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Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements

Lani Guinier
Harvard Law School

Gerald Torres
Cornell Law School, gt276@cornell.edu

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LANI GUINIER & GERALD TORRES

Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements

ABSTRACT. This essay was influenced by a class on Law and Social Movements that Professors Guinier and Torres taught at the Yale Law School in 2011. This essay was also informed by numerous conversations with Bruce Ackerman regarding his book that is under review in this Symposium. While we are in fundamental agreement with Professor Ackerman's project, as well as the claims he makes as to the new constitutional canon, we supplement his analysis with the overlooked impact of the lawmaking potential of social movements. In particular, we focus on those social movements that were critical to the legal changes that formed the core of Professor Ackerman's book. The strong claim that we are making is that the social movements of the civil rights era were actually sources of law. The weaker claim is that these social movements deeply influenced the formal legal changes represented by the statutes and Supreme Court decisions that framed the constitutional moment so convincingly illustrated by Professor Ackerman. In order to make the stronger claim, we demonstrate how social movements made some legal conclusions not just more likely, but for all intents and purposes, inevitable. The way the Court interpreted existing racial justice jurisprudence and was responsive to the constitutional understanding represented by non-elite actors in the civil rights and social justice movements that had their high water mark in the 1950s and '60s.

AUTHORS. Gerald Torres recently joined the permanent faculty at the Cornell Law School, where he is currently the Marc and Beth Goldberg Distinguished Visiting Professor. Professor Torres previously held the Bryant Smith Chair at the University of Texas Law School. He was a Visiting Professor at Yale Law School from 2011 to 2012. Lani Guinier joined the faculty at Harvard Law School in 1998, where she is the Bennett Boskey Professor of Law. Guinier was a professor at the University of Pennsylvania Law School from 1988 to 1998. Professors Torres and Guinier thank the students who enrolled in our seminars and courses in Law and Social Movements at Harvard, Yale, and University of Texas Law Schools and who helped us think through these issues with their probing questions and important insights.



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INTRODUCTION

I say here's how you recognize a member of Congress. They're the ones walking around with their fingers up in the air. And then they lick their finger and they put it back up and they see which way the wind is blowing.

You can't change a nation by replacing one wet-fingered politician with another. You change a nation when you change the wind. You change the way the wind is blowing, it's amazing how quickly they respond. And so you look at Selma, Alabama, and how that led to a Voting Rights Act five months later. Johnson had told King just before Selma, it'll take five years to get a Voting Rights Act. King said, I can't wait five years. He organized Selma. And we've got to now be wind-changers. Not lobbyists, but wind-changers. How do we—by our service, by our doing in our lives—how do we then join together and knit together a movement that holds politics accountable?

—Reverend Jim Wallis¹

In his important new book, *We the People: The Civil Rights Revolution*, Bruce Ackerman argues that the statutes of constitutional dimension passed in the second half of the twentieth century, which function like modern constitutional amendments, are “privileged expressions of We the People.” Like Professor Ackerman, we believe that the civil rights revolution was “one of the most successful exercises in constitutional politics in American history.”² Yet, in most legal accounts, the role of lawyers and the courts take center stage. Even 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. They focus on creating social or economic change by expanding and/or reinterpreting the legal canon, often attempting to defend and reinterpret many of its most famous cases. The aim of Professor Ackerman’s “exercise is to enable law-trained folk to use a small set of texts to generate deep and broad insights into our governing arrangements.”³

1. Krista Tippett, *Transcript for Jim Wallis—The New Evangelical Leaders, Part I*, ON BEING (Nov. 29, 2007), <http://www.onbeing.org/program/new-evangelical-leaders-part-i-jim-wallis/transcript/1299>.

2. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 9 (2014).

3. *Id.* at 8.

Professor Ackerman urges us to look at the politics and the deep constitutive changes wrought by legislative, administrative, and judicial action, and to understand those statutes, executive orders, and elections as part of the true constitutional history of the modern era. An obsessive focus on judicial decisions causes the observer to lose sight of the other venues in which real legal change occurs. Yet those like Professor Ackerman who are instrumental in identifying and developing the legal canon often overlook the important contribution of social movement activism. The Second Reconstruction may have *Brown v. Board of Education*⁴ as its lodestar, but it was also the concerted actions of a mobilized people that gave heft and constitutional value to the legal changes following *Brown*. The legislative and administrative initiatives that would normally be conceived of as sub-constitutional changes were given constitutional weight by the concerted action of the Supreme Court and the mobilized constituencies that demanded those changes.

Our essay largely agrees with this aspect of Professor Ackerman's book: it is the people in combination with the legal elite who change the fundamental normative understandings of our Constitution. We argue that social movements are critical not only to the changes Professor Ackerman chronicles, but also to the cultural shifts that make durable legal change possible. We believe that the role played by social movement activism is as much a source of law as are statutes and judicial decisions. Our goal, therefore, is to create analytic space to enable a greater understanding of lawmaking as the work of mobilized citizens in conjunction with, not separate from, legal professionals. Our aim is to better understand and recognize the important roles played by ordinary people who succeed in challenging unfair laws through the sounds and determination of their marching feet. The role played by legal professionals—from judges to legislators to lawyers—is essential. Yet the civil rights movement grew in its efficacy in the 1950s and 1960s—helping to expand the “constitutional canon”—by putting its boots on the ground. It was the mobilization of ordinary people willing to play a significant role in shifting the law both locally and nationally that had a decisive effect.⁵

4. 347 U.S. 483 (1954).

5. *Levels of Power*, POWERCUBE, <http://www.powercube.net/analyse-power/levels-of-power> (last visited Apr. 23, 2014). John Gaventa's power cube analysis builds on the forms, spaces, and levels of power. The forms dimension refers to the ways in which power manifests itself, including its visible, hidden, and invisible forms. The spaces dimension of the power cube refers to the potential arenas for participation and action, including what Gaventa calls closed, invited, and claimed spaces. The levels dimension of the power cube refers to the differing layers of decision-making and authority held on a vertical scale, including the local, national, and global.

Thus, this essay argues that social movements⁶ have played key roles in redefining the meaning of our democracy by creating the necessary conditions for a genuine “community of consent.” We contrast two views. On one side is James Madison’s characterization of one view of the role of the people: “When they have established government [the people] should think of nothing but obedience, leaving the care of their liberties to their wiser rulers.”⁷ On the other side is Frederick Douglass: “We, the people—not we, the white people—not we, the citizens, or the legal voters—not we, the privileged class, and excluding all other classes but we, the people . . . the men and women, the human inhabitants of the United States, do ordain and establish this Constitution.”⁸ The authority, the right, and the power to govern are never complete, but are in trust to the various institutions of democracy.

Like Martin Luther King, Jr., we believe that it is often by the thick action of concerted social movement through which “we the people”—meaning, in our view, the people who reflect a genuine community of consent—discover and legitimize the principles on which our democracy presumably rests. We use the “wind changers” metaphor to test the following four-part hypothesis:

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6. For a definition of social movements and their distinction from interest groups, see *infra* pp. 2756–62. Our definition of social movements borrows from SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 1–9 (2d ed. 1998). Contentious politics involves a repertoire of actions, discourses, and visionary goals that tell a story that (1) seizes historically contingent openings, (2) mobilizes popular will (not just in terms of polls, but also in terms of “the will to act”), (3) builds on networks of social solidarity, and (4) 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. *Id.*; see CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006); MICHAEL McCANN, *LAW AND SOCIAL MOVEMENTS* 508 (2004); CHARLES TILLY & SIDNEY TARROW, *CONTENTIOUS POLITICS* (2007).
 7. James Madison, *Who Are the Best Keepers of the People’s Liberties?*, NAT’L GAZETTE, Dec. 20, 1792, reprinted in 6 *THE WRITINGS OF JAMES MADISON, 1790–1802*, at 120 (Gaillard Hunt ed., 1906), <http://oll.libertyfund.org/titles/madison-the-writings-vol-6-1790-1802>.
 8. Frederick Douglass, *Speech on the Dred Scott Decision* (May 14, 1857), in *TWO SPEECHES BY FREDERICK DOUGLASS* 40 (Rochester, N.Y., C.P. Dewey 1857), http://www.libraryweb.org/~digitized/books/Two_Speeches_by_Frederick_Douglass.pdf; see also Frederick Douglass, *Unconstitutionality of Slavery* (Mar. 26, 1860), in *SELECTED ADDRESSES OF FREDERICK DOUGLASS: AN AFRICAN AMERICAN HERITAGE BOOK* 75, 96 (2008) (“[W]hat do we want? We want this: whereas slavery has ruled the land, now must liberty; whereas proslavery men have sat in the Supreme Court of the United States, and given the constitution a pro-slavery interpretation against its plain reading, let us by our votes put men into that Supreme Court who will decide, and who will concede that that constitution is not slavery.”).

1. For those interested in social change, it is useful to view lawmaking from the perspective of popular mobilizations, such as social movements and other sustained forms of contentious politics and collective action that serve to make formal institutions, including those that regulate legal culture, more democratic.
2. One of the important functions of law resides in its power to translate lived experience into a series of stories about individual and social fairness and justice. Although courts and lawyers are important participants in the creation of these narratives through the shaping of the discourse of law, social movements and organized constituencies of non-expert participants also play an important role in the creation of authoritative interpretative communities.⁹
3. A fundamental claim of legal liberalism is that social movements achieve their goals when they translate their claims into law. The most efficient way of achieving social change, therefore, is directly through litigation and legislative actions. A commitment to legal liberalism drives the litigation and policy focus that is the priority of conventional cause lawyering. We posit almost the reverse: for legal change to reflect real social change it must take account of, and engage with, alternative or contending sources of power. Such change must also, in some measure, transform the culture.¹⁰
4. We do not want to minimize the importance of legislative change, especially legislation of constitutional dimension.¹¹ Our main point is that such legislative change—and to a large extent judicially driven change—gets its enduring force from “We, the People.”¹²

9. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

10. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997). Conservative critics of social justice movements fear this cultural transformation most of all. See, e.g., “A COUNTRY I DO NOT RECOGNIZE”: THE LEGAL ASSAULT ON AMERICAN VALUES (Robert H. Bork ed., 2005).

11. See 3 ACKERMAN, *supra* note 2.

12. *Id.*; see also CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED* (1997). Both of these noted constitutional scholars treat the Preamble not as surplusage, but as an integral and legally significant part of the Constitution—no throat clearing for the “Founders.” When we argue for legitimate and durable social change we want to be clear that our emphasis is on change that is democracy enhancing. By democracy

Throughout the second half of the twentieth century, those who were interested in progressive social change often turned to the courts because the institutions of normal politics excluded them, especially blacks and other stigmatized or politically weak minorities.¹³ They saw the Supreme Court as the only federal institution in our constitutional democracy that would protect the basic rights of numerical, stigmatized, or politically weak minorities. Progressive change agents relied on liberal principles of constitutional democracy to defend and expand the role of judicial review to protect individual rights against the biases or unfairness of majoritarian politics or other forms of process failure.

Scholars like Michael Klarman, Larry Kramer, Gerald Rosenberg, and Mark Tushnet have raised questions about this emphasis on court-centered social change.¹⁴ Those who oppose the role of the courts have challenged the legitimacy of judicial review by raising what is commonly known as the “counter-majoritarian” difficulty.¹⁵ Or, they contend, as Gerald Rosenberg does, that the courts offer only a “hollow hope” — a battle won, but a war lost.¹⁶ Rosenberg argues that legal victories often act as flypaper, attracting social

enhancing we mean the creation of both constituencies of accountability and alternative and authoritative interpretative communities. These interlaced changes are democracy enhancing because they give agency to those otherwise excluded or marginalized by the conventional structure of electoral politics. Democracy-enhancing social change reminds us that genuine communities of consent are what justify democracy.

13. A counterexample is the labor movement, especially during the period of the New Deal, when labor unions were able to get the attention of all three branches of government. The normal political branches were even able to discipline a reluctant Supreme Court by threatening the Court’s supremacy, reflected in the “switch in time that saved nine.” The neo-*Lochnerianism* that is current today shows, however, that without deep cultural change, no political victory is ever secure. See, e.g., JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011); TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012).
14. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (arguing that *Brown v. Board of Education* brought race issues to the public’s attention but that at the same time it energized the conservative opposition); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005) (arguing that the meaning of the Constitution and its legitimacy is premised on the understanding of the people and is not subject to judicial supremacy); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that durable social change is neither produced nor sustained through litigation); MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987) (examining the relation between the people and their lawyers).
15. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).
16. See ROSENBERG, *supra* note 14.

change proponents who begin to defer to the courts to lead the movement for social change. Courts, he argues, are institutionally constrained from playing that role.¹⁷ In a related move, Michael Klarman argues that key Supreme Court opinions have tended to spark backlash, mobilizing those who resent the Court's intervention.¹⁸ The backlash then undermines the Court's ability to enforce its rulings. Others fault the political or ideological capture of this branch of government by conservative judges who are unsympathetic to individual rights claims when the rights bearers are disadvantaged or politically weak minorities.¹⁹ In fact, Professor Ackerman's book is a sustained critique of just that court-centric focus.

Some go further, questioning the efficacy of liberal legalism as a philosophical agenda. The liberal approach to constitutional democracy focuses on individual rights, is preoccupied with a procedural rather than a substantive concept of justice, and tends to confuse principles for power. When fair rules are considered independently of fair outcomes, large social problems may be "lawyerized" rather than redressed.²⁰ Fair procedures become a surrogate for the more difficult task of advocating, in both legally and popularly recognizable terms, a substantive commitment to justice. Moreover, the articulation of legal rights often proceeds without comparable attention to the development of remedies and without a clear sense that the rights (which dominate the scope of the proposed remedies) actually address the problem at hand.²¹ Even when legal rights grant those with a grievance a highly individualistic remedy, the definition of those rights can be manipulated over time by clever lawyers and conservative judges to legitimate the status quo.²² At the same time, rights talk

17. *Id.*

18. KLARMAN, *supra* note 14.

19. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008).

20. In another context, and in a rather flip expression of this process, the legal and corporate anthropologist Jane Anne Morris suggests that environmental regulation merely regulates environmentalists. See JANE ANNE MORRIS, *GAVELING DOWN THE RABBLE: HOW "FREE TRADE" IS STEALING OUR DEMOCRACY* (2008). This is why opposition to the Keystone Pipeline is more important as a mobilizing tool than as a point of judicial or legislative intervention. See, e.g., BILL MCKIBBEN, *OIL AND HONEY: THE EDUCATION OF AN UNLIKELY ACTIVIST* (2013).

21. In this way, litigation, for example, may shift power to the lawyer as a technician and limit the lawyer's capacity to understand clients' demands, which are translated primarily into legal principles.

22. Ralph Bunche articulates a thick version of this argument in an article published in 1935: Extreme faith is placed in the ability of . . . instruments of democratic government to free the minority from social proscription and civic inequality. The inherent

locates the injury in a specific context that makes it vulnerable to charges of special interest pleading, while using the status of those who currently have power as the baseline for change. Women want what men have; blacks want what whites have. But neither group questions whether the preferences or arrangements enjoyed by men or whites fully embody the potential of a true democracy. Is the goal simply to reduce group inequality within a system that remains fundamentally unequal, unfair, or illegitimately hierarchical?

Despite the growing chorus of scholars who argue that change neither begins nor ends with the courts, most constitutional scholars have nevertheless replicated a court-centric approach in their analysis. Proponents of legal liberalism, for example, claim in its defense that rights have important symbolic effects. Rights signal to those who have been left out that they, too, belong.²³ Rights talk does more, however, than give individuals a sense of dignity. Rights can mobilize and inspire group action, as in the Montgomery Bus Boycott or in the actions of student sit-in demonstrators in the early 1960s.²⁴ Rights can also provide an agenda for group mobilization, translating local complaints to a more generalized cause. Proponents of legal liberalism also point to iconic cases like *Brown v. Board of Education* as having a long-term effect not just in rule shifting, but also in culture shifting.²⁵ The liberal strategy, epitomized by the NAACP Legal Defense and Educational Fund, was to change the governing rules institution by institution with the hope that linking those changes together would transform the culture.²⁶ The problem was that the required focus on doctrine and rules deflected time, energy, and resources from the harder work of changing the culture. Like Professor Ackerman, we note that the sector-by-sector approach epitomized by *Brown* (even if predicated on

fallacy of this belief rests in the failure to appreciate the fact that the instruments of the state are merely the reflections of the political and economic ideology of the dominant group, that the political arm of the state cannot be divorced from its prevailing economic structure, whose servant it must inevitably be.

Ralph J. Bunche, *A Critical Analysis of the Tactics and Program of Minority Groups*, 4 J. NEGRO EDUC. 308, 315 (1935).

23. Cf. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (arguing that rights are a powerful symbolic message of belonging to marginalized or excluded groups).
24. See, e.g., CHARLES M. PAYNE, *I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 236, 236-64 (1995); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 LAW & SOC'Y REV. 367 (2000); *infra* pp. 2778-80.
25. See Stoddard, *supra* note 10.
26. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

a commitment to generalizable principles) was an important but insufficient part of the crucial agenda-setting mechanism for activism.

We seek in this essay to go beyond the debate over legal liberalism as a philosophy or as a justification for the role of judicial review in protecting minority rights. Instead we propose a new paradigm that we call *demosprudence*. Demosprudence is the study of the dynamic equilibrium of power between lawmaking and social movements. Demosprudence focuses on the legitimating effects of democratic action to produce social, legal, and cultural change. Although democratic accountability as a normative matter includes citizen mobilizations organized to influence a single election, a discrete piece of legislation, or a judicial victory, we focus on the interaction between lawmaking and popular, purposive mobilizations that seek significant, sustainable social, economic, and/or political change. Put differently, we seek to understand, analyze, and document those social movements that increase the extant democratic potential in our polity, and which do so in a way that produces durable social and legal change.

Whereas jurisprudence examines the extent to which the rights of “discrete and insular” minorities are protected by judges interpreting ordinary legal and constitutional doctrine,²⁷ demosprudence explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems. Rather than turning over their agency to lawyers, they must find a way to integrate lawyers not as leaders but as fellow advocates. Borrowing a phrase from social theory, proponents of progressive social change must be advocates in themselves and for themselves and others. Understanding the roles played by social movements in producing durable social and legal change is central to our inquiry.

A. Introducing Demosprudence

As a method, demosprudence requires us to ask two overarching questions: (1) How and when do disadvantaged or weak minorities (whether political, economic, or identitarian) mobilize to protect their own rights in a majoritarian democracy?; and (2) Does the mobilization of these constituencies have a democracy-enhancing effect? By democracy enhancing, we mean that the mobilization opens up space to those previously excluded or marginalized and enables them to participate more fully in helping to make decisions that affect

27. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

their lives.²⁸ Demosprudence, therefore, is the study of the relationship between social movements and law in the creation of authoritative meaning within a democratic polity.²⁹

Unlike jurisprudence, which analyzes the work of judges acting in formal sites such as courts, or legisprudence,³⁰ which produces a secondary literature about how the work of elected representatives is an important source of lawmaking,³¹ demosprudence focuses on the ways that ongoing collective action by ordinary people can permanently alter the practice of democracy by changing the people who make the law and the landscape in which that law is made.³² Scholars of jurisprudence focus on the collection of rules imposed by authority and interpreted by jurists; scholars of legisprudence see the legislator or elected official as the pivotal actor.

Scholars of demosprudence, by contrast, draw attention to the “dynamic constituencies” who call power to account through their participation in “contentious” politics and other forms of legal meaning making that also call

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28. We ask: does the interaction between social movements and lawmaking allow discrete and insular minorities (or groups that have otherwise been relatively voiceless) an opportunity to participate directly—rather than through surrogates—in making *and interpreting* the decisions that affect their lives? In particular, we contrast the demosprudential effect of constituency mobilization to the counter-majoritarian difficulties that some associate with judicial review to protect the rights of discrete and insular minorities.
 29. By democracy we mean something similar to what Robert Maynard Hutchins, former president of the University of Chicago, said in a 1962 interview: “Every member of the community must have a part in his government. The real test of democracy is the extent to which everybody in the society is involved in effective political discussion.” ROBERT M. HUTCHINS & JOSEPH P. LYFORD, *THE POLITICAL ANIMAL: A CONVERSATION 2* (1962).
 30. Jurisprudence predominantly deals with the question of the application and interpretation of the law by the judge. Legisprudence uses the tools and insights of legal theory to study legislation and regulation, i.e., the creation of law by the legislator. Julius Cohen introduced this term to describe the theoretical study of the legislative (as opposed to the judicial) aspect of legal philosophy. Julius Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983); Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950); see also LUC J. WINTGENS ET AL., *LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION* (Luc J. Wintgens ed., 2002); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693 (1987).
 31. See Eskridge & Frickey, *supra* note 30.
 32. The word “changing” in this sentence is ambiguous, but intentionally so. We mean that you can switch the people who are in power and, as a result, empower those who are members of the mobilized opposition, or you can transform the understanding of the roles and the obligations of the people in power without actually changing the individuals who occupy the roles.

democracy to account.³³ Constituencies refer to those actors who make up the body of support for leaders and elites in the process of governing or policy change. We use the term “constituencies of accountability” to refer to those groups who are not committed primarily to any particular person or leader, but rather to a particular vision of change against which they measure the effectiveness of those using state power.

We should be clear that demosprudence is not a philosophy of the left or the right. Neither is it the philosophy of unmediated preference gathering (like the populist initiative process or the market). Rather, demosprudence represents a philosophical commitment to the lawmaking force of meaningful participatory democracy. It is true that we deploy the interpretive device of demosprudence to examine social movements that represent those who were not part of the “consent community” and who challenge the legitimacy of those rules that flowed from the period of their exclusion or those rules that continue to exclude them. We are also interested in social movements where the principle at stake is democracy enhancing. But we want to reflect on the democracy-enhancing and meaning-making capacity of the conservative social movements of the 1980s and 1990s, not just the democratic meaning-making role of the civil rights or women’s rights movements of the 1960s and 1970s. For example, even though it is commonly defined by its conservative agenda, elements of the property rights movement are aimed at improving the confidence we have that the government works for the common good and not in the service of corporate special interests. We hope to encourage greater attention to the lawmaking (not just election-defining) effects of movements ranging from the abolitionists and suffragettes to the evangelical Christian, property rights, and gun rights movements of today. To that extent, they are worth exploring through the lens of demosprudence because they arguably expand the quotient of democratic legitimacy.

As a methodology, we use the term demosprudence to invite empirical, comparative, and historical analysis of social movements whose aim has been political change defined more broadly than simply the effort to elect a

33. The term “dynamic constituencies” comes from Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 45 (2011). The term “contentious politics” comes from Sidney Tarrow. See TILLY & TARROW, *supra* note 6. One of us has further developed the concept of “demosprudence.” Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009); see Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40-41 (2008).

candidate of choice or to influence the outcome of a single election.³⁴ Demosprudence, in other words, is not primarily the study of electoral campaigns. Rather, it invokes a particular kind of challenge, which Sidney Tarrow calls “contentious politics.”³⁵

The methodology of demosprudence is organized around the evolving secondary literature in law and legal studies analyzing the role of citizen mobilizations in authoring new laws, changing the meaning of existing laws, and producing a more democratic understanding of how power functions in representational relationships. Such an effort emphasizes the tools that social movements use to make law and the role of ordinary people whose collective struggle and collective commitments inform the lawmaking process. We argue that the power of social groups is found in normal politics, but its more important role is in constitutive politics. Demosprudence is in the nature of an acid bath to remove the corrosion that has isolated the realm of the state from the legitimizing power of the people, except as it is expressed through conventional partisan politics and the act of representation by elites.

As a practice, demosprudence trains its sights on the lawyer or public citizen who functions as a crucial source of moral authority and democratic legitimacy in facilitating the interaction between social movements and formal lawmaking. Demosprudence is a way to examine how lawyers and other public citizens represent social movements to make law. Rather than focus on the multiple ways in which lawyers guide movement activists through the thickets of law, we want to focus on the ways in which movement activists and a mobilized community can change thinking about the *content* of law and thus the horizon of the possible and sustainable. Borrowing from Thomas Stoddard’s terminology, we emphasize the role of culture shifting, not just rule shifting, in producing durable social change.³⁶

Through this process we aim to engage academics, activists, policymakers, and ordinary people in a larger conversation about the interaction between legal culture and popular mobilization, to supplement the court-centered view of law, and to specify the relationship between lawmaking and social movements. This is a conversation about how lawyer-citizens working with social movement activists authorize new meanings for lawmaking and thus challenge existing centers of power in service of democracy.

34. See, e.g., TOMIKO BROWN-NAGIN, *THE COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011) (documenting the complex goals of social movements in the early civil rights period).

35. See *supra* notes 6 and 33 for Sidney Tarrow’s definition of contentious politics as distinct from ordinary, electoral politics.

36. See Stoddard, *supra* note 10.

For example, demosprudents might study public citizens/public lawyers who are multi-vocal change agents, who structure their interventions to (1) activate/animate dynamic community involvement, (2) make meaning, and (3) expand the source of authority to include mobilized constituencies of accountability. The ideal moral actor becomes the public citizen who calls power to account by also calling democracy to account.³⁷

Demosprudence as a lawyering practice involves a transformation of the lawyer/client relationship to build sites of democratic accountability internally and externally. Such a transformative process depends upon a participatory, power-sharing process within the lawyer/client relationship. Our conception of the social change role contemplates a strategic power-sharing partnership that builds on David Wilkins's social obligation thesis,³⁸ William Simon's view of critical lawyering,³⁹ Lucie White's lawyering within the three dimensions of power,⁴⁰ Thomas Stoddard's culture-shifting versus rule-shifting analysis of

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37. On one level, the professional commitments and responsibilities of all lawyers should be organized around their role as public citizens. For example, Preamble [6] of the Model Rules of Professional Conduct states that

[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. . . . [A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

MODEL RULES OF PROF'L CONDUCT pmb. [6] (2013); *see also id.* pmb. [7] ("A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."); *id.* pmb. [8] ("A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious."); *id.* pmb. [13] ("Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.").

38. David Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT'L J. LEGAL PROF. 141 (1998) (highlighting the tension between the legal norm of "bleached out professionalism" and a lawyer's social obligations).
39. William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984).
40. *See, e.g.,* Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

social change,⁴¹ Mike Grinthal's taxonomy of the models of law and organizing,⁴² Scott Cummings and Ingrid Eagly's critical reflection on law and organizing,⁴³ and Marshall Ganz's concept of strategic mobilization of resources.⁴⁴ Neither the lawyer nor the client alone sets the terms or the goals of the relationship. Together they act out democracy.⁴⁵

The *demos* in demosprudence are those people who are collectively mobilized both to make change and to create constituencies of accountability to which their representatives (including non-elected elite decision makers) must answer. The "demos" in demosprudence is not "the community" at the micro level; nor is it the "representative of the community," when those men and women are millionaires who represent their own ideals rather than those of their claimed "constituents."⁴⁶ Instead, it is a constituency of accountability that may or may not have geographic proximity as one of its binding forces.⁴⁷

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41. See Stoddard, *supra* note 10; see also Doug NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (arguing that regardless of its outcome, litigation can provide an opportunity for mobilization). *But see* Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011) (arguing that litigation sometimes produces demobilization).
 42. Grinthal, *supra* note 33.
 43. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); see also Doug NeJaime & Scott Cummings, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (analyzing various approaches to litigation on behalf of marriage equality).
 44. See also Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970) ("Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.").
 45. One of the ways people act out democracy is through the process of reflecting upon and learning from shared experiences. That self-reflective practice is stimulated by and often culminates in the making of new stories. These stories systematize the knowledge created by collective engagement, collective risk-taking, and collective action. These stories transform people's willingness to act when they nurture relationships, highlight the contingencies of past choices, and illuminate future possibilities.
 46. See Eric Lipton, *Half of Congress Members are Millionaires, Report Says*, N.Y. TIMES, Jan. 9, 2014, <http://www.nytimes.com/2014/01/10/us/politics/more-than-half-the-members-of-congress-are-millionaires-analysis-finds.html>.
 47. We differentiate constituency from community. See Marshall Ganz, *Organizing Notes: What Is Organizing?*, HARV. KENNEDY SCH. OF GOV'T (2013), <http://www.hcs.harvard.edu/summercamp/wp-content/uploads/2013/06/What-Is-Organizing-2013.pdf> (arguing that the term "constituency" refers to a population that is "able to 'stand together' on behalf of common concerns"); John McKnight, *Services Are Bad for People: You're Either a Citizen or a Client*, ORGANIZING, Spring/Summer 1991, at 41. In addition, Brittny-Jade Saunders notes that

Nor is it the “polity” writ large, or as an abstract construction. It is not the theory or practice of a riot or a lynch mob. Nor is it simply the study of elections, whether focused on representatives or referenda or initiatives. Instead, it is the study of how these communities (and constructed and mobilized constituencies) come together to produce durable social change. They succeed when they (1) shift the rules that govern social institutions, (2) transform the culture that controls the meaning of legal changes, and (3) affect the interpretation of those legal changes by providing the foundation for naturalizing those changes into the doctrinal structure of law and legal analysis. This process can be observed and analyzed sector by sector and institution by institution.⁴⁸

Demosprudence is not an adversary of jurisprudence. Rather it is an analysis of how social power circulates and finds its expression in law. Demosprudents examine the collective expressions of resistance (whether through counter-narratives or paradigm-shifting mobilizations) that test the democratic content of the formal institutions of lawmaking studied by jurisprudents and legisprudents. Demosprudence looks for the answers in the people themselves when organized as dynamic constituencies and not as isolated individual preference holders. We are most concerned with law and the meaning-making potential of mobilized constituencies. At the same time, we want to keep the focus on the role of social movements in enhancing

[o]ften, as in the legislative context, constituents and their interests are represented by a particular advocate, policymaker, movement leader, or organization. Ideally, however, constituents are not passive recipients of these actors' largesse, but rather are active participants in the processes that shape their fortunes. Organized constituencies are capable of holding leaders accountable for their actions or omissions. They are also crucial to the vitality of social and political movements. They play a vital role both by *moving*—contributing ideas and inspiration that influence leaders—and by being *moved*—to change their ways of thinking and to take action. Scholars and practitioners of social change have distinguished between “clients” or “customers,” who are made dependent on service providers, and constituents who are empowered through their relationships with other actors to exercise “voice” and exert greater influence on their social and political worlds.

Big Ideas and “Boots on the Ground”: Proposing a Constituency-Building Approach to the Achievement of Progressive Social Change 5 (Mar. 12, 2008) (unpublished student paper, Harvard Law School) (on file with authors).

48. See 3 ACKERMAN, *supra* note 2. As Professor Ackerman demonstrates, the racial transformation of the broader American culture was not done in a single stroke, but in multiple attacks on racialized power however it was manifested: school segregation, housing discrimination, voting access and equality, intimate unions (as in *Loving v. Virginia*, 388 U.S. 1 (1967)), and employment.

democracy while remaining critical of those social movements that do not enhance the democratic potential in society.

Demosprudence expands beyond litigation-centric social change, which is often driven by national elites. Demosprudence, however, is not a critique of tactical litigation per se, but of the tendency of litigation to migrate from tactics to strategic centrality in theories of change.⁴⁹ In fact, questions about the proper role of the courts in this process are intentionally secondary. Instead, the principal question is how do courts and social movements influence each other to interpret the meaning of law? The power of social movements stems from their ability to mount collective challenges by drawing on social networks, common purposes, and shared cultural frameworks. Social movements may expand the capacity of previously excluded or marginalized members of a polity to narrate constitutional meaning despite their numerically or politically weak position in a majoritarian democracy. In particular, the recursive relationship between social movements and law can expand the field on which the formal institutions of the society (courts and legislatures, for example) function most effectively as democracy-enhancing venues.

B. Social Movements Are Different from Interest Groups

As we hope to demonstrate through the examples of the Montgomery Bus Boycott, the Mississippi Freedom Democratic Party (MFDP), and the United Farm Workers (UFW) in California, social movements are one way that minorities in a majoritarian democracy protect their rights by creating a constitutional crawl space in which they forge new understandings of the

49. Litigation is an essential tactic for social movements. However, 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. Litigation, especially high-stakes litigation, often produces both mobilization and backlash in some measure. This is especially true in a political culture like ours where law is understood to mediate profoundly different cultures through a universalizing discourse. This universalizing process is especially complex where law is presumed to perform that function largely through the dynamic of neutrality (whether this is expressed through the language of rights or through the institutional limitations on the exercise of state power). See, e.g., TUSHNET, *supra* note 14, at 138-66. *But see* Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 715-16, 729-43 (1992) (reviewing ROSENBERG, *supra* note 14) (arguing that impact litigation may be more effective at provoking change than some critics suggest and discussing “top-down” versus “bottom-up” approaches, as well as “court-centered” versus “dispute-centered” analyses). Thus, our critique of litigation, which we shall develop further in the context of both the civil rights and farmworkers movements, is based on the failure of many cause lawyers to formulate their strategy in conjunction with cycles of mobilization.

status quo. From that space, social movements challenge, and, if successful, change governing norms, creating an alternative narrative of constitutional meaning. The goal of demosprudence is to understand the ways that social movements enable those who are shut out of a majoritarian political process to nonetheless open up nodes in the decision-making practices of a democratic society.

We want to make it clear that social movements are not the same as interest groups, although there may be some overlap. The principal difference for us is that interest groups focus their attention on elites and are largely composed of elites or elite surrogates. Interest groups are also more likely to engage in conventional politics by trying to influence, in conventional ways, people who exercise state power. By contrast, a social movement echoes the collective voices of political protest or moral vision from the perspective of those for whom the normal channels of politics are often impervious to their needs. Social movements also are characterized by the centrality of “contentious politics” practiced by actors whose “core ‘indigenous population’ . . . tends to be ‘the nonpowerful, the nonwealthy and the nonfamous.’”⁵⁰ Social movements arise when ordinary people join forces in confrontation with elites, authorities, and opponents to change the exercise and distribution of power. “[T]hey are animated by more radical aspirational visions of a different, better society.”⁵¹ Social movements build solidarity through “a sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation,” as well as through connective structures and shared identities that sustain collective action.⁵² They are more likely to engage in “disruptive, ‘symbolic’ tactics such as protests, marches, strikes, and the like that halt or upset ongoing social practices.”⁵³

Social movements tend to emerge initially as a local source of power and moral authority. Social movements create constituencies of accountability and alternative authoritative interpretive communities that draw on local resources (networks, information, relationships, and cultural symbols) to ground the

50. Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 506, 509 (Austin Sarat ed., 2004).

51. *Id.* at 509.

52. See TILLY & TARROW, *supra* note 6, at 4. Sidney Tarrow defines social movements as consisting of four elements: (1) collective challenges, based on (2) common purposes and (3) social solidarity in (4) sustained interaction with elites, opponents, and authorities. Social movements are “groups possessing a purposive organization, whose leaders identify their goals with the preferences of an unmobilized constituency which they attempt to mobilize in direct action in relation to a target of influence in the political system.” *Id.*

53. McCann, *supra* note 50, at 509.

lawmaking process in a moral vision that forces both their legal advocates and the larger society to begin to contend with issues of substantive justice. As they grow, social movements monitor the translation function of law, by telling stories that provide a bridge, as Robert Cover suggests, linking lived experience to an imagined alternative.⁵⁴

Social movements may ultimately succeed by changing public opinion.⁵⁵ Or minorities – through social movements – can attract more supporters, influence a political majority, and thus succeed in conventional politics through their disproportionate and concentrated attention on gaining access to legislation or the executive branch (e.g., the women’s rights movement leading to the passage of the Nineteenth Amendment or the Christian Right in the election of George W. Bush).⁵⁶ Demosprudence is an attempt to understand the recursive dynamic at work. Social movements influence lawmaking, which then shapes the agenda of the social movement, etc. Nevertheless, it is crucial to recognize that most social movements do not prevail on their own or in conventional terms.

Yet even when they fail, social movements may still provide a valuable window on lawmaking because they bring to the fore conceptions of substantive justice, not just procedural fairness. Social movements, whether of the political right or left, help narrate new social meanings, often through their interaction with, and resistance to, more conventional understandings. By contrast, lawyer-driven lawmaking is tied to precedent and thus depends on conventional understandings as a point of departure.⁵⁷ Litigation, for example,

54. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 19 (1983).

55. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

56. Our reference to the women’s suffrage movement in the late nineteenth and early twentieth centuries as a movement of a “minority” does not, of course, ignore the numerical percentage of women; it merely cabins the movement to a subset of women and their male supporters in gaining women the right to vote.

57. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843 (1992) (“Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, that definition of liberty is still questioned.” (citing *Roe v. Wade*, 410 U.S. 113 (1973))); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012). Yet even this central obligation is currently contested. See, e.g., Jeffrey Toobin, *Clarence Thomas’s Disgraceful Silence*, NEW YORKER: DAILY COMMENT (Feb. 21, 2014), <http://www.newyorker.com/online/blogs/comment/2014/02/clarence-thomas-disgraceful-silence.html>; Editorial,

attempts to vindicate established legal principles in a specific case. Legislation, by contrast, often seeks to articulate new principles through the passage of a statute. Whether through litigation or legislation, these principles are then often captured in the language of rights to represent the current expression of durable commitments that we make to each other.⁵⁸ But the declaration of a new statutory or judicially determined right alone is neither self-enforcing nor culture shifting.⁵⁹ By themselves, rights do not offer a path out of the morass; they inspire people to stand up for their dignity but rights—even when clearly stated—do not necessarily articulate either an enforceable set of policies or a vision of the better society.⁶⁰ To be sustainable and compelling, the declaration of rights needs to be connected to remedies as well as to the lived experience of those on whose behalf they are named by shifting norms of fairness and justice, not just changing the rules governing their conduct or status.

Thus, we 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. Much of the sociological literature, for example, explores social movements independently of their actual lawmaking role. Second, we hope to expand the lexicon of lawmaking itself to acknowledge the work of social movement actors. Courts and legislatures are not the sole expositors of constitutional or legal meaning. The dynamic equilibrium of power does not just circulate within a privileged, technically savvy, or influential elite.

Citizens are not only *sources* of constitutional meaning; mobilized constituencies are also *resources* for the protection of constitutional rights and

Clarence Thomas's Brand of Judicial Logic, N.Y. TIMES, Oct. 22, 2011, <http://www.nytimes.com/2011/10/23/opinion/sunday/clarence-thomass-brand-of-judicial-logic.html>.

58. Of course, this is only one definition of “rights,” but it is an attempt to capture the social content of rights rather than just the individual experience of having a “right.” We are using “rights” as a non-legal expert might understand them. By “social content,” we mean the shared understanding of what might conventionally, by legal experts, be described as Hohfeldian categories. See, e.g., Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1916).
59. For a definition of culture shifting, see Stoddard, *supra* note 10 (arguing that culture shifting changes widely shared norms and commitments, while rule shifting, by contrast, changes the rules but does not necessarily assure enforcement of, or respect for, those rules).
60. *Id.*; see also JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2007) (describing the potential derived from the intersection of immigrant workers and union organizing, particularly non-traditional forms of organization); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 407-10, 428-45 (1995).

constitutional meaning.⁶¹ Demosprudence examines this interdependence between lawmaking and social movements by rethinking the way mobilized constituencies, often at the local level, challenge basic constitutive understandings of justice in our democracy. Rather than deferring to appointed judges as the preeminent authority for understanding or applying the Constitution, these local movements often introduce new sources of interpretative authority that ultimately change the cultural norms of the larger society.

We believe that social movement activism is as much a source of law as are statutes and judicial decisions. 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. By contrast, we seek to make analytic space for lawmaking that is the work of mobilized citizens in conjunction with, not separate from, legal professionals.

For example, at the first mass meeting in Montgomery, Alabama, following the arraignment of Rosa Parks for refusing to move to the back of the bus, Martin Luther King, Jr. declared, “We are here because of our love for democracy, because of our deep-seated belief that democracy transformed from thin paper to thick action is the greatest form of government on earth.”⁶² King’s message was that democracy is not the captive of a legal document; it is a practice. And it is a practice that was authorized by the original Constitution,

61. See, e.g., Elizabeth Beaumont, *Reviving the Republican Face of Constitutional Rights: Abolition as a Constitutional Project 10* (2008) (unpublished manuscript), <http://www.polisci.umn.edu/assets/pdf/Beaumont-PTColloq10-08.pdf>. Beaumont calls this process “public guardianship.” *Id.* at 1. According to Beaumont, “We, the People,” have, can, and should engage in

immanent criticism, which exposes constitutional contradictions, paradoxes, failures, or hypocrisy by pointing to conflicts between existing constitutional principles or practices; creative reimagination, which offers new understandings of constitutional rights, principles, and structure; and reinvention, reconstruction, or refounding, which tries to implement, institutionalize, ratify, or otherwise set in political motion a new framework of rights and constitutionalism.

Id. at 8. Beaumont then offers an in-depth study of abolition within its historical context as an example of “public guardianship.” However, the change-making capacity of mobilized constituencies is not restricted to the actions of legal citizens, as demonstrated by Jennifer Gordon’s use of the term “non-citizen citizens.” GORDON, *supra* note 60, at 237.

62. Martin Luther King, Jr., *Address to First Montgomery Improvement Association (MIA) Mass Meeting* (Dec. 5, 1955), http://mlk-kpp01.stanford.edu/kingweb/publications/speeches/MIA_mass_meeting_at_holt_street.html.

as amended and as then interpreted in 1954 by the Supreme Court in *Brown v. Board of Education*.⁶³

But King did not rely solely on the Court. He relied on a higher moral authority when he added, “If we are wrong, God Almighty is wrong,” thus joining the idiom of religious values to the legal principles articulated by the Supreme Court’s decision in *Brown*.⁶⁴ This fusion of national law and religious authority was key in convincing blacks in Montgomery in 1955 that their anger over Jim Crow seating on the city buses was both righteous and legitimate. It helped persuade blacks that their civic dignity demanded that they boycott those buses. Through “thick action,” they would help the United States realize the true faith of democracy. Nine years later, Fannie Lou Hamer joined her own biography to those of fellow members of the Mississippi Freedom Democratic Party when she spoke to the Democratic Party and a national television audience about all the beatings she withstood in order to exercise the fundamental right to vote. Her narrative was about physical courage that was only possible when it was backed by a collective commitment. For Hamer, “thick action” meant rejecting a compromise proposed by the Democratic Party elite that would have allowed the segregationist Mississippi Democrats to be seated at the convention as the official representatives of Mississippi. All the MFDP would get would be the symbolic presence of two non-voting delegates. For Hamer, that was no compromise at all.

In this excerpt from our project, we make three preliminary points. First, we examine the processes, outputs, and stories of collective representation as a democratic process because that is one place where higher lawmaking finds its legitimacy in a democracy. Second, we scrutinize the interaction between the repertoires of those outsiders seeking access to power and those regulating that access, in order to comprehend and appreciate the dynamics of what makes social movements an instrument of lawmaking and also a vital force in our democracy. Third, we explore the role of social movement activists in transforming the ways in which lawyers represent their clients. The stories of the Mississippi Freedom Democratic Party, the Montgomery Bus Boycott, and the United Farm Workers are exemplary of these points. In addition, these stories highlight the processes that Professor Ackerman details. By focusing on the ways in which the Court intervened and on the arguments marshaled on behalf of civil rights activists, Professor Ackerman illustrates the recursive

63. See Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1064-66 (2012) (providing a longer critique of framework originalism in JACK BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011)).

64. See *supra* note 63.

processes necessary to generate substantial and durable legal change. He also illustrates the ways in which these changes, unless solidified by concerted social action, remain vulnerable to the forces of retrenchment.

I. **NOMOS AND NARRATIVE: ALL OF US IS TIRED**

*"We didn't come all this way for no two seats . . . all of us is tired."*⁶⁵

In August 1964, the Mississippi Freedom Democratic Party challenged the right of the all-white segregationist Mississippi Democratic Party to represent Mississippi at the Democratic National Convention. The Freedom Democratic Party, an insurgent organization open to all Mississippians, arrived in Atlantic City poised to make a public stand against segregation. Its delegation, including Fannie Lou Hamer, Victoria Jackson Gray, and Annie Devine, was composed of ministers, farmers, sharecroppers, domestics, and the unemployed. Activists spanned the Mississippi black community, and they demanded to be seated at the convention as official Mississippi delegates.

The party was founded in the spring of 1964 after unsuccessful attempts to secure black participation in the local branches of the Democratic Party⁶⁶ and in the midst of a violent backlash in Mississippi against the gains that were being made nationally, such as the civil rights bill of 1963 (signed into law as the Civil Rights Act in 1964). Telling the Credentials Committee at the Democratic National Convention why they created the MFDP, Hamer explained:

We formed our own party because the whites wouldn't even let us register. . . . We followed all the laws that the white people themselves made. We tried to attend the precinct meetings and they locked the doors on us or moved the meetings and that's against the laws they made for their own selves. So we were the ones that held the real precinct meetings. At all these meetings across the state we elected our representatives, to go to the National Democratic Convention in Atlantic City. But we learned the hard way that even though we had all

65. This is how Fannie Lou Hamer reportedly responded to the Democratic National Committee's offer of two seats to the Mississippi Freedom Democratic Party at the 1964 Democratic National Convention. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1414 (1991).

66. PAYNE, *supra* note 24, at 321.

the law and all the righteousness on our side—that white man is not going to give up his power to us.⁶⁷

Earlier, on August 6, 1964, the MFDP had held its state convention in Jackson and nearly 2,500 filled the Masonic Temple. Joseph Rauh, a leader of the Democratic Party’s liberal wing and MFDP’s attorney, told the crowd that the MFDP would first present its case to be seated at the Democratic National Convention later that month by arguing to the Credentials Committee that blacks had been excluded from the “regular” state Democratic Party and that the MFDP was the only party in the state loyal to the national ticket. He assured the gathering that chances for success were excellent. At the August 6 convention, the delegates elected Lawrence Guyot as MFDP chair, Aaron Henry as chair of the delegation, and Fannie Lou Hamer as vice-chair. Victoria Gray and Ed King were representatives to the Democratic National Committee.⁶⁸

By 1964, black Mississippians had proven their mettle over and over again in trying to exercise their democratic rights as citizens. In the 1946 statewide primary, Vernando R. Collier, a thirty-six-year-old army veteran and president of the NAACP’s Gulfport branch, arrived at city hall with his wife to vote. He was knocked down, dragged to the front porch, and thrown out. His wife was assaulted while a police officer on the scene walked by as if nothing had happened.⁶⁹ When Collier later requested federal protection from the FBI so that he might vote, the FBI agent informed him: “It is not our job to give protection, only to investigate.”⁷⁰

As the decades rolled by, violent white resistance to black voting continued. The Southern senators who dominated the Judiciary Committee in the U.S. Senate had used their clout to secure the appointment of segregationist judges to the federal courts.⁷¹ As a result, black Mississippi citizens could not rely on the federal judiciary to protect their right to vote. Yet voting for blacks was not just a matter of right and respect. It was a matter of life and death.

67. FANNIE LOU HAMER, *TO PRAISE OUR BRIDGES: AN AUTOBIOGRAPHY* (1967), excerpted in *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 176, 178-79* (Clayborne Carson et al. eds., 1991).

68. *Id.*

69. JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 5 (1994).

70. See PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 318 (2009).

71. *THE EYES ON THE PRIZE CIVIL RIGHTS READER*, *supra* note 67, at 69.

In 1961, Gerald Stern, a young Jewish lawyer from Memphis, Tennessee, joined the Civil Rights Division of the Justice Department. He was assigned to investigate voter discrimination and intimidation in Mississippi. Stern made his way through the back roads of Mississippi. He came upon Moses McGee, an elderly black man, plowing his fields behind a mule with the plow lines hitched over his shoulders. Without a word, McGee unhitched himself, went to his shack, cleaned up, and then returned to talk. As McGee explained to Stern, "It's not right for anyone to be seen as an animal. I want you to see me as a human being."⁷²

McGee wanted blacks to get the right to vote so they could force the county supervisors to pave the roads leading to black people's homes like they paved the roads to white men's homes. For example, when it rained, the dirt roads became impassable. He recounted an occasion when a black baby who fell ill died because no doctor could reach him over those impassable roads. He carried the baby in his arms for miles over the hills to get to town. The baby died in his arms before he could get there.⁷³

McGee said John Hardy had accompanied Edith Simmons Peters and Lucius Wilson, both of whom were elderly and owned large farms, to register to vote.⁷⁴ "When the registrar saw Hardy, he . . . got a gun from his desk, and ordered him to leave." When Hardy turned to go, the registrar "struck him on the back of the head with his gun, saying, 'Get out of here you damn son-of-a-bitch and don't come back in here.'"⁷⁵ A bleeding Hardy encountered the sheriff shortly after, but when he told the sheriff what had happened he was arrested for "disturbing the peace and bringing an uprising among the people."⁷⁶

Hardy's case was later dropped, but when Stern requested that Federal District Court Judge Elijah Cox order Walthall County to cease discriminating against black voters, Cox rejected Stern's motion. According to Cox, only two

72. Gerald M. Stern, *Mississippi*, in *OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA* 164 (Susan Richards Shreve & Porter Shreve eds., 1997).

73. *Id.* at 165.

74. John Hardy was "a young black college student from Nashville, Tennessee," who, "along with some other students, set up a voter registration school" in the county. Every evening for three weeks they taught Walthall County residents "how to fill out registration forms and explain[ed] sections of the Mississippi Constitution. . . . Hardy accompanied the first five blacks" in their attempt to register in a county without one black registered voter. They "were rejected, as were the [next] three who tried." *Id.* at 164.

75. *Id.* at 165.

76. *Id.*

of the 2,490 blacks in the county were registered to vote because blacks “have not been interested in registering to vote.”⁷⁷

On May 30, 1964, local police stopped Otha Williams, a businessman and farmer, and beat him severely. Four days later, the Council of Federated Organizations office in Jackson was fired at, shattering the plate-glass front and injuring several workers inside. In that same week, two black men and one black woman were found dead in a car near Woodville.⁷⁸

Like the rest of the black population of Mississippi, many of the MFDP delegates had faced their own hardships. Fannie Lou Hamer was born on October 6, 1917 in Montgomery County, Mississippi, and moved to Sunflower County when she was two years old.⁷⁹ She was the last of twenty children born to sharecroppers.⁸⁰ In 1962, Hamer was working on the Marlowe Plantation outside Ruleville, where she and her husband had both worked for eighteen years; she was first a field worker and then became the plantation timekeeper.⁸¹ She had, by her own words, a reputation for not having good sense—that is, having the guts to complain about inhumane conditions ill-advisedly.⁸²

According to Hamer, her activism began when her pastor announced a mass meeting to discuss registration and her friend convinced her to attend.⁸³ It was there she first learned that a “Negro” could register and vote. She volunteered to go to the courthouse the next day. She reflected, in retrospect, that perhaps she should have been scared, but, “[t]he only thing they could do to me was kill me and it seemed like they’d been trying to do that a little bit at a time ever since I could remember.”⁸⁴

Her attempt to register was unsuccessful and when she returned to the plantation, an enraged Marlowe demanded she withdraw her application or leave the plantation. She defied him with, “I didn’t try to register for you. I

77. *Id.* at 166.

78. DITTMER, *supra* note 69, at 237. Bob Moses, Aaron Henry, and David Dennis wrote to President Johnson, requesting a meeting on June 18 or 19 to “discuss preparations for the summer.” The first group of summer volunteers also wrote an impassioned plea to the President on June 17, asking, “as we depart for that troubled state, to hear your voice in support of those principles to which Americans have dedicated and sacrificed themselves since our country’s founding.” President Johnson did not respond. *Id.* at 239.

79. THE EYES ON THE PRIZE CIVIL RIGHTS READER, *supra* note 67, at 82.

80. DITTMER, *supra* note 69, at 137.

81. *Id.*

82. PAYNE, *supra* note 24, at 154.

83. *Id.*

84. THE EYES ON THE PRIZE CIVIL RIGHTS READER, *supra* note 67, at 83.

tried to register for myself” and left that very night.⁸⁵ Ten days later, nightriders fired into the home of Mary Tucker in Ruleville, where Hamer was staying. The winter was rough for the Hamers. Neither could get a job but somehow they got through it and Hamer became more deeply involved in the movement, teaching citizenship classes for the Southern Christian Leadership Conference (SCLC).⁸⁶

Hamer’s courage was extraordinary. She was also a charismatic speaker. In 1967, Robert Jackall, then a young professor of sociology at Georgetown University, spent part of the spring and summer working in Sunflower County. In an essay years later, he claimed he had seen true charisma only once when, in a flagging mass meeting, Hamer stood to speak:

Immediately, an electric atmosphere suffused the entire church. Men and women alike began to stand up, to call out her name, and to urge her on She went on to speak about the moral evil of racism itself and the grievous harm it was doing to the souls of white people in Mississippi She did not do so in accusation, but with a kind of redemptive reconciliation She ended by leading the assembly in chorus after chorus of . . . “This Little Light of Mine.” When she finished, the entire assembly was deeply shaken emotionally. People crowded around her to promise they would join the struggle.⁸⁷

And Hamer would hold them to those commitments after the meeting.⁸⁸

By the end of August 1964, Hamer’s charisma catapulted her into public prominence during her testimony before the Credentials Committee of the Democratic National Convention. With unvarnished detail, she described one of the beatings she suffered while trying to register to vote. In June 1963, in Winona, Mississippi, Hamer and others were on the way back from SCLC citizenship school in Charleston, South Carolina. The group was arrested and Hamer was carried out of one cell into another cell where there were “two Negro prisoners”:

The State Highway Patrolmen ordered the first Negro to take the blackjack.

85. Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention (Aug. 22, 1964), in *SAY IT PLAIN: A CENTURY OF GREAT AFRICAN AMERICAN SPEECHES* 49, 51 (Catherine Ellis & Stephen Drury Smith eds., 2007) [hereinafter *Hamer Testimony*].

86. PAYNE, *supra* note 24, at 155.

87. *Id.* at 241-42.

88. THE EYES ON THE PRIZE CIVIL RIGHTS READER, *supra* note 67, at 78.

The first Negro prisoner ordered me . . . to lay down on a bunk bed on my face.

I laid on my face and the first Negro began to beat. I was beat by the first Negro until he was exhausted. I was holding my hands behind me at that time on my left side, because I suffered from polio when I was six years old.

After the first Negro had beat until he was exhausted, the State Highway Patrolman ordered the second Negro to take the blackjack.

The second Negro began to beat and I began to work my feet, and the State Highway Patrolman ordered the first Negro who had beat me to sit on my feet – to keep me from working my feet. I began to scream and one white man got up and began to beat me in my head and tell me to hush.⁸⁹

In her words, “when they turned me loose, I was hard as a bone.”⁹⁰

The testimony of this straight-talking, plainspoken black sharecropper gave the MFDP’s fight a sense of moral urgency. Hamer was, in the words of Robert Jackall, “devoid of all pretence” with an “unshakeable conviction in the justness of her cause, proved by her personal physical sufferings and the risks she continued to take.” She had learned to “articulate her ideas with a powerful religious rhetoric that had deep resonance for her audience but that had no trace of practiced cant.”⁹¹ Hamer was such a compelling public presence that Lyndon Johnson “once called a news conference solely to stop television coverage of her.”⁹²

Hamer mesmerized a national television audience at the 1964 Democratic National Convention with her stark but riveting description of the struggle to register to vote. However, Hamer’s physical sacrifice and spellbinding performance were not enough to convince either Lyndon Johnson, the Democratic Party’s presidential candidate, or Hubert Humphrey, its eventual vice-presidential candidate, to take on the state segregationists in a face-off with the Freedom Democrats. Instead, the Democratic national party leaders cobbled together a compromise: they would pledge to ban segregation at future conventions, but for now, the MFDP would have to settle for two seats as at-large delegates.

89. Hamer Testimony, *supra* note 85, at 53.

90. DITTMER, *supra* note 69, at 72.

91. PAYNE, *supra* note 24, at 242. Jackall was quite taken by Hamer’s “ennobling vision of racial harmony and of personal redemption for those who seek it.” *Id.*

92. *Id.* at 258.

Hamer and the other MFDP delegates rejected the compromise. As Bob Moses explained, “What is the compromise? We are here for the people and the people want to represent themselves. They don’t want symbolic token votes. They want to vote themselves.”⁹³ In the end, the Freedom Democratic Party refused to be placated: Hamer said simply, but firmly, “We didn’t come all this way for no two seats, ’cause all of us is tired.”⁹⁴

Fannie Lou Hamer’s convention speech was political theater in service of a profound challenge to both the national and the local party’s understandings of democracy. According to Bob Moses, “the whole point of the MFDP is to teach the lowest sharecropper that he knows better than the biggest leader exactly what is required to make a decent life for himself.”⁹⁵ The composition of the delegation of the MFDP—where the constituents were the leaders—was emblematic of the changes necessary to make Mississippi, and indeed the rest of the South, more democratic. By taking the fight to the Democratic Party they announced that this was a challenge to the nation as a whole and not a mere sectional defect.

Hamer spoke to the nation on behalf of an organized and mobilized constituency that reimagined the structure of democratic representation. The MFDP didn’t travel from Mississippi just to play normal politics. The MFDP came to Atlantic City to contest the way in which representation was understood. They were not just there to be able to get a seat on the floor, but to dispute the legitimacy by which the seats were allocated. Hamer and the other MFDP delegates were clear. Their role in democratic life should be taken seriously. For the MFDP, this was a moral not just a political struggle. As MFDP delegate Unita Blackwell explained:

The whole issue around the compromise for us and for me was that it was some kind of political ploy that they understood but for us, for Mississippi, it was what was right and what was wrong. It was we had been done wrong. Our rights had been taken away, and you just couldn’t issue some two seats at large to correct that. And it was a moral situation that had to be righted. So it was not just a political something to get away with, is that we sit in the rooms and negotiate. You know, they knew about those kind of things, but we didn’t. How to sit in the rooms and negotiate away and say, “You know, we’ll take the best of this, a piece of that.” We went after what was right, and it was wrong,

93. DITTMER, *supra* note 69, at 299.

94. Jack Hitt, *Party Crasher*, N.Y. TIMES MAG., Dec. 31, 2006, <http://www.nytimes.com/2006/12/31/magazine/31gray.t.html>.

95. Polletta, *supra* note 24, at 395.

the way we had been treated for hundreds and hundreds of years; denied the right to register to vote, denied the right to participate in the political process, and that's what was going on.⁹⁶

“We’re not here to bring politics to our morality but to bring morality to our politics,”⁹⁷ Moses said to the delegates informing them that it was their decision to make when confronted with the “compromise” proffered by the Democratic National Committee. Bob Moses, Aaron Henry, and Ed King had been in a meeting with Herbert Humphrey, Walter Reuther, Bayard Rustin, Martin Luther King, Jr., and several other representatives of SCLC and the Johnson Administration to hammer out the announced compromise. Moses, Henry, and Ed King would not agree to the settlement, maintaining that it was up to the entire delegation to decide. Later, when the delegation caucused to revisit the issue of the compromise, Moses reminded the delegates that it was up to them to decide.⁹⁸

For Joe Rauh, MFDP’s attorney, it was a different matter. He knew the game of politics. He arrived at the Democratic National Convention as an insider. He held one of its 110 votes as a delegate from the District of Columbia and “faced the Credentials Committee as a comfortable peer.”⁹⁹ At the MFDP state convention in Jackson on August 6, 1964, Rauh had assured the gathering that “chances for success were excellent.”¹⁰⁰ His written briefs revealed the push for a pragmatic solution based on his knowledge of the way things worked. He cited “twenty-six major credentials contests” dating back to 1836, all of which had been resolved by splitting the prize. In particular, he cited the Texas case of 1944 when a faceoff between New Deal loyalists and Texas regulars resulted in both groups being seated with half votes apiece.¹⁰¹

His MFDP clients had charged him to bargain for nothing less than what other challengers had gotten: shared seats with the regulars. Yet, Rauh expressed enthusiasm for the two-seat compromise, focusing on the practicalities of negotiation and bargaining rather than justice, law, and the rights of black Mississippians to participate. In an interview at the Convention,

96. *Eyes on the Prize: America’s Civil Rights Movement 1954-1985: Mississippi: Is this America? (1962-1964)*, PBS (Aug. 23, 2006), http://www.pbs.org/wgbh/amex/eyesontheprize/about/pt_105.html.

97. TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65*, at 474 (1998).

98. *Id.*

99. *Id.* at 458.

100. DITTMER, *supra* note 69, at 281.

101. BRANCH, *supra* note 97, at 462.

shortly after the announcement of the compromise, a self-satisfied Rauh declared:

We've got an offer to our people, we've got a great deal out of this. I think to call this a loss is a bad . . . is a bad mistake. I think we've made a terrific gain. You always talk "no compromise" in a Convention until you get the best you can then you quit.¹⁰²

When asked whether the MFDP leaders were satisfied, he responded: "I don't think so and I don't blame them. Nobody ever gets all they want. The leaders of the regulars [white Democratic Party officials] aren't satisfied either. They're going back to Jackson."¹⁰³

Joseph Rauh, the well-connected, liberal, Washington, D.C.-based white lawyer for the MFDP, played a key role in behind-the-scenes negotiation. Rauh understood the necessity of moving the national leaders who were unconnected with the grassroots movement, yet he seemed to assume that the compromises that he was working out would be acceptable if both sides could see them as reasonable. Had the MFDP been given more agency in orchestrating the terms of the compromise, the MFDP delegates, in Rauh's eyes, would have been mollified. Rauh and his ilk were concerned with state power, but they failed to realize that the MFDP's challenge to state power came from outside the precincts of normal politics.¹⁰⁴

Rauh had several "masters." He was beholden to national unions, to preserving access to elite decision makers, and he also sincerely wanted to help blacks in Mississippi. Unlike Bob Moses, who was also an outsider, Rauh never integrated himself into the community. But most importantly, and despite his genuine commitment to the MFDP cause, Rauh misunderstood the power of the MFDP, which he tried to channel into conventional deal-making. The MFDP power came from the evident justice of their claim that the Mississippi delegation was patently illegitimate. Their position was not about accommodating two reasonable sides to a political contest. They saw this as a right side and a wrong side. The meaning of democratic participation meant seating the truly legitimate party, the one party that offered to represent

102. *Eyes on the Prize: America's Civil Rights Years: Episode 5* (PBS television broadcast 1987).

103. *Id.*

104. Rauh and King were able to sit with the probable vice-presidential nominee. Rauh vulgarly characterized the actions of Humphrey's staff, but he seemed to believe that the only difficulty with the compromise was that the DNC rather than the MFDP prematurely chose the two at-large delegates. See BRANCH, *supra* note 97, at 470.

everyone. The challenge was not about getting the best deal; the challenge was not to abandon fundamental values.

Unlike Joseph Rauh, Bob Moses's leadership style reflected the understanding that his authority came from the people and he refused to impose what he thought best upon them. Rauh would later claim that he was shut out of the discussion during which the compromise was forged. Nevertheless, the civil rights activists at the convention felt betrayed by their attorney. As far as they were concerned, it was all a ploy. A deal had been struck in the dead of the night. Nevertheless, Rauh told his clients nothing new had emerged and went to the Credentials Committee meeting knowing a deal had already been made.¹⁰⁵ Whatever the truth, it is telling that Rauh even thought such a deal could be made. Rauh, legal counsel for the United Auto Workers, told UAW President Walter Reuther that the compromise was a "great proposal" but that he could not vote for the proposal, nor could he endorse the compromise within the party chiefs, without the approval and support of Aaron Henry and the MFDP. If Henry gave his consent, Rauh would endorse the compromise before the Credentials Committee. The problem was that while Rauh believed in Henry's legitimacy, the compromise did not have the consent of the entire MFDP delegation.¹⁰⁶

The compromise was announced while Moses was still meeting with Humphrey, Reuther, and the others. Moses subsequently shrieked at Humphrey and Reuther, "You cheated!"¹⁰⁷ Rauh was more charitable with his friend Humphrey, "the dumb bastards on your side—and I'm sure it wasn't you, Hubert—chose our two people instead of letting them choose their own two people."¹⁰⁸ And Rauh urged the MFDP delegates to accept the compromise saying that, in his view, the two seats represented a victory.¹⁰⁹ Though he later marched dutifully to the convention podium to return the unused at-large delegate credentials issued for Aaron Henry and Ed King, he shed tears of regret. He was troubled, not so much by falling short of the goal of representation for his clients, as by losing the trust of Moses, which would haunt him for years.¹¹⁰

What Rauh did not grasp is that Hamer and Moses had a vision of democracy that did not begin and end with "politics" or with "put[ting] a

105. DITTMER, *supra* note 69, at 294-95.

106. *Id.* at 296.

107. BRANCH, *supra* note 97, at 470.

108. *Id.* at 473.

109. DITTMER, *supra* note 69, at 300.

110. BRANCH, *supra* note 97, at 472, 613.

point over.” Moreover, the MFDP did more than represent a broader and more participatory view of democracy. As an uneducated though eloquent sharecropper, Hamer’s mere presence—televised to the nation—put conventional ideas about leadership in jeopardy, as well. Hamer and the other delegates of the MFDP sought to expand the democratic potential in Mississippi and in Atlantic City by saying that the right to participate belonged to all, not just to those deemed qualified by elites, whether black or white. Merely securing the right to vote, or gaining access to a convention seat for two “representatives,” was not the same as “freedom.” “By representing the poorest of Mississippi’s residents, people without the ‘qualifications’ that accompanied middle-class status, the MFDP repudiated traditional criteria of leadership.”¹¹¹

This fight was not about abstract rights for invisible people. Voting rights were a precondition to mobilization, not its end. The goal was to organize, to develop the power of the local people to change their own circumstances. As Mississippi activist Lawrence Guyot explained, voting rights assure the right to begin to fight “in the way we want to fight.”¹¹² And the way they wanted to fight involved ordinary people speaking for themselves.

By contrast, Roy Wilkins and Lyndon Johnson wanted Fannie Lou Hamer back in Mississippi or at least off center stage. Similarly, a few black ministers in SCLC agreed with prominent leaders of mainstream civil rights organizations that high-profile positions should be reserved for those who would be received most sympathetically by Northern whites and liberal allies. Under a media spotlight, illiterate blacks might undermine “qualified” blacks’ ability to gain the rights they deserved. This was especially worrisome for those who wanted to use the movement as a personal passport to respectability and as an opportunity for individual exit.¹¹³ The historic sectional dispute and political alignment that gave the South to the Democratic Party was being renegotiated on the floor inside and outside the convention as well as in the backrooms and replayed on national television. While the big dogs bickered, the moral force of the MFDP, which had made the credentials contest an issue of national importance in the first place, got lost.

111. Polletta, *supra* note 24, at 395.

112. *Id.* at 392.

113. Andrew Young captured the movement’s middle class orientation:

The primary battle in the 1950s and 1960s was to right the wrongs against a population that was already qualified and middle class, but was still denied the basic right to public accommodations in America. We set out to break down the color barriers for those who were exceptionally well qualified, and we succeeded.

Andrew Young, *Foreword* to GARY ORFIELD & CAROLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY*, at ix (1991).

The dominance of elite thought reveals a tension in the ways even the most sympathetic elites “represent” non-elites at the moment of action. For example, Martin Luther King, Jr. lobbied *for* the compromise and *against* it simultaneously. When King weighed in privately on the proposed two delegate-at-large seat plan proffered by the National Democratic Party, he gave explicit voice to his multi-dimensional role. Speaking to Fannie Lou Hamer, Victoria Jackson Gray, Annie Devine, and the other MFDP delegates about the compromise, King acknowledged the oppressive conditions facing black people in Mississippi. He also admitted the burden he felt as a national figure whose influence depended to a large measure on his ability to preserve and move the good will of other national leaders. Yet, because he understood that his national standing also depended on the trust of local black people in Mississippi, in trying to balance the competing pressures, King equivocated. “So, being a Negro leader, I want you to take this, but if I were a Mississippi Negro, I would vote against it.”¹¹⁴ With that one sentence King was the MFDP’s “mirror,” its delegate, and its trustee. He was the descriptive representative who represented the MFDP members because he looked like them, shared much of their historical ancestry, and was familiar with their experience; he could serve as their delegate by acting as an agent for the MFDP’s expressed wishes; yet he was also their trustee who acted on behalf of the MFDP by following his own conscience.¹¹⁵

In contrast to King’s equivocation, it was the courage and clarity of Fannie Lou Hamer and Bob Moses that directly challenged the lack of leadership in the Democratic Party establishment, including Lyndon Johnson and Hubert Humphrey. Hamer and Moses embodied an implicit conception of representation that was at odds with the model being offered to the MFDP. It was also at odds with the contradictions in which King found himself trapped.

Hamer’s and Moses’s clarity put into play the question of Martin Luther King, Jr.’s embrace of the three traditional faces of representation: the mirror, the delegate, and the trustee. Those traditional faces describe important ways in which leaders represent followers, politicians represent constituents, and lawyers represent clients. But Hamer and the others refused to cooperate with the traditional role assigned to them. Hamer was not the mere delegate to King’s Hamlet. King felt as though he had two sources of authority: the mobilized community in Mississippi and his ability to whisper in the President’s ear. That tension was both intoxicating and confusing and left him

114. BRANCH, *supra* note 97, at 473.

115. See A. Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071, 1073-74 (1988) (book review) (citing Eskridge and Frickey’s adaptation of Hanna Pitkin’s three metaphors for representational theory).

trying to guard both sources of his power. By attempting to serve two masters, King sought to preserve his own status as an individual power broker. Hamer, however, was clear where her power and authority came from. She was speaking for, to, and with every Mississippi Negro who took the promise of democracy seriously.

Hamer and King had different goals for their power, as well. She was not interested in two seats and by her resistance transformed thin paper promises into thick action. While acknowledging the importance of King's personal magnetism and his access to elites, Hamer's stand made the national leadership aware of a constituency that would try to hold them accountable to a larger vision of justice. Hamer's stand was an exhortation as well as an implicit critique of King's conception of representation and leadership. The role that Hamer played was exemplary of the capacity for members of a mobilized constituency to change the rules of the game and to hold those who would claim the mantle of leadership accountable. The test wasn't whether King or the others could get the national elite of the Democratic Party (the President, the Vice-President, their lawyers, and others) to yield some temporary power; it was instead to suggest new reasons for why that elite was allowed to wield power in the name of those who suffered for democracy and who, with their resistance to white supremacy, put the norms of the Equal Protection Clause into effect.

Hamer reminds us that King's view of representation inhabits a dangerous territory to the extent that it reflects a status to be defended more than a dynamic relationship defined by its sources of accountability and legitimized by an accounting of the distribution of power. Where it is defined primarily as a status, representation misallocates power because it misrepresents the authority of an organized constituency to sanction, define, and defend social change. By characterizing this as misrepresentation, we mean that the relationship does not reflect the dynamic equilibrium of power that organized constituencies bring to the representational connection. By inviting new sources of information, energy, and vigilance to the making (and enforcement) of laws, these constituencies enhance the quality of democracy.

In juxtaposing King's ambivalence with Hamer's and Moses's steadfastness, we see how social movement actors can tell a competing story of democracy that reframes the idea of participation, the meaning of representation, and the sources of democratic authority. Hamer and the other MFDP delegates changed the idea of participation from an obligation to obey to an obligation to speak out. They were no longer content to be the passive objects of power; they became active subjects of legitimate authority. Hamer also embodied a different meaning of representation. Unlike King's fundamental confusion as to the source of his power and to whom he was

obligated, Hamer rejected the offer of representation when it was presented as a bribe of individual access dressed up as power. Hamer's conception of representation bound her to the community, which was a reservoir of their power, not hers. She knew that the source of her authority came from the struggle of the activists in Mississippi, rather than the boardrooms of Washington or any other polished corridor of power from which those activists, to be sure, would have been excluded.

As a dynamic constituency, the MFDP was telling different stories: the meta story, the micro story, and the resonant story. The meta story is the one that explains all the others. It is the story that lays out a conception of justice and translates into one that others can hear and join. It invites their individual stories into a broader story. The micro story, by contrast, allows individuals to tell their "own" story. The sharing of these micro stories builds trust and provides motivation for action as well as a willingness to assume agency. The resonant story frame – e.g., "all of us is tired" – gives ordinary people, as well as sympathetic but non-movement listeners, a conceptual frame that can become part of the vernacular understanding of justice.¹¹⁶ As a mobilized constituency, the MFDP challenged the idea of representation itself, asking fundamental questions about who can speak for whom.

However, the MFDP was not just telling stories of representation and accountability. The stories of its members also play an important role in understanding the wellspring of movement "successes." They illustrate the vital role of the MFDP as an alternative interpretative community that helped drive rule shifts and changes in law. The MFDP—here exemplified by the person of Fannie Lou Hamer but also embodied in the actions of many of her cohorts—helped create obligations, not just new incentives for those with formal power to change the rules. True, their position did not result in a wholesale change of the 1964 convention rules. But, as a result of their challenge to the justification for the legitimate exercise of power, the formal rules of the Democratic Party ultimately changed because they excluded large numbers of the Democratic Party base.

The MFDP, as an alternative interpretative community *and* a constituency of accountability, also created pressure external to the normal disciplinary techniques of access. The MFDP's position provided the analysis that supported the organizing in Selma and elsewhere that ultimately pushed both King and Johnson to assume greater leadership in getting the Voting Rights

116. The image of Rosa Parks refusing to give up her seat is another example of a resonant frame. *See infra* Part II.

Act of 1965 passed.¹¹⁷ Although further organizing in Selma, in particular, was central to this process, the public challenge of the MFDP cannot be underestimated as an important precipitant to this fundamental reallocation of power between the federal and state governments for the supervision of voting rules throughout the South. With their protest at the Democratic National Convention the MFDP forced two issues to the fore: (1) whether they would be granted a role in the national party that claimed to represent their interests, and (2) whether they would even be allowed to vote as full citizens. The President and his party had to answer both questions. One could be elided with a deal and “inside baseball,” but the other could only be answered with a commitment to changing the ways in which elections were constructed throughout the South. This pressure and the amazing courage of the leadership from Mississippi and elsewhere, especially in Alabama, moved activists to demand action, and the President could not give them an answer with merely a personal assurance or a backroom deal. The marches in Selma and the blood spilled at the Edmund Pettus Bridge flowing together with the blood of Jimmie Lee Jackson created a pressure the President could not deflect.¹¹⁸ When President Johnson told King that it was “too soon” for a Voting Rights Act, he had not anticipated both the tenacity of those who wanted justice or the coiled violence of those who would deny it. He would have to mobilize his renowned political powers to move Congress to give him and the people the change they demanded.

Fannie Lou Hamer and her MFDP associates exemplify an alternative but important source of lawmaking power that is not controlled entirely by elections, legislatures, executives, or courts.¹¹⁹ Just compare Joe Rauh’s combination of pragmatism and grandstanding to Unita Blackwell’s sense of righteous indignation and Bob Moses’s commitment to nurturing local leadership. Importantly, as we shall also see in the story of the Montgomery Bus Boycott, the fearless challenge to power by Moses, Hamer, and Blackwell helped change the background narratives of social life against which authoritative expressions of law are placed. The local MFDP members also

117. Of course, the Voting Rights Act has to be understood, to some extent, as an attempt by those in power to legitimate their continuing exercise of power.

118. Jimmie Lee Jackson was shot on February 18, 1964, protecting his mother during a night vigil to try to secure a right to vote six months after the Democratic National Convention.

119. In a democracy there are a number of interpretive communities with some claim to authority that can play a role in influencing the construction of social norms and which provide a narrative framework for understanding social life, upon which law must operate. One of the ways these communities do this is by creating and enacting stories of justice. In some ways the distinction between *Brown* and the Montgomery Bus Boycott is about the origin of the story—does it come from the courts or from the people?

functioned as a constituency of accountability that the national Democratic Party leaders could not ignore.

We now turn to the Montgomery Bus Boycott to further examine some of the same issues—considering again the perspective and practice of lawyers who “represent” a dynamic constituency.

II. THE MONTGOMERY BUS BOYCOTT

On the night of December 5, 1955, Dr. King put succinctly the relationship between law on the books and law as experienced. Well before King became a “national” leader, he delivered his very first speech as head of the Montgomery Improvement Association (MIA). Earlier that day, Rosa Parks had been convicted of disorderly conduct for refusing to acquiesce to the Jim Crow laws of the segregated bus system. Her arrest and trial triggered plans for a one-day boycott of Montgomery buses. At the mass meeting celebrating the first day of the bus boycott, King asserted: “We are here because of our love for democracy, because of our deep-seated belief that democracy transformed from thin paper to thick action is the greatest form of government on earth.”¹²⁰ Drawing on the authority of the Supreme Court, he linked the decision in *Brown v. Board of Education*, which had come down a year earlier, to the authority of God, Jesus, and the very nature of justice itself. Declaring that he had “legal authority behind [him],” King linked his new community’s “right to protest for right” to a biblical story of divine justice.¹²¹ King challenged local legal authority with the national commands of the highest court. But he joined that challenge to the even higher authority of the religious faith that his listeners shared.

The mass meetings were crucial. Like the one on December 5, 1955, at which King connected two important sources of justice, God and the Court, the meetings continued to play a critical role throughout the boycott’s thirteen months.¹²² For black Montgomery citizens, the mass protest action was a constant cycle of personal sacrifice, weariness, and collective “rousment” from

120. See *supra* note 63.

121. TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63*, at 139–41 (1988).

122. Women played an important part in the mobilization and in the material support that enabled the boycott to succeed. JoAnne Grant, for example, used her access to a mimeograph machine at the local college to produce flyers and handbills that helped publicize the initial mass meeting and had an important impact on turnout for the first day of the boycott. The existence of the handbills and flyers were evidence of organization and a message to the black people of Montgomery that they were not alone.

mass meetings.¹²³ Mass meetings ultimately became the movement's works of art. At those meetings, religious and legal idioms were fused and the collective will of the bus boys and the maids, the porters, and the seamstresses, was galvanized on a nightly basis.¹²⁴ Middle class and poor blacks, at the local and national level, strategically mobilized their collective resources. As a result, fifty thousand black people in a single city refused to ride the segregated buses for more than a year.¹²⁵

At the time, black Montgomery attorney Fred Gray was bright, aggressive, and a year out of law school. Gray, who moonlighted on weekends as a preacher, wanted to challenge the city's segregation laws even before Rosa Parks was arrested for refusing to obey them on a city bus. Yet Gray waited to file his case until the MIA leadership voted to grant him that authority. More significant than Gray's apparent self-restraint¹²⁶ were the institutional restraints imposed on him by the MIA, whose executive board and strategy committee rendered Gray *unable* to dominate their broader extra-legal strategies.¹²⁷ For example, although they relied on stories of law and rights talk to both inspire and legitimize the boycott, King and the MIA initially resisted actually *litigating* (except for Parks's catalytic appeal).¹²⁸ Thus, Gray entered an organizing landscape with wide strategic possibilities that the MIA surveyed with Gray's input, but not his control. Ultimately, the leadership authorized Gray to prepare the "ultimate weapon" of a federal lawsuit against bus

123. See BRANCH, *supra* note 121, at 145.

124. As Charles Payne noted, "Mixtures of the sacred and the profane, the mass meetings could be a very powerful social ritual . . . [P]eople helped make new definitions of their individual and collective selves real." PAYNE, *supra* note 24, at 263. Moreover,

[m]ass meetings, which had the overall tone and structure of a church service, were grounded in the religious traditions and the esthetic sensibilities of the Black South. If the drudgery of canvassing accounted for much of an organizer's time on a day-to-day basis, mass meetings, when they were good, were a part of the payoff, emotionally and politically . . .

Id. at 256.

125. See BRANCH, *supra* note 121, at 131-35.

126. Although Gray made clear his desire to directly challenge segregated busing with a federal suit, he did not press the issue further with the MIA; he began quietly exploring the option with NAACP lawyers in New York and with other attorneys in Alabama to be ready to deploy a lawsuit if necessary. See *id.* at 158.

127. See William Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 487 (1984).

128. See BRANCH, *supra* note 121, at 158-59. Once it became clear that the MIA's relatively moderate negotiation strategy would not penetrate the obstinate city councilors, the MIA board discussed an alternative tactic of a black-owned bus line in addition to their "ultimate weapon" of a federal suit against bus segregation. *Id.*

segregation.¹²⁹ Thanks to Gray's advance behind-the-scenes preparation, he was able to file the suit relatively quickly.¹³⁰

Gray supported rather than led the boycott organized by the MIA, whose key resources grew out of grassroots mobilization and mass action.¹³¹ Moreover, the deliberately non-bureaucratic structure of the MIA, an "organization of organizations," extended to, and endured because of, the MIA's grassroots fundraising.¹³² The MIA's carpool and other capital-dependent activities were initially supported by collections at the mass meetings,¹³³ which literally "refueled" the boycott. Although money soon flowed from outside, these funds were raised in large part by black churches, organizations (including NAACP branches), and individuals, as well as some northern white individuals and organizations. Thus, money from sympathetic whites augmented the large sums systematically raised by the black community of Montgomery and its networks throughout the country.¹³⁴ The funding pool spread with the fame of the MIA's boycott: by the time the three-judge panel declared Jim Crow buses unconstitutional, the organization was rich enough to sustain the boycott pending the appeal.¹³⁵ The upward, inward flow of financial resources located power inside the organization, not just its representatives.

The MIA was a constituency of accountability, capable of holding lawyers like Gray to the discipline of shared power. With grassroots leadership anchored in the church, funding was not controlled by a single outside donor. Instead the MIA benefited from a motivated community and an ability to draw on the resources of the black middle class who initially provided the cars to ferry black people to their jobs. Although it was the intervention of the Supreme Court, ruling on the case Fred Gray brought in federal court, that ultimately declared the segregated buses unconstitutional, it was the social movement activism embedded in a biblical belief in justice that shortened the

129. *See id.*

130. *See id.* at 158, 163.

131. Gray moonlighted on weekends as a preacher in Montgomery. Despite Gray's interest in NAACP-style impact litigation, he understood that he "represented" the MIA and not simply the named plaintiffs he recruited for a class action lawsuit. *See id.*

132. *See* BRANCH, *supra* note 121, at 144, 163, 176 (describing the relationship with NAACP); ALDON MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 54 (1984).

133. *See* MORRIS, *supra* note 132, at 56.

134. *Id.* at 57. As a Brooklyn chapter NAACP leader wrote King: "Thousands of people, Negro and White, are working behind the lines to help you who are carrying on the fight on the front lines." *Id.* at 57-58.

135. *See* BRANCH, *supra* note 121, at 188.

distance between our democracy's reality and its potential to be the "greatest form of government on earth." Story-making by community members became mantras of the movement. One memorable mantra was Mother Pollard reassuring MLK that: "My feets is tired, but my soul is rested."¹³⁶ Told in their own words, these narratives of justice repositioned blacks in Montgomery from victims with a grievance to citizens with a cause. They captured the dignity of the community's effort, inspired protests in other cities, built other insurgent organizations such as SCLC, and ultimately influenced blacks North and South to believe in their own agency to transform our democracy from "thin paper to thick action."

Fred Gray and other litigators certainly played a crucial role representing the boycotters in Montgomery.¹³⁷ In this role, Gray and others were held accountable to a constituency that had rarely found a public voice. They translated their client's concerns and grievances into legal cases that did much more than inform the litigants of their respective rights and responsibilities. The process in Montgomery transformed the nature of the political struggle using, among other things, the idiom of law.¹³⁸

As a result of the supportive and influential role of Fred Gray, and the community-driven power of the MIA, the boycott's successes went beyond the litigation victory that decisively desegregated the buses.¹³⁹ King personally noted the lessons learned: the solidarity of the community around a common cause;¹⁴⁰ the integrity of their leaders, who did not have to sell out; the increasing militancy of the black church; and the community's discoveries of dignity, destiny, and strategy.¹⁴¹ Furthermore, the movement trained King and other fellow ministers as leaders in the civil rights struggle; although the MIA

136. See BRANCH, *supra* note 121, at 164 (recounting Mother Pollard's public reassurance to King that he was not alone).

137. See FRED GRAY, *BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM* (1994).

138. See, e.g., Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999 (1989). Of course, according to some observers, legal victories by these outsiders can spark political backlash even as they inspire and energize popular mobilization. See, e.g., Klarman, *supra* note 14; see also BROWN-NAGIN, *supra* note 34 (discussing the 1960s student sit-ins in Atlanta).

139. Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 *LAW & HIST. REV.* 59, 94-97 (1991).

140. Cf. SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 4 (1998) (describing social movements as (1) collective challenges, based on (2) common purposes and (3) social solidarity in (4) sustained interaction with elites, opponents, and authorities).

141. BRANCH, *supra* note 121, at 195.

itself burnt out after the sustained boycott campaign, from its ashes rose a new organization, the SCLC.¹⁴²

The court decisions in *Browder v. Gayle*¹⁴³ were important texts that influenced and conditioned discourse and action within the larger society. But legal academics and lawyers often ignore the complex and extrajudicial ways in which social movement actors make themselves audible to each other, to their opponents, and to elite policy makers and legal interpreters. The popular amnesia relating to the case of *Browder* demonstrates the ways in which law, while important to the legal affirmation of the premise of the boycott, has been viewed almost as a footnote to the action of the boycotters and the sustained resistance that it represented. The litigation, the judicial decision, and the actions of the people combined to change the climate in Montgomery. They changed the wind.

As the Montgomery Bus Boycott story illustrates, the actual conversation between law and social movement activism is complex and multi-directional. It is grounded in the actions and beliefs of ordinary people who come together and craft, through their experiences and actions, a story of social life and power and make change over time. It draws in participants from outside the profession, deepening law's reach beyond the sophisticated legal grammar of formal fairness to the transcendent commitments of justice. When this happens, the language of law is stretched to accommodate the language of the people, especially those who act collectively to strengthen our democracy. Thus, social movement actors in Montgomery influenced the way courts and the people themselves interpreted and gave meaning to law.

The bus boycott involved a theory of popular mobilization *and* a theory of representative democracy. Social movement activists, represented by lawyers but also representing themselves, became important authoritative interpretative communities of our democracy. Martin Luther King, Jr.'s authoritative interpretive community was grounded in a "democratic" universe of people who were "voting" with their feet (by walking to work), with their personal spirit fused with the spirit of collective struggle and the historic story of biblical liberation, and with the meaningfulness of their shared sacrifice. Their actions had lasting impact to the extent they provoked shifts in popular understandings of law and justice. They did not just enforce specific and discrete law reform policies or proposals. By interrogating their collective discourse in the same ways lawyers and scholars carefully analyze Supreme

142. Glennon, *supra* note 139, at 96-97.

143. 352 U.S. 903 (1956).

Court oral arguments and the resulting decisions, we can begin to understand the way social movement actors author legal meaning.¹⁴⁴

In the Montgomery Bus Boycott, the lawyers represented a movement, not a class. The iconic images of the bus boycott are fifty thousand black people mobilized for over a year to collectively protest the arrest of Rosa Parks and the continued segregation of the municipal buses. The Montgomery Improvement Association had weekly leadership meetings with the lawyers to plot out a joint strategy of protest and resistance. The forum for change was not the courtroom or the law office conference room, but the mass meeting. Even the discussion of what was at stake had to undergo community interrogation. The Montgomery Bus Boycott and the MIA demanded equal dignity and relief from the oppressive private enforcement of white racial privilege. That demand resulted in the desegregation of the buses, but the court decision in many ways ratified the actions of the people. Desegregation meant the freedom to sit anywhere they wanted and it de-deputized the drivers from acting as civilian enforcers for the political elite.

The mass mobilization created a shared purpose and was symbolized by the middle class black community committing its private automobiles to the creation of an alternative public transportation system. Given the importance of cars to the status of their owners, this represented a serious commitment. This was vital to the cross-class integrity of the protest that led to its success and power. It could not have lasted as long as it did without this crucial contribution. Another example of how the mobilization produced the capacity for resistance is found in the alternative media system created by the MIA and its supporters that could keep the conventional media honest. The community was able to leverage its resources that would individually be relatively meager but in combination provided the critical capacity to resist.¹⁴⁵

144. The very nature of legal education makes it hard to gain this perspective in law school. The technique of inquiry in law schools involves the close examination of individual opinions written by appellate judges about individual disputes, where the only facts that matter are those deemed legally relevant to the result the court reaches. The raw material of the appellate opinion is a very selective statement of the actual events that motivated the dispute that resulted in a lawsuit. It is as though the social facts are stripped away so that the merest silhouette of reality becomes its definition for the purposes of “law.”

145. Neither King nor Rosa Parks alone desegregated the buses. The success of the boycott depended on the ability of leaders like King and the network of community activists to maintain an alternative source of popular information, which permitted him and the MIA to quickly counter the false claims that were about to be published in the Sunday edition of the *Montgomery Advertiser* that the boycott was over. The leaders of the boycott fanned out to the black clubs, churches, house parties, and other places black people might be gathering on a Saturday night to bring them the truth about the boycott.

While there continues to be a healthy debate over the significance of the Montgomery Bus Boycott and whether it would have succeeded without the correlative court victories and a Supreme Court ready to integrate public conveyances, it seems to us that there were at least two independently important results of the local, regional, and national coverage of the events in Montgomery. First, it validated a new model of protest and created a place where what black people knew to be the truth could be validated without the mediation of institutions that were controlled by others. This is not to say that without the protests there would not have been disputes over the existence of invidious discrimination, but the meaning of the racialized institutions from the perspectives of black people was given a central place. The concrete meaning of inequality could be exposed in the disparate distribution of both public and private wealth. Also, the minor indignities and multitudinous microaggressions could be understood as part of the system of white racial supremacy. This may have had an effect on local federal judges that encouraged or enabled them to act more quickly to do justice despite the wrath of their peers: keep it in the courts and not on the streets. Second, it mobilized a local black community—tempered through the months of struggle—that was able to pressure the city into complying with the Supreme Court’s order because noncompliance put too much at risk for the city.

Of longer term significance was the formation of new organizations, both the MIA and the SCLC. These organizations helped institutionalize the idea of mass mobilization and hastened the transformation of the church by centering it on the social gospel and locating its claims in politics and morality. The success helped launch a national movement and created a new cadre of young leadership. Equally important is that it gave agency and dignity to participants.¹⁴⁶ It validated their experience in a way that others had to credit. The national publicity educated whites and others outside of the South, and in this way would help transform the national debate about race.

III. THE STORY OF THE UNITED FARMWORKERS: ANOTHER VIEW OF THE STRUGGLE FOR FREEDOM

The first two stories recounted dramatic moments in the history of the struggle for black civil equality. The stories were tied to long struggles

146. Cf. GORDON, *supra* note 60 (describing a process by which undocumented workers came to her legal clinic full of outrage because of dignitary harms suffered for which there was no legal remedy, and how, nevertheless, resolving the things that the law could control gave them a sense of agency and dignity—a path out of the morass—even if it did not directly address their outrage).

beginning with the First Reconstruction and even before. The Second Reconstruction resulted in canonical statutes and court decisions and a basic restructuring of the relationship between the federal government, the individual, and the state. But it was more than that. It was the mobilization of an engaged citizenry that confronted racialized injustice, named it, and created the informal institutions to consolidate and identify resources that would make sustained resistance possible. “Freedom Summer” brought many northerners to the South to participate in the transformation of the United States. One of these young northerners was Marshall Ganz, a sophomore at Harvard who dropped out to work in Mississippi. He left Harvard in 1962 and spent more than two years there working with organizers in the black community, organizing voters, and helping to create alternative sources of power for the people who had been denied access to the formal institutions of governance.

A native of California, the son of a rabbi in Bakersfield, Marshall went home and in the process realized that his work in Mississippi had changed him. The brown people sweating in feudal conditions in the fruit and vegetable fields of central California were no longer just part of the background against which his life was lived. Instead, he explained, he saw the brutal conditions in the fields through what he called “Mississippi eyes.” Those eyes let him see that the sharecropping that defined rural poverty and oppression in the south had a western expression in the labor gangs in California’s Central Valley. The structure of disenfranchisement differed in detail, but not in effect. Like the black people in the South, the field workers were just resources to be used, not people to be respected.

Efforts to organize migrant farm workers had long been viewed as futile. Many were undocumented and even those who were citizens were poor and often illiterate in English and even in Spanish. Nonetheless, the precursor to what would become the United Farm Workers began the task of organizing workers farm by farm, field by field. Marshall did not go back to Mississippi. There was work to be done in California.

While the work would mirror the efforts for civic, political, and economic justice that were taking place in the South, one of the prime movers in California was the National Farm Workers Association (NFWA). The NFWA would later become the more famous United Farm Workers. While many histories of this movement focus on its role as a labor organization dominated by and working on behalf of the interests of Mexican Americans, Ganz showed how this struggle was connected to the broader movement for justice. In 1966, during the march from the farm town of Delano to the state capitol, Sacramento, a reporter for an African American newspaper simply stated:

“Those who march for Negro Freedom also have to march for freedom of other men, for economic freedom and justice.”¹⁴⁷

The NFWA laid the groundwork for a broader movement by defining itself not just as a labor organization, but as a “farm worker civil rights movement.” It recognized the necessity to develop public support beyond local labor markets. This support was possible because, as Ganz pointed out,

the core leadership and volunteers participated in the day-to-day, tactical decision making involved in each strike, the newcomers learned how to function as part of a leadership team, while the top leaders learned first-hand about the on-the-ground realities about which they had to strategize. . . . The NFWA’s capacity for continuous learning, its motivation to learn, and its access to an array of ever-changing but relevant information set it apart.¹⁴⁸

It was through the struggle for farm worker rights to organize and live with dignity that many other elements of the Chicano movement (La Causa) came together and formed alliances with leadership in the black community. If there was going to be a movement for justice in the American West, it would necessarily be multicultural given the demographics of the West. In fact, because of its public leadership, the UFW is commonly thought of as a Mexican American organization. Despite that public perception, however, the membership and the governing councils of the union reflected the diversity of the state. The history of the UFW could not be written without a reference to the Filipino workers and the white and Jewish organizers who worked shoulder-to-shoulder with Cesar Chavez, Dolores Huerta, and the other better-known members of the union. Moreover, the UFW and La Causa more generally used elements of cultural struggle to popularize their positions and to empower the rank and file in ways that generated a kind of participatory democracy.

Before exploring the cross-racial alliances that gave foundational support to the union in its efforts to organize the workers and to organize the politicians necessary to achieve a change in the farm labor laws, we want to focus on an innovation of the UFW that gave the workers themselves the power to engage in full-throated exploration of the politics of economic justice. By reviving the form of the *Actos*, Luis Valdez and his allies created a mechanism that

147. LAUREN ARAIZA, *TO MARCH FOR OTHERS: THE BLACK FREEDOM STRUGGLES AND THE UNITED FARM WORKERS* (2013).

148. MARSHALL GANZ, *WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT 117-18* (2009).

politicized aesthetics in a way that made drama a useful tool for education, mobilization, and change.¹⁴⁹

A. The Formation and Impact of El Teatro Campesino

Teatro Campesino started when Luis Valdez travelled to his hometown, Delano, California, to participate in a march in support of the Grape Pickers strike organized by the newly formed United Farm Workers Organizing Committee (UFWOC).¹⁵⁰ The year was 1965 and it was no coincidence that the rise of the UFWOC and Teatro Campesino came at a time of great sociopolitical action motivated by the social unrest present amongst blacks and Chicanos who were leading a multi-dimensional civil rights movement.¹⁵¹ Valdez, who had apprenticed with the San Francisco Mime Troupe, approached UFWOC leaders Cesar Chavez and Dolores Huerta about starting a farmworker theater company. Chavez explained that there was not money, actors, or a stage for a theater company.¹⁵² Yet, he told Valdez that if he could put something together, it was fine with him.¹⁵³ “And that was all we needed— a chance,” explained Valdez.¹⁵⁴ Valdez was committed to the idea of creating a theater “of, by, and for farmworkers” and gave birth to Teatro Campesino on the picket lines of Delano.¹⁵⁵ According to Valdez, the picket line was the only and most effective place to do what he wanted to do: “communicate with the workers non-violently and . . . communicate ideas with humor, a lot of energy, and a lot of spirit.”¹⁵⁶ Valdez described the moment in which Teatro Campesino was formed:

I talked for about ten minutes, and then realized that talking wasn’t going to accomplish anything. The thing to do was do it, so I called three of them over, and on two hung *Huelgista* signs. Then I gave one

149. See the discussion of the uses of drama and street plays in the liberation of South Africa recounted in White, *supra* note 40.

150. See HARRY J. ELAM, TAKING IT TO THE STREETS: THE SOCIAL PROTEST THEATER OF LUIS VALDEZ AND AMIRI BARAKA 3 (1997).

151. *Id.* at 2.

152. See Voces Vivas, *Luis Valdez—Founder “El Teatro Campesino,”* YOUTUBE (Oct. 21, 2011), <http://www.youtube.com/watch?v=XdeIwysKwJM>.

153. See Max Benavidez, *The Fight in the Fields*, PBS, <http://www.pbs.org/itvs/fightfields/book3.html> (last visited Mar. 24, 2014).

154. *See id.*

155. *See Voces Vivas, supra* note 152.

156. *See id.*

an *Esquirol* sign, and told him to stand up there and act like an *Esquirol*—a scab. He didn't want to at first, because it was a dirty word at that time, but he did it in good spirits. Then the two *huelgistas* started shouting at him, and everybody started cracking up. All of a sudden, people started coming into the pink house from I don't know where; they filled up the whole kitchen. We started changing signs around and people started volunteering, "Let me play so and so," "Look this is what I did," imitating all kinds of things. We ran for about two hours just doing that. By the time we had finished, there were people packing the place. They were in the doorways, the living room, and they were outside at the windows peeking in. Dolores [Huerta] showed up later. She stood there watching, and I think it got the message across—that you can do a lot by acting out things.¹⁵⁷

Later on, the troupe performed in front of the farmworkers for the first time. "We jumped on top of a truck and started performing. Then something great happened. Our work raised the spirits of everybody on the picket line and Cesar saw that," said Valdez.¹⁵⁸ Soon, Teatro Campesino became "the cultural voice of the UFWOC."¹⁵⁹ Yolanda Broyles-González posits that "[t]he Teatro Campesino's militance was a direct response to the needs of the UFW struggle from which it emerged."¹⁶⁰ That included a "need to unionize in the struggle against the multiple abuses of agribusiness, which included large-scale pesticide poisoning of farm laborers, exploitative wages, substandard housing, child labor, and no benefits."¹⁶¹ In effect, Teatro Campesino formed an authoritative interpretative sub-community within the UFWOC that profoundly impacted the way the movement as a whole perceived the law and justice. It served as the "bridge" between the farmworkers' "lived experience" and "imagined alternative."¹⁶² Teatro Campesino transformed how farmworkers thought of their own power to make change and motivated them to take action in reclaiming the rights the theater convinced them they deserved. It also defined the lived experience of the farmworkers, an experience to which the UFWOC lawyers were being held accountable.

157. Beth Bagby, *El Teatro Campesino: Interviews with Luis Valdez*, 11 *TULANE DRAMA R.* 70, 74-75 (1967).

158. Benavidez, *supra* note 153.

159. ELAM, *supra* note 150, at 3.

160. YOLANDA BROYLES-GONZÁLEZ, *EL TEATRO CAMPESINO: THEATER IN THE CHICANO MOVEMENT* 25 (1994).

161. *Id.*

162. Cover, *supra* note 54, at 4, 9.

Luis Valdez describes Teatro Campesino as “somewhere between Brecht and Cantinflas.”¹⁶³ Cantinflas “is virtually synonymous with a Mexican popular tradition of comedy associated in the past two hundred years with the *carpa*,” a “tent show” which has served as a “counterhegemonic tool of the disenfranchised and oppressed.”¹⁶⁴ The *actos*, or skits, were improvised. Valdez described the process of creating an *acto*: “We take a real situation—often something that happens on the picket line—and we improvise around it. When we get an improvisation that we like, we’re ready. An *acto* is never written down.”¹⁶⁵ Essentially, each *acto* represented a story about individual and social fairness and justice. “Memory indeed was the prime conduit for all performance work within Teatro Campesino,” explains Broyles-González.¹⁶⁶ “And the power and instrumentality of memory, rooted in the community and in the body, made possible the immediacy, authenticity, and vitality characteristic of the ensemble’s work.”¹⁶⁷ The use of humor also played an important role, as Valdez explains:

We use comedy because it stems from a necessary situation—the necessity of lifting the morale of our strikers, who have been on strike for seventeen months. When they go to a meeting it’s long and drawn out; so we do comedy, with the intention of making them laugh—but with a purpose. We try to make social points, not in spite of the comedy, but through it. This leads us into satire and slap-stick, and sometimes very close to the underlying tragedy of it all—the fact that human beings have been wasted in farm labor for generations. . . .

. . . People say, “Yes, that’s the way it is,” and they laugh. If it’s a reality they recognize as their own, they’ll laugh and perhaps tears will come to their eyes.¹⁶⁸

Chavez had long wanted to use the *carpa* as an organizing tool, believing that it could provide farmworkers with a shared cultural language.¹⁶⁹ “With a *carpa*, we could say difficult things to people without offending them,” explained Chavez. “We could talk about people being cowards, for example.

163. BROYLES-GONZÁLEZ, *supra* note 160, at 7 (quoting Luis Miguel Valdez, *Theatre: El Teatro Campesino*, RAMPARTS, July 1966, at 55, 55).

164. *Id.*

165. *Id.* at 22.

166. *Id.* at 23.

167. *Id.*

168. Bagby, *supra* note 157, at 77.

169. See BROYLES-GONZÁLEZ, *supra* note 160, at 11.

Instead of being offensive, it would be funny. Yet it could communicate union issues.¹⁷⁰ Teatro Campesino itself was a “unique and often effective social and cultural weapon” that was used when regular union organizers failed.¹⁷¹ For example, in Selma, California, Teatro Campesino succeeded in convincing farmworkers of the need to organize after UFWOC organizers had tried for weeks without any success.¹⁷² The effectiveness of Teatro Campesino may stem from the fact that its *actos* represented a declaration of rights that was asserted through the exhibition of a shared lived experience coupled with a remedy. “One of the things we’re forced to do in our form of drama is present the solution. The farm workers say, ‘We know the problems, what about it?’ So in the *acto*, a farm worker grabs the *Huelga* sign and shouts, ‘*Huelga!*,’” explains Valdez.¹⁷³ “[I]t forces us to think up endings that are basically the same. It’s the snap ending; you end with a bang, and certainly with hope. You show some kind of victory, even though victory is not immediately forthcoming.”¹⁷⁴

Teatro Campesino was part of a “widespread theatrical mobilization” that “sought to affirm an alternative social vision that relied on a distinctly Chicana/o aesthetic.”¹⁷⁵ In effect, it helped create and champion a new moral vision both within the movement and beyond. The *Wall Street Journal* described Teatro Campesino as a “proletarian pantomime.”¹⁷⁶ “Chicano intellectuals even touted [it] as ‘a key to a new historical consciousness.’”¹⁷⁷ Most importantly, the farmworkers began to “see themselves as the protagonists in a daily drama that had seemed theirs alone until this moment,” explains Jorge A. Huerta.¹⁷⁸ “With each improvisation of their daily struggles, these campesinos demonstrate to Valdez that there is a message to be dramatized and that the talent to dramatize it is in this room.”¹⁷⁹ During the day, the Teatro Campesino troupe would “visit campuses and Latino neighborhoods to build support for the union and would also perform on a

170. *Id.* at 13.

171. See Elam, *supra* note 150, at 45.

172. See *id.* (quoting JOHN WEISMAN, *GUERRILLA THEATER: SCENARIOS FOR REVOLUTION* 19 (1973)).

173. Bagby, *supra* note 157, at 79. *Huelga* means “strike” in Spanish.

174. *Id.* at 80.

175. BROYLES-GONZÁLEZ, *supra* note 160, at 3.

176. RANDY SHAW, *BEYOND THE FIELDS: CESAR CHAVEZ, THE UFW, AND THE STRUGGLE FOR JUSTICE IN THE 21ST CENTURY* 277 (2008).

177. *Id.*

178. JORGE A. HUERTA, *CHICANO THEATER: THEMES AND FORMS* 12 (1982).

179. *Id.*

flatbed truck in the fields adjacent to picketing workers.”¹⁸⁰ Later, at night, it performed on makeshift stages right in the middle of the fields “before laughing and boisterous crowds, who watched performances illuminated by car headlights.”¹⁸¹

The early *actos* all revolved around one solution: “join the union.”¹⁸² The theater troupe did not specifically focus on tangibly changing the legal reality of the farmworkers. Rather, it was part of a broader mobilization effort not only to change the way justice was administrated, but also to alter the way farmworkers viewed themselves and their own power within the system. “Our most important aim is to reach the farmworker. All the actors are farmworkers, and our single topic is the *Huelga*,” Valdez stated.¹⁸³ Valdez further describes the purpose of Teatro Campesino:

We don’t think in terms of art, but of our political purpose in putting across certain points. We think of our spiritual purpose in terms of turning on crowds. We know when we’re not turning on the crowd. From a show business point of view that’s bad enough, but when you’re trying to excite crowds to go out on strike or to support you, it gains an added significance.¹⁸⁴

“Valdez’s company made no pretense of creating Great Art. Nor did it have time for such aesthetic dreams when members of the group could be called away at any moment to walk the picket lines or hand out leaflets in a field or get involved in any of the activities the fledgling union demanded.”¹⁸⁵ Instead, Valdez identified five goals he hoped to accomplish with the *actos*: (1) “Inspire the audience to social action,” (2) “Illuminate specific points about social problems,” (3) “Satirize the opposition,” (4) “Show or hint at a solution,” and (5) “Express what people are thinking.”¹⁸⁶ Ultimately, the “simple recreations” of the farmworkers’ plight did not just have a democracy enhancing effect; it also helped the workers find a “spirit of reinforcement and encouragement.”¹⁸⁷

180. Shaw, *supra* note 176, at 278.

181. *Id.*

182. HUERTA, *supra* note 178, at 16.

183. ELAM, *supra* note 150, at 100.

184. Bagby, *supra* note 157, at 78.

185. HUERTA, *supra* note 178, at 16.

186. *Id.*

187. *Id.* at 13.

The special attributes of the *acto* helped Valdez accomplish his goals. The *acto* requires at least two characters and a conflict.¹⁸⁸ As long as the conflict is commonly understood and solved by the *acto*'s participants, the essential elements of the *acto* are present.¹⁸⁹ Teatro Campesino member Olivia Chumacero explained:

You had to draw from yourself, from where you were coming from. Things came out from you, from what you thought, from where you were coming from, from what you had experienced in life. . . . It was not a mechanical learning of lines, word for word. Words that someone had put in your mouth. It was your life.¹⁹⁰

The *actos* also involved audience participation.¹⁹¹ The actors “transformed spectators into active participants, and their participatory activity inside the theater was an indicator of or precursor to revolutionary activity outside of the theater.”¹⁹² Luis Valdez declared in 1967, “We shouldn’t be judged as a theater. We’re really part of a cause.”¹⁹³

Teatro Campesino also had a profound effect beyond the farmworker community. Soon after its creation, the troupe was invited by Stanford University for a paid performance.¹⁹⁴ “We performed in a student lounge, and there were about fifty people present. It was interesting from the viewpoint that what we had been doing for farm workers in Delano could work outside too, in a university setting,” explained Valdez.¹⁹⁵ It was a success and from there on out, Teatro Campesino began to tour campuses, churches, community halls, and theaters.¹⁹⁶ The farmworkers’ message was taken from the field to the cities, where audiences were moved to donate money to a union that desperately needed all of the financial support that it could get.¹⁹⁷

188. See *id.* at 17.

189. *Id.*

190. BROYLES-GONZÁLEZ, *supra* note 160, at 22.

191. See ELAM, *supra* note 150, at 11.

192. *Id.*

193. *Id.* at 19.

194. See HUERTA, *supra* note 178, at 18.

195. Bagby, *supra* note 157, at 76.

196. See *id.*

197. See *id.*

B. Las Dos Caras del Patroncito (*The Two Faces of the Boss*)

Jorge H. Huerta describes the *acto*, *Las Dos Caras del Patroncito*, as being “representative of the needs [of the UFWOC] at the time.”¹⁹⁸ The first performance of the *acto* was in 1965 on the picket lines of the Delano grape strike.¹⁹⁹ The *acto* was created to combat the power and wealth of the growers that made organizing and striking so difficult for the UFWOC.²⁰⁰ In response, Valdez and the actors created an *acto* where the farmworker and the boss (*el patroncito*) exchange roles so that each figure understands what it is like to be in the shoes of the other.²⁰¹ The *patroncito* is identified by a pig-face mask and the farmworker by his shears.²⁰² The *patroncito*, who is tired of the “frustrations” associated with wealth, agrees to trade places with the farmworker.²⁰³ He then sheds his symbols of oppression: his mask, whip, cigar, and coat.²⁰⁴ Upon removing these items, the farmworker exclaims, “Patron, you look like me!”²⁰⁵ suggesting that the *patroncito*’s “power was not essential nor internal within the body but, instead, constructed.”²⁰⁶ The farmworker puts on the pig-face mask and becomes the *patroncito*.²⁰⁷ He begins to list the things belonging to him and offers the former *patroncito* less pay.²⁰⁸ The *patroncito* turned farmworker realizes that things have gone too far and calls for help.²⁰⁹ However, the police officer on stage does not recognize the *patroncito* without his symbols of power and takes him away.²¹⁰ The *patroncito* shouts, “Where’s those damn union organizers? Where’s Cesar Chavez? Help! *Huelga!*”²¹¹ The debasement of the

198. HUERTA, *supra* note 178, at 19.

199. ELAM, *supra* note 150, at 38.

200. HUERTA, *supra* note 178, at 19.

201. *Id.*

202. *Id.* at 20.

203. *Id.* at 22.

204. *Id.*

205. *Id.*

206. ELAM, *supra* note 150, at 40.

207. HUERTA, *supra* note 178, at 22.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

patroncito is described as “an important turning point in the assertion of [farmworkers’] dignity.”²¹²

Harry Elam writes, “[t]his *acto* affirmed the new awareness of self-worth and cultural pride among . . . the underdogs . . . [It] exposed the vulnerability of the ranch owner and encouraged farmworkers to arise as new political subjects in their own real struggle against subordination.”²¹³ The context in which *Las Dos Caras* was originally performed, in front of the grower’s armed security guards, augmented its effects. The performance itself was “an act of resistance” that “was at once within and outside the other strike activities on the picket line.”²¹⁴ In effect, it “worked to redress the present social drama by symbolically disempowering the ranchers and revealing the potential power achieved through collective farmworker participation in the strike.”²¹⁵ “Through the power of performance El Teatro contested conventional power relationships and the subordination of farmworkers within the agribusiness hierarchy,” writes Elam.²¹⁶

Las Dos Caras also reconceptualized the social order in which the farmworkers lived. The audience participation together with the context in which the *acto* was performed in the fields where the story originated gave farmworkers a sense of agency. Power was portrayed as external and constructed, rather than internal. One academic argues that the role reversal in *Las Dos Caras* represents the transfer of external social trappings that determine social status and in effect “can topple the entire social order.”²¹⁷ Elam, on the other hand, believes that the social order was *inverted* as the hierarchy remained in place in order to symbolize the power deflation that the UFWOC was attempting to effect in actuality.²¹⁸ “This *acto* affirmed the new awareness of self-worth and cultural pride among” the underdogs, writes Elam.²¹⁹ “[It] exposed the vulnerability of the ranch owner and encouraged farmworkers to arise as new political subjects in their own real struggle against

212. ELAM, *supra* note 150, at 42 (citing GUILLERMO E. HERNÁNDEZ, *CHICANO SATIRE: A STUDY IN LITERARY CULTURE* 36 (1991)).

213. *Id.*

214. *Id.* at 38.

215. *Id.*

216. *Id.*

217. *Id.* at 40.

218. See *id.* at 40-41 (citing Andrea G. Labinger, *The Cruciform Farce in Latin America: Two Plays*, in *THEMES IN DRAMA: FARCE* 220 (James Redmond ed., 1988)).

219. *Id.* at 42.

subordination.”²²⁰ Both theories encompass the view that the *acto* reinterpreted the status quo and offered an alternative vision of power.

By the late 1960s, El Teatro Campesino was no longer singularly concerned with farmworkers and farmworker organizing and expanded to broader issues of “Chicano identity, racism in education, the Vietnam War, and police brutality.”²²¹ “But always,” Valdez notes, “the cultural root is the *campesino*, the farmworker. I don’t care how sophisticated we get in the city, we share the communal remembrance of the earth. This goes for Chicanos as well as anyone else.”²²²

C. *The Organizing Effort: Labor and Civil Rights*

Like the civil rights activists in the South, the UFW leadership knew that strategy matters.

When Cesar Chavez used to say “power makes you stupid,” this is what he meant: you come to rely on an overwhelming resource advantage, which is exactly what creates opportunity for the Davids of the world. Chavez took particular pleasure in getting people together to figure things out, to respond to moves with countermoves, to find ways, as he would say, to kill two birds with one stone and keep the stone.²²³

Built on a foundation of commitment to the cause rather than to a particular strategy, the union was able to improvise and learn from the people on the ground. You also “need access to the right kind of information . . . [T]he UFW wove together its connections with the farm worker world, the churches, the unions, the civil rights movement, and the political domain in widely diverse ways.”²²⁴ In addition, the UFW was willing to learn and it had “the courage to risk failure.”²²⁵

The UFW was more than a union, but it was, of course, created to organize farm workers and to secure contracts on their behalf. In the process of negotiating more than a hundred union contracts and having in excess of fifty thousand dues-paying members, the union trained hundreds of organizers and

220. *Id.*

221. Benavidez, *supra* note 153.

222. *Id.*

223. GANZ, *supra* note 148, at 253.

224. *Id.* at 252-253.

225. *Id.* at 253.

community activists. These efforts enabled the UFW to become a player in California politics as well as a major player in Chicano activism unrelated to farmworker issues. Because of the use of the boycott and the involvement of non-labor activists and celebrities, the public responded to the actions and issues raised by the UFW as part of the civil rights movement rather than as a standard labor conflict. After more than a dozen years of activism and sometimes violent conflict in the fields, the union and its antagonists were able to negotiate the passage of the Agricultural Labor Relations Act (ALRA) and to inaugurate a new era of agricultural labor relations.²²⁶

The ALRA was designed by the UFW not just to be a framework for securing new contracts, but to use the process of collective bargaining to continue to organize.²²⁷ The provisions of the Act permitted swift elections and created a process that would help guard against intimidation by the growers. In addition, the anti-intimidation provisions also promoted worker education. The UFW wanted to use the ALRA to promote continued organization of farmworkers.²²⁸

Yet, despite the success of the organizing during the 1960s, the most dangerous period for the UFW came after the ALRA was passed. The truth is that “the living and working conditions of California farm workers are little better at the beginning of the twenty-first century” than when the organizing efforts began.²²⁹ “Although the [ALRA] remains the only collective bargaining law to encourage farm worker unionization in the continental United States, the organization that made it work is a shadow of its former self.”²³⁰ As Marshall Ganz noted:

Once again, however, a moment of victory became a moment of danger. . . . This time, however, the threat came from within and it was not overcome. Within just four years [of the passage of ALRA], the UFW stopped organizing, drove out most of its experienced leaders, and entered into a decline from which it has not recovered.²³¹

226. *Id.* at 234.

227. *Id.*

228. *Id.* at 235-36.

229. *Id.* at 239.

230. *Id.* at 240.

231. *Id.* at 241; see MATTHEW GARCIA, FROM THE JAWS OF VICTORY: THE TRIUMPH AND TRAGEDY OF CESAR CHAVEZ AND THE FARM WORKER MOVEMENT (2012).

CONCLUSION: DEMOCRACY AT ITS BEST IS A SOCIAL MOVEMENT

The point of the stories we have told, which are only exemplary, is that the courts alone are not the voice of change. At best, the courts ratify change. The social movement activists—through their political mobilization and their transformation of the culture—made the actions of the Supreme Court seem appropriate and long overdue.

In the case of both the Mississippi Freedom Democratic Party and the Montgomery Bus Boycott, black activists did not just want a chance to compete for a seat at a convention or on a bus. To allow two individuals to represent the whole, as Joseph Rauh and Martin Luther King, Jr. did in the MFDP conflict, takes the power away from the community they claim to represent. In Montgomery, the MIA did not want just more seats, or even the mere desegregation of the buses; they wanted to eliminate the private enforcement of Jim Crow laws by the bus drivers. Thus activists in both Mississippi and Montgomery claimed an alternative source of power, one that took the promise of democracy seriously. They restructured the meaning of opportunity at the same time that they restructured the meaning of representation.

Nevertheless, the civil rights movement, especially at the national level, was not a fight in which all blacks were represented. Many middle class blacks (just like their white counterparts) used the language of qualifications (speaking proper English, knowing how to read and write) to define who the leaders should be and to privilege some spokespersons over others. The idiom of “qualifications” meant an unlettered sharecropper should not dominate the national drama of the Democratic National Convention in Atlantic City. The MFDP’s stance, therefore, sought to push black and white elites to face up to the double exclusion of poor blacks “from mainstream and movement politics.”²³² By directly confronting the language of qualifications and all that it entailed, local activists also thought they had found a way to talk about class without reducing race to class or the reverse.²³³

Indeed, the MFDP’s demands challenged the lack of democracy in Mississippi as well as in the National Democratic Party. These mainly poor and illiterate black activists threatened the monopoly on power held by national elites, not just white segregationists. They soon learned that few traditional black leaders would be persistent in the face of white resistance, whether at the local or national level. The danger posed by common people speaking on their own behalf had been enough to trigger an outburst by Roy Wilkins, the head

232. Polletta, *supra* note 24, at 398.

233. *Id.*

of the national NAACP. Wilkins excoriated Hamer, “[Y]ou people are ignorant, you don’t know anything about politics, you put your point over, why don’t you pack up and return to Miss.?”²³⁴

Like Roy Wilkins, legal advocates and cause lawyers also often lose perspective when they move to study and learn from the places where lawyers are most in control during these public conflicts.²³⁵ The conflict may be translated into the legal documents they study, but they often forget that it is a translation for a specialized audience using a rarefied way of talking about and understanding the world. It is not that the legal elites are wrong; it is just that their representation is only a partial view of the cathedral. They zoom in on the brief Rauh wrote, for example, citing the relevant statutes, organizational rules, and court decisions. They may even parse the legal documents and subsequent case law in search of the conflict’s enduring meaning. For these inquisitors, what matters over time is the way elite actors ultimately give meaning to the actions of non-elite activists. We are arguing that the reverse is often closer to the truth. The elite actors often derive the social meaning of their actions from the efforts of non-elite activists like Fanny Lou Hamer and all of the others standing behind and beside her.

The boycotters in Montgomery and the activists of the MFDP moved from marginal characters to members of authoritative interpretative communities. What they were reinterpreting was the meaning of American constitutional justice. They ultimately restructured the politics of the possible. They gave their actions a plausible explanation, one that formed the basis for shared understanding. That understanding initially grew from an internal explanation that allowed a sense of community to exist. But it ultimately had to persuade

²³⁴. *Id.* at 395.

²³⁵. For a definition of cause lawyers as political actors whose work involves doing law, who use their legal skills to pursue ends and ideals that *transcend* client service, and who are involved in a professional project to provide a public good, but who are also not the same as public interest lawyers, see STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 1-22 (2004). Scheingold & Sarat argue that the cause lawyer fits within the legal profession’s mainstream discourse of lawyering as a public good. They attempt to justify the cause lawyer’s role in a democracy, by distinguishing between political and rule-of-law cause lawyers.

[Political] cause lawyers, in effect, declare their solidarity with their clients and the causes they jointly pursue. . . . Conversely, rule-of-law cause lawyers tend to identify with rights, legality, and constitutionality as ends in themselves. For the politically engaged cause lawyer, both the client and the law are treated as means rather than ends. For the legally engaged cause lawyer, legality is, in effect, the cause.

Id. at 18. We use the term cause lawyer to refer both to political and rule of law lawyers.

external actors, as well. These two communities became authoritative because other members of the polity found themselves having to come to terms with their interpretations. In a heroic version of the actions of the Montgomery boycotters and the MFDP activists, they demonstrated that institutional change was necessary in order to validate the rhetoric of democracy and equality. These two movements illustrate what Professor Thomas Stoddard documented: rule shifting without culture shifting is not enough to produce real and sustained change.²³⁶

While the black people in Montgomery and the MFDP activists wanted seats, the metaphor should not be lost. Their stories are “texts” in what we have come to call *demosprudence*. Defying the rules for seating on a bus or at a national political convention both implicated and challenged the private use of state power. The Mississippi and Alabama activists were not, however, merely confronting the authority of the state. They were also confronting the claims of what constituted justice. They removed the mantle of authority from what claimed to be authoritative but which was shown to be false. They challenged the “is” with a vision of the “ought” and pushed the larger society to contemplate “what might be” if justice would be made real. Most importantly, they helped shift the cultural norms, not just the rules. They enacted a “normative” or “motivating” vision of a just society that was both remedial and aspirational. It was through their actions that dramatic interventions in the status quo were enacted rather than merely contemplated.

To the extent that the UFWOC succeeded, it was in large part because of its ability to draw on cultural heuristics and transcendent questions of justice. In addition, the dogged and relentless organizing of the UFW joined more than just labor grievances with broader questions of social justice. Its strategic mobilization of resources permitted the UFW to prevail, while better-funded rivals failed. Without this capacity to mobilize unrecognized resources there would have been no ALRA. The UFW linked Catholic conceptions of justice to their claims against the growers. The use of the iconography of religion was similar to Dr. King’s ability to ground his claims for justice using the belief structure of the Baptist Church.

236. See Stoddard, *supra* note 10. We are particularly interested in mobilizations (or collective action) that share three elements: (1) they are premised on a set of beliefs about the future, or how things might be (based on a normative vision), (2) their stories of the future contain the motivation for acting, and (3) their actions express the moral of the story. Our interest includes collective mobilizations, from the right as well as from the left, that share in common an abiding commitment to mass mobilization over time to transform culture, economic or social arrangements, and/or institutions. Electoral campaigns, litigation to yield a singular judicial victory, and legislative strategies may be tactics deployed by a social movement, but they alone do not signal the existence of a social movement.

We agree with Professor Ackerman that the courts, the legislature, and the electoral process are important. However, Ackerman's focus on the elite should not blind us to the actions of ordinary men and women on the ground. Without the people who were mobilized across the South and North (the participants in Freedom Summer, for example), there would have been few effective leaders. It was their concerted actions that gave substantive content to, and amplified the voices of, the so-called "spokesmen for the American people." Without the MFDP, without SNCC, without the march from Selma to Montgomery, there would have been no Voting Rights Act in 1965; there would have been no fundamental change in the understanding of what our democracy is for. Similarly, without the UFW—and its capacity to organize allies across the country (beginning with the march from Delano to Sacramento)—there would have been no Agricultural Labor Relations Act (ALRA) in California.

The leaders of political institutions get their courage to act from the people themselves. President Johnson could never have delivered his "We Shall Overcome" speech, as important and dramatic as it was, without the sacrifices of the people in the civil rights movement. The importance of that formulation is as much in the idea of a "movement" as it is in the content of "civil rights." The substantive content changed as the democratic potential in our culture as a whole was enlarged and the possibility of achieving the promise of the four freedoms of the original new deal seemed accessible for all.

In many ways, our project is not new. Like Professor Ackerman, we are challenging the privileging of formal sources of authority that discount or minimize the role of social movement activists and other contentious forms of organized power to name their own reality and give that reality a heart, a soul, and a story. The political transformation of the United States comes not just from what the Court is doing or what arguments the lawyers for the social movements are making. The movement activists themselves are part of the law creation process. They make some arguments more resonant and even more plausible. This is what Adam Liptak, in describing the dueling roles played by iconic Supreme Court cases like *Brown v. Board of Education*, calls the "music" as opposed to the "logic" of law.²³⁷ Lawyers are usually understood to control the logic of law through their analysis of precedent and commitment to principle. Meanwhile, the activists reveal the music of law by combining legal rights talk with home-grown stories of justice that define normative or narrative frames through which to understand what the courts thought they

237. Adam Liptak, *Brown v. Board of Education, Second Round*, N.Y. TIMES, Dec. 10, 2006, <http://www.nytimes.com/2006/12/10/weekinreview/10liptak.html>.

were doing. According to Francesca Polletta, when the Southern civil rights movement organizers “transposed” conceptual frameworks from one institutional domain to another, they provided new energy for resistance.²³⁸ The music these activists composed is the work of “transposition,” which combines, for example, legal rights formulations with “locally resonant justificatory rhetorics.”²³⁹

Such work, through decentralized structures at some distance from national or state civil rights organizations, encouraged tactical and ideological experimentation and innovation, built organizational solidarity, and enabled movement activists to broaden their appeal in some cases and in other cases to engage, at minimum, in critical reflection.²⁴⁰ When a “dynamic” constituency names its own reality by, for example, singing spirituals in the church choir, composing its own anthems in the call and response of the amen corner, or summoning in plain English, before a television audience, the brutal hardship of trying to register to vote in Mississippi, movement activists supply additional sources of authority for the lawyer and a new source of accountability for both the lawyer and “the law.” By expressing what the law means to those subject to it, activists create new grounds on which to interpret the law and make it harder for elites to say it means something other than what those on the street thought it should mean if it were talking to their experience. Any substantial disjunction is felt as injustice. It is through this potential feedback effect that those who sing the music of law can have a role in composing its logic.

By defining winning in its narrowest possible terms, as Joe Rauh did with the MFDP, lawyers may prompt litigants to celebrate important tactical victories. At the same time, the strategic vision essential to sustainable long-term change can be lost.²⁴¹ Nonetheless, whatever their historically contingent

238. Polletta, *supra* note 24, at 379. Polletta describes the importance of the black church in “nurturing counterhegemonic challenges” and preserving alternative normative frameworks. By emphasizing and pushing the black church’s social gospel mission, civil rights activists were able to foster cultural challenges that “promoted the compatibility of religious and legal idioms.” *Id.* at 379-80.

239. *Id.* at 379.

240. *Id.* at 380-81. By raising its collective voice, the community’s music can change its own understanding of what it is capable of and what organized power can do. Such a dynamic constituency builds from a shared identity by developing a structure (rituals, commitments, leadership) for sustaining that identity and naming things that they understand to be true (the ideology/epistemology divide).

241. See, e.g., ROSENBERG, *supra* note 14; Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); see also Michael Grinthal, *Lawyers and Relational Organizing* 23 (May 15, 2006) (unpublished manuscript)

role, Fred Gray's relationship with the MIA shows that law and lawyers ultimately do much of the heavy lifting in shaping a social movement's trajectory in fashioning both its short term objectives and long term consequences.²⁴² Because lawyers occupy both an elite and expert position and often do not reflect on the impact of their expertise on their imagination, their role in social movements deserves more attention.

Cause lawyers and legal scholars have begun to take notice of the multiple ways practicing lawyers, organizers, and policy makers can and do represent marginalized communities to tell different stories and make new law.²⁴³ There is renewed interest in researching the relationship between social movements and lawmaking among legal scholars and practitioners on the left²⁴⁴ as well as the right.²⁴⁵

(on file with authors) (describing the way litigation over rights can define claimants by their weakness and their need for state intervention). Cf. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004) (explaining that one of the conflicts within the strategy to desegregate the South was how to eliminate the bad effects of race while keeping the good effects of race).

242. Austin Sarat calls the difference between concrete objectives and long-term intangible outcomes "first" and "second" generational change. Telephone Interview with Austin Sarat (Nov. 30, 2006). There is a chronological distinction in time-sensitive terms; he also intends to draw attention to the difference between tangible change and intangible change. *Id.* Thomas Stoddard terms this "rule-shifting" versus "culture shifting." See Stoddard, *supra* note 10, at 973.
243. See, e.g., Ann Southworth, *Professional Identity and Political Commitment Among Lawyers for Conservative Causes*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 83 (Austin Sarat & Stuart Scheingold eds., 2005).
244. There is a growing body of legal scholarship on this subject, much of it coming out of Yale Law School. See, e.g., KLARMAN, *supra* note 14; Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Brown-Nagin, *supra* note 241; Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005); Robert Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Siegel, *supra* note 55; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004); Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001); see also KRAMER, *supra* note 14; William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001). *But cf.* Lucas Powe, *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (reviewing KRAMER, *supra* note 14).

During the 1980s and 1990s there was also an energetic set of conversations about the relationship between law, litigation, and social change. The critical legal studies movement devoted substantial attention to a critique of rights, especially those that direct claimants'

Even so, much of the focus is still on discovering new avenues for elite driven social change. Some cause lawyers search for ways to do “public education” or develop “communications strategies” to win support for their cases, but they rarely pause to wonder whether the cases they litigate resonate with the lived experience of their clients, not just their putative supporters and funders.²⁴⁶ Sociologists, political scientists, and historians have long studied social movements, yet their theories of social change also separate out the role of law and lawyers, as if lawyers and social movement actors function on parallel but distinctive tracks. Similarly, many lawyers and law professors still focus on legal cases and judicial opinions without necessarily considering the social, political, and historical forces that influence the development of legal doctrine. Unlike Professor Ackerman, they concern themselves primarily with formal lawmaking by the judiciary, the legislature, or the executive. Lawyers, in particular, too often assume that their maximum opportunity to influence the

attention to social change through litigation. Much of the earlier work, however, focused specifically on the work of litigators and courts. Some scholars have also put the genre of “legisprudence” on the table. See, e.g., Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1170 (2006). The newer scholarship has broadened the conversation to include the work of non-legal actors, as well. Our particular focus, however, is on the dynamic relationship between lawmaking and meaning making, in which meaning making originates and takes hold at the grassroots level not just in the courts or legislature.

245. For example, conservative lawyers, funders, and activists who joined to animate, narrate, and authorize fundamental legal change in the last quarter of the twentieth century studied the careful, sequential litigation strategy of the NAACP in the 1940s and 1950s to overturn *Plessy v. Ferguson*. Their strategy slowly evolved in response to what they learned as they waged their battles against liberal judges, liberal media, and “lazy” poor people (generally of color). See Southworth, *supra* note 243; see also Kimberly Liu, *The Role of Litigation Movement for Education Reform: A Case Study of the Milwaukee Voucher Campaign* (2007) (unpublished student paper, Harvard Law School) (on file with authors).

Adapting what they had learned, conservatives built a strategy that abandoned the explicitly racist or sexist appeals of the past and instead use sophisticated yet resonant rhetoric to tell a story about the American Dream under siege. Fighting for individual opportunity, family values, and the legitimate rewards of hard work, their core constituency mobilized to push back and overturn iconic decisions, chipping away at their legal as well as popular rationale (as in *Roe v. Wade*, 410 U.S. 113 (1973)) or co-opting arguments for equality through a form of national amnesia (as in *Parents Involved v. Seattle School District No. 1*, 551 U.S. 701 (2007)). The courts, working in tandem with citizen initiatives, such as the Michigan Civil Rights Initiative that passed in 2006, continue to redefine the meaning of conventional civil rights, feminist, and labor victories. See *Schuetz v. Coal. to Defend Affirmative Action*, 2014 WL 1577512 (U.S. 2014). One of the big lessons from the successes of conservative change agents is that legal as well as social changes take place on street corners and around kitchen tables, not just inside courthouses or legislatures.

246. This is not a new issue. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

law is through formal argument in judicial settings. Their argument, however, is not necessarily situated in a larger story that has normative force of its own and may be distinguishable from what the courts say is important. Even when moments of popular constitutionalism are considered, the actions of “the people” count only when they can be canonized through the published opinions of courts or the statutory language of legislators.²⁴⁷ In either case, it is the judiciary that serves as law’s authoritative editor.

By contrast, we contend that democratic societies are organized to produce a variety of authoritative interpretive communities.²⁴⁸ The MFDP, Montgomery Bus Boycott, and UFW stories exemplify the ways a social movement functioning as an authoritative interpretive community can play a critical role in redefining the meaning of accountability, democratic action, and American democracy.

Hamer and the other MFDP delegates were exemplary “wind changers.” Their goal was to widen the scope of meaningful participation in decision-making. They questioned the limited definition of what is legitimate representation; they redefined meaningful participation; and they insisted on a wider scope for who should be included in decision-making. By contrast, the politicians and the national leaders, as members of the state apparatus, stood with their wet fingers in the wind without noticing that the weather was changing.

The roles played by Fred Gray and other lawyers in the Montgomery Bus Boycott, the story that law ultimately tells, the driving ideal of equality, the assumption about the source of power to make change, and the definition of success all reflect the distinctive interpretive communities to which the lawyers felt they were accountable. In the case of the bus boycott, law is practiced tactically. It retains its link to a mobilized community that is seeking change to produce justice. A narrative whose higher authority comes from the idea that

247. KRAMER, *supra* note 14; William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967 (2006).

248. *See supra* notes 116-119, 138-144 and accompanying text (discussing the way the Mississippi Freedom Democratic Party in 1964 and the Montgomery Bus Boycott in 1955 functioned as alternative yet authoritative interpretive communities). Part of the object of our investigation is to map the intersections of these various communities. Generalizable meaning occurs at the intersections, and law crosses a variety of authoritative interpretive communities, pulling meaning from these various communities. These communities, however, are dynamic and thus put legal meaning under a continuous flux of varying intensities. One way that this flux is mediated is through the interaction of law, lawyers, and social movements.

national citizenship applies to black people in Alabama motivates this community. These people are inspired to take risks in support of this ideal because of their belief in a just God and the support they gain from religious cultural rituals, as manifest in the religious tenor, the spirituality, and the singing at mass meetings. Through their collective struggle and communal resourcefulness they gain a sense of agency and create a constituency of resistance that builds a new organization and inspires a series of national movements.

The texts of their stories were written with the ink of consummate courage by a mobilized community that actively represented itself. These social movement actors changed the background against which questions of legality and justice were understood. They marched. They sang. They declaimed in their unschooled voices. They changed the wind. And in the process, they transformed the “thin paper” of democracy to the “thick action” of government of, by, and for the people.