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## Legal Change

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# THE EIGHTY-THIRD CLEVELAND-MARSHALL FUND VISITING SCHOLAR LECTURE

## LEGAL CHANGE

GERALD TORRES \*

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### I. INTRODUCTION

I ask your indulgence because I am going to offer a series of provisional analyses of some observations about the relationship of law to social change and the relationship of social movements to legal change. Many of the propositions expressed here still have to be completely worked out, but they seem to me to be correct in outline.

This Essay will proceed in the following steps. First, I want to propose a preliminary definition of legal change. As I hope to make clear, there are technical and non-technical dimensions to the definition. Second, I want to offer a preliminary definition of social change and social movements. Third, I want to build on the analysis of the late Professor Thomas Stoddard in which he sketched out a relationship between what he calls “rule shifting” and “culture shifting.”<sup>1</sup> Finally, I want to describe what Professor Lani Guinier and I have come to call “demosprudence.” I appreciate that it is not a word in common usage, but I hope to demonstrate how it is rooted in our commitment to a broad form of democratic legitimacy. Demosprudence is a philosophy, a methodology and a practice that systematically views lawmaking from the perspective of popular mobilizations, such as social movements and other sustained forms of collective action that serve to make formal institutions, including those that regulate legal culture, more

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\*Bryant Smith, Chair, University of Texas Law School. This Essay is based on a talk and many of the themes and arguments will be more fully developed in a book that I am currently writing with Professor Lani Guinier. I would like to thank Dean Geoffrey S. Mearns, Associate Dean Phyllis Crocker, Assistant Professor Chris Sagers and the faculty of Cleveland-Marshall College of Law for the invitation to speak at the law school.

<sup>1</sup>Thomas B. Stoddard, Essay, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 973 (1997).

representative and thus more democratic. It highlights the democratic wisdom and lawmaking power of social movements. The study of demosprudence is the study of the lawmaking and democracy enhancing effects of social movements as they influence and are disciplined by democratic practice.

Guinier and I have two interrelated goals in introducing the term demosprudence. First, we aim to enrich the conventional social movement literature by taking stock of the ways lawyers and judges influence and are influenced by the shape and direction of popular mobilizations. Second, we seek to expand the lexicon of lawmaking itself to include the work of social movement actors. We believe that social movement activism is as much a source of law as are statutes and judicial decisions. Thus, we seek to make analytic space for lawmaking that is the work of mobilized citizens not just legal professionals. Even those cause lawyers, whose goals are consistent with the highest calling of their profession and our democracy, still tend to think primarily if not exclusively in terms of their own professional tools for lawmaking.

I will explicate the idea of demosprudence through a series of examples that illustrate how durable social commitments influence and are influenced by lawmaking. I hope to show how those commitments ultimately produce a new interpretive framework that changes the meaning of law in a way that experts cannot ignore. I want to make clear that this is an analysis of the relationship between social movements and legal change, and it does not have a predetermined political coloration. The other point that is important to remember, but one that I will not elaborate on here, is that the temporal dimension of social movements is often critical to understanding the depth and relative permanence of social change. I raise this here so that there is no misunderstanding of my argument. I do not want to be understood as making a causal claim that any particular episode of judicial or legislative activity produced social change or that any particular episode of social action produced a specific legal outcome. Trying to draw that direct linkage, while possible in assorted specific cases, in my view leads to misunderstanding of the ways in which social change is tied to legal change both as an analytic matter and as a practical matter. It is precisely Professor Gerald Rosenberg's point, for example, that excessive belief in the efficacy of litigation leads to a misallocation of resources by social change activists.<sup>2</sup>

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<sup>2</sup>It is precisely this conundrum that prompted Professor Stoddard to examine the problematic relationship of law to social change. *Id.* at 969-70; see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). Professor Rosenberg argues that there is no causal link between the desegregation decisions and the mass movements and modest changes in race relations that we have witnessed: "In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform." *Id.* at 71. As, I hope to show, this analysis is only partly right and in some ways fundamentally wrong. Of course, there are others, like Robert Glennon, who connect activist success much more closely to the success of the parallel litigation that was underway at the time. I am not particularly interested in a genealogy. Instead, I am more interested in how the processes of choice created more or less power in the hands of the people who would have to live with events the litigation produced.

## II. LEGAL CHANGE &amp; SOCIAL CHANGE

The question of defining legal change seems like one that is relatively simple and straight-forward: you look to see what the authoritative commands of a particular community are, then you examine how those commands are created, changed and enforced and then any deviation from the current authoritative state of affairs that has been enacted according to those rules is what we can call legal change. Of course, this formulation begs important questions about our political institutions and presumes some stability in those institutions. But, in fact, legal change so understood imagines that change itself preserves the stability of those institutions. By building in the capacity (or perhaps the obligation) for serious political disagreement to be channeled into preexisting ways of comprehending the essential nature of the political community, change can be moderated and truly disruptive transformation can be avoided. Law serves that role, and it is perhaps this that leads a large number of political disputes to be contested in the domain of law.<sup>3</sup>

Yet this leads to one of the points that I think is of critical importance and is the one on which Professor Stoddard focuses his essay: major legal change only occurs when the technical legal rule changes are accompanied by cultural change. This is the distinction between what Professor Stoddard calls rule shifting and culture shifting or between rule shifting and lawmaking.<sup>4</sup> It is this lawmaking function that I am most interested in, because it fuses the technical and non-technical exercise of legitimate political power in the process of saying authoritatively what the law is without the brute resort to a naked identity between power and authority and, more importantly, suggesting that mere formal rule changes are always going to be insufficient to produce significant social change. Thus, except in a narrow technical way, although Stoddard styles the attributes of lawmaking as goals, his analysis implies that they are criteria for ascertaining when legal change (as opposed to mere rule change) has occurred.

Investigating the linkage between social change and legal change reveals the limited nature of the conventional understanding of technical legal change. In this, I am not so much interested in how legal experts come to assign meaning to particular legal changes (especially those driven by litigation). Every law student is taught that the meaning of a particular case is only revealed by the propositions for which it is cited in subsequent cases. It is the special domain of legal experts to assess the meaning of law for purposes of social action, but it is also that expertise that leads

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<sup>3</sup>This observation is at least as old as Alexis de Tocqueville's *Democracy in America*. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., Alfred A. Knopf 1945) (1835).

<sup>4</sup>See Stoddard, *supra* note 1, at 972. Professor Stoddard explains:

Lawmaking has at least five general goals:

- (1) To create new rights and remedies for victims;
- (2) To alter the conduct of the government;
- (3) To alter the conduct of citizens and private entities;
- (4) To express a new moral ideal or standard; and
- (5) To change cultural attitudes and patterns.

*Id.*

non-experts to cede to lawyers leadership in the decision-making process or for lawyers to use the legal expertise as a proxy for political decision-making.<sup>5</sup>

What Stoddard and others have cautioned against is conflating legal change and social change. This mistake often leads legal analysts to mistake a legal movement for a social movement rather than trying to understand how a particular legal strategy ought to fit into the politics of broad scaled cultural change that will yield the kind of transformation I have characterized here as "lawmaking."

The story of lawyers as leading change agents is an important one in our social history.<sup>6</sup> It is typically a heroic story both because of the individual lawyers and because the law is presumed to be a neutral vehicle for our political aspirations. This belief seems to be critical for a demographically pluralistic society as a way to formulate a justification for social solidarity in the face of empirical political, social and economic inequality.

The importance of constitutional practice in the popular imagination is found in the naïve belief that beyond fixing the structures of governance, the constitution is also the repository of our beliefs in justice and the core linkage of the idea of liberty to the idea of justice.<sup>7</sup> Of course, what constitutive values we have and want to enforce as either a political or legal matter is exactly the point.<sup>8</sup> That they are not reducible to legal claims is a truth often forgotten. Social movements are particularly challenging because they are not simply about negotiation of interests within an agreed upon normative and political framework, but because they generate new normative frameworks (related to values, new forms of identity, new institutions) and aspire to alter the relations of power, or the political context.

Phrasing political disputes within the abstract grammar of law, especially constitutional law, makes a concrete dispute seem at once both central and general: the generality of the principle is supposed to render it less susceptible to the critique that the claim is *just* politics. Yet, this step suggests that law is outside of politics. Of course it is not.<sup>9</sup> Law—which is supposed to be embedded in both a normative (justice) and political (state power) context—is often taught as a closed technical system, mastery of which is seen as its own craft, but disconnected from both normative and political context. So the "technical system" generates its own norms and operates within its own political context.

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<sup>5</sup>See, e.g., MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (2004) (1987). In this excellent history, there are many points at which the national leadership both participated with and directed local anti-racism efforts. Professor Tushnet makes the undisputable point that, without the support of the local communities, the efforts by the national office would be less effective. *Id.* at 147-54. But, he is also clear that the lawyers, in seeking a judicial solution, both sought out communities that would support the legal strategy and that could be "educated" to accept the strategy. *Id.*

<sup>6</sup>In many ways, this is the story written by Professor Tushnet. *Id.*

<sup>7</sup>For an excellent statement of the various problems that linkage poses for our constitutional practice, see LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

<sup>8</sup>See, e.g., CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (Yale Univ. Press 1999) (1997).

<sup>9</sup>See, e.g., Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

By making the claim for equalization of educational opportunity into one about the correctness of government use of racial classifications, for example, takes a concrete injustice (funding black schools at a lower rate than white schools) and converts it into an operating procedure that is not *essentially* connected to a correction of the complained of inequality. This may in some important ways misstate the problem.<sup>10</sup> Was the problem in segregated schools unequal resources tied to race or the stigma tied to state sponsored racial classification? The lawyers conceptualized this problem with reference to prior principle. They sought to overrule *Plessy*<sup>11</sup> and thus needed to establish a basis for arguing that separate but equal is inherently unequal. But could they have established more simply—through extrajudicial action—that separate may not be inherently unequal but it was in fact in these cases? There was certainly support for such a claim among black teachers, black parents, and others. Indeed Mark Tushnet identifies instances in which black students come to the lawyers complaining of unequal resources and are coached by the lawyers into filing a desegregation suit rather than a suit to equalize resources. At the time, of course, the lawyers' strategy was appealing. They had established a track record chipping away at *Plessy* within the Supreme Court and seemed poised to march against *Plessy* itself.

Thus, a judicial remedy was arguably justified by resorting to a form of political process failure argument. After all, blacks in the South could not vote. And while *Smith v Allwright*<sup>12</sup> represented a victory against the white primary, it did nothing to overcome the exercise of discretion at the local level that prevented blacks from registering in the first place. But if that is the case, then it is the underlying democratic disability that is the difficulty, not the yet unrealized commitment to a particular form of substantive constitutional liberty. So litigation as a strategy is still caught in a paradox: while it neutralizes the claim that the lawyers are just "using" the plaintiffs for their own ends (as was the complaint made against the communists who represented the Scottsboro boys), the commitment to litigation tended, at least in the eyes of the lawyers, to diminish the value of other tactics, such as nonviolent direct civil disobedience. It also converted a tactic—school desegregation—into a goal. As a result, the underlying problem—the inequality of resources—was never addressed. Instead, the focus shifted to the issue of "stigma," which was the social scientific case that the lawyers tried to make in *Brown*.<sup>13</sup>

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<sup>10</sup>This was the essence of the colloquy between Herbert Wechsler and Charles L. Black, Jr., about the meaning of *Brown v. Board of Education*, 347 U.S. 483 (1954). See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). Even asking students to re-read the case today in order to state its meaning (not what it has come to mean, although that is itself in dispute, but what the Court seems to be saying is the particular harm to be remedied) reveals the problematic nature of the opinion. Another useful exercise is to ask the students to choose from among the remedial approaches that the Court summarizes in footnote 13. See *Brown*, 347 U.S. at 496 n.13.

<sup>11</sup>*Plessy v. Ferguson*, 163 U.S. 537 (1896). I have not described the case because I assume that everyone knows that this was the case that upheld the constitutionality of the principle of "separate but equal" in a suit brought to challenge the application of Jim Crow segregation laws on intra-state public transportation.

<sup>12</sup>*Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>13</sup>*Brown*, 347 U.S. at 494-95.

There are four problems with this shift. First, while green might follow white (and thus desegregation would invariably lead to equal resources if whites were required to stay in public schools), whites had the opportunity of exit. This opportunity translated into white flight to private academies and to the suburbs where the Court eventually ruled there was no jurisdiction to enforce *Brown*. This meant that the only whites left to “integrate” were often poor and working class, for whom integration looked a lot like downward economic mobility.<sup>14</sup> Thus, desegregation racialized resentments that may have reflected class anxiety, not just racial bias. This is the backlash effect that ultimately undermined white support for busing and other pro-integration remedies.<sup>15</sup>

Second, even when schools were desegregated, tracking—accompanied by other informal manifestations of continued stigma—meant that the classrooms inside the schools were not. From W.E.B. Dubois to Martin Luther King to Claude Steele, black intellectuals have been acutely aware of the relationship between a sense of belonging and achievement.<sup>16</sup> Thus, even in integrated schools, there still remains an “achievement” gap, what some might prefer to call an “expectations” gap. Indeed, this reflected the irony of the Clark doll study on which the Court in *Brown* relied. It was the blacks in integrated schools in the North who experienced the greatest hesitancy in playing with the black dolls. Blacks in the segregated schools in the South experienced less of a stigma than blacks who had greater exposure to whites.<sup>17</sup>

Third, the focus on integration became, after *Bakke*,<sup>18</sup> a preoccupation with “diversity.” The goal was to have enough students of color to enhance the educational environment for white students. (This result may, in many ways, be thought of as the polar opposite of the change that was sought in *Brown*.) The experience of blacks or Latinos remained marginalized except to the extent it

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<sup>14</sup>See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 99 (2004).

<sup>15</sup>See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>16</sup>See, e.g., Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, § 7, at 8. Freedman quotes Martin Luther King, Jr., as saying in 1959:

I favor integration on buses and in all areas of public accommodation and travel. . . . I am for equality. However, I think integration in our public schools is different. In that setting, you are dealing with one of the most important assets of an individual—the mind. White people view black people as inferior. A large percentage of them have a very low opinion of our race. People with such a low view of the black race cannot be given free rein and put in charge of the intellectual care and development of our boys and girls.

*Id.* (internal quotation marks omitted) (quoting Martin Luther King, Jr.); see also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 613 (1997) (discussing how societal pressures and negative stereotypes threaten “the standardized test performance of women and African Americans” in the educational setting).

<sup>17</sup> See Guinier, *supra* note 14, at 110.

<sup>18</sup>*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (outlawing racial quotas in university admissions, but permitting race to be taken into account as part of a university’s interest in creating a diverse learning environment).

contributed to the ability of whites to learn to lead in a multiracial world. White students would understand that not all blacks or browns think alike. They would figure out ways to live side by side the exceptional individuals of color who made it into their world. Once again the emphasis was on exit. But here it was the exit of individual blacks and Latinos from their communities. This left communities that had been integrated by class but segregated by race to become concentrated by race and isolated by poverty.

Finally, the investment of resources in litigation as “the” social change strategy ultimately redefined the issue of race itself. Race became a problem of discrimination rather than a proxy for deprivation of resources. While the issue of discrimination may have represented a convergence of interests between Northern elites and blacks when the “discriminators” were white good old boys in the South, once Jim Crow fell, and discrimination became less overtly intentional, the language of discrimination became a language of blame that started to make all whites feel uncomfortable if not guilty. The relationship between race and class anxiety was ignored, and the conservative language of colorblindness was able to recruit more speakers, who, accompanied by a more conservative Supreme Court, rewrote *Brown* to mean formal equality and nothing more.<sup>19</sup> That the constitution did not guarantee against these particular kinds of process failure might not be surprising; and, in fact, the failure itself might be written in the DNA of the document.<sup>20</sup> Thus we are left with two overarching questions: (1) Is law the best way to address or conceptualize this problem? (2) Is resort to litigation the best and most sustainable resolution if there is political process failure?

### III. DEMOSPRUDENCE

One of the chief impediments to change is the idea that things are *necessarily* one way or another. Rule shifting as the result of a sustained social movement challenges the dominant narrative of social life by making its current forms seem contingent and by linking the alternative narrative to other powerfully held ideas about ourselves as a political community. For our purposes this might be summarized as a way of legitimizing an alternative view that preserves the distinction between ideological difference and epistemological difference. Saying what we know to be true rather than what we are supposed to believe to be true changes the nature of the debate. It engages the question of how we know. This is one way in which use of the law in the process of cultural change can be seen to be particularly important. Rule shifting through litigation is one way of engaging and challenging the dominant narrative of social life, but the use of litigation entails the use of storytelling in a specific way that is determined, to a large extent, by the institutional imperatives of law.<sup>21</sup> Thus litigation in order to function as an effective

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<sup>19</sup>See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 32-66 (2002); see also Adam Liptak, *Brown v. Board of Education, Second Round*, N.Y. TIMES, Dec. 10, 2006, § 4, at 3.

<sup>20</sup>A memorial to the confederate dead on the campus of the University of Texas says that the memorial is for those who died in defense of the Constitution and, strictly speaking, it is not wrong.

<sup>21</sup>See discussion in Gerald Torres & Kathryn Milun, *Frontiers of Legal Thought III, Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990).



public articulation of a counter narrative has to reframe the nature of the claim of what is at stake, and it has to change what counts as evidence of the claim. By changing what counts as a valid legal argument and what counts as valid legal proof, changes in the law can be used to reframe politics.

This point is crucial, because neither just legal rule shifting nor cultural action through resistance or reframing will do the work of politics. But they are necessarily part of any political project, especially one that has as its goal a fundamental restructuring of institutions and the power represented by them. In exploring the distinction we have drawn thus far between culture and rule shifting, the question of priority still remains. If culture shifting follows rule shifting or is more important than rule shifting, how is the agenda for cultural change formulated? If one of the critiques of rule shifting is that it is controlled by elites, do we have any basis for confidence that cultural change will not be similarly controlled? And would it matter if it were a different kind of elite leadership? The answer has to be that non-elite actors have to have a voice earlier in the agenda setting process. This is why ideas about *representation* are a crucial point of entry. In order for representation to be effective in the ways described here it has to be supported by an organized constituency that will hold them accountable or to be there when the representatives are attacked.

So the goal is to shift cultural norms in a way that energizes the participation of non-elite actors throughout the process. Said more directly, culture shifting requires *power shifting* that enables non elites to inform both rule and cultural shifts. And *demosprudence*—the jurisprudence of social movements—means we need new forms of representation (or criteria for power-sharing relationships) that ensure that the power shifts are not just pendulum swings between two different groups of elite actors (from the business elite to the academic elite or from the conservative think tankers to the liberal ones) but change that actually bring the voices and bodies of non-elites into the discourse.

So *demosprudence* is really about bringing in intellectual resources (of lawyers and others) and embedding them in social movements. It is also about lawyers who bring their ideas and skills to the table, but who see themselves as representing democracy not just clients or causes. What does it mean to “represent” democracy? It means working to enhance opportunities for building and shifting power so that non-elite actors get to participate in making the decisions that affect their lives. It is not about “service” to clients or causes. It is about constantly asking: what do we need to do to bring more people into the exercise of democratic power. Social movements are one important way to do this.

Social movement lawyering is thus very different from cause lawyering. Cause lawyers are not embedded. Their cause is legally defined rather than defined by their clients. To the extent they do have clients, they function in a clientelist way—they serve clients rather than democracy. Cause lawyering may try to shift the rules, which ultimately may change the culture, but the problem with cause lawyering is that decisions about which rules are being shifted and how those rule shifts are being enforced is ultimately made by elites. Derrick Bell makes this point in the development of his interest convergence hypothesis when he suggests that the elites went along with the lawyers' terms of social justice advances through rule shifting to

the extent they were required to sacrifice nothing themselves.<sup>22</sup> They realized they could still enjoy all their privileges while ending Jim Crow. This has also been the criticism that environmental justice advocates have made of the mainstream environmental movement.<sup>23</sup>

Demosprudence, by contrast, is about a practice of law and interpretation of law that increases the quantum of democratic potential in social life. By this we mean bringing the voices of non elites into the discourse. It means lawyering for democratic outcomes and democratic processes. The challenge for democracy has always been to negotiate mass participation in ways that avoid mobocracy. Democracy thus needs a process for negotiating that participation that is not just voting, which has been corrupted by (1) candidate centered rather than agenda centered politics; (2) organized money rather than organized people; and (3) a public relations approach to politics that treats people as consumers not citizens.

Thus when we use the calculus of demosprudence, culture shifting means: (1) a shift in who gets to participate in who creates the narratives of justice; and (2) representing narratives that are ultimately about the conditions for democracy—assuring that all the people get to participate in a meaningful way to help to make the decisions that affect their lives. In continuing to think about *Brown*, using the metric of culture shifting, we actually see that the culture *did* shift. But not in the ways that social justice and racial justice advocates imagined. Instead, the meaning of *Brown* was found in the capacity for individuals to exit rather than in a more profound redistribution of resources for communities. The lesson found in this result is the need to link culture shifting with democratic accountability that gives poor people and communities of color (not just individual people of color) voice, choice and power.

#### IV. SOCIAL MOVEMENT AND LEGAL CHANGE

##### *A. Temporary and Durable Commitments: Linked Fate*

The vigorous and often heated popular and technical debates that center on the text of the Constitution as a legal document are about its meaning for us as a polity, even if they are sometimes phrased in terms of structure. Even where the Constitution seems to speak without ambiguity, that determinant structure supports the open textured quality of what Professor Lawrence Sager calls its liberty bearing provisions which preserve for the people the rights that we have always possessed.<sup>24</sup> Importantly, many of the debates ignore the processes through which those rights have to be vindicated by changing many of the institutions and crabbled interpretations that have limited the scope of the binding document. The movements for civil and economic rights of black people, women, and other subordinated communities are continued expressions of a process of social change that profoundly alters the nature of the political commitments we have to one another. Of course, what I mean by this is that the baseline for understanding the meaning of political

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<sup>22</sup>See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>23</sup>See, e.g., Richard J. Lazarus, *Pursing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

<sup>24</sup>See SAGER, *supra* note 7.

and economic justice has shifted and with it the meaning of the law that supports those commitments. Yet as the previous section suggests, to the extent that these changes are not democracy enforcing they remain unstable.

Despite the strong and spirited attempts to locate constitutional meaning within a doctrine of "originalism," which essentially holds that the Constitution only means what the drafters of the document intended, most modern theorists demonstrate that conceiving of our constitutional practice as a justice-seeking enterprise enlarges and enriches our understanding of our Constitutional tradition.<sup>25</sup>

Whatever the complex motivations animating the movements for racial and economic justice, one explicit justification was to suggest that there is a minimum material content essential to the meaning of membership in the polity.<sup>26</sup> This is the second step after challenging the entrenched ideas of what the polity is. By shifting the debate to what that minimum content might be, these movements have struggled to put their vision of the good at the center, even though, as I have argued, there were internal disputes about how best to articulate and pursue the goals of the movement.

How law might be used to reinforce these claims is a critical question because where it is used to usurp both political engagement and bottom-up leadership, it loses its power as a democracy enhancing device except to the extent that it is rooted in a process failure claim. Social movements have shaped our modern understanding of social life. More importantly, those movements have helped change our understanding of who belongs and ultimately changed the way we understand the minimum obligations of the law and our minimum obligations to one another.

### B. Two Examples

I will close with two examples of how social movements have produced changes in the kinds of durable social commitments that necessarily affect what is thought both to be possible as well as legally permissible. In short, the examples illustrate how what might be thought of as technical legal interpretations are affected by background understandings of what the world *ought* to look like.

The first example grows out of the response to the case of *Hopwood v. Texas*.<sup>27</sup> In that case, the United States Court of Appeals for the 5th Circuit prohibited any consideration of race for admission to the University of Texas. While not ignoring the law, it was clear both to the leadership in the University at the time and to the Mexican American and African-American members of the Texas legislature that such a rule would effectively resegregate the University. Moreover, because the University is a gateway institution, its resegregation would ultimately lead to the resegregation of other important institutions in the state. Virtually all of the leadership in the state has some connection to one of the two flagship schools in Texas.

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<sup>25</sup>*Id.*

<sup>26</sup>See Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 LAW & SOC'Y REV. 367 (2000) (discussing rights consciousness and its impact on the mobilization of resistance to Jim Crow and other forms of racial subordination); see also William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999).

<sup>27</sup>*Hopwood v. Texas*, 78 F.3d 932, 944-50 (5th Cir. 1996).

The legislature created what came to be called the Texas Ten Percent Plan (TTP) that guaranteed to all graduates in the top 10 percent of their high school class a place in one of the flagship schools. Rather than responding with a naked defense of affirmative action, the legislature asked: What is the university for? Whom ought it serve? What values should it reinforce? The TTP was designed to support the commitment to the values of geographic, demographic, and economic diversity by committing to the values of hard work and fair play. By opening the University to those high school graduates who have demonstrated academic success and because Texas public schools remain embarrassingly segregated, a large number of Mexican American and African-American students would be eligible for admission to the school in addition to a large number of rural whites who had never considered attending UT Austin.

Yet, in addition to making the university accessible to students from every corner of the state, there were two additional ancillary benefits. First, it meant that the school would remain racially and ethnically integrated, but it would also and importantly be geographically and economically integrated. It really would be a school that belonged to the entire state by making a promise to students all over the state: You are welcome here regardless of your station at birth or the property value that supports your local public primary and secondary schools.

Second, it led to an improvement of undergraduate education for all students. In order to accommodate those students who administrators feared might not be ready for a University-level education, the university leadership changed the freshman curriculum and advising program in ways that have resulted in a general improvement in undergraduate education. Perhaps even more important than these changes, however, was the knowledge gained from watching these formerly excluded students excel. What it taught admissions officers and others is that perhaps we don't know all we think we know about who can succeed at a university of the quality of the University of Texas. That humility changed the ways in which we could appreciate the gaps in our own understanding.

The second example comes from the property rights movement. This is a movement that has galvanized grass root support for concentrations of power by structuring the story as essentially David against Goliath. The reason it has gained such a purchase on policy makers and judges is that it has been able to tell a story about a government that is out of step with the community. When the government is not operating in congruence with the deeply held values of the people it is likely to produce the kinds of injustices property rights and civil rights advocates warned about. The success of the property rights movement to make that claim legitimate is what made the recent case of *Kelo v. City of New London*<sup>28</sup> a difficult case. A generation ago it would not have been hard, but here it was understood by a great number of people as a manifest injustice. It was the city acting on behalf of a large corporation rather than on behalf of citizens who built their lives (as well as their homes) there. Long time residents of New London experienced a kind of civic disrespect when the city determined that it would sacrifice their homes in the service of economic development. Relying on what seemed to be settled law,<sup>29</sup> the case

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<sup>28</sup>*Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>29</sup>*Kelo*, 545 U.S. at 487-89 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), as settled precedence).

ended up in a 5-4 decision. The reason it seemed difficult could be explained through a careful parsing of the opinion and the differing claims the majority and dissent argued were compelled by doctrine, but what is clear is that the background normative assumptions about the limits to the police powers and the fundamental power of eminent domain had been changed by concerted popular action over the course of a generation.

While these two examples might be thought of as coming from opposite ends of the political spectrum, what they illustrate is the power of narrative reconstruction to condition normative assumptions that ultimately take technical form.

## V. CONCLUSION

The *demos* in demosprudence is meant to refer to those people who are collectively mobilized to make change. *Demosprudence* is not “the community” at the micro level. Nor is it *the “polity”* writ large whether it acts through representative decision-making or voting in referenda and initiatives. It is not the theory or practice of a riot or a lynch mob. Nor is it the study of elections, whether for representatives or referenda. It is the theory and philosophy of legal meaning making through popular mobilization that engages a “thick” form of participation by people who are pushing for change by resisting manifestations of either public or private power. Demosprudence is an effort to expand the analysis of the way social power circulates and finds its expression in law. Demosprudents examine the collective expression of resistance that tests the democratic content of the formal institutions of lawmaking studied by jurists and legislators. Rather than solely relying on courts to protect “discrete and insular minorities,” demosprudence forces us to focus on alternative forms of representing power, especially on alternative democratic expressions of power. You might think about this by asking a question: if we value democratic legitimacy, how do we know when democracy is working? We look for the answers in the people themselves when organized as dynamic constituencies and not as isolated individual preference holders. We are not talking about alternative accumulations of preferences (poll taking, a mob, or a referendum). We are talking about the lawmaking and democracy-expanding potential of social movements.<sup>30</sup>

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<sup>30</sup>See, e.g., SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2d ed. 1998) (1993) (providing an especially important definition of contentious politics as distinct from ordinary, electoral politics). Contentious politics involves a repertoire of actions, discourses, and visionary goals that tell a story that (a) seizes historically contingent openings, (b) mobilizes popular will (not just in terms of polls, but in terms of “the will to act”), (c) builds on networks of social solidarity, and (d) finds sites for narrative resistance in which to transpose/transport grievances into causes that resonate with the larger culture’s narratives of justice. Contentious politics engages opponents over time and changes the meaning of law, not just its rules. Our critique of litigation is based on the failure of many cause lawyers to formulate their strategy in conjunction with the cycles of mobilization. Litigators too often use state power in service of a principle rather than using principle in service of resistance to state power or other concentrations of power that undermine democracy. Causes are adjudicated into grievances; constituencies of accountability are demobilized.