (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); Fisk, supra note 112 (discussing adjudication as structural reform and the theory of legislative failure). This is, of course, the doctrine of the famous "Footnote 4" in United States v. Carteron Products Co., 334 U.S. 144 (1948). See Bruce A. Ackerman, Beyond Caroline Provisions, 85 RUTG. L. REV. 733 (1991) (arguing for a reinterpretation of Carteron's operative terms as "America wins toward the participatory paradigm"); J. M. Balkin, The Footnote, 85 WASH. L. REV. 275 (1980) (discussing "the opinion as footnote" and the "footnote as opinion" through a discussion of the Caroline case); Les Brillman, Caroline, Conflict, and the Fate of the "Inside-Outside", 134 U. PA. L. REV. 1201 (1986) (contending that Caroline is not adequately protective of the rights of inferior and discrete minorities and that it effectively is an "unconstitutional ideal of democratic theory" that is odds with the Constitution). But see Geoffrey Miller, The True Story of Caroline: 1987 STAN. L. REV. 997 (contending that the statute at issue was irrational, special interest legislation).
Treaty the statues that Progressivism produced in this man-
ner supports the argument recently advanced by William Eskridge and
John Feerjohn that many of these were "super-statutes" that courts
have treated, and should treat, as quasi-constitutional. Subsidy
strands within the Progressive movement might provide similar in-
sights into our legal system. The fact that our labor laws are the prod-
ocet of a social movement might suggest a different approach to their
interpretation and administration; similarly, the social movement ori-
gins 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 any understanding of the American
Revolution and the Constitution's creation and ratification in social
movement terms can inform an originalist interpretation of the Con-
stitution, then an understanding of all the subsequent social move-
ments 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. Abol-
itionism, 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 envisaging 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 instruction with constitutional provisions over
the course of our history, these movements have reinterpreted the
Constitution itself from a document that creates an effective but de-
linated 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 recommenda-
tions for the reform of existing statutory and doctrinal rules. One
area where contact with the social movements scholarship might offer

such prescriptive insight is the doctrine of standing. The Supreme Court's rulings in this area are not only incoherent, but, worse still, insane.24 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.25 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,26 but would probably benefit from a better understanding of the social movements that spawn public in-

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24 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, 764 (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; *Soto v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 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; *Worth v. Selin*, 422 U.S. 490, 518 (1975), holding that minority residents who seek to move to low-cost housing in a particular suburb, residents of a neighboring suburb that suffers a disproportionate amount of low-cost housing, and builders who want to build low-cost housing in that suburb, and a nonprofit organization concerned about this issue all lack standing to challenge the suburb's exclusive zoning practices that preclude the construction of low-cost housing; and *Davis v. Bares*, 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 demonstrate that the Supreme Court's doctrine is incoherent. See, e.g., *Arden Construction, Inc. v. Penna. 505 U.S. 200, 211-12 (1996)* (concluding that enhanced standing is the challenge that federal government's practice of giving general contractors on government projects a financial incentive to hire subcontractors owned by "socially and economically disadvantaged individuals"); *Regents of the Univ. v. Bakke*, 438 U.S. 265, 277-78 (1978) (allowing a white medical school applicant to challenge the school's admissions program as violating his rights under the Fourteenth Amendment's Equal Protection Clause); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 715-76 (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).

25 See 509 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 "constitutional interpretation of Article III, and its Steel Co. v. Citizens for a Better Environment* decision under the Fifth Amendment's Due Process Clause); *Sunstein*, supra note 24, at 182-83 (discussing the practical difficulties of defining standing).

tered 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.

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. 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.

Of the cases cited supra note 156, all should be reviewed because at least one institutional plaintiff was a valid representative of a readily recognized social movement that was perfectly capable of representing the named plaintiff. In some cases, only such a representative can represent the position. The basic case that would be overruled according to the considerations is Sierra Club v. Morton, 405 U.S. 727 (1972). This was not an unexpected or inequitable decision: the Sierra Club was trying to change the law and obtain recognition as an institutional litigant, and the Court appeared 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.


Macey and Miller conclude, correctly, that class action rules are 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 156, at 13. One such rule is the requirement that the suit be brought on behalf of a named plaintiff, or at least 61-64 (discussing the regulations governing the representative plaintiff 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 plaintiff, on its own motion, on standing grounds); see also Christopher D. Stone, Earth and Other Entities: The Case for Moral Pluralism, 73 DET. L. REV. (1987) (arguing that organizations should be granted standing). More generally, the same observations that Fred Macey and Miller make to suggest an action in such actions where monetary damages are available also suggest that organizations that represent a social movement be allowed to represent a class in
natural 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 so 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 cases may be an empty gesture unless there is a social movement to initiate and support each 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 in 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-
erize new regulations, or to obtain compliance with those already made. The principal procedure for formulating agency regulations is notice and comment rulemaking, 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. Rather than having the notice and comment 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 alternative means of structuring the negotiations. For example, the extent to which negoti-
ated rulemaking procedures are employed, or the amount of credi-
tence 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 en-
vironmental 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 pre-
vious reluctance to acknowledge the role of lobbyists in the adminis-
trative 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 pro-
cedures. In place of the episodic contacts that exist under current
procedures, it might suggest some sort of continuing consultative re-
lationship with representatives of broad-based movements.

sive time and eliminate litigation, the procedure so far has not proven itself superior to the informal rulemaking that agencies ordinarily use."—William Parks, How Smoke
Gas is Your Enemy: Regulatory Negotiation and the Public Interest—1974’s Wisconsin Standards, 18 EMERG. L. 55 (1997) (arguing that negotiated rulemaking is a "win-win" principle and "the best of the administrative rulemaking by altering an agency’s objective from serving the public interest to seeking for a consensus among private parties."); Jim Rossi, Per-
sonal Regulation: The Fine Art, Nw. U. L. REV. 173 (1997) (arguing that public participation in agency decisions can have adverse effects); Sittenfeld, supra note 135, at 413 (arguing that collaborative negotiation is incapable of resolving current regulatory ill because they can succeed in overcoming the adversarial properties of at least some stakeholders and within various regulatory domains."). Perhaps negotiation in the structured manner prescribed in the Negotiated Rulemaking Act is the best way to involve citizens in general, as social movements in particular, in the rulemaking process. The idea, however, seems too promising to abandon without further explora-
tion of its possibilities. The point here is that analysts of this, and other neocorporate rulemaking, should be carried out with an understanding of social movements. Sittenfeld 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 move-
ment literature to describe these groups, however, he relies largely on the literature regarding interest groups. E.g., INTEREST GROUP POLITICS (Alan J. Cigar & Burdett A. Lonergan eds., 2d ed. 1980) (exploring the study of interest group politics); TERRyl. MOLE, THE ORIGINATION OF INTERESTS: INCENTIVES AND INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS (1986) (exploring interest groups from the perspective of the individuals’ decision to join, organizational formations and maintenance, and in-
ternal politics). This is a perfectly valid approach, but it restricts the analysis to the process aspect of legal scholarship. Sittenfeld, supra note 135, at 419 ("Literature on public interest groups has characterized the traditional interest group—the pure member group—as the archetypal 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.
The enforcement of statutes and regulations by administrative agencies raises other possibilities for prescriptive legal scholarship based on the social movement literature. Just as legal initiatives that are enforced by private means may depend on social movements for their effectiveness, other initiatives may depend on such movements for compliance with publicly initiated enforcement efforts. For example, the Community Reinvestment Act (CRA), which, like the CRA, does not provide for 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. The Occupational Safety and Health Act (OSHA), which includes enforcement mechanisms, may be less effective than it could be because of its failure to connect with


105 See DILLARD, supra note 16 (“[C]ommittee arrangements were formed to get due-concerns and vetting related to the delivery of services by the government and to the impact of housing, transportation, and education on the social and economic structure of the city.”); Shalhevet, supra note 166, at 257 (“The CRA has provided community groups with substantial leverage to end discrimination practices and to obtain commitments from lenders to undertake new community investment activities.”); McCoy & Miller, supra note 166, at 3 (noting that among the principal effects of the CRA is the enhancement of actual group power in promoting community development with agencies and encouraging meetings between institutions and groups appealing to a CRA challenge to resolve the differences). McCoy and Miller do not regard the CRA as efficient, but they do argue in producing an impact, it did not try to do, that is, if it were more: non-mimetic or symbolic legislation with no practical effect, it would not be inefficient.

any social movement.\(^{100}\) By drawing on social movements literature, legal scholars might be able to frame recommendations for the design of statutes that will enable 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 identifying 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

\(^{100}\) The impetus for enactment of OSHA did not come from organized labor, but from officials in the Department of Labor. While the AFL-CIO initially supported the legislation, as did some public interest organizations, none undertook the task of enforcing OSHA the way ACORN undertook the enforcement of the CRA. See JOHN M. EDELTON, REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH POLICY 16 (1979) ("Since the failures of collective bargaining derived mainly from members' distributional give-up much in return for greater safety, one might wonder whether (OSHA) reflects the preferences of union members or that 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."); I. J. Macaulay, The Job Safety Law of 1970: In Passage Was Peril, 50 MICH. L. REV. Mar. 1952, at 18 (recounting that the Department of Labor proposed a model for a job safety and health program with President Johnson's backing.")
to put the matter in Hunt'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. 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. Thus is there 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 predictions. 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.

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

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177 See infra note 99 (citing sources).
178 See, e.g., PETER L. BERGER & THOMAS L. LUDMANN, THE SOCIAL CONSTRUCTION OF REALITY 1 (Anchor Books 1965) (1966) ("The basic contention of the argument of this book are . . . namely, that reality is socially constructed . . . ."), RICHARD J. TEICHMANN, RECONSTRUCT OBJECTIVISM AND RELATIONISM (1983) (arguing that the customary notions of human rationality, objectivity, and relativism are converging to form a new understanding), NELSON GOODMAN, WAY OF WORLDMAKING (1978) (exploiting the idea of eightness when understanding is relative, based on one's frame of reference); METAPHYSICS IN SOCIAL SCIENCE: PLURALISM AND SUBJECTIVITY (Donald W. Fiske & Richard A. Shweder eds., 1986) (presenting several views concerning science and subjective-objectivity that respond to the rise in contemporary doubts about the possibility of standards, criteria, or methods definitive of scientific or rational thinking); ALFRED SCHUETZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD (George Walsh & Frederic Lehman trans., 1967) (analyzing the phenomenon of meaning in ordinary social life to arrive as an objective criterion that can be used by social science); PETER WOOLF, THE IDEA OF A SOCIAL SCIENCE (1988) (arguing that progress in social sciences has not come from emulating natural sciences but shares a valuable connection with philosophy concerned with the nature of reality in general).

See STANLEY FISCH, Is There a Text in This Class? in CAPTIVAT, MULTICULTURALISM AND THE POLITICS OF DIFFERENCE 49 (John Arthure & Ann 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, Biological Draft and the Struggle over Meaning, 25 CONN. L. REV. 869, 871 (1993) ("[I]egal ideas and ethical norms will change their political valence as they are used over and over again in new contexts."); J.M. Balkin, Ideology as Cultural Software, 16 CARDEO L. REV. 1221, 1221 (1995) ("[H]umans are affiliated with beliefs that in some way modify or obfuscate social reality"); Steven L. Weiss, Concluding and Community in Narrative 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. 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 motivating forces of American law. The implication of legal scholarship that legal concepts exist in some sort of transhistorical 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. From this perspective, virtually

11 Natural law continues to have a certain number of adherents. See, e.g., JOHN FINNEF, NATURAL LAW AND NATURAL RIGHTS (1989) (discussing 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 moral law to modern issues); LEO WENTHOR, NATURAL LAW AND JURISPRUDENCE (1987) (arguing that justice is beyond the range of positive law); Michael S. Moore, Meat Bodies Imagined, 90 MICH. L. REV. 2524 (1992) (examining the idea that there are objective moral truths). For more people, however, the attack on this concept has been maintained throughout the course of the twentieth and twenty-first centuries has grown in importance. In the United States, legal realism may be acknowledged, in part, as an attack on the semantics of natural law thinking. The main target of the realists was what we now call formalism, but Anthony Sebok contains arguments treating the formalism as natural law. See, e.g., Anthony Sebok, Formalism doesn’t make the formalism a natural law, 90 NYU L. REV. 85 (2005) ("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.

12 See, e.g., JURG FEUERBACH, SOCIAL PHILOSOPHY (1970) (discussing both social ideals and normative principles); ALAN GORDIN, THE COMMUNITY OF RIGHTS (1996) (differentiating between positive and negative rights while arguing for the necessity of certain positive rights); JOHN ROSS, A THEORY OF JUSTICE (1958); (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 reforms 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 linear descendant 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.1 This debate pitted the Franciscan order

1 MORALITY OF FREEDOM 163 (1989) (arguing that certain rights should be given a preferred position in society); SAMUEL SYLVEST, AN ANALYSIS OF RIGHTS (1984), (investigating when a person should be able to claim a natural right regardless of actual law); Ronald Dworkin, Rights as Entitlements, in THEORIES OF RIGHTS 155 (Jeremy Waldron ed., 1986) (examining the rights of moral and political independence).

against the Avignon Popes, particularly Pope John XCI, and it was the Franciscans who developed the idea of natural rights in an effort to escape papal condemnation. The Franciscans were as archetypal social movement, mobilised by a charismatic leader to rebuild a church and then to bring an emotive version of Christianity to the common people. 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. 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 properly articulate by John Paris and then by Ockham’s opponents in the course of the power conflict.


This is not the same as Hebraism positivism. Kelsen argued that law possessed no inherent morality, but was merely the command of a sovereign power. See HANS KESEL, GENERAL THEORY OF LAW AND STATE 3-45 (Andrew Wessberg transl., 1945) (presenting the thesis that law is a coercive order); HANS KESEL, PURE THEORY OF LAW 149 (Max Knight transl., 1967) (hereafter KESEL, PURE THEORY) (outlining a positive theory of law); see also J.L. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 503, 605 (1958) (“The effort to show that laws conferring rights are ‘really’ only conditional stipulations or agreements to be extracted 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 KESEL, PURE THEORY, supra, at 504-05 (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. 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 movement literature offers a distinctive way of understanding legal concepts, and of placing them within a larger epistemological framework. The idea that these concepts are constructed is certainly not unknown to law, but social movement 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 movement 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 criticism 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 movement 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.

129 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 (1978) (“Rights are a social phenomenon . . . . [that] cannot be fully appreciated or evaluated apart from the way in which the practice [of rights] fits into and contributes to the set of rules, values, purposes, and institutions that constitute this or that society . . . .”); REX MARSH, A SYSTEM OF RIGHTS 97 (1993) (“[T]he crucial issue [for theory of rights] is whether appropriate practices of social recognition and protection are in place for this kind of right . . . .”); LO 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 in which problems of social justice arise”). Such views are certainly congruent 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, theoretical 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. In 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 Gannon's. According to Gannon, social movements succeed when the government provides tangible benefits to its 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, cooption, 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.

The concepts of cooption 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

(1) Gannon, supra note 22. For other discussion of the relationship between state officials and social movements in the social movements literature, see, for example, J. Craig Jenkins & Charles Perrow, Ignorance of the Powerful: Farm Worker Movements (1946-1972), 42 Am. Soc. Rev. 239 (1977); McCarthy & Zald, supra note 41, at 275; 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, legislative, 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—are fought for, bled for, and died for. 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 transcendentalmush, but because we possess the effulgent virtue of maintaining and recreating 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.

106 See, e.g., McAdam, supra note 16 (tracing the history of black insurgency); Morin, supra note 16 (discussing the challenges faced in the civil rights movement); McAdam, supra note 51 (examining the 1964 Mississippi Freedom Summer project, which McAdam labeling as “high risk/cost” activism).