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## OWS and the Constitution

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## OWS and the Constitution

Posted By [Timothy Zick](#) On October 20, 2011 @ 10:18 am In [Civil Rights, Constitutional Law, Current Events](#) | [5 Comments](#)

Jack Balkin [suggests](#) <sup>[1]</sup> that the Occupy Wall Street (OWS) demonstrations are, or at least could be, rooted in the Constitution. Balkin suggests that OWS's complaint is partly about *Citizens United* and the perceived corruption of the political system by corporate interests. On a deeper level, he suggests, OWS's complaint is that there has been a systemic failure of government — a denial of a "Republican Form of Government." Thus, Balkin suggests, OWS is rooted in Article IV's Guarantee Clause.

The fact that the movement *could* be about the Constitution does not mean that it *ought* to be, or that this is the most effective means of garnering public support for its agenda. Many successful social movements have rooted claims in constitutional text and principle. The Tea Party is only the most recent example. The Tea Party's complaints map very well onto current debates over things like the extent of federal power and federalism. As Balkin and others have noted, the Tea Party has been successful at taking some claims that seemed "off the wall" and putting them, as Mark Tushnet perhaps more appropriately suggests, "[on the table](#)" <sup>[2]</sup>."

This may not work quite as well for OWS. One can certainly think of constitutional arguments that have been in the cabinet, or on the shelf, that OWS might want placed back "on the table." Among these might be arguments for positive or affirmative fundamental rights to housing, subsistence, health care, and education. OWS supporters might support measures that level the playing field with regard to expression, such that "poorly financed causes" have equal access to media and communications channels and the influence of corporate wealth on politics would be diminished or eliminated. And, of course, they could define their movement in anti-Tea Party terms — i.e., by keeping some constitutional arguments "off the table" and supporting the broad constitutional powers to spend, tax, and regulate commerce that Congress has possessed and exercised since the New Deal. The former arguments are likely to stay off the table, in part because they have no political traction in Congress or in state legislatures. Among other difficulties, defining themselves as an anti-Tea Party constitutional movement allows the Tea Party to define the agenda and set the terms of debate.

OWS might become a constitutional movement. It might, as Balkin suggests, find some purchase in the Guarantee Clause (although that provision seems not to translate well as a political slogan or platform). At this point, however, I think the part of the Constitution that speaks to OWS's concerns most directly is its opening passage — the Preamble.

*"We the People" . . . in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America."*

These fundamental principles seem to reflect what the protesters are most concerned about. This is a nascent populist movement. I'm sure if they were polled, the "99 percent" would embrace the notion of a "Republican form of government." But they would embrace that principle because it is supposed to produce "a more perfect" union, justice, tranquility, general welfare, and the "blessings of liberty" across generations. OWS supporters seem less concerned with the specifics of campaign finance law or principles of republican government than with their loss of employment and security, the decline in economic and social welfare, and the dimming prospects for cross-generational enjoyment of these and other Blessings. They blame the structure of government, but only in part. They lament what they view as a fundamental breach of the social contract — by their government, corporations, and fellow citizens. That's a constitutional argument of sorts, but I think it's also a more fundamental complaint about the current state and direction of social and economic welfare in the U.S.

*Addendum:* Over at *Balkinization*, Jason Mazzone and Jack Balkin debate the meaning of the Guarantee Clause and its relevance to OWS – [here](#) <sup>[3]</sup>, [here](#) <sup>[4]</sup>, and [here](#) <sup>[5]</sup>.

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URLs in this post:

[1] suggests: <http://balkin.blogspot.com/2011/10/occupy-constitution.html>

[2] on the table: <http://balkin.blogspot.com/2011/06/structural-similarities-between.html>

[3] here: <http://balkin.blogspot.com/2011/10/ows-which-constitution-which-government.html>

[4] here: <http://balkin.blogspot.com/2011/10/does-guarantee-clause-apply-to-federal.html>

[5] here: <http://balkin.blogspot.com/2011/10/on-guarantee-clause.html>

[6] : [http://en.wikipedia.org/wiki/Second\\_Bill\\_of\\_Rights](http://en.wikipedia.org/wiki/Second_Bill_of_Rights)

[7] : <http://www.opensecrets.org/orgs/list.php?order=A>

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