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Aligning the Stars: Institutional Convergence as Social Change

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ALIGNING THE STARS: INSTITUTIONAL CONVERGENCE AS SOCIAL CHANGE

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"Don't wait for the stars to align, reach up and rearrange them the way you want . . . create your own constellation."[1]

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1. Pharrell Williams, AZQUOTES, https://www.azquotes.com/quote/867259 [https://perma.cc/64TX-S2AH] (last visited Feb. 9, 2023).

INTRODUCTION

In a democracy, in which the legal and constitutional systems should reflect popular will and individual and collective self-determination are the engines through which those systems are realized,[2] what are the means by which individuals, organizations, and social movements might bring about meaningful and sustainable social change that makes that society more just, more inclusive, and more equitable?[3] A common understanding of how social change happens, and who can bring about that change, is represented in an oft-quoted phrase, attributed to Margaret Mead: "Never doubt that a small group of committed people can change the world: Indeed, it is the only thing that ever has."[4] One group of scholars has even put a number on the percentage of a population that must be engaged with an issue to bring about change: 3.5 percent.[5] In recent decades, mostly following the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*[6] and the laws passed in the 1960s as a result of the advocacy of the civil rights movement, legal scholars have sought to understand the "puzzle" of social movements[7]: what role such movements have played in influencing not just the passage of legislation[8] and the transformation of legal institutions,[9] but also the understanding of the U.S. Constitution itself.[10] In legal scholarship, as one scholar has declared, it is "the moment of social movements."[11]

One theory about how social change happens comes from the late Professor Derrick Bell, who posited that constitutional change is possible when the interests of elites align with those of advocacy groups seeking such

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2. For the relationship between democracy and individual and collective self-determination, see Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 439 (1998).

3. *See, e.g.*, Idit Kostiner, *Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change*, 37 LAW & SOC'Y REV. 323, 325–30 (2003) (describing various definitions of social change).

4. THE YALE BOOK OF QUOTATIONS 508 (Fred R. Shapiro ed., 2006).

5. *See, e.g.*, Erica Chenoweth & Margherita Belgioioso, *The Physics of Dissent and the Effects of Movement Momentum*, 3 NATURE HUM. BEHAV. 1088 (2019).

6. 347 U.S. 483 (1954).

7. Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1554 (2017).

8. *See* Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 67–70 (2001) (emphasizing the role of social movements in the passage of New Deal social welfare legislation).

9. *See* K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL'Y REV. 321, 330–32 (2016) (stressing the importance of social movements to policy change).

10. *See generally* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014).

11. Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 360 (2018).

change.[12] He used as an example of this phenomenon—what he called the "Interest-Convergence Thesis"—the forces that led to the Supreme Court's landmark decision in *Brown*. There, the Court concluded that the system through which educational institutions, largely in the states of the former Confederacy that operated Jim Crow institutional systems, offered segregated schools for whites and African Americans, was unconstitutional.[13] For Bell, the decision was justified according to the "neutral principle" that advocacy groups could foster change when their interests aligned with those of elites: in the case of *Brown*, elite *white* interests.[14] In the historical context in which the Warren Court decided *Brown*, the need to address segregation had become a Cold War imperative and white elites, according to Bell, aligned with the leaders of the civil rights movement to bring a nominal end to the "separate but equal doctrine."[15] Legal scholars have identified other examples in which the Interest-Convergence Thesis appears to explain Supreme Court decisions in the intervening seventy years since the decision in *Brown*.[16] Other legal scholars have seen the Interest-Convergence Thesis as a model for catalyzing change: that one can bring about such change when advocates can identify opportunities to align their goals with the interests of elites.[17] The framework has even spilled into popular culture.[18]

Bell's theory has been identified with what is often referred to as legal liberalism—a faith in activist lawyers aligning themselves with activist judges to bring about social change.[19] But this vision renders insignificant the very social movements that many see as central to social change.[20] Thus, as prescription—that is, as a formula for bringing about social change—Bell's thesis relegates social movement organizations to a spectator's role at best. Is there another way to look at the movement for civil rights for the African American community and other, similar movements since, to

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

13. Of course, *Brown* overruled the U.S. Supreme Court's precedent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that enshrined the separate but equal doctrine in constitutional law. *See id.*

14. *See* Bell, Jr., *supra* note 12, at 522–28.

15. *See infra* Part I.A.

16. *See infra* Part I.A.

17. *See generally* David A. Singleton, *Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform*, 34 N. KY. L. REV. 663 (2007) (describing ways in which advocates can harness the Interest-Convergence approach to drive social change).

18. *See, e.g.*, *Nice White Parents, Episode 5: 'We Know It When We See It*,' N.Y. TIMES (August 20, 2020), https://www.nytimes.com/2020/08/20/podcasts/nice-white-parents-school.html [https://perma.cc/ZJ6P-MW5P] (using Interest-Convergence analysis to assess school reform advocacy).

19. *See* Cummings, *supra* note 11, at 361–62 (describing legal liberalism).

20. On the role of social movements in social change, particularly legal change, see generally DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW (2016).

identify a prescriptive theory that can help not just explain the achievements of those groups, but to inspire and catalyze other social movements to advance significant and durable social change?

This Essay explores one way of looking at social change that sees the Interest-Convergence Thesis as incomplete. Its emphasis on elite interests undermines the importance of the very social movements that have been at the heart of most instances of meaningful social change in the United States.[21] Because of this, it is less effective empirically: it has less explanatory force and does not serve as a means of identifying the sources of social change. What is more, by relegating social movements to spectator status, it actually has little prescriptive value as well. That is, it cannot serve as a formula for *advancing* social change that activates the central actors in social change efforts: social movements themselves. A different model—which I will call, in a salute to Bell in many ways, "Institutional Convergence"—offers a different approach, one that is both descriptively and prescriptively superior to one that focuses on interests alone. This approach draws from other disciplines that study social movements to place institutions, broadly defined, at the center of social change.[22] Such an approach has both explanatory and prescriptive value, and it thus contains a concomitant normative quality and weight.

In this Essay, I hope to provide justification for this Institutional-Convergence approach. It begins with a description of the Interest-Convergence Thesis and its critics in Part I. Then, Part II describes what I call the "institutional turn" in social movement scholarship that has emerged over the last two decades, a phenomenon that has occurred, for the most part, separately from legal scholarship. Part III then describes how this institutional turn can inform both social movements and legal scholars through the adoption of a methodology for catalyzing social change that harnesses the power of institutions in their broadest sense and provides social movements with new methodologies and tactics to bring about lasting social change.

I. THE INTEREST-CONVERGENCE THESIS AND ITS CRITICS

A. Bell's Critical, Normative, and Descriptive Thesis

In many ways, the decision of the Court in *Brown v. Board of Education* would end up signaling the end of what had come to be known as the Legal Process School.[23] Professor Herbert Wechsler, a prominent scholar within

21. *See* THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 74–78 (2003) (describing the role of social movements and social movement organizations in American civic and democratic life).

22. *See infra* Part II.B.

23. For an explanation of the Legal Process School, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 446–48 (2004), and sources cited therein.

the Legal Process School, criticized the Court's decision, arguing that it could not be justified according to so-called "neutral principles."[24] For Wechsler, consistent with legal process thought, courts must "reach[] judgment on analysis and reasons quite transcending the immediate result that is achieved."[25] He believed that the Court's decision failed to take into account the interests of some in the white community whose own freedom not to associate with members of different races was being infringed by a finding that public education institutions could no longer segregate by race.[26] Wechsler would ask when the state "must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"[27] He believed there was none.

In response, Derrick Bell would assert that the neutral principle that could justify the Court's holding and reasoning in *Brown* was what he called the convergence of interests between white elites and the Black minority.[28] The mutual interest in securing equal protection of the laws came from two different sources. First, white elites saw a need to resolve the significant tensions the United States faced on the geopolitical stage as the Soviet Union, in its search for allies and global influence, used the treatment of African Americans within the United States to help drive a wedge between the United States and countries in the developing world, many of which were made up primarily of people of color.[29] The desire to end Jim Crow to support the foreign policy goals of U.S. elites converged with the desire of those who wished to end segregation for instrumental and moral reasons.[30] For Bell, this convergence of interests was a sufficient "neutral principle" to justify the Court's decision in *Brown* that the Equal Protection Clause of the Fifth and Fourteenth Amendments prohibited government-sponsored segregation in educational and, ultimately, other institutions.[31]

In the wake of *Brown*, what has come to be known in legal theory as legal liberalism emerged, and this theory places at the center of social change the collaboration between activist lawyers and activist courts.[32] What is more, many would latch on to the Interest-Convergence Thesis for its prescriptive

24. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26–36 (1959).
25. *Id.* at 15.
26. *See id.* at 34.
27. *Id.*
28. *See* Bell, Jr., *supra* note 12, at 523–28.
29. *See id.* at 524–25; *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 119–20 (1988) (establishing historical support for Bell's theory regarding elite interests).
30. *See* Bell, Jr., *supra* note 12, at 524–28.
31. *See id.* at 522–28.
32. *See* Cummings, *supra* note 11, at 361–62.

value, even as its value in terms of describing elite dynamics seemed fairly well-established.[33]

B. Interest-Convergence as Prescription

Viewing the Court's decision in *Brown* retrospectively, Bell used his thesis to offer a basis upon which the Court brought about social change. But others have used Bell's theory not just to explain social change in other contexts,[34] but also with prospective, instrumental purposes in mind—as a way to offer a roadmap for how one can induce such change.[35] In order to bring about social change, then, if Bell's Interest-Convergence Thesis is to be believed and one wants to implement it, one needs to identify when interests align. But what interests? There may be an alignment of interests among a band of small political "sects" who, standing alone, can gain little legal or political traction. But even standing as one, they may still not create the sort of hydraulic pressure that the alliance of civil rights advocates and white elites applied in the desegregation context.[36] Even aligning a majority of the population behind a particular political or legal goal does not always translate into victory in the courts: for example, a majority of Americans endorse stricter gun laws than the Supreme Court's decision in *District of Columbia v. Heller*[37] seems to prohibit.[38]

For some, whether the role of the Court, and the decision in *Brown*, actually accomplished the goals of the civil rights movement is subject to significant debate.[39] And if the Court's decision in *Brown* did not accomplish a true and effective end to segregation, how useful is the Interest-Convergence approach as a tool for inducing change? If it has little explanatory value as a theory of social change in relation to the very case study it was designed to explain, it is difficult to argue that it can serve as a model for social change in other contexts. With these concerns in mind, a review of the effectiveness of the decision in *Brown* in bringing about the advancement in civil rights that the advocates sought is in order. For this, I will turn next to the critical work of Professors Justin Driver and Gerald Rosenberg to help shed light on the subject.

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33. *See infra* Part I.B.

34. For a collection of scholarship applying the Interest-Convergence Thesis to other contexts, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 154–55 nn.25–28 (2011).

35. *See generally* Singleton, *supra* note 17.

36. As explored below, early in the campaign for marriage equality, there was not the type of broad, national support that might lead the Supreme Court to validate same-sex marriages. *See infra* text accompanying notes 107–12.

37. 554 U.S. 570 (2008).

38. *See* Kristin A. Goss & Matthew J. Lacombe, *Do Courts Change Politics?:* Heller *and the Limits of Policy Feedback Effects*, 69 EMORY L.J. 881, 892–98 (2020) (describing the relationship between the Supreme Court's recent Second Amendment jurisprudence and public opinion).

39. Representative scholarship includes Thomas Kleven, *Separate and Unequal: The Institutional Racism of the Supreme Court*, 12 ALA. C.R. & C.L. L. REV. 276, 280–91 (2021).

C. The Prescriptive, Empirical, and Normative Shortcomings of the Interest-Convergence Thesis

Driver provides a useful critique of Bell's theory in his work *Rethinking the Interest-Convergence Thesis*.[40] There, he argues that there are several flaws in the thesis, including that it might not enjoy much empirical, normative, or prescriptive force.[41] Those flaws are summarized by Driver as follows. First, the theory contains an "overly broad conceptualization of 'black interests' and 'white interests'" that "obscures the intensely contested disputes regarding what those terms actually mean."[42] Second, the thesis "incorrectly suggests that the racial status of blacks and whites over the course of United States history is notable more for continuity than for change."[43] Third, the theory "accords insufficient agency to two groups of actors—black citizens and white judges—who have played, and continue to play, significant roles in shaping racial realities."[44] Fourth, the theory cannot be "refuted" or "examined for its validity," Driver argues, "because it accommodates racially egalitarian judicial decisions either by contending that they are necessary concessions in order to maintain white racism or by ignoring them altogether."[45] Here, since this Essay seeks to address the prescriptive value of the Interest-Convergence Thesis, I will largely address the third of these critiques—that it affords insufficient agency to those who might seek to catalyze change. But by doing so, I hope to also offer an alternative theory that is in some ways superior, perhaps, to the Interest-Convergence Thesis, in its prescriptive, empirical, and normative qualities.

Driver's critique of Bell's thesis surrounding questions of agency centers around a construction of interest convergence which would mean that for social change to occur, otherwise marginalized groups—or at least those not in the majority—must wait for the interests of elites to align with those of such groups.[46] As Driver explains, "[r]ather than black advancement being principally driven by canny litigation strategies, political mobilization, or other modes of self-assertion, interest convergence instead views black people as mere 'fortuitous beneficiaries'" of forces beyond their control.[47] It "instructs them to expect (even fleeting) advances toward racial equality only if they possess the good luck to have their interests be perceived as aligning with those of whites."[48]

For these reasons, when speaking about advocates in the civil rights era and beyond, according to Driver, the theory "risks reducing black people to

40. Driver, *supra* note 34.
41. *Id.* at 156–57.
42. *Id.* at 156.
43. *Id.* at 156–57.
44. *Id.* at 157.
45. *Id.*
46. *Id.* at 176.
47. *Id.*
48. *Id.*

the role of bystanders to the events of American history, individuals who occasionally get swept up in the current of world affairs but have a negligible role in shaping those affairs."[49] As a result, for this community, and, presumably, any non-elite group that wants to bring about change, "[s]o limited is their ability to shape their own realities, so complete is their subordination, that, in the absence of racial fortuity, struggling against the prevailing racial order constitutes an exercise in futility."[50] Indeed, Driver quotes Bell himself to show how it "illuminates blacks' supposed inability to shape the world around them": "It is as though black people are trapped in a giant, unseen gyroscope. Even their most powerful exertions fail either to divert the gyroscopic prison from its preplanned equilibrium, or to alter its orientation toward dominance for whites over blacks."[51]

This critique suggests that the Interest-Convergence Thesis has both prescriptive and normative flaws. The most important of these prescriptive flaws is that an essential element of any social movement is the movement members' sense of their own efficacy: that is, social movement mobilization is only possible when its members believe that they can bring about a desired change to the societal order.[52] But it also has empirical flaws as well. That is, the thesis may not even establish that the gains of the civil rights movement can be traced to the outcome in the 1954 decision in *Brown* because, as Rosenberg has argued,[53] the greatest gains of the movement did not occur in the decade following the decision by the Supreme Court. Rather, for Rosenberg, those gains would occur largely once other *institutions* came around to support the civil rights cause in the mid-1960s.[54] It was during this period that the civil rights movement secured its landmark legislative gains through the passage of the Civil Rights Act of 1964,[55] the Voting Rights Act of 1965,[56] and the Fair Housing Act,[57] among others. And those advances

49. *Id.* at 177.

50. *Id.* It is certainly possible that marginalized communities can, through agitation, attempt to encourage elites to see their own self-interest bound up in improving the conditions of such communities. *See, e.g.*, THE NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 11–14 (1968) (noting the role that race discrimination played in unfair treatment of minoritized communities, which led to civil unrest and a call for greater government investment in such communities to help alleviate those conditions and quell such unrest). That discussion is beyond the scope of this Essay, however.

51. Driver, *supra* note 34, at 177 (quoting DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 77 (2004)).

52. *See* SAUL D. ALINSKY, RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS 20 (Vintage Books 1989) (1971) (describing the importance of belief in an individual's and a group's efficacy in community organizing).

53. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 157–69 (2d ed. 2008) (questioning the impact of judicial decisions on civil rights from the 1950s).

54. *Id.*

55. Pub. L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

56. Pub. L. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

57. Pub. L. 90-284, 82 Stat. 73 (codified as amended in 42 U.S.C. §§ 3601–3619).

occurred when Congress, with the backing and support of the President, took such legislative action.[58] These accomplishments occurred not through the alignment of interests between the civil rights movement and white elites, but, rather, through painstaking work; high-profile abuses at the hands of some elements of those elites; canny strategy; and a coalescence of social movement organizations, private sector interests, elected officials, and, lastly perhaps, judges.[59] In other words, empirically, it was not the elite interests that needed to align with those of the civil rights movement. Rather, the civil rights movement had to secure the support of a range of institutions, and it was that support, that *institutional* convergence, that likely brought about the gains that the movement would secure in the decade after *Brown*. I will return to this concept in Part III.A. As the next part shows, however, this turn to institutions and their role in social change is reflected in developments in social movement scholarship over the last several decades.

II. THE INSTITUTIONAL TURN IN SOCIAL MOVEMENT SCHOLARSHIP

A. Institutions in Social Movement Scholarship

There is a growing acknowledgement among social movement scholars that they should view such movements through an institutional lens. Doing so helps to "broaden[] conceptions of movement actors, targets, goals, and strategies in provocative ways."[60] Professors Elizabeth A. Armstrong and Mary Bernstein argue that a "multi-institutional" approach to social movements[61] involves a "conception of society as a multi-institutional field in which different institutions operate with distinct logics or organization principles."[62] These institutions, broadly defined, "exercise both material and symbolic power, so that meaning is constitutive of structure every bit as much as structures [of institutions] shape meanings."[63] What is more, "all such institutions may provoke collective challenges to their authority, and each challenge is a legitimate topic of study."[64] The focus of this analysis is

58. *See* Gary Orfield, *Ending Jim Crow, Attacking Ghetto Walls*, *in* LBJ'S NEGLECTED LEGACY: HOW LYNDON JOHNSON RESHAPED DOMESTIC POLICY & GOVERNMENT 31–50 (Robert H. Wilson, Norman J. Glickman & Laurence E. Lynn, Jr. eds., 2015) (describing President Lyndon B. Johnson's support for the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act).

59. A full analysis of the struggles and successes of the American Civil Rights Movement is beyond the scope of this article. For an anthology that largely documents this era, see generally TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1988); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65 (1998); TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68 (2006).

60. STEVEN M. BUECHLER, UNDERSTANDING SOCIAL MOVEMENTS: THEORIES FROM THE CLASSICAL ERA TO THE PRESENT 220 (2011).

61. Elizabeth A. Armstrong & Mary Bernstein, *Culture, Power, and Institutions: A Multi-Institutional Politics Approach to Social Movements*, 26 SOCIO. THEORY 74, 74 (2008).

62. BUECHLER, *supra* note 60, at 220.

63. *Id.*

64. *Id.*

often directed toward "meso-level groups, organizations, and informal networks that comprise the collective building blocks of social movements and revolutions."[65] Institutions are instantiated in organizations, governmental bodies, trade associations and even such concepts as marriage, family, and religion.[66] And, for those social movement scholars who view social change through an institutional lens, the process of institutionalization of ideas, symbols, concepts, behaviors, practices and even laws is what represents social change itself.[67] Moreover, that institutionalization of the symbolic occurs within organizational forms and is realized by the actions of individuals operating within those institutions.[68] Thus, change is institutional: social movement organizations (as institutions) target their efforts at organizations and entities (that are also institutions) that can bring about changes to certain other institutions that both constrain society while also providing its symbolic and structural form—that is, the laws, norms, and practices of the community. Social change is thus an institutional phenomenon, with institutions being the subjects, objects, and outcomes of social change efforts.

B. Institutions in Legal Scholarship

Although social movement scholarship, which sometimes informs legal scholarship, has largely taken this institutional turn, legal scholarship has failed to embrace an institutional view—at least it has failed to do so explicitly. Nearly thirty years ago, Professor Edward Rubin assessed the emergence of several approaches to legal scholarship from across the political spectrum, including critical legal studies, critical race theory, feminist legal theory, and even law and economics to assert that, despite their apparent differences, all of the scholars from these different schools engaged in what he called the "microanalysis of institutions," an approach he labeled the "New Legal Process."[69] He encouraged legal scholars to engage in this sort of institutional analysis explicitly, and identified at least one legal

65. Doug McAdam, *Revisiting the U.S. Civil Rights Movement: Toward a More Synthetic Understanding of the Origins of Contention* 3 (Ctr. for Rsch. on Soc. Org., Working Paper No. 588, 1999), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/51352/588.pdf?sequence=1 [https://perma.cc/MJW9-NXGA]. It is this "meso-level" analysis of institutions that Rubin both identified and called for in legal scholarship. *See* Edward L. Rubin, *Commentary, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1424–29 (1996) (describing the assessment of norms and their operation on institutions).

66. Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 249 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

67. On the process of cultural institutionalization, see Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, 42 AM. SOC. REV. 726, 728 (1977).

68. On the institution of slavery in both its symbolic and material forms, see Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 978–79 (2002).

69. Rubin, *supra* note 65, at 1424–29.

scholar, Professor Neil Komesar, as taking this approach in his development of the methodology that has come to be known as Comparative Institutional Analysis.[70] Through this methodology, Komesar offered analytical tools for accomplishing policy goals that encouraged scholars to identify the appropriate institutional setting in which to achieve such goals.[71] According to Komesar, one should compare different institutional settings and align their characteristics with the nature of the problem one is trying to solve; it is only through such an analysis that one can find the best choice, among different institutional settings, for achieving one's policy goals.[72]

Although Komesar's approach seemed promising to Rubin as an example of effective incorporation of an institutional view into legal scholarship, as a prescription for catalyzing such change, it, too, loses some of its analytical and prescriptive force. When we think of the institutional structure and field of American institutions in their material form, we can start from the ways that Komesar defined institutions to lay the initial scaffolding for the broader conversation about how to harness institutions to bring about social change. Komesar, who sought to compare institutional settings in which one might choose to make policy change, classified institutions quite narrowly, as either the market, the political sector (meaning the Legislative and Executive Branches), or the courts.[73] These different institutions in the Komesarian view each had their own qualities and characteristics, and it is the different aspects of institutions that make policymaking in a specific domain more or less effective, depending on those different qualities.[74] Komesar would use the example of a community faced with the noxious emissions from a cement plant to help illuminate his theory.[75] He explains that the failure of political institutions and the market to resolve the collective action problem posed by the plant's operation was "solved," according to Komesar, by a court ordering the plant to compensate the residents who lived in the area for the harm that the plant had caused them.[76] Since the overall benefits of the plant outweighed the cost of compensating the plant's victims (that is, even with the plant having to compensate its victims, it still turned a profit), the judicial solution to the collective-action problem was, for Komesar, the best one given the dysfunctions inherent in the political process and the market.[77] Actors in those institutional systems would not have been able to resolve the dispute in a meaningful and effective way: political power was not shared

70. On the relationship between comparative institutional analysis and the theories of Professor Ronald Coase, see Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470, 501–503 (1996).

71. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 4–5 (1994).

72. *Id.* at 5–9.

73. *Id.* at 9.

74. *Id.* at 14–28.

75. *Id.*

76. *Id.* at 26–27.

77. *Id.*

equally between the residents and the plant, and it would have been inefficient for the plant to have to negotiate with dozens, if not hundreds, of residents to reach an effective solution to the collective-action problem.[78] For Komesar, the institutional features of the judicial system meant that it was in the best position to reach a meaningful resolution to the dispute.[79] Looking at this resolution of the problem facing that community, we can see that it veers awfully close to legal liberalism: wise judges resolve disputes when other institutional settings are ineffective at doing so.[80]

Indeed, Komesar's system, which, for the purposes of identifying the comparatively superior setting through which advocates might seek to bring about a desired policy change, leaves much to be desired. Many of those interested in social change, particularly those seeking to advance progressive political change that might strive to address the inequitable distribution of income and wealth that is often produced by the normal functioning of the markets, rightly fear that such economic inequality often translates into outsized influence over the political system.[81] As a result, it leaves such groups with no other option but the courts, which are themselves subject to the spillover effects of the other institutional systems and are becoming increasingly hostile to progressive movements for change.[82] Such an institutional framework does not seem to offer much more to progressive groups than Bell's Interest-Convergence Thesis. That is, when institutions are viewed in Komesar's narrow light, it is difficult to offer social movements tools for catalyzing change. Thus, although Komesar's theory has some descriptive and normative value, as conceived, it offers social movements little more than the Interest-Convergence Thesis itself: its formalism (based on the characteristics of different institutional settings), although offering social movements a modicum of choice as to the institutional setting in which they might focus their attention, still leaves social movements with less agency and power over the change they seek. But a more complex view of institutions, one that more accurately describes them in theoretical and practical terms, might offer social movements more purchase when it comes to seeking social change through institutional means.

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78. *Id.*

79. *Id.* at 21–27.

80. *See* Cummings, *supra* note 11, at 362–63.

81. *See, e.g.*, Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 421 (2015) (arguing that increasing economic inequality in the United States "has been accompanied by the concentration, or re-concentration, of political power among wealthy individuals, large business firms, and organized groups representing them" at the same time that there has been a "precipitous decline of countervailing organization among middle- and low-income Americans"). More recently, Professors Daron Acemoglu and James Robinson describe norms and practices that help economic elites entrench their political power as "extractive" institutions. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 73–76 (2012).

82. For an early analysis of the conservative bent of the Roberts Court, see Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), https://www.nytimes.com/2010/07/25/us/25roberts.html [https://perma.cc/8J32-LJDB].

C. The Multidimensionality of Institutions

Just as institutions can exist in both material and immaterial forms, they also can be described along a number of dimensions. It is within these dimensions that the opportunity to catalyze institutional change emerges, solving the agency/efficacy problem presented by the Interest-Convergence Thesis. There is certainly the possibility that interests may and will play a part in the larger institutional setting; however, it is only when we consider those interests within the broader institutional landscape that the opportunity for a richer and more complex dialogue about the ways in which change occurs, and is possible, can emerge. What is more, the institutional landscape shapes organizations just as organizations shape that institutional landscape.[83] As I have already noted, institutions can appear in both material and immaterial form.[84] But we can also view those institutions within a complex field. For the most part, when describing this field, I will discuss the ways in which institutions exist in their material form, but one should also recognize that immaterial institutions—norms, values, habits, and practices—are often mapped onto the complex, multidimensional, and broader institutional landscape, with all of its complexity.

But Komesar's view of institutions is a narrow one, and not one that social movements need to embrace to identify locations and mechanisms for bringing about social, policy, and/or institutional change. Indeed, a more complex view of institutions, which shows their complexity and heterogeneity, helps to set the stage for social change advocacy that might serve to overcome some of the prescriptive weaknesses of the Interest-Convergence Thesis. Recognizing the complexity of institutions, and how they change, opens up spaces in which social movements can target their advocacy and shift their tactics in new and exciting ways—ways that do not require that they wait for their interests to align with those of elites in those groups' quest for social change.

If we take Komesar's tripartite view of institutions as a starting point, we can see that those institutions—the market, the political system, and the courts—exhibit heterogeneity on a range of dimensions. As I have explained in a previous article in some detail,[85] institutions are heterogeneous "vertically."[86] Within the American system, each of these three institutions have national, state, and local components.[87] But they also exhibit horizontal heterogeneity.[88] Within each institutional category, there are divisions in which they are technically equal. The "market" is broken up into different

83. PAUL PIERSON, DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT 40 (1994) (arguing that "if interest groups shape policies, policies also shape interest groups").

84. *See supra* Part II.A.

85. *See generally* Raymond H. Brescia, *Understanding Institutions: A Multi-dimensional Approach*, 17 U.N.H. L. REV. 1 (2018).

86. *Id.* at 39.

87. *Id.* at 39–41.

88. *Id.* at 41–42.

businesses and types of entities (for-profit entities, nonprofit/civil society groups). Political institutions will have executive and legislative branches and actors, as well as administrative agencies that emerge from within the political system.[89] The courts, too, have different roles within a system, even within the same court level, like a local court system that has different courts that handle housing, family and matrimonial, or some other substantive area of law.[90]

Recognizing the vertical heterogeneity of these systems demonstrates that they are complex, which, at first blush, might appear to make the task of institutional choice more difficult when it comes to the pursuit of a particular policy goal. In reality though, what it does is expand the locations and opportunities for social change organizations to catalyze change. Institutional settings exhibit internal differences that mean that a particular institutional setting might offer more of an opportunity to serve as a locus of advocacy efforts, when, from the outside, viewing settings as monolithic might suggest such efforts are hopeless. If, for example, one perceived that the inclinations of the Justices of the Supreme Court suggested that they would be hostile to a particular claim, that does not mean that there is no room for advocacy within the broader judicial system. One might instead direct one's efforts to bringing about change in the courts of a particular state or a group of states where one might stand a better chance of success, assuming that one was pressing claims that would not ultimately raise questions that fall within the jurisdiction of the highest court in the federal system.[91] In the area of abortion rights, civil rights, the environment, and worker rights, advocates have found ways to press claims under state constitutions and state laws that might not stand a chance of success before a potentially hostile Supreme Court.[92]

Returning to Bell's Interest-Convergence Thesis, one area in which that theory and a theory based on institutions might, well, converge, is the notion, as Bell advanced, that different interests can align to bring about change.[93] Whether elite interests always drive change, a position that I will challenge soon, it is important to note that—even though there might be opportunities for interests to align—within different institutional settings, different entities and actors will exhibit different interests. What is more, who is an "elite" will also change in different settings. One political party might dominate one branch of the federal government (or the legislature of a state), but there might also be subnational, and even substate, settings in which different

89. *Id.* at 40–41.

90. *Id.* at 41–42.

91. *See, e.g.*, Finding of Facts, Conclusions of L. & Ord., Held v. Montana, No. CDV-2020-307 (Mont. First Jud. Dist. Ct. Aug. 14, 2023) (finding that state government practices violated state constitutional protections regarding the environment).

92. For an articulation of this view that predated (but probably presaged) the Supreme Court's conservative turn over the last twenty years, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

93. Bell, Jr., *supra* note 12, at 522–28.

groups might have a greater amount of power, shifting the meaning of elite. This is important for individuals and social movements seeking to make change, and it is not to suggest that one must wait for, as Bell posited, these interests to change in one's favor.[94] Rather, a group could recognize that there might be a better place in which to push for a particular change over another. Once one changes the power dynamics that come from the diffusion of interests, roles, and institutions, it creates more places and spaces where groups can make change. In turn, as that change begins to take hold, it can create what Professor Cass Sunstein calls "norm cascades": in which normative change spreads to other locations.[95]

D. Social Movements and Institutions

What we might see when we take a multidimensional view of institutions and apply comparative institutional analysis to that new, complex view, is that it creates greater space and opportunity for social movements to have more purchase and to choose from a range of institutions in a wide variety of contexts in order to create effective social change. If social movements were relegated to choosing simply among the market, the political process, and the courts, it is easy to see how they can be overwhelmed and will have a hard time doing anything but waiting for elite interests within those institutional settings to align with those of their own. But if we take a more complex view of institutions and recognize that they exhibit a range of qualities and heterogeneities, it creates a more target-rich environment for groups to identify locations where they might effectuate change. It means that they can find places, spaces, and moments in which they can concentrate their power and direct it toward those locations within the institutional matrix in which they can have the greatest success. In many ways, this reflects the notion of "shrinking the change," not in the sense that social movements should only look for incremental, small-bore change, but that they can look for those sites where their power enables them to secure meaningful victories.[96] They can take such action with an eye toward broader victories as different institutions "tip" as their different component parts are won over by that social movement.[97] In the next part, I will explore this notion of institutional tipping—what I call institutional convergence—and offer several examples of the phenomenon in practice.

94. *Id.*

95. CASS R. SUNSTEIN, HOW CHANGE HAPPENS 9–10 (2019) (describing norm cascades).

96. On the concept of "shrinking the change," see CHIP HEATH & DAN HEATH, SWITCH: HOW TO CHANGE THINGS WHEN CHANGE IS HARD 124–48 (2010).

97. SUNSTEIN, *supra* note 95, at ix–x (describing tipping points).

III. THE INSTITUTIONAL-CONVERGENCE THESIS

A. When Institutions Converge

Rosenberg's "Hollow Hope" thesis is that meaningful change largely escaped the civil rights movement until it was able to secure victories within institutions beyond the Supreme Court, or even the courts generally, alone.[98] For him, the most important legislative changes, like the Civil Rights Act and Voting Rights Act, were secured once Congress and the President all supported such legislation.[99] This is an example of institutional convergence, even on a grand scale. But we also saw that the efforts to bring about those legislative achievements were the result of carefully executed, if, at times, ad hoc, actions and strategies, often in defiance of elite leadership both within the civil rights movement and in the federal government in Washington, D.C.[100] Local civil rights leaders helped to accelerate advocacy and highlight the abuses by Jim Crow institutions and actors within the formal and informal institutional infrastructure in high-profile campaigns in Birmingham and Selma, Alabama, among many other communities.[101] Those efforts targeted locations where the African American community was well-organized, and those engaged in the advocacy were committed to nonviolent resistance to the oppressive tactics of Southern law enforcement.[102] The attacks on those advocates in Birmingham and at the Edmund Pettus Bridge in Selma helped to raise awareness throughout the nation of the atrocities being meted out against the African American community across the South.[103] The advocates took those flash point moments and used them to galvanize broader support.[104] The victories in those fights and countless others in communities across the South helped move the larger, national institutions to take critical

98. ROSENBERG, *supra* note 53, at 157–69.

99. Orfield, *supra* note 58, at 31–50.

100. In the interest of brevity, the facts describing the Birmingham campaign of 1963 are described in detail in PAUL KIX, YOU HAVE TO BE PREPARED TO DIE BEFORE YOU CAN BEGIN TO LIVE: TEN WEEKS IN BIRMINGHAM THAT CHANGED AMERICA (2023). For a description of the attack on the protestors on the Edmund Pettus Bridge, see JOHN MEACHAM, HIS TRUTH IS MARCHING ON: JOHN LEWIS AND THE POWER OF HOPE 195–201 (2021).

101. On the role of local leaders in the Birmingham campaign, see KIX, *supra* note 100, at 231–34 (describing the role of Fred Shuttlesworth there), and in Selma, see DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 20–39 (1978).

102. *See* David A.J. Richards, *Ethical Religion and the Struggle for Human Rights: The Case of Martin Luther King, Jr.*, 72 FORDHAM L. REV. 2105, 2127–47 (2004) (describing the prominence of nonviolent tactics in the Civil Rights Movement in various local campaigns).

103. PETER J. LING & DAVID DEVERICK, MARTIN LUTHER KING JR.: A REFERENCE GUIDE TO HIS LIFE AND WORKS 109–10 (2023) (describing media attention on nonviolent protests that raised national awareness about the need for civil rights legislation).

104. Although reviewing all of the different events that might have galvanized and mobilized individuals to participate in efforts to support the civil rights movement is beyond the scope of this Essay, for a discussion of some phenomena that served to spur activism, see MICHAEL K. HONEY, GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE, MARTIN LUTHER KING'S LAST CAMPAIGN 29–30 (2007) (murder of Emmitt Till); *id.* at 164 (Bull Connor's aggressive tactics against protestors in Birmingham, Alabama).

action.[105] But those efforts were carefully calibrated, at least by local leaders, to take action that some of the more cautious national leaders might not have undertaken on their own.[106] Those local tactics thus helped the social movement organizations as a whole break through on the national stage and led to broader support by national institutions like Congress and the Presidency that would ultimately coalesce around the critical civil rights legislation passed in the mid-1960s.

Another more recent civil rights achievement—that of the legal victory in the campaign for marriage equality[107]—serves as another example of the Institutional-Convergence approach working in practice. In the early 2000s, political operatives from within the Republican Party identified what they concluded was a "wedge issue," something that might mobilize their supporters to come to the polls and then vote for members of that party.[108] The then-mayor of San Francisco, Gavin Newsom, had started to recognize same-sex marriages, and this issue became a focus not only for the advocates on the left, but also the right.[109] For conservative politicians, this created an opportunity to support ballot initiatives in states—even those in which no one had raised the issue of recognizing same-sex marriages—to make it illegal for any local government official to endorse such unions.[110] These ballot initiatives succeeded in several pivotal states in the 2004 presidential election.[111] In response, advocates who sought recognition of the institution of same-sex marriage began to explore ways to advance the cause of marriage equality, but to do so on the state and local levels.[112]

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105. Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOCIO. REV. 552, 554–55 (1989) (describing the role of protests in Birmingham and Selma, Alabama, that led to support for civil rights legislation).

106. *See supra* note 101.

107. Once again, in the interest of brevity, this account draws from several sources, including WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020); NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA (2017).

108. Paul M. Smith, Book Review, 80 TUL. L. REV. 1001, 1002–04 (2006) (reviewing IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS (2005)) (describing the introduction of anti–marriage equality legislation as a "wedge issue" exploited by opponents of same-sex marriage).

109. FRANK, *supra* note 107, at 154–58.

110. FRANK, *supra* note 107, at 115–124 (describing interplay between federal law, state ballot initiatives, and the few localities where marriage equality had been formally recognized); *see also* David Masci & Ira C. Lupu, *Overview of Same-Sex Marriage in the United States*, PEW RSCH. CTR. (Dec. 7, 2012), https://www.pewresearch.org/religion/2012/12/07/overview-of-same-sex-marriage-in-the-united-states/. [https://perma.cc/BM8M-AK4Q] (describing the history of ballot referenda related to marriage equality in the United States).

111. Masci & Lupu, *supra* note 110 (providing an overview of results of ballot referenda related to marriage equality in the United States).

112. *See, e.g.*, RAY BRESCIA, THE FUTURE OF CHANGE: HOW TECHNOLOGY SHAPES SOCIAL REVOLUTIONS 195–97 (2020) (describing the movement for marriage equality turning to state-based advocacy in order to build momentum for a nationwide victory).

Although some advocates had pressed for a large-scale, *Brown v. Board of Education*–style lawsuit that would resolve the matter once and for all before the Supreme Court,[113] others preached caution and set out to identify jurisdictions in which the marriage equality message would resonate and the movement would start to build greater support for the cause in an incremental way.[114] Advocates had some degree of success in state courts, mostly establishing civil unions or modest relief,[115] and the New York State Legislature passed the first law in the nation to recognize same-sex marriages outright.[116] In 2012, the strength of the organizing would be tested when advocates placed pro–marriage equality ballot initiatives in three states (and had to beat back an anti–marriage equality measure in a fourth state).[117] On election night in 2012, the three pro–marriage equality initiatives passed, and the lone anti-equality measure that year failed.[118] This victory prompted advocates to consider whether to begin a direct legal assault in the courts, first to chip away at the disparate treatment of same-sex couples, and then to ultimately bring about its demise.[119] In the first of these cases, *United States v. Windsor*,[120] the Supreme Court found that § 3 of the Defense of Marriage Act[121] (DOMA) was unconstitutional.[122] Although this was a relatively narrow decision,[123] it was still an important step in the larger fight, even prompting Justice Antonin Scalia to lament in the case's dissent that if this component of DOMA was unconstitutional, then any laws against marriage equality in the fifty states were likely unconstitutional as well.[124] For advocates, this was not a caution, but an invitation. Two years later, they would secure victory in the landmark *Obergefell v. Hodges*[125] decision, which realized Justice Scalia's fears: that state laws prohibiting same-sex marriages were, indeed, a violation of the Equal Protection Clause and thus unconstitutional.[126]

What these two, brief case studies show is that social movements have leveraged an Institutional-Convergence approach to social change that

113. Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC (July 1, 2015), https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-courtpolitics-activism/397052/ [https://perma.cc/4GXE-J9T5] (describing desire for an aggressive court-based strategy and its potential risks).

114. FRANK, *supra* note 107, at 193 (describing the embrace of the incremental approach).

115. Matthew T. Cook & Jason E. Shelly, *Recognition of Same-Sex Marriage*, 8 GEO. J. GENDER & L. 683, 727–32 (2007) (describing the state of the law at the time in various states regarding civil unions).

116. FRANK, *supra* note 107, at 265–67 (describing the passage of marriage equality legislation in New York).

117. *Id.* at 273–74.

118. *Id.* at 282–83.

119. *Id.* at 254–60.

120. 570 U.S. 744 (2013).

121. 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

122. *Windsor*, 570 U.S. at 775.

123. *Id.* at 772–76 (invalidating § 3 of DOMA, which denied certain federal benefits to same-sex couples married in states that recognized marriage equality).

124. *Id.* at 799–802 (Scalia, J., dissenting).

125. 576 U.S. 644 (2015).

126. *Id.*

recognizes the heterogeneity of institutions and seeks to identify locations within the institutional matrix where groups can effectuate meaningful change. Social movements, as institutions, can identify those institutions that they can tip—they then can build greater and broader institutional support for the change they seek, leveraging the tactic of institutional convergence.

B. The Descriptive and Normative Value of the Institutional-Convergence Thesis

As a descriptive tool, these two examples might show that institutional convergence can serve to explain some of the recent successes of social movements in bringing about social change. But its prescriptive force is where, I believe, it is most useful. If one of the most significant flaws in the Interest-Convergence Thesis is that it removes the agency from otherwise marginalized groups because they must wait for elite interests to converge with their own, what the Institutional-Convergence Thesis does is offer groups an approach that urges them to identify precisely where and when they might apply their energy and resources to a range of institutions. By spreading these efforts across the wide spectrum of institutions in all of their messy complexity, the social movement might secure victories, and then attempt to transpose those victories into other institutional settings. It gives such groups a choice—and a much greater degree of agency—to pursue wins that they can secure, to make some degree of change, and to potentially build the momentum for broader victories.

The work of Professor Erica Chenoweth, who has done remarkable quantitative research to understand the drivers of social change, is illustrative here. One of the most important of those drivers is what Chenoweth describes as an organized citizenry that takes part in public demonstrations attempting to communicate to those in power that the populace does not support their policies or even their continued rule.[127] But their work also explores the targets of those efforts in institutional terms. As Chenoweth explains, "many activists and organizers have found it useful to conduct a 'pillar analysis' . . . as they develop a campaign strategy."[128] Such pillars include the military, leaders in business, government civil servants, state-owned media, and police forces.[129] For activists, the goal is to "try to examine different influential subgroups within each 'pillar,'" and determine "the movement's potential for affecting or disrupting people in each of these smaller groups."[130] Professor Gene Sharp was another researcher who used this sort of pillar analysis and saw change as possible once groups are able to chip away at a regime's support with the different pillars of institutions that

127. *See generally* ERICA CHENOWETH, CIVIL RESISTANCE: WHAT EVERYONE NEEDS TO KNOW (2021).
128. *Id.* at 102.
129. *Id.*
130. *Id.* at 103.

prop it up.[131] But, as I hope I have shown, this sort of institutional analysis is not just useful to *undermine* a regime or a practice, but also useful to create institutional support for a policy change that a social movement seeks to achieve. Indeed, using this sort of institutional analysis, but running it in reverse, might serve social movements well as they strive to create meaningful and lasting social change.

CONCLUSION

The Interest-Convergence Thesis has some descriptive force when it comes to identifying the conditions under which social change can occur. As legal scholars have pointed out, however, it can also serve to undermine social movements because, as prescription, the thesis removes the agency from the very groups that might bring about a desired change, particularly a change that does not necessarily align with the interests of elites in power.[132] As such, it is not really a recipe for meaningful—and self-directed—change for marginalized groups. Instead, I attempt to offer here a different approach, one grounded in an institutional view of social change, that recognizes the heterogeneity of institutions and the many opportunities that they create for social movements to harness their power and make change—incremental at first, perhaps, but lasting, durable, and meaningful in the long run. I also suggest that it has both greater prescriptive and normative force than the Interest-Convergence Thesis as a means of achieving social justice through the work of social movements. Although more work needs to be done to identify other examples and other ways in which the Institutional-Convergence Thesis might serve as a useful tool for those seeking to bring about social change, I hope that this Essay can begin a dialogue around—and greater inquiry into—the methods and means of making meaningful and lasting social change when seen through an institutional lens.

131. GENE SHARP, FROM DICTATORSHIP TO DEMOCRACY: A CONCEPTUAL FRAMEWORK FOR LIBERATION 32 (2012).

132. *See, e.g.*, Driver, *supra* note 34, at 157; Joseph Lubinski, Note, *Screw the Whales, Save Me!: The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC'Y 377, 412–13 (2003) (describing advocacy in accordance with the Interest-Convergence approach in largely passive terms).