The Jurisgenerative Role of Social Movements in United States Constitutional Law

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> Social movements can be viewed as collective enterprises to establish a new order of life. They have their inception in the condition of unrest, and derive their motive power on one hand from dissatisfaction with the current form of life, and on the other hand, from wishes and hopes for a new scheme or system of living.
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> Herbert Blumer, *Collective Behavior, in* AN OUTLINE OF THE PRINCIPLES OF SOCIOLOGY (1939) [1]

> In the United States associations are established to promote the public safety, commerce, industry, morality, and religion. There is no end which the human will despairs of attaining through the combined power of individuals united into a society. . . . When an opinion is represented by a society, it necessarily assumes a more exact and explicit form. It numbers its partisans and engages them in its cause; they, on the other hand, become acquainted with one another, and their zeal is increased by their number. An association unites into one channel the efforts of divergent minds and urges them vigorously towards the one end which it clearly points out.
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> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835) [2]

What is the "relationship of organized protest movements and democratic principle"? Questions posed for this panel presuppose a conflict between them, suggesting that protest movements may threaten democratic principle, not merely because protest movements may employ violent means, but because protest movements refuse to employ a society's existing institutions and procedures for political expression. [3]

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[1] Herbert Blumer, *Collective Behavior, in* AN OUTLINE OF THE PRINCIPLES OF SOCIOLOGY 199 (Robert E. Park ed., 1939).

[2] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 192 (Phillips Bradley ed., Knopf 1945) (1835).

[3] SELA organizers have asked this panel to examine the conflicts between organized protest movements and democratic principle, focusing in particular on protest movements that claim justification for their organization and tactics on the ground that "established democratic institutions are inadequate" so that "protest becomes an extraordinary means of pressing ordinary political claims." The panel has been asked: "Can organized protest predicated on a view of the inadequacy of established political processes be justified? If so, what burdens may be imposed upon other citizens in pursuit of this protest? How might the limits of acceptable protests be established?

This paper examines citizen movements on the assumption that they are crucial building blocks of self-governance: associations in civil society that mediate relations between government and citizenry. The paper does not analyze the normative basis for limiting the use of violence and other forms of social disruption as a means of social protest. Rather, it considers how mobilized citizens acting outside ordinary channels and procedures of governance can serve democracy-enhancing ends—offering as a case study the role that social movements play in shaping the development of United States constitutional law.

Social movements can steer or topple government. As the panel conveners point out, in societies with weak democratic institutions, social movements enable citizens to voice concern, criticism, or outright resistance to government policy. In societies with strong democratic institutions, social movements serve related functions. It is not simply that social movements supplement the electoral process where governance is incompletely democratic–where there are formal restrictions on the franchise or practical barriers that inhibit effective access to governmental decision making. Even where government is democratically responsive, citizens may turn to social movements because voting in general elections is a crude method of communicating concern about particular issues. Social movements focused on particular questions of governance can educate and arouse public opinion in ways that redirect the agenda of electoral politics. Social movements supplement electoral politics as a medium of democratic expression for other reasons as well. In democratic states there are important areas of governance that are not subject to direct electoral oversight. Constitutional adjudication is one of them.

Do these limits derive from an independent moral principle (regarding, for example, the sanctity of life), or might they arise from democracy itself?"

This paper examines the role that social movements play in shaping the development of constitutional law in the United States. Only sometimes do citizen movements exert influence on constitutional law through the formally-designated lawmaking procedures designed to regulate constitutional change. Perhaps for this reason, even though mobilization for constitutional change is a regular practice in American life, it is not a focal point of analysis in American constitutional theory. This paper addresses this uneasy silence about social movements in American constitutional theory, reflecting on the ways that social movements have served as democratizing factors in American constitutional development, even when movements have precipitated change by means that do not conform to constitutionally designated procedures. In examining social mobilization as a vehicle of change within an ongoing constitutional tradition, this paper considers how social movements that operate subject to certain cultural constraints can destabilize law in ways that strengthen it.

I. Social Movements and Constitutional Change: Lawmaking and Adjudicative Models

Any history of American constitutional development would have to address the many roles that social movements have played in shaping constitutional law. Can landowners hold chattel slaves? Can the state prohibit women from voting? Can the state prosecute union members who picket their employer's premises when on strike? Can the state segregate public schools by race? Can the state prohibit abortion? Can the state criminalize sexual acts between persons of the same sex? Do considerations of federalism preclude the national government from developing a uniform body of law concerning such matters? Social movement advocacy has

played a crucial role in changing the way the United States Constitution speaks to these questions.

Of course it took more than the abolitionist movement to achieve a constitutional prohibition on slavery; it took a civil war, followed by several constitutional amendments, ratified under "irregular" post-war voting procedures.[4] A growing woman suffrage movement claimed that these newly-ratified amendments enfranchised women, and in the decade after the Civil War, its members were arrested for attempting to vote at polling places across the nation; it was not until 1920 that the suffrage movement was able to ratify a constitutional amendment that protected women's right to vote.[5] After decades of often violent struggle, the labor movement won important changes in constitutional law concerning workers rights, but it did so without the benefit of a constitutional amendment; the Court shifted ground on a variety of labor-related constitutional questions after the Democratic Party won a series of national elections addressing government regulation of the market during the Great Depression of the 1930s, and President Franklin Roosevelt appointed Supreme Court justices more friendly to labor's cause.[6] Both the civil rights movement and the women's movement secured major shifts in constitutional law during the twentieth century, without the benefit of constitutional amendment, or signaling elections and associated judicial appointments.[7]

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[4] *See* BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 99-159 (1998) (arguing that the Thirteenth and Fourteenth Amendments were not proposed and ratified in accordance with the principles of Article V).

[5] *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968-76 (2001) (describing the "New Departure" of the women's movement in the aftermath of the Civil War, when women began to claim the right to vote under the Fourteenth Amendment).

[6] See Ackerman, *supra* note 4, at 279-344 (describing the process by which a mobilized citizenry, a Democratic President, and the New Deal Court brought about a dramatic expansion of the national government without amending the Constitution).

[7] On the civil rights movement, see, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1977) (describing litigation campaign that culminated in the desegregation orders of *Brown*); Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520 (1968) (describing judicial decision-making in the cases arising out of the arrest of citizens arrested for engaging in sit-ins to protest the racial segregation of restaurants). On the women's movement, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric*

Social movement activism has played a crucial role in the development of American constitutional law; yet the role that social movements play in constitutional change is more visible from the standpoint of history, sociology, or political science than it is from the standpoint of scholars who theorize constitutional change within the discipline of constitutional law.

The question of constitutional change is a fraught one in American constitutional theory. Article V of the United States Constitution provides a procedure for amending the document, but amendments have been added by means of that procedure less than twenty times since the Constitution was first ratified in the late eighteenth century.[8] For the last two centuries, all other changes in constitutional law have occurred through shifts in judicial interpretation and the political practice of the representative branches of government.[9] Historians and political scientists freely analyze these developments as changes in constitutional law, but constitutional theorists in the legal academy have proven more reluctant to analyze constitutional change as a practice that occurs outside of the amending procedures of Article V. Doing so calls into question a classic conception of the Constitution as text—as a form of law, adopted through democratic procedures, that can only be changed by compliance with the rigorous supermajority requirements of Article V.[10]

Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943 (2003) (describing the way Congress responded to the protests of the women's movement during the 1970s, and the Supreme Court in turn began to scrutinize laws that discriminate on the basis of sex as it had not before); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. (forthcoming 2004).

[8] The first ten amendments were appended to the Constitution during the ratification process, and the remaining seventeen amendments adopted in the following two centuries. For a history of constitutional amendments, see DAVID KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 (1996).

[9] For an account of how Congress has elaborated constitutional meaning through its own practices, see KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

[10] For a classic expression of this understanding, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). Scalia observes:

> A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well. The purpose of constitutional

Some constitutional scholars who analyze constitutional change outside Article V reason about the Constitution as law that evolves in politics. Political accounts of constitutional change reason about the Constitution as a form of law that is founded on democratic will, and so look for activities in the representative branches of government that signal assent to shifts in the nation's constitutional commitments. Bruce Ackerman is the leading voice in this tradition, arguing that a pattern of signaling elections can amount to a form of higher lawmaking, producing "amendment analogues" that judges can interpret and enforce as they might interpret and enforce Article V amendments.[11] Sanford Levinson and Jack Balkin also emphasize the political nature of constitutional change. Because the Constitution vests the representative branches of government with responsibility for making judicial appointments, they argue, interpretation of the Constitution changes with shifts in the values of the officials the nation elects. Constitutional law will shift over time with the changing commitments of the President who nominates and the Senators who confirm federal judges, a dynamic Levinson and Balkin call "partisan entrenchment."[12]

Other accounts of constitutional change outside Article V depict the Constitution as an enduring body of foundational principles whose practical significance is elaborated in history

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> guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.

Id. On the constitutional amendment process more generally, see RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT (1992).

[11] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266-94 (1991) (arguing that social movements can transcend the realm of normal politics and engage in constitutional lawmaking without enacting Article V amendments).

[12] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) ("Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment."); *see also* Howard Gillman, Constitutional Law as Partisan Entrenchment: The Political Origins of Liberal Judicial Activism (Sept. 12, 2003) (unpublished manuscript), *available at* http://www.yale.edu/law/ltw/papers/ltw-gillman.doc.

through adjudication on the model of the common law. The most prominent theorist of this adjudicatory model of common law constitutionalism is David Strauss, who contends that constitutional change is so thoroughly a matter of adjudication that the amendment process is, in his words, "irrelevant."[13] On this account, constitutional change is not the product of shifts in political will, but instead occurs as judges enforce constitutional commitments in changing historical circumstances—a process that involves a practice of adaptation that theorists understand as the outworking of legal reason, not political value.[14]

Social movements do appear in political and adjudicatory models of constitutional change. The activities of social movements play an important role in the world of representative branch constitutional lawmaking that Ackerman describes. In Ackerman's account, abolitionist movements helped shape the antislavery program of the mid-nineteenth century Republican Party, and thus the constitutional transformations of the Civil War, while the labor movement helped shape the social welfare state vision of the mid-twentieth century Democratic Party, and

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[13] David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1457 (2001) (arguing "that precedents and other traditions are often as important as the text of the amended Constitution; that political activity, in general, should not focus on proposed constitutional amendments; and that American constitutional law is best seen as the result of a complex, evolutionary process, rather than of discrete, self-consciously political acts by a sovereign People."); *see also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that "[t]he common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices.").

One might also include in this tradition the work of Henry Monaghan, who emphasizes the role of stare decisis in giving shape to the American constitutional tradition. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772 (1988) (asserting that "[t]he more that stare decisis is used to rationalize the existing order, the more problematic becomes originalism's insistence upon the crucial importance of the written Constitution, at least in the context of constitutional adjudication.").

[14] Barry Friedman offers an account of constitutional adjudication that might stand as a bridge between these two models of constitutional change. He argues that constitutional adjudication follows shifts in public value, and so is properly understood as "majoritarian" rather than "counter-majoritarian"—a regime he calls "mediated popular constitutionalism." *See* Barry E. Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. (forthcoming 2004). This view of constitutional adjudication, as highly responsive to shifts in public value, is the basis of much work on constitutionalism in political science, and less common in constitutional scholarship in the legal academy. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

thus the constitutional transformations of the Depression era.[15] Similarly, the activities of social movements play a role in the world of common law constitutionalism that Strauss describes, as one important source of social change to which a common law constitutional regime adapts.[16]

But Ackerman and Strauss each model constitutional change in terms that elide the significance of social movements. Ackerman is looking for a rule of recognition that can identify changes in constitutional understanding that judges must read as moments of constitutional lawmaking. But the activities of social movements, as such, cannot supply evidence of change in a lawmaking paradigm. A social movement is at once too informal in structure and too partisan in its views to represent the views of the demos. If one analyzes constitutional change in a lawmaking framework, the activities of a social movement matter only insofar as they can be ratified as representing the national will in some procedurally determinate way. Strauss, by contrast, models constitutional change as common law adjudication, rather than democratic lawmaking. In this framework, social movement activity is just one species of social change that a judge must take into account as she interprets constitutional commitments in concrete case. From the standpoint of common law adjudication, social mobilizations, wars, and technological developments are similar: they disturb settled arrangements and understandings in ways that judges must attend to as they determine what the Constitution requires in particular cases.

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[15] The role of abolitionism in the development of Republican thought emerges most clearly in Ackerman's discussion of Charles Sumner and Thaddeus Stevens, but the abolition movement does not feature prominently in his account of the Civil War and Reconstruction. *See* ACKERMAN, *supra* note 4, at 99-252. The labor movement plays a slightly larger role in Ackerman's account of the New Deal. *See id.* at 323 (acknowledging that ideas associated with the New Deal "had gained broad currency after decades of political initiatives against the courts by the Progressive and labor movements.").

[16] *See* Strauss, *Common Law Constitutional Interpretation*, *supra* note 13, at 905 ("The most important changes to the Constitution—many of them, at least—have not come about through changes to the text. They have come about either through changes in judicial decisions, or through deeper changes in politics or in society."). Strauss credits the civil rights movement and the women's rights movement for bringing about "great revolutions in American constitutionalism."*Id.* at 884.

In the remainder of this paper I focus on some features of social movement activity these accounts of constitutional change obscure. Social movements are powerful factors in constitutional development for reasons that are partly reflected in the lawmaking and adjudicatory models of constitutional change, but not adequately captured by either.

II. Social Movements as Jurisgenerative Agents in Democratic Constitutionalism

A social movement that aims to shape the development of constitutional law operates under a set of constraints that distinguish it from other kinds of social movements. Two constraints immediately present themselves.

The first we can call the "consent condition." Social movements can achieve social change by a wide variety of means, including techniques of terror or war or other forms of violent coercion. But social movements that seek change within a constitutional tradition, without overthrow of the government, cannot achieve change through coercion; instead, they must persuade. The audience a movement seeking constitutional change must persuade is in fact quite various. It includes other citizens the movement might mobilize to join its ranks or move to support its claims, officials of political parties or in the representative branches of government whom it wants to act on its behalf (to support a constitutional amendment, oppose a judicial appointment, enact or enforce a law), and judges before whom its lawyers are litigating cases. How a movement subject to the consent condition approaches the task of persuasion is shaped, not only by its audience, but also by its attitude toward authority. The American constitutional tradition counsels respect for the authority of judges to pronounce constitutional law; yet, at the same time, it views citizens as having special standing to speak about the meaning of a

constitution whose preamble announces it is authored by "We the People."[17] Mobilized citizens understand themselves as authorized to speak to constitutional questions and employ a diverse array of techniques to contest the actions of government officials and other citizens with whom they disagree. Movements advance their constitutional views through the ordinary channels, litigating and organizing in an effort to build support for constitutional amendments. But they also and quite commonly engage in procedurally irregular, disruptive activities in an effort to make themselves heard, not infrequently engaging in unlawful conduct for these purposes. Some movements have employed violence to advance claims about the meaning of the United States Constitution,[18] and many have employed tactics of civil disobedience.[19] Given the consent

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[17] *See infra* note 47.

[18] Southern whites have regularly employed violence to control freedom claims of black Americans since the days of slavery, most recently to block the civil rights movement of the Second Reconstruction. *See, e.g.*, Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 141 (1994) (arguing that "the Kennedy and Johnson administrations were spurred into action when the nation—including, most significantly, northern whites—was appalled to witness the spectacle of southern law enforcement officials brutally suppressing generally nonviolent civil rights demonstrations."); Robert J. Norrell, *One Thing We Did Right: Reflections on the Movement, in* NEW DIRECTIONS IN CIVIL RIGHTS STUDIES 72 (Armstead L. Robinson & Patricia Sullivan eds., 1991) (noting that televised images of white Southerners attacking peaceful protesters "caused a mass revulsion from racial violence that aided the civil rights cause immeasurably.")

The "pro-life" movement, protesting the Supreme Court's decision to protect the abortion right, has employed violence to deter or punish women visiting abortion clinics, and to intimidate doctors engaged in the practice. Most notoriously, a "pro-life" organization established a website in 1997 known as "The Nuremberg Files," which published the names, photographs, home addresses, and telephone and license plate numbers of dozens of abortion providers; lines were drawn through the names of doctors killed by "pro-life" activists. *See* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) (holding that "The Nuremberg Files" constituted a "true threat" and was therefore unprotected by the First Amendment).

[19] The women's movement employed civil disobedience at crucial junctures in its quest for the vote. After ratification of amendments that conferred citizenship on the emancipated slaves, hundreds of women across the nation cast ballots with the collaboration of poll officials, and were arrested for voting "unlawfully." *See* ELLEN CAROL DUBOIS, *Taking the Law into Our Own Hands: Bradwell, Minor, and Suffrage Militance in the 1870s, in* WOMAN SUFFRAGE AND WOMEN'S RIGHTS 114 (1998). During World War I, with the possibility of ratifying a suffrage amendment in sight, women seeking President Wilson's support regularly chained themselves to the fence encircling the White House. *See* ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (1975).

In the conflict over southern desegregation, both sides employed tactics of civil disobedience. In 1957, Orval Faubus, then Governor of Arkansas, refused to permit the Supreme-Court-mandated integration of the Little Rock Central High School; on the day the school was to be integrated, he dispatched units of the Arkansas National Guard to Central High School to prevent black children from entering the building. For an account of Faubus' civil disobedience and the Court's response, see Cooper v. Aaron, 358 U.S. 1 (1958). For an account of civil disobedience among proponents of civil rights, see ADAM FAIRCLOUGH, BETTER DAY COMING: BLACKS AND

condition, violence and other unlawful conduct must remain part of an effort to communicate and persuade; when used to coerce, it draws into question the democratic legitimacy of the system, and so has generally worked to discredit a movement's claims.[20] That much said, the universe of strategies a movement promoting change through persuasion, rather than coercion, might employ is quite broad, and often includes many forms of procedurally nonconforming, socially disruptive, and unlawful conduct that draws attention to the movement's claims.

The second condition constraining movements for constitutional change we can call "the public value condition." Citizens join in social movements when they are moved to collective action by some injury, concern, aim or value that differentiates them from other citizens.[21] In recruiting members, a movement seeking constitutional change may emphasize the kinds of injuries or values that differentiate the group's members from the rest of society; mobilization is often animated by beliefs and commitments rooted in a community's discrete normative universe. But the movement cannot secure recognition of its constitutional claims through these same forms of argument. To persuade citizens outside its ranks or officials in government to recognize its claims, the movement must express its values as public values. A movement can realize its constitutional vision only to the extent that it is persuasive in presenting it as the

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EQUALITY, 1890-2000, at 241-47, 252-56, 273-79 (2001) (describing sit-ins of 1960, freedom rides of 1961, and protests in Birmingham in 1963).

[20] *See, e.g., supra* note 18.

[21] Social movement theory holds that this kind of mass mobilization depends upon the creation of "collective action frames," or "sets of collective beliefs that serve to create a state of mind in which participation in collective action appears meaningful." *See* BERT KLANDERMANS, THE SOCIAL PSYCHOLOGY OF PROTEST 17 (1997). Collective action frames generate social change through a process that social theorists refer to as "frame alignment," whereby individuals reconceptualize their identities in ways that move them to action. *See* David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986) (defining "frame alignment" as "the linkage of individual and SMO [social movement organization] interpretive orientations, such that some set of individual interests, values, and beliefs and SMO activities, goals, and ideology are congruent and complementary"). Sociologist William Gamson has identified three conditions that must be present for frame alignment to occur: 1) a sense of injustice; 2) an element of identity; 3) a belief in one's agency. *See* WILLIAM A. GAMSON, TALKING POLITICS 7 (1992).

nation's: as required by the principles and as resonant with the memories that comprise the nation's constitutional tradition.

The combined operation of the consent condition and the public value condition discipline the ways that social movements make constitutional claims to other citizens who do not share the movement's interests and aims; they together operate to require creative translation of partisan value and vision into public value and vision. For example, when the movement for woman suffrage sought to recruit women to its ranks, it argued that the prevailing legal regime, which gave women "virtual representation" in the political process through male heads of household, produced law that served men's but not women's interest; the movement's recruitment arguments continually emphasized *differences* of position, interest, and value between men and women, manifest in the many laws produced under conditions of male suffrage that injured women. But when the movement sought to persuade men to give women the right to vote, it was constrained by the consent condition and the public value condition and so presented its claim in another discursive form. Seeking to move those outside its ranks to recognize its claims, the movement advanced its arguments in terms that emphasized the principles and memories that united citizens into a community rather than the values and interests that divided citizens in the community. Arguing in this discursive register, subject to the public value condition, the suffrage movement urged that virtual representation inflicted the same injustice on women as it inflicted on men: a regime of male suffrage violated the principle of "no taxation without representation," the principle for which the American revolution against the British crown was fought. By appeal to the founding principles and memories of the American

constitutional tradition, women asserted that men who refused their claims violated the rights of women just as the British king had violated the rights of the colonists.[22]

Perhaps not surprisingly, it took nearly three-quarters of a century before there were a sufficient number of men troubled by this analogy to amend the Constitution.[23] Before the rise of the suffrage movement no one thought that the principles of the American Revolution required enfranchising women; indeed, most Americans at the time of the Revolution and for decades after thought sovereignty an apt paradigm for family and gender relations. Precisely because the suffrage claim challenged customary understandings that differentiated the position of men and women in public and private arenas, "the woman question" (as the suffrage claim was known) was the subject of constitutional contest for generations. Ultimately, the movement secured ratification of a constitutional amendment that required states to include women as voters—and had to wait another half century before any other aspect of the movement's transformative understanding of constitutional principles was explicitly recognized as constitutional law.[24] While the core constitutional claim of the "first wave" of the women's movement was codified by an Article V amendment, the "second wave" of the movement advanced its constitutional claims by legislation, litigation, and a high-profile campaign to amend the Constitution that precipitated organization of a countermovement sufficiently strong to block the final votes

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[22] See Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 337-38 (2001).

[23] The movement for woman suffrage began in the pre-Civil War period, secured changes in state laws during the late nineteenth century, but did not achieve equal suffrage with men until ratification of the Nineteenth Amendment in 1920. *See* U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

[24] For an account of how the suffrage campaign unfolded as a cross-generational national debate about family structure in a democratic constitutional order, see Siegel, *She the People*, *supra* note 5. On the movement's constitutional advocacy during the 1960s and 1970s, see sources cited *infra* note 26.

needed for ratification of the amendment[25]—but not to block substantial change in the Court's interpretation of the Constitution[26] and in the nation's civil rights laws.[27]

As this example illustrates, social movements play a mediating role between government and citizenry in the American constitutional tradition. Social movements may well be better vehicles for incubating, articulating, and justifying evolving understandings of the nation's constitutional values than the regular institutions of democratic governance.

Movements voice shifts in the constitutional vision of the citizenry, even though they do not satisfy criteria of procedural regularity or majoritarianism that the lawmaking model associates with democratic constitutionalism. The informality, partiality, and lack of public accountability of a social movement make it a poor candidate to speak for (represent) the demos within a law-making model of constitutional change. But these same qualities of informality, partiality, and lack of public accountability allow a social movement to pursue its constitutional vision with the single-minded intensity that makes it a powerful force in constitutional development. It is because a movement speaks for only some of the people that it can act as a change agent, and express values and pursue ends with the kind of clarity that would be impossible were the movement obliged to speak for all. At the same time, because a movement seeking constitutional change can achieve its partisan vision only if it persuades others to adopt it as the best understanding of a constitutional tradition that claims to speak for all, movements

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[25] For an account of the mobilization for and against the Equal Rights Amendment in the early 1970s, see Siegel, *Text in Contest*, *supra* note 22, notes 308-10 and accompanying text.

[26] David Strauss argues that the ERA was effectively ratified through adjudication. *See* Strauss, *Irrelevance of Constitutional Amendments*, *supra* note 13, at 1476-77 (arguing that "it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted. For the last quarter-century, the Supreme Court has acted as if the Constitution contains a provision forbidding discrimination on the basis of gender.") (footnote omitted). For a list of equal protection cases recognizing values of sex equality that the Supreme Court has decided since the 1970s, see Siegel, *She the People*, *supra* note 5, at 1023 n.246. For an analysis of the use of the Fourteenth Amendment in the 1970s to combat sex discrimination without engaging the contentious debate over the ERA, see Mayeri, *supra* note 7.

[27] For a list of sex equality legislation enacted by the 92nd Congress, see Post & Siegel, *Legislative Constitutionalism*, *supra* note 7, at 1995-96.

continually endeavor to re-present the meaning of the nation's constitutional commitments in terms that would realize the movement's distinctive vision of human flourishing—whether that vision entails a challenge to, or a defense of, existing social understandings and arrangements. In this way, the consent condition and the public value condition discipline the partisan energies of movements for constitutional change, and create imperatives for them to advance their claims by appeal to the society's stock of shared values, principles, memories, and symbols. The society's understanding of the lived meaning of its normative commitments is thus continuously refreshed by mobilized collectivities of citizens speaking to other citizens and to the representative and judicial branches of government. New constitutional understandings emerge from networks of associations in civil society, framed by a movement's members, leaders, and lawyers in terms that make such new understandings candidates for assimilation into law. A movement succeeds only as its claim is taken up—usually in qualified and compromised terms—and integrated into the fabric of constitutional law, by whatever authorities (juridical,[28] legislative,[29] or popular[30]) one understands as pronouncing constitutional law.

This drive to persuade by translating partisan vision into public value, which arises out of combined operation of the consent and public value conditions, makes movements advancing constitutional claims singularly creative change agents. Constitutional mobilizations incubate legal normativity; they are jurisgenerative factors in democratic constitutional development.[31] They perform a role that is only half glimpsed through the law making model of constitutional

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[28] *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (distinguishing between constitutional law and constitutional culture).

[29] *See* WHITTINGTON, *supra* note 9; STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS (1996).

[30] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[31] *Cf.* Robert M. Cover, *The Supreme Court, 1981 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1982).[Add]

change, and half glimpsed through the adjudicative paradigm of constitutional change. Social movements voice the changing constitutional understandings of the demos, though they do not always do so in ways that satisfy the conditions of procedural regularity or majoritarianism associated with lawmaking. Instead, movements speak for the whole only insofar as they succeed in presenting their constitutional vision as the best understanding of the nation's constitutional commitments, and present it in terms that are taken up by others outside the movement (generally officials in the legal system) who can claim to speak for the whole. In the end, the authority of a social movement making constitutional arguments derives from its ability to elaborate the meaning of a tradition as it lives, and changes, in history—a form of legal rationality often associated with the practice of common law adjudication performed by judges.[32] Yet it is striking how much of this kind of work is performed by mobilized groups of citizens in the American constitutional tradition—a democratic feature of the system wholly obscured if one analyzes constitutional change in the juricentric model of common law adjudication.

It is possible to see these understandings and practices in play in the current dispute over same-sex marriage now working its way through the American legal system. For the last two decades, there has been increasing social movement activity advocating and opposing changes in the way that the American legal system treats sexual minorities.[33] Until recently, the United States Supreme Court had been quite hesitant to grant any form of recognition to the gay rights

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[32] A movement making a constitutional argument, whether before a court or on behalf of a constitutional amendment, often advances its cause by invoking the memories, principles, and precedents that comprise the American constitutional tradition. *See* Siegel, *Text in Contest*, *supra* note 22, at 323 ("Sometimes citizen claims are interpretive and take the form of an assertion about what the Constitution does say; sometimes these claims are amendatory and take the form of an assertion about what the Constitution ought to say. During periods of social movement mobilization, interpretive and amendatory claims are often advanced in tandem, and there are certain deep linkages between them. Citizens advancing amendatory claims appeal to the understandings constituting our constitutional tradition to challenge "official" declarations about the Constitution's meaning, and as they do so, amendatory claims may converge with interpretive claims in semantic structure.") (footnotes omitted).

[33] For a comprehensive history, see WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999).

movement's claims. But last term it reversed a particularly hostile precedent that had allowed states to criminalize same-sex sodomy, in a decision that addressed gays and lesbians as members of the community whose relationships were worthy of respect.[34] Several state courts have gone further, interpreting state constitutions to require state governments to allow same-sex couples to marry, or, to provide same-sex couples a "civil union" status that would give them all the legal benefits of marriage without the name.[35]

These most recent decisions have triggered energetic mobilization supporting and opposing change in the legal status of gays and lesbians. After the President of the United States indicated in his State of the Union Address that he might support a constitutional amendment that would bar same-sex marriage, the mayor of San Francisco responded by announcing that officials in San Francisco would allow same-sex couples to marry, even though the state had just adopted a constitutional provision that defined marriage as a union of a man and a woman. Asserting that the state law violated the equality guarantees of the state constitution, the mayor began issuing marriage licenses to same-sex couples over Valentine's Day weekend, as the nation watched, transfixed by this new chapter in the history of Constitution-driven civil disobedience.[36] Couples invoked the memory of black civil rights protest as they wed: "Everybody has a right to love each other. . . . It's a civil rights issue. It's time for us to get off

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[34] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[35] The Vermont Supreme Court has required the state legislature to provide same-sex couples access to civil union or marriage. *See* Baker v. State, 744 A.2d 864 (Vt. 1999). And just this year, the Massachusetts Court required the state legislature to allow same-sex couples to marry. *See* Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). Before that the high courts of Hawaii and Alaska each signaled that they would recognize the rights of same-sex couples to marry, but citizens of the state mobilized to amend their state constitutions to define marriage as a union of a man and a woman. *See* Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 918-31 (1999).

[36] *See* Rachel Gordon, *Bush Stance Led Mayor to Back Gay Marriages*, MIAMI HERALD, Feb. 16, 2004, *available at* 2004 WL 67040539.

the back of the bus."[37] With other local officials beginning to follow the mayor and authorize same-sex marriage—citing the civil disobedience practiced by civil rights protesters in the American South and in South Africa as they did so[38]—the California Supreme Court ordered the San Francisco mayor to stop allowing same-sex couples to marry,[39] and President Bush announced that he was seeking an amendment to the federal constitution that would define marriage as a union of a man and a woman.[40]

All groups engaged in this conflict act on the understanding that they must energetically voice their constitutional vision, if they wish to live under a Constitution that reflects their values. The expectation of constitutional change is so strong that advocates of same-sex marriage act in violation of law, endeavoring through the performance of marriages to make the law as they would have it be—while opponents of same-sex marriage seek to amend the federal Constitution in order to preserve its current interpretation, acting to keep law as they would have it be. Even as they mobilize to engage in normative contestation, advocates understand that, to prevail, they cannot present their vision as partisan or partial; instead they must present their vision as expressing public values—as vindicating the core commitments of the American constitutional tradition. Opponents of same-sex marriage thus invoke longstanding traditions of heterosexual marriage and emphasize rule of law values,[41] while advocates of same-sex marriage

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[37] Simone Sebastian and Tanya Schevitz, *Marriage Mania Grips S.F. as Gays Line Up for Licenses*, S.F. CHRON., Feb. 16, 2004, at A1.

[38] *See* Thomas Crampton, *Same-Sex Marriage: New Paltz*, N.Y. TIMES, Mar. 4, 2004, at B6 (at arraignment of Mayor of New Paltz, who performed same-sex marriage against state law, supporters played the civil rights anthem "We shall Overcome," and held placard with a photograph of Nelson Mandela that read "All great leaders have gone to jail").

[39] Maura Dolan & Lee Romney, *High Court Halts Gay Marriages*, L.A. TIMES, Mar. 12, 2004, at A1.

[40] *Bush's Remarks on Marriage Amendment*, N.Y. TIMES, Feb. 25, 2004, at A18 ("On a matter of such importance, the voice of the people must be heard. Activist courts have left the people with one recourse. If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America.").

[41] *Id.* (President Bush objecting that "after more than two centuries of American jurisprudence and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization."); Dolan & Romney, *supra* note 39 (same-sex marriage opponent Benjamin Bull, in

invoke the historic struggles of African Americans against long-entrenched practices of racial exclusion, and celebrate the civil disobedience techniques through which the civil rights movements achieved recognition of constitutional equality principles that most Americans now venerate.[42] Each side claims, credibly, that it acts from the history and principles at the heart of the American constitutional tradition. The debate will no doubt continue for decades, generating legal conflict and confusion as it does so, until such time as constitutional law and constitutional culture are in sufficiently stable relation that citizens are no longer moved to mobilize for constitutional change. In the interim, conflict rages. Yet, as it does so, it is possible to make out the outlines of community in the very practice of constitutional contestation. Citizens divided in vision are united in the struggle to shape the terms of collective life. Seemingly only one side can prevail: either marriage is the foundational social unit reserved to persons of the opposite sex, or it is not. Yet as the conflict progresses, it is possible to see how each party to the dispute has, in a measure, shaped the normative views of the other. A movement of sexual dissent has increasingly come to embrace the institution of marriage as it seeks acknowledgment that its members are equal in status to other citizens[43]; at the same time, those who would defend

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response to the California Supreme Court's order to halt same sex marriages, stating, "We're celebrating here, and thankful that the court has enforced the rule of law"); *id.* (quoting California state senator William "Pete" Knight's response to stay as, "I'm delighted that someone has finally taken action to stop the anarchy that is being perpetrated in San Francisco.").

[42] *See* Wasim Ahmad, *Commentary—A promise to love, honor, and disobey*, PRESS & SUN-BULLETIN, BINGHAMTON, Mar. 21, 2004, 2004 WL 60242495. ("These rogue marriages are the first step toward gay marriage winning acceptance in this country, much in the way that Rosa Parks sitting in the 'whites only' section of the bus was the first step in what became a huge, powerful movement. . . . There was a time when equal rights for black Americans were unthinkable. There will come a time when gay marriage is no longer unthinkable."); *see also* Don O'Brian, *Book Buzz: Four Arguments in Favor of Same-Sex Marriages*, ATLANTA-JOURNAL CONSTITUTION, March 26, 2004, at B7, 2004 WL 73418772 ("Marriage is more than a legal arrangement. Marriage is standing in your community. Civil unions are a seat in the back of the bus.").

[43] For movement critics of this strategy, see MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 81-147 (1999) (arguing that marriage is the state's most effective form of sexual discipline and control); Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: PRO AND CON 118-124 (Andrew Sullivan ed., 1997) (arguing that same-sex marriage rights would force gays to assimilate into a patriarchal system and sap the energy of the progressive movement). *See also* WENDY BROWN, *Rights and Losses, in* STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995) (discussing the perils of pursuing apparently emancipatory political goals within repressive, regulatory, and depoliticizing

marriage as a union between a man and a woman have just modified their proposed constitutional amendment to allow states to recognize "civil unions" that would confer the legal incidents of marriage on couples of the same sex.[44]

III. Conclusion: Constitutional Contestation as Community

Constitutional mobilizations tear at the social fabric. Over the course of United States history, movements have advanced constitutional claims by civil disobedience and other forms of socially disruptive conduct—even violence.[45] Movements seeking constitutional voice inflame controversy, divide the nation, and threaten settled understandings and arrangements. Yet even as they do so, social movements have acted as a constructive force in the American constitutional tradition. They have sustained the normative vitality of the American constitutional order over the course of the nation's history, time and again teaching that the foundational principles of the nation require change—or defense—of longstanding understandings and practices. Authorities regularly attempt to stabilize the meaning of the Constitution by pronouncing constitutional law in terms that satisfy prevailing rules of recognition; yet, despite widespread belief that the judiciary is supreme in declaring the Constitution's meaning, citizens and public officials regularly challenge the terms on which the Court has interpreted the Constitution.[46] In the American legal system, constitutional

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institutions); Urvashi Vaid, *Beyond Rights and Mainstreaming, in* VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 178-209 (1995) (arguing that sexual minorities should abandon the civil rights paradigm and strive for freedom rather than assimilation).

[44] *See* David Espo, *GOP Alters Marriage Bill to Allow Civil Unions*, AP, COMMERCIAL APPEAL, Mar. 23, 2004, *available at* 2004 WL 59036491 (discussing modification of proposed constitutional amendment).

[45] *See supra* notes 18-19.

[46] There is ongoing dispute in the American constitutional tradition about the respective authority of the three branches of government to pronounce constitutional law. Many subscribe to a version of judicial supremacy that would give the Supreme Court the last word in questions of constitutional meaning. *See* Larry Alexander &

contestation in the face of authoritative pronouncements of constitutional law works to vitalize rather than undermine the system. This paradoxical result obtains because even vigorous challenges to pronouncements of law are generally conducted by means of a complex code that preserves respect for legal authorities and rule of law values, at the same time as overlapping conceptions of authority in the system encourage and sustain dispute about constitutional meaning.[47]

Conducted on these terms, constitutional mobilizations mediate conflict about the forms of life that constitute the community. When citizens who passionately disagree about the terms of collective life can advance their contending visions as the outworking of the nation's founding commitments, they belong to a common community, despite deep disagreement about its ideal form. The practice of negotiating conflict about the terms of collective life by reference to a shared constitutional tradition creates community in the struggle over the meaning of that tradition; it forges community under conditions of normative dissensus.[48] It is under these

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Frederick Schauer, *On Extrajudicial Constitutional Interpretation,* 110 HARV. L. REV. 1359 (1997) (discussing settlement function). Others subscribe to different versions of "departmentalism" that treat three branches of the federal government as sharing authority in matters of constitutional interpretation. *See, e.g.,* LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988) (depicting the three branches of the federal government as engaged in an on-going dialogue that may not lead to settlement but does produce communication about disputed constitutional questions); Walter Murphy, *Who Shall Interpret?* 48 REV. OF POLITICS 401 (1986) (identifying issues about which there ought to be judicial supremacy and others about which there ought to be congressional supremacy). Keith Whittington suggests that different institutions in the American constitutional order are "supreme" on different issues at different times, with equilibria worked out through politics rather than through a general theory of institutional responsibility. *See, e.g.,* Keith Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365 (2001); Keith Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

Over the course of American history, movements seeking constitutional change have endeavored to move one branch of government to dispute questions of constitutional meaning with another, in an effort to make dissenting constitutional claims audible, and ultimately, to secure for them the force of law.

[47] The American constitutional tradition arises out of a commitment to three potentially conflicting beliefs: belief in the institution of "judicial supremacy," belief in the equality of the three branches of the federal government charged with enforcing the Constitution, *see supra* note 46, and belief in the people's authority to speak to the meaning of a constitution they author. For some reflections on the how the tradition negotiates these conflicting commitments, see Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. __ (forthcoming July 2004).

[48] For an illustration of this dynamic in the decades of conflict over the Court's desegregation orders in *Brown*, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional*

conditions that citizens and government officials come to reckon with—and sometimes even partly to credit—each other's most passionately held views.

Dispute in this form is a practice of civic attachment. It allows citizens to experience law, with which they disagree, as emanating from a demos of which they are a part; it enacts citizenship as a relation of engagement among those having authority to shape a community's constitution. And, it may strengthen law precisely as it unsettles it, enabling—and, on occasion, moving—those who pronounce law to do so in deeper dialogue with the concerns and commitments of those for whom they speak.

Struggles Over Brown, 117 HARV. L. REV. 1470, 1546 (2004) ("Today, most Americans believe that state action classifying on the basis of race is unconstitutional—yet there remains wide-ranging disagreement about the understandings and practices this presumption implicates, and why. The presumption's capacity to sustain this form of conflicted assent would seem to be the ground of its constitutional authority. For a norm that can elicit the fealty of a divided nation forges community in dissensus, enabling the debates through which the meaning of a nation's constitutional commitments evolves in history.").