

SOCIAL MOVEMENTS AND THE ETHICAL CONSTRUCTION OF LAW+

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I. INTRODUCTION

This article grows out of the work that Professor Lani Guinier and I have been doing on political movements, social movements, and the relationship of politics to law. I want to be clear at the outset that I do not mean the relationship of politics to law in the sense of the relationship of ideology to law or in the sense that the institutions of law and its practice should be understood as a subspecies of politics. Instead, because law, legal institutions, and their processes are one way in which political differences are worked out, even conceding that the legal system operates as a semi-autonomous system,¹ an analyst has to situate law and its performance within the broader political commitments that underlie the social order and to understand how those changing commitments affect our understanding of what counts as law. This might seem to be a simple inquiry: law is different from interpretation or any of the other tools we use to understand and differentiate between those authoritative commands we recognize as lawful and those we do not. Put more baldly, law commands, interpretation suggests. Despite that rather simple and clear distinction, we

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¹ See, e.g., Robert W. Gordon, *Critical Legal Histories*, in CRITICAL LEGAL STUDIES 93, 96 (James Boyle ed., 1992).

all know that authoritative interpretations of legal principles are part of what constitutes the web of obligations and contestation that we call law.²

Another way to conceive of the task I am undertaking is to ask: How do social and political movements facilitate the creation of social meaning and how is that meaning reflected in the technical application of the law's command? *Because* law is a technical discipline with its own rules regarding what counts as authoritative and what does not (in both a formal and substantive sense),³ the processes of law and the institutions through which the practice of law is performed must be understood as both producers and consumers of social meaning. This, of course, is obvious. Law could scarcely be authoritative (or even really law) if it were not seen to flow from the ultimate law givers. In a democracy, the ultimate law giver is "the people." Social and political movements change the constitution of the people, not the locus of legitimacy.⁴ As Professor Guinier has written elsewhere, the distinction between law and politics is difficult to sustain in a constitutional democracy to the extent that the Court's authority "to pronounce law depends largely upon popular will and

² See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 65–66 (Walter Wheeler Cook ed., 2002) (1964) (discussing how eight fundamental conceptions can be "applied *in judicial reasoning* to the solution of concrete problems of litigation"); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS (forthcoming 2009) (manuscript 27–29, available at <http://www.law.harvard.edu/faculty/workshops/open/papers0708/vermeule.paper.pdf>).

³ See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) ("There are . . . two opposed modes for dealing with questions of the form in which legal solutions to the substantive problems should be cast. One formal mode favors the use of clearly defined, highly administrable, general rules; the other supports the use of equitable standards producing ad hoc decisions with relatively little precedential value.").

⁴ I recognize that that sentence contains much that is disputable both because of the words I have chosen and because of the question what constitutes democracy in our republican form of government. Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 48 (2008) (describing demosprudential intuition as "democracies, at their best, make and interpret law by expanding, informing, inspiring, and interacting with the community of consent, a community in constitutional terms better known as 'we the people'").

popular will is forged through public discussion and deliberation.”⁵ Put another way, in a constitutional democracy where even judicial authority is premised, at root, on consent, the membrane separating law and politics is necessarily porous.

One of the things that Professor Guinier and I want to do is to sketch out the role that popular understanding plays in how law is created, thus expanding the conventional ideas about where the authoritative commands that we call law originate. Now much of the analysis will, of course, hinge on questions of interpretation. What I am going to do is ask you to look behind the usual interpretive strategies. Within the law, any interpretive strategy assumes that there is something that can be described as a body of material and as a set of intellectual tools with which you identify authoritative statements and treat them as law.⁶ What I am going to ask you to think about is both what the background materials are and where some of the tools of interpretation come from. To accomplish this, I will first explain what I mean by the ethical construction of law. As I explain below, I take this formulation from Professor Philip Bobbitt.⁷ Next, I will analyze a series of cases. I suspect that my versions of the cases will not exactly square with the interpretation those who are familiar with the cases carry around. Instead of being a problem, it is precisely in those disagreements that insight might emerge about the role of “we the people” in making and interpreting law. If my reading of those decisions strikes you as subject to dispute, we will have to ask about the roots of the disagreement. I hope that such disagreement is not just charged as willfulness on my part, but to a difference in our understanding of the varied sources of interpretation that encompass the construction of legal meaning.

⁵ *Id.* at 117; see also Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1357 (2001).

⁶ I know there are those, especially those associated with Professor Stanley Fish, who will argue that this is either nonsense or an impossible task. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 1–17 (1980); JOHN LANGE, *THE COGNITIVITY PARADOX: AN INQUIRY CONCERNING THE CLAIMS OF PHILOSOPHY* (1970). While it does run the risk of infinite regress, it need not.

⁷ PHILIP BOBBITT, *CONSTITUTIONAL FATE* 93–136 (1982) (explaining the ethical constitutional argument and its application).

II. THE ETHICAL MODALITY OF CONSTITUTIONAL INTERPRETATION

The ethical construction of law connects changes in legal meaning to moments of democratic action. It borrows liberally from the claim of my colleague, Philip Bobbitt, in his justly celebrated book, *Constitutional Fate*, that law is constructed out of our shared values. The book is about what Professor Bobbitt calls the approaches or “modalities” in the constitutional interpretation.⁸ These are the various techniques that courts use to decide constitutional cases. He divided the modalities into six separate approaches, analyzed them, and then sketched out what those modalities are. In chapter seven of his book, Professor Bobbitt sketched the following passage:

Thus far, I have discussed the following types of constitutional arguments: historical, textual, structural, prudential, and doctrinal. If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when you were finished. Judges are the artists of our field, just as law professors are its critics, and we expect the creative judge to employ all of the tools that are appropriate . . . to achieve a satisfying result. Furthermore, in a multi-membered panel whose members may prefer different constitutional approaches, the negotiated document that wins a majority may, naturally, reflect many hues rather than the single bright splash one observes in dissents.

If you ever take up my suggestion and try this sport you will sometimes find (leaving aside the statement of facts and sometimes the jurisdictional statements) that there is nevertheless a patch of uncolored text. And you may also find that this patch contains expressions of considerable passion and conviction, not simply the idling

⁸ *Id.* at 3–8; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991). Bobbitt identified six modalities of constitutional arguments: historical, textual, structural, prudential, doctrinal, and ethical.

of the judicial machinery that one sometimes finds in dictum. It is with those patches that I am concerned here.

The class of arguments that I call ethical arguments reflects, like other constitutional arguments, a particular approach to constitutional adjudication. . . .

By ethical argument I mean constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or *ethos*, of the American polity that is advanced in ethical arguments as the source from which particular decisions derive.⁹

So too, like Professor Bobbitt, I am concerned with those blank patches, those patches that when you color through constitutional decisions, you find you are not able to mark with the color that represents historical argument, or the color that represents prudential arguments, or the color that represents doctrinal arguments. I will focus on the passages that he calls *ethical* arguments in the sense that he means it: *ethos*, the part that relates directly to who we think we are as a people.¹⁰ The blank spaces are not empty but rather are composed of that which need not be explained by legal argument or sometimes cannot be explained by legal argument.

In discussing these arguments I shall focus on how the construction of the American polity affects interpretation in law making. I want to show how interpretive communities are formed out of conflict and through the concerted social action of mobilized social groups. The impact of conflict between these mobilized groups on how policy is formed and how it is articulated as political and legal argument is what I am concerned with here.

We live in a complicated, pluralistic, multi-faceted political community, many parts of which are mobilized for one issue or another. These mobilized constituencies often embody the background norms on which law is written. Yet they also clearly represent competing contemporary understandings of social and political norms; an understanding that is fluid, but not formless or infinitely malleable.

⁹ BOBBITT, *supra* note 7, at 93–94.

¹⁰ *Id.* at 94.

Historical examples demonstrate that some of the meanings that are created through social action become generally persuasive while some do not.

How is it that some constructions of social meaning become persuasive and some do not? What are the processes through which authoritative interpretations are made? The meaning of a particular law can be altered by changing the background understanding against which law is interpreted. Thus, by focusing on the relationship of social movements to law, what I want to do is bring attention to the way in which the debate is really about the popular understanding of the nature or meaning of the Constitution evolved, an understanding that reflects developments in constitutional culture and not just constitutional law.¹¹ Yet, this idea of constitutional meaning implicates some of the most technical aspects of lawyering. Legal arguments, especially constitutional arguments, are limited to a specific domain of logical, historical, structural and textual materials. There are certain technical limitations that I must observe to fit the argument within the structure of a legal claim.

What I hope to convince you of is that the changes in legal meaning, which by all appearances are technical, are really moments of democratic action, although sometimes they are slow, halting, incomplete democratic actions, and they are not filled often with the drama of a presidential election like a primary season, nor are they necessarily violent, but they are necessarily contentious. Nonetheless, they are moments that bring to consciousness the social understanding of what is, or ought to be, part of our law, and how our law is tied directly to the legitimacy of constitutional decision making, as well as to the legitimacy of judicial interpretations of the meaning of legislative or executive action.¹² Despite these observations, I will not discuss constitutional argument only in the technical sense. I clearly want to be talking about the ways in which constitutional argument is understood colloquially. What I am asking is how do we use law and the processes of creating legal meaning to constitute ourselves as a people?

¹¹ See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007).

¹² See Guinier, *supra* note 4, at 56–59 & n.239.

III. THE NEW AGREEMENT CREATED BY THE CIVIL WAR AMENDMENTS

On the capitol grounds in Austin, Texas, is a memorial to the Civil War dead.¹³ Surviving soldiers dedicated the memorial to the memory of the Confederate dead who died in defense of the Constitution.¹⁴ From the jaded perspective of someone in the twenty-first century, this might be read as a kind of high sounding throwback, an attempt to reclaim the historical romanticism of the “Lost Cause.”¹⁵ At the time the statue was erected in 1903, it may have been put there for that reason, but that is a conflict for the local historians to work out. Nevertheless, one must admit that the legend on that memorial, whatever the intentions, is not inaccurate. It is not anachronistic. Regardless of when it was erected, it nonetheless reflects one reading of the deal that was struck when the country was created.

There are many reasons the soldiers of the southern states went to war, but certainly some of the Confederate dead went to war in defense of what they believed the Constitution guaranteed. If the warrant for the union was no good, then it should be dissolved.

Our civil war between the secessionist states and the union was the bloodiest conflict in American history.¹⁶ The cost in human tragedy is still being figured to this day as it is played out in the politics and history of our nation.¹⁷ I do not mean to belittle the sacrifice or the anguish that that war caused, but viewed from an historical perspective, the war is justifiably thought of as the only method for amending the Constitution that was then available. The Constitution guaranteed slavery in the provinces in which it

¹³ SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 53 (1998).

¹⁴ *Id.* at 55.

¹⁵ See ERIC FONER & OLIVIA MAHONEY, *AMERICA’S RECONSTRUCTION* 54 (Louisiana State University Press 1997) (1995) (“After the Civil War, many Southern whites reacted to the harsh realities of defeat by developing a romanticized view of the past that became known as the ‘Lost Cause.’”).

¹⁶ DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* xi (2008).

¹⁷ David Brion Davis, *Free at Last: The Enduring Legacy of the South’s Civil War Victory*, N.Y. TIMES, Aug. 26, 2001, § 4, at 1.

was legal.¹⁸ It contemplated the elimination of the slave trade, but it permitted slavery. It even provided for the constitutionality of the Fugitive Slave Acts,¹⁹ those acts that so enraged northern abolitionists by constitutionalizing individual complicity with something they considered a surpassing evil. This may have been the foulest compromise in a document that was rife with them, but it was part of the deal. The ways through which the Constitution may be formally changed are specified and also part of the deal.²⁰ If you assume that the community of consent necessary for the binding legitimacy of the constitutional order was comprised of independent states when the Constitution was drafted and ratified, then any effort to change the deal struck in the Constitution in any way other than through the Article V processes was itself illegitimate. Moreover, to impose an understanding of the law—that was at odds with what was agreed to—should trigger a condition that would permit states to withdraw from that compact. If it turns out they cannot withdraw from the compact, then they have, in fact, agreed to something that they did not know they were agreeing to at the time they signed it. And so, if the states could not secede, then to what extent was the Constitution still binding?

Despite any conflicting motives that may cloud its history, in a real way the memorial was constructed in honor of those who died in defense of the Constitution. It does no dishonor to the victors to imagine that the vanquished died in defense of their understanding of what it meant to belong to a country bound together by a document like the Constitution, even if it seemed to justify and protect an abominable institution that was recognized as such even then. If constitutional guarantees could not be protected by secession, and if the Constitution could not be amended by consent, then the Civil War really was the only way the Constitution could have been amended to eliminate slavery. This is true even if slavery was itself a proxy for other issues.²¹ Yet regardless of how slavery was viewed, it was clear that the Constitution could not be amended through the normal processes of law. But even if war is considered one of the processes at the

¹⁸ U.S. CONST. art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII, § 1.

¹⁹ Act of Feb. 12, 1793, 1 Stat. 302, *amended by* Act of Sept. 18, 1850 (repealed 1864).

²⁰ U.S. CONST. art V.

²¹ *See* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 23–27 (1997).

far end of law, the changes that the war wrought were still a technique of constitutional amendment that had to be later codified in the so-called “Civil War Amendments.”²² Those amendments did technically change the constitutional understanding, but they changed the constitutional language to reflect the new constitutional pact that was written in the blood of those who were part of the original consent community as well as in the blood of those who were not.

In many ways the struggle is not over the source of the meaning of the new agreement, that source is the bloody war that the people just engaged in, but the struggle is over the meaning of the new agreement. The new compact changed the extant constitutional understanding by outlawing chattel slavery, guaranteeing equal rights to all citizens and, granting equal protection of the law to all persons within the jurisdiction of the United States.²³ Perhaps more importantly, the amendments created a new national constitution and a new national citizenship by making those persons born within the jurisdiction of the United States citizens of the state in which they resided regardless of the views of the existing citizens of the states.²⁴ Thus if you were a resident of Ohio or Alabama but were not a citizen before the Civil War, and you were subject to the jurisdiction of the United States, you became a citizen of the United States and of the state or territory within which you resided.²⁵

Yet, at the same time that the Civil War Amendments affirmed the “people’s” new interpretation of the Constitution, those amendments did so without revisiting the idea of consent and its meaning for the new members of the polity. The scope of that change was potentially profound and its reverberations are still being felt and argued about. For example, the justification for birthright citizenship which flows from this change is something we take for granted. However, it is not an obviously necessary constitutional condition but instead a more expansive reading of nationally protected human rights.²⁶

²² U.S. CONST. amend. XIII, XIV, XV.

²³ *Id.* amend. XIII, § 1; *id.* amend. XIV, § 1.

²⁴ BLACK, *supra* note 21, at 23–24.

²⁵ This does not apply to Indians. *See infra* Part IV. The so-called insular cases also present a number of difficult issues.

²⁶ BLACK, *supra* note 21, at 23–27; PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 90–91 (1985).

The Civil War Amendments changed the basic relationship between African Americans and their non-African American fellows. It meant that things like the Fugitive Slave Acts²⁷ and *Dred Scott v. Sandford*²⁸ were wrong. *Dred Scott*, although it was one of the precipitating factors in the Civil War, was wrong. But why was it wrong? If it was wrong as a technical matter, then its technical deficiencies should be specified. Yet even if we concede that it was wrong as a technical matter, can we escape our professional obligations by insisting that it was wrong for some other more important reason? I think most of us would want to say, “No.” We would want to say that it was wrong as a technical matter of law. But we would also want to say it was wrong because on some fundamental level it violated the ethical relationship of free citizens to one another. It was wrong because it violated the relationships, as Charles Black called them, of human rights.²⁹ They are the unenumerated, fundamental conditions of mutual consent that bind one human being to another. Importantly, the Civil War Amendments recognized the humanity of the persons who were brought over as slaves and they stood for the proposition that the recognition of the humanity of these people was no longer going to be subject to that agreement that we struck before we allowed ourselves to recognize that free human beings in a constitutional system cannot exist without a community of consent that includes all people within that polity.

At the same time that the Civil War Amendments codified changes forged by the sacrifices on the battlefield, the amendment process failed to give those new members of the consent community an opportunity to formally ratify the terms of the new meaning of the original understanding. From the perspective of the ex-slaves the Constitution was expanded by fiat. Although many former slaves fought on the Civil War battlefield, they were not permitted to participate in the ratification of the Civil War Amendments. Simply put, they could not vote until after the last of the Civil War Amendments was already approved. Nor were they invited to reconsider the unamended ethical commitments of the original document to which they, as newly declared beneficiaries of the “privileges and immunities” of citizenship, would now presumably proclaim allegiance. They were made members of the consent community without the

²⁷ Act of Feb. 12, 1793, 1 Stat. 302, amended by Act of Sept. 18, 1850 (repealed 1864).

²⁸ 60 U.S. (19 How.) 393 (1856).

²⁹ BLACK, *supra* note 21, at ix.

opportunity to grant or withhold consent. As involuntary immigrants, and even more as the former property of many of the country's founders, the ex-slaves were once again subject to the ethical vision of others, even as they joined the community of consent.³⁰

Like the legends on the memorials on the capitol grounds in Austin, Texas, the past—and the ex-slaves' place in it—remains contested. The law is part of that past. That certain interpretations become more persuasive than others is obvious. But my main point is that those interpretations are framed in the light of the actions of “the people” more than simply the legal elites? Whether those actions occur on the battlefield of the Civil War or in black churches during the civil rights movement or during boycotts of grapes to support the farmworkers, it is crucial to understand when and how the people actually mobilize to supply the ethical construction in Professor Bobbitt's tableau of legal opinions.

To further this point, I will eventually discuss our constitutional and political relationship with the Indian tribes. First, however, I will focus on those people we intentionally brought into our jurisdiction. From this perspective, the Civil War Amendments can be thought of as reconstituting the community of consent that existed at the time of the drafting of the Constitution. It is important to remember that the United States, and the experiment that the United States represented, was deeply threatening to ideas of political legitimacy in Europe because it took the idea of legitimacy and turned it inside out. Governments in Europe were founded on the notion of power resting with an ordained, powerful elite rather than resting with the people. In Europe, you had governments of unnumbered powers and citizens or subjects with limited rights. But our constitutional structure suggested a government of enumerated powers³¹ with citizens of unnumbered rights.³² The Civil War Amendments extended this understanding explicitly to the states.³³

Thus, what I am principally examining here is the tension between two conceptions of consent that form the foundations of political legitimacy in a constitutional democracy. The conceptions are not merely abstract or academic, because they not only define our obligations to one another but

³⁰ The Slaughterhouse Cases, 83 U.S. 36 (1871).

³¹ U.S. CONST. art. I, § 8.

³² *Id.* amend. IX.

³³ BLACK, *supra* note 21, at 23–27.

the obligations of the government to the people. These obligations are not expressed merely as positive rights but also through arguments over relationships of federalism as fundamental limitations on the powers of the states that continue to animate current constitutional discourse. Of course, if consent is presumed, then its substantive content is where all the constitutional action is to be found. If the Civil War Amendments and the subsequent litigation that has followed are to be understood as merely contested applications of the meaning of civic inclusion, then doctrinal coherency should, as a logical matter, ultimately solve the problem. But if the fundamental transformation wrought both by the Civil War and the Amendments that it produced wrote human rights into the constitutional consent that makes us indissolubly bound to one another, then the social contestation over the meaning of the “our constitution” is a task that is not confined to experts but that is given to all of us.

For the purpose of this article, I will not talk about the legitimacy of judicial review, not because it is difficult or uninteresting, but because it is really beside the point.³⁴ What I want to do is review some constitutional cases and ask how our political lives have transformed the legal meaning of those cases over time. In the sections that follow my examples will come from Civil Rights Law and Indian Law.³⁵

³⁴ Judicial review is part of our democratic legacy. It is part of the democratic legacy of our constitutional system. The main principle that underlies judicial review is directly related to the capacity of courts to vindicate the democratic potential that is etched onto our culture at any particular historical moment. The important idea here is that democratic constitutionalism is rooted in interpretation that increases the democratic potential of our social relations. If you agree with me that one of the grand experiments that the United States, and especially the United States Constitution represents, is the location of legitimacy in democratic consent, then one of the things that the law ought to be concerned with, and one of the things judicial review ought to be concerned with, is maximizing the capacity for democratic legitimacy in our political life.

³⁵ Because the work that I do is largely in four areas, most of my examples will come from those areas. I am an environmental lawyer, and have been an environmental lawyer my entire career, but I have limited my examples in this text to civil rights and Indian law, two other areas I work in rather than environmental law or property law. The version of this text that will appear as a chapter in the book Professor Guinier and I are writing will include examples from these other areas.

IV. CIVIL RIGHTS CASES

What I am trying to sketch out is the relationship between popular action and technical meaning in order to understand who among “we the people” actually get to fill in the white spaces of Professor Bobbitt’s canvas. Our province is law. When we make arguments, they have to make sense technically, even though, as I suggested, the body of our law could not be understood if we were restricted solely to the range of technical arguments, especially in the constitutional context. I think Professor Bobbitt impressively demonstrates that in *Constitutional Fate*.

The white spaces that are filled in by the relationship between popular action and technical meaning help locate the evolution of the ethical commitments of the peculiarly American community of consent, particularly the community of consent as expanded after the Civil War. This is a complex proposition because those in the expanded consent community were not only denied the opportunity to ratify the original understanding of the Amendments that made them citizens. They also never had the opportunity to deliberate about the significance of the original understanding of the Constitution, which had affirmed their status as slaves in the first place. After Reconstruction, the voices of those in the expanded consent community were silenced or ignored as the South declared victory in the “ideological Civil War” that followed.³⁶

I would like to start with a series of three cases, all of which are well known, asking some questions about these cases and about their meaning; about why the meaning of those cases has changed, and what the effect is of the changing of those meanings. Now, remember I am not asserting that conventional politics governs legal decision making, but that concerted social action changes what can be considered the legitimate judicial interpretation of law. If you agree that there are parts of our lawmaking

³⁶ See, e.g., Davis, *supra* note 17. Davis writes:

The reconciliation of North and South required a national repudiation of Reconstruction as “a disastrous mistake”; a wide-ranging white acceptance of “Negro inferiority” and of white supremacy in the South; and a distorted view of slavery as an unfortunate but benign institution that was damaging for whites morally but helped civilize and Christianize “African savages.”

Id.

that legitimately exist within the technical discourse, but that are not confined to a technical argument, then you have to answer the questions: what is their meaning, and why are they allowed to be part of the lawmaking apparatus that we treat as governing and as authoritative? I hope to be able to answer those questions, although I doubt that I will be able to answer them completely. I will try to answer them in the context of the following cases.

The first set of cases I am going to talk about is comprised of *Plessy v. Ferguson*,³⁷ *Brown v. Board of Education*,³⁸ and the Seattle and Louisville cases that have recently been decided, better known as *Parents Involved in Community Schools v. Seattle School District No. 1*.³⁹ I will begin my inquiry by asking whether all of these cases are logically (and where appropriate, doctrinally) consistent. If they are consistent, that is, if you can read them as making up a coherent whole, then there must be a technical response that allows you to read them coherently, even if socially they do not describe a completely coherent vision of reality. It is the disjunction between legal reality and social reality that occupies most of this article. But the discontinuity is not the result of an insufficient grasp of either the limitations of legal doctrine or legal facts. It is instead, I am suggesting, a constitutional problem in the sense of the implicit and irreducible problem of depending on doctrine to describe what it means to constitute us as a people, yet it is the concerted actions of the people that ultimately creates the raw material of the doctrine.

Let us turn now to the famous case of *Plessy v. Ferguson*.⁴⁰ *Plessy v. Ferguson* was the post-Civil War case in which Homer Plessy, a colored man who was an octoroon or one eighth “black,” attempted to ride in a coach that was reserved for white passengers.⁴¹ He was arrested for failing to move.⁴² Plessy was an ideal person to challenge this statute, because as an octoroon he was, by all appearances, white. His challenge was also

³⁷ 163 U.S. 537 (1896).

³⁸ 347 U.S. 483 (1954).

³⁹ 127 S. Ct. 2738 (2007).

⁴⁰ *Plessy*, 163 U.S. 537.

⁴¹ *Id.* at 538.

⁴² *Id.* at 538–39.

supported by the railroad companies who were chafing under the expense of maintaining separate coaches.⁴³

Plessy attempted to avoid Commerce Clause issues by squarely asking the court about the reach of the Civil War Amendments. He justified his refusal to move to the colored coach and challenged his arrest, claiming protection under the Equal Protection Clause as well as claiming that he had been deprived of a property interest in being forced to move.⁴⁴ His appearance was virtually indistinguishable from that of a white man. The continued segregation he was required to endure was more than a continuing social insult. It diminished his place in the community and reinforced both the idea and the fact that black people, despite the bloody Civil War, Reconstruction, and the Civil War Amendments that were designed to remove the remaining badges and incidents of slavery, remained in a subordinate position that was supposed to reflect the natural order of things. The law, in this context, merely validated the existing state of affairs.⁴⁵ The statute underlined and reinforced the social humiliation of black people by deputizing white civilians to enforce its rules and to act, in effect, like the racial agents of the state.

In a famous majority decision and an equally famous dissent, the Court determined that the claim of Homer Plessy was specious at best and a malicious slander at worst. The statute that Homer Plessy was objecting to was, after all, perfectly neutral.⁴⁶ In the cool language of the law, the statute merely said that colored passengers could not ride with white passengers and white passengers could not ride with colored passengers.⁴⁷ Neither of those groups was disadvantaged because the rule applied equally and neutrally to both:

[A]ll railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a

⁴³ *See id.* at 557 (Harlan, J., dissenting).

⁴⁴ *Id.* at 542–43 (majority opinion).

⁴⁵ We shall see this same formulation later in the plenary power cases involving Indian tribes. *See infra* Part IV.

⁴⁶ *Plessy*, 163 U.S. at 540.

⁴⁷ *Id.*

partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to.⁴⁸

Thus, the equality of the law is not embarrassed by that classification system. According to the majority, we can understand that the challenged law was passed for the protection of the black passengers as much as the white passengers.⁴⁹ It is not for the court to second guess the legislature in its assessment of what is necessary to preserve public order, especially where all the statute is doing is ratifying the common understanding of how people want society to function. Neutrality may be a command of law, but the court also treated the statute as though it were a legislative expression of a command of nature that functioned like a legislative imperative on the solons.

Professor Jan Deutsch taught us over a generation ago that neutrality is one expression of generality in principled decision making, but that there is always a tendency to want to solve difficult jurisprudential problems with technical answers.⁵⁰ He was also clear, however, that formal neutrality as a doctrinal matter was not an expression of neutrality as an empirical matter, and that failure at that level was one of constitutional consequence.⁵¹

There is a passage in the opinion that will come back to haunt us in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁵² It reads:

We consider the underlying fallacy of [Plessy's] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything

⁴⁸ *Id.* (quoting 1890 La. Acts, No. 111, p. 152).

⁴⁹ *See id.* at 551.

⁵⁰ Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 188 (1968).

⁵¹ *Id.* at 189–90.

⁵² 127 S. Ct. 2738 (2007).

found in the act, but solely because the colored race chooses to put that construction upon it.⁵³

Thus, the classification is permissible because there is no damage inflicted by the state. Any damage that was suffered by the black passengers was presumptively self-inflicted and in any event was merely psychological injury that was purely unintentional. There was no evidence that the state was intentionally visiting any harm on these passengers or on the white passengers for that matter.

The senior Justice Harlan dissented. In his stirring dissent, one that continues to have ideological currency to this day, Justice Harlan said that our Constitution is color blind and recognizes no classifications of citizens on the basis of race.⁵⁴ His dissent was largely taken as the beacon of enlightened thinking up to that point. If we fast forward until we get to *Brown v. Board of Education*,⁵⁵ we see the DNA of Harlan's dissent being replicated in the NAACP's litigation strategy⁵⁶ and in the Supreme Court's opinions.⁵⁷ When you read the short opinion of *Brown*, it seems proper to ask: "What did the Court decide?", not "What did the case come to mean?"

Certainly, it could be said that at a minimum, the Court held that the separate provision of public education allocated according to race is inherently unequal.⁵⁸ That is often simplified to mean that separate is unequal, but what does it mean to say that separate is not equal? In the litigation strategy leading up to *Brown*, there were at least two competing theories. There was the theory of the national office of the NAACP, and there was the theory of the NAACP at many of the local offices. These

⁵³ *Plessy*, 163 U.S. at 551.

⁵⁴ *See id.* at 559 (Harlan, J., dissenting).

⁵⁵ 347 U.S. 483 (1954).

⁵⁶ *See generally* MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (The University of North Carolina Press 2004) (1987) (discussing the litigation strategy of the NAACP against segregated schools leading up to *Brown*).

⁵⁷ *See Brown*, 347 U.S. at 493–95; *see also* William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 783 (1979) (discussing the series of per curiam Supreme Court decisions following *Brown* and how the decisions appeared to follow Justice Harlan's position from *Plessy*).

⁵⁸ *Brown*, 347 U.S. at 495.

local offices largely supported an equalization strategy.⁵⁹ What they wanted were equal resources for the black schools. The local constituencies of black teachers, black counselors, black employees, and parents wanted their schools to be equal. The question was how to secure a sound education for their children. In comparison, the NAACP national office wanted to focus on dismantling the dual system.⁶⁰ For them the way to dismantle the dual system was to establish the principle that separate is not equal and that under current conditions separate could never be equal. Harlan's dissent resonated here. But the question that this strategy begs is whether it should be understood as an empirical matter? Clearly not as an empirical matter, because there is no question you could create schools that were separate yet equal in terms of material resources. So what did they mean? Were they speaking about the political reality? If so, then that would be outside the competence of the court. Perhaps this was Wechsler's complaint.⁶¹

What the Court said in *Brown* is that the psychological harm that is visited on black school children by virtue of their being assigned to the segregated schools was so great that the damage inflicted would be unlikely to ever be undone.⁶² The harm that was inflicted on these school children was the psychological harm of classification. "Wait," you are undoubtedly thinking, "isn't that the harm that Homer Plessy was complaining about?" Not exactly, and here it gets a little dicey, because context matters. *Brown v. Board of Education* was saying separate is not equal in the provision of public education. But it was not really the separateness; it was the state classifying students by race in order to distribute educational resources unequally that was the constitutional sin, but by locating the inequality in the harm of separateness, the Court could yoke resources to the harm of classification. The institutional setting made a constitutional difference: a railroad car is not a school house.

⁵⁹ See TUSHNET, *supra* note 56, at 89, 95.

⁶⁰ *Id.* at 109, 113, 136.

⁶¹ See Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁶² See *Brown*, 347 U.S. at 494.

First of all, one thing that must be appreciated is that *Brown* did not overrule *Plessy*. A subsequent case overruled *Plessy*, not *Brown*.⁶³ After all, Chief Justice Warren wanted a unanimous opinion that would not be unduly harsh to the South,⁶⁴ so to overrule *Plessy* might have been seen as going too far too quickly. Second, it may not have been purely strategic thinking that kept *Plessy* off the jurisprudential table in *Brown*. Arguably, *Brown* drew its power from its psychological ties to *Plessy*.⁶⁵ In *Plessy* the stigma was found to be self-inflicted. In *Brown*, the psychological damage was imposed by the act of segregation (or as it would be read later: classification by the state). The psychological damage thesis, which was drawn from the Clark doll studies,⁶⁶ informed much of the litigation that followed despite the criticism that was heaped on both the study and the Court's reliance on it.⁶⁷

Nonetheless, *Brown* and the social movement that both supported and produced it also generated legislative innovation, not just further litigation.⁶⁸ The social movement it represented generated the policy innovations of the Civil Rights Act,⁶⁹ the Voting Rights Act,⁷⁰ and the other federal attempts to address social inequality,⁷¹ which allow race to be taken into account. In many cases these statutes require race to be considered in order to come to terms with inequality that is the by-product of state action as well as with the lingering unfairness in the distribution of public resources. The policy innovation was to self-consciously take race

⁶³ The idea that separate is not equal sounds like it overrules *Plessy*, but *Plessy* was not explicitly overruled until the Supreme Court affirmed a district court opinion which found that *Plessy* was no longer a correct statement of the law. *Gayle v. Browder*, 352 U.S. 903 (1956), *aff'g per curiam* 142 F. Supp. 707 (M.D. Ala. 1956).

⁶⁴ DARYL MICHAEL SCOTT, *CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996*, at 133 (1997).

⁶⁵ *See id.* at 130–36.

⁶⁶ *Id.* at 122–23.

⁶⁷ *Id.* at 124, 133.

⁶⁸ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 43–45 (2d ed. 2008).

⁶⁹ Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 and 42 U.S.C.).

⁷⁰ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 42 U.S.C.).

⁷¹ SCOTT, *supra* note 64, at 139.

into account and to make decisions that would ultimately result in the diminishing significance of race as a source of social division over time.

The legislature understood that race had to be taken into account in order to craft remedies that would hold the promise of reducing the negative salience of race. This conflict between the constitutional vision of the Court on the limited context within which race could be consciously considered and that of the legislature was reflected in the backlash to the Civil Rights Movement that began almost immediately in the South. The doctrinal expression of it is found in the savage conflict over the “State Action Doctrine” that marked the South with original sin, but made the North, if not innocent, at least not stained at the creation.⁷² The backlash had its untidy elements in massive resistance and more refined forms through various kinds of legal doctrinal retrenchment.⁷³ But the most serious opening intellectual attack, one that could not be dismissed as a mere apologia for a way of life under assault, was launched at an important lecture given by an influential legal intellectual at the Harvard Law School.

I want to take you back to 1960 to revisit a famous debate between Professors Herbert Wechsler and Charles Black, Jr. Professor Wechsler delivered the Oliver Wendel Holmes Lecture at Harvard Law School,

⁷² See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (Section One of the Fourteenth Amendment prohibits “state action of a particular character . . . Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.”).

⁷³ The Court’s discussions in early equal protection cases based on race or national origin focused more on correcting social injustice rather than individual discrimination. See, e.g., *Yick Wo. Hopkins*, 118 U.S. 356, 373–74 (1886); *Civil Rights Cases*, 109 U.S. at 23–24; *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879). The analysis changed after *Korematsu v. United States*, 323 U.S. 214 (1944), when the Court stated that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” *Id.* at 216. This meant that equal protection arguments became more individualized because of the need to show both discriminatory purpose and effect on the claimant. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292, 298–99 (1987).

entitled *Toward Neutral Principles of Constitutional Law*.⁷⁴ What Professor Wechsler said in that essay was that *Brown* was not based on a neutral principal that was part of a general rule. The decision was explicable only by understanding it as an operation of political reasoning, and if this case were really about the right of association among black people or white people, it could not honestly be said that the right of association of black people and the right of association of white people were offended merely by saying that the state would provide for them separately. As in *Plessy*, the law was neutral. All the law can aspire to is neutral principles, because they can be generally applied. Their generality assures their lawfulness. And so, much to his regret, he had to conclude that *Brown v. Board of Education* was lawless.⁷⁵

The response by Charles Black, Jr., one of the great constitutional writers of all time, was the polite and technical version of “give me a break.” What he said was:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.

Here I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of “equality” is just about on a level with fiction of “finding” in the action of trover.⁷⁶

Professor Black also said that if *Brown* is, in fact, wrong, then we can be certain that the legal elite, the professionals among us, will correct the

⁷⁴ Wechsler, *supra* note 61, at 1.

⁷⁵ *Id.* at 34.

⁷⁶ Charles L. Black, Jr., *The Lawfulness of the Segregation Doctrine*, 69 YALE L.J. 421, 424 (1960).

law.⁷⁷ They will correct the problem and ultimately the law will be restored to its neutral majesty. But, of course, *Brown* was doing more than communicating a technical principle of constitutional law; the Court was trying to sketch out a vision of how we can see ourselves as a society. The idea that we were so constituted that separate could be equal was anathema to the court.

Remember, Black was on a mission. He predicted that if the Court was wrong, then the elite legal professionals would correct it and he wanted to strike the first blow in defense of its decision. That does not settle the issue, however. The question remains: was the meaning of *Brown* corrected? I suggest that the answer at the time was *no*, but in its nature legal correction is rarely an overnight event. And while Wechsler may have gotten the analysis wrong, Black got it right in more ways than even he probably wanted, as the legal profession ultimately “corrected” *Brown* in *Parents Involved in Community Schools*.

The elite legal profession did not “correct” *Brown* on their own. Instead, by the time *Parents Involved in Community Schools* was decided, the litigants stood at the head of a conservative social movement that had struggled on many fronts against the advances of the civil rights movement. One of the principal intellectual beachheads was made in taking on the notion of what constitutional equality required. Rather than opposing black gains as such, the conservative movement opposed governmental “favoritism,” and championed colorblindness as the only constitutional norm permissible. They also believed that racism was the residue of individual acts of prejudice and that racism could therefore be overcome through a deep commitment to individual equality of opportunity. The government could not address societal or systemic discrimination. This movement provided the foundations for the legal arguments that won the day in *Parents Involved in Community Schools*, but it did so by filling in the white spaces left by *Brown* and, as Professor Bobbitt suggested, became the most obdurate part of the opinion because, in some sense, it was the least argued.⁷⁸

⁷⁷ *Id.* at 421.

⁷⁸ The part that was not argued was the question of whether integration for purposes of equal educational opportunity is constitutionally required, rather than merely permitted. This fight began to be lost certainly by *Milliken v. Bradley*, 418 U.S. 717 (1974).

Propelled by this social movement of intellectuals, legal advocates, and Republican Party activists and legitimized by its argument, prominent members of the legal profession began to say that what *Brown* was talking about was not equality but classification. Although separate was not equal, it was separate that does the work, not equal. Separation, they concluded, has to be understood as being about illegitimate classification of students by race. The injury suffered by the children of white parents in Louisville and Seattle in 2007 is exactly the same as the injury that was suffered by the black children in Topeka, or the black children in Austin, or the black children in Montgomery in 1954. This is the neutral understanding of that case. So, perhaps Black was right, and the legal professionals have, in fact, come back and “fixed” the technical misunderstanding that existed after *Brown*. If they have, I suggest we are still in for more technical corrections, not by virtue of arguments you can make under the law, but because, in fact, we got to where we are under the influence of a social movement that pressed us into understanding separate but equal to be about racial classifications, not about equality. If we understood it as being about equality, then the argument would have taken a different turn.

But all of that is hindsight. Should we have opposed segregation as a way to eliminate the psychological harm to the African-American students in the schools in the South or should we have focused on the importance of access to educational resources themselves? Each choice was enormously complex. The decision to take one path or another had profound implications, both for our conception of what we were doing and for the law.

Yet, looking backwards makes the issue seem over-determined. As Professor Tushnet points out, once litigation to challenge de jure segregation was undertaken as the dominant tactic, it morphed into the principal strategy for attacking Jim Crow.⁷⁹ The effect of that translation was to convert political disputes into the idiom of constitutional law. By taking a specific local material dispute for which there were distinct and contending constituencies within the Civil Rights Movement and making it stand for a larger and in some sense, neutral principle permitted the national leadership to generalize the conflict and to render it less

⁷⁹ See TUSHNET, *supra* note 56, at 164.

susceptible to the critique that the dispute was *just* politics.⁸⁰ As I have said elsewhere, “making the claim for equalization of educational opportunity into one about the correctness of government use of racial classifications . . . takes a concrete injustice (funding black schools at a lower rate than white schools) and converts it into an operating procedure that is not *essentially* connected to a correction of the complained of inequality [and] may in some important ways misstate the problem.”⁸¹ What the lawyers wanted was a decision that overruled *Plessy*. What they hoped they would get was improved schools in the bargain. What they also risked however, in addition to the alienation of the black teachers and principals in segregated schools who formed the core of the black educational establishment, was the demobilization of the activists who could have pressed harder on the equalization part of the equation to challenge more vigorously the neoconservative cultural shifts that laid the foundation for the lasting change.

The white spaces in constitutional decisions identified by Professor Bobbitt are often filled in with democratic action. This does not have to be formal democratic action, but without the capacity to participate on that level, other forms of civic action are limited. After all, blacks in the South could not vote. Thus the mobilization of the black community was a critical form of civic involvement that was a momentary (in historical terms) but absolutely vital response to political process failure. It *was* democratic action. But the institutional disability that exclusion from the political process represented meant that the sources of state power would remain off limits for most of the twentieth century and thus would access to resources for those on the losing end of the process failure. Yet, the question posed here is whether the paradox suggested by Professor Tushnet was ever resolved: Over time litigation, originally undertaken as a tactic, ultimately became the dominant strategy and may have diminished the value of other tactics, such as nonviolent direct civil disobedience.⁸² It was not just the fact of litigation by itself. It was also its focus. By focusing on

⁸⁰ See Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985); see also Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 139–40 (2007).

⁸¹ Torres, *supra* note 80, at 139.

⁸² See TUSHNET, *supra* note 56, at 164–65; Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence/Dilemma*, 91 J. AM. HIST. 92, 95–96, 117 (2004).

the question of separation, litigation as a strategy co-opted the discussion and gradually moved the conversation away from the question of substantive “equality.” To what extent, then, was the Tushnet paradox responsible for the fact that access to equal material resources, over time, lost its salience?

The strategy/tactic paradox raises a difficult set of questions. We are in constant conversation about who we are as a people and about the proper role of government. Changing that understanding—and filling in the white spaces in the ethical construction of law—is one of the effects that social movements can have. For example, the backlash to desegregation changed the background screen on which the principles of equality were being sketched out and, as a constitutional matter, were being reconceived. Thus *Parents Involved in Community Schools* can be viewed, through a technical lens, as a logical extension of *Brown*, rather than as a repudiation of *Brown*. If neutrality was the goal originally outlined by Professor Wechsler, the Roberts Court has delivered. But it was permitted to deliver on this goal, not by the arguments of the elite bar alone, as predicted by Professor Black. Instead, it is important to acknowledge the demobilization of Civil Rights Movement activists and their concomitant acquiescence to the lawyers’ focus on *Brown*’s promise of social integration. The deference of grassroots activists ultimately created a discursive vacuum dominated by the conservative social movement. That movement successfully reframed the conversation, limiting equality to an inquiry into private malice and procedural formality by the government.

The commitment to procedural formality is dispatched to answer the claims in *Parents Involved in Community Schools*: what are the harms sought to be avoided? The harm in *Parents Involved in Community Schools v. Seattle School District No. 1* was the classification of students by race.⁸³ There was no proof of empirical harm that was done to the students or the community. The harm was the racial classification of students by the state. The harm was that which the classification itself imposed, even if the net result was to improve the delivery of public educational services. The Roberts Court’s claim that it was affirming *Brown* can only be understood in terms of this psychological damage thesis. Yet here those suffering the stigma of race were the white students who did not get their first choice of kindergarten assignments.

⁸³ 127 S. Ct. 2738, 2746 (2007).

What this decision by the Roberts Court illustrates is an understanding of *Brown* as a technical matter of “neutral principles,” whereas the Civil Rights Movement (and not just the elite elements of it) understood *Brown* to stand for an affirmation of equality in social life, not just neutrality in civic life.⁸⁴ This difference in understanding is crucial to the cases we are examining, because they all go to the heart of what it means to be a full member of the political community. In a democracy the legitimacy of the political community is critically tied to the quality of the consent of its members. However, political equality is not a mere formal condition. Without the material foundations to support the possibility of economic and social equality, political equality withers to a mere husk.⁸⁵

The snake in the garden of American constitutional life was slavery. If the Constitution did not provide for the elimination of slavery through the ordinary working of law, or if it contemplated an extra-legal attenuation of the institution, the only way slavery could be excised from our national life as a constitutional matter was through amendments to the basic document that would alter its status as a protected (if regional) economic arrangement.⁸⁶ Yet the machinery of the Article V amendment process was, by design, difficult to exercise where it implicated basic social arrangements, even those that were at odds with otherwise generally applicable legal principles that would seem to be at the core of the consent community that conferred legitimacy on the basic document itself. In the end the constitutional accession to slavery had to be amended, as I discussed earlier, through the Civil War.⁸⁷

⁸⁴ See Martin Luther King, Jr., Speech at Holt Street Baptist Church, Montgomery, Alabama (Dec. 5, 1955), in *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 44, 45* (Clayborne Carson et al. eds., 1987) (“If we are wrong, then the Supreme Court of this Nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong.”).

⁸⁵ See generally William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999).

⁸⁶ U.S. CONST. art. IV, § 2, cl.3, repealed by U.S. CONST. amend. XIII, § 1.

⁸⁷ Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1746 (2007). Lincoln’s Second Inaugural rhetorically captured the inevitability of this conflict and his biblical references underlined the ways in which the constitutional tension and contradiction was bred in the bone. Abraham Lincoln, U.S. President, Second Inaugural Address (March 4, 1865), in *LEADING AND LEADERSHIP* 168, 168–70 (Timothy Fuller ed., 2000).

By disapproving the act of secession, which ought of course, to be permissible in any voluntary combination, the federal union not only invited the people into the law interpretation business of deciding whether the Constitution permitted slavery. The Civil War also challenged the idea of legitimacy through consent. It certainly raised profound issues about the nature of political legitimacy. If our republic really is a community of consent, secession ought to be permissible. But what the Civil War settled was that the Union was indissoluble, consent once given could not be revoked, because the legitimacy of each had to be endorsed by the other, and the institution of slavery would be eliminated by constitutional amendment that was written through force of arms. It also meant that the consent community could be enlarged by fiat. Consent could be presumed to be an unspoken but necessary condition precedent. Consent could not be withdrawn, but it could be compelled.

The Roberts Court is acting on the assumption that ex-slaves presumably “consented” to become citizens under the Constitution and by this “consent” agreed not to be treated preferentially on the basis of race despite their prior condition of servitude. For Roberts, the Civil War Amendments disabled the government from doing more to equalize the conditions of the newly freed slaves. What blacks consented to after the Civil War was civic equality and nothing more.

Yet, an alternative reading of the Civil War Amendments suggests that they were as much about human rights as they were about civic equality. How else can you explain section one of the Fourteenth Amendment? There is a doctrinal consistency in the Roberts’ position, one that lawyers and logicians can appreciate, but there is a social disjunction that creates a kind of cognitive dissonance. The “expressive” harm of classification has been deemed more invidious than the substantive harm of actual resource inequality. The legacy of slavery and Jim Crow has been erased by the Court’s interpretation of the Fourteenth Amendment. In the absence of a mobilized consent community on the left, and enabled by the activism on the right, the Court erases the white spaces in *Brown*, which becomes a guarantee of neutrality for the government and nothing more.

There is also a pinched view of the meaning of consent behind Roberts’ theory, and consent is at the heart of legitimacy of constitutional democracy, especially where consent has to be presumed. The mythology of consent is what the Court must rely on to justify its conclusions to those who are excluded by the structure of politics. The community of consent is what undergirds the legitimacy of the Court’s role as the principal expositor of constitutional meaning. Yet, it is critical to understand that the idea of consent contained in this mythology is one that depends on your

having your interests represented by others. This is true whether or not you were excluded from the consent community at the time of the ratification of the constitutional agreement, even if you are never permitted to review the conditions precedent to joining the community. And perhaps especially even if you are consistently represented by those you vote against after you have consented to participate. Thus while consent might be likely, it ought not to be or have been lightly construed.

V. INDIAN LAW

Because this article involves more than just the evolution of the law of race relations, I want to turn to other examples of the process of social movement and the ethical construction of law as I have described it up to this point. The examples that come most readily to hand are from Indian law, property law, and environmental law. While federal Indian law is a mystery to most people, I think that it is critical for understanding our Constitution, both normatively and structurally.

Recall now our brief discussion of the Fourteenth Amendment. One of the rights that flowed from that amendment was birthright citizenship.⁸⁸ How does the alchemy of birthright citizenship work? As the Court points out in *Elk v. Wilkins*.⁸⁹

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which “no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;” and “the Congress shall have power to establish an uniform rule of naturalization.” [U.S. CONST. art. 2, § 1; art. 1, § 8]. By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this [C]ourt, as to the citizenship of free

⁸⁸ See U.S. CONST. amend. XIV, § 1 (“All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”).

⁸⁹ 112 U.S. 94 (1884).

negroes ([*Dred Scott v. Sandford*, [60 U.S. (19 How.) 393]); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside.⁹⁰

As suggested earlier, this only raised additional questions concerning the consent community that underlie the premises of constitutional legitimacy. The Civil War Amendments were designed to address the problem of incorporating millions of former slaves into the polity (they were already counted for apportionment purposes to protect the prerogatives of the southern states, but now they would be members of the political community).⁹¹ How were these amendments supposed to work for Indians? The tribes represented a complex and vexing set of constitutional problems. This is what the Court said in *Elk*:

“They” (the Indian tribes) “may, without doubt, like the subjects of any foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.” But an emigrant from any foreign State cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law.⁹²

⁹⁰ *Id.* at 101 (citations omitted).

⁹¹ *Cf.* *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2751–52 (discussing a state’s compelling interest of remedying past intentional discrimination and how “the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation”).

⁹² *Elk*, 112 U.S. at 101.

This case was about John Elk.⁹³ He was born among his people on a reservation.⁹⁴ As he grew up, he decided that he no longer wanted to live among his tribe, so he moved to Omaha.⁹⁵ He lived there for a number of years, renouncing his allegiance to his tribe and taking up the traditions and customs of the people of Nebraska.⁹⁶ After deciding that he wanted to participate in the civic life of Omaha, he tried to register to vote, but was refused.⁹⁷ Why? The answer was simple: only citizens can vote.⁹⁸

John Elk had to be stunned; was he not born within the territorial limits of the United States? And was he not born subsequent to the passage of the Fourteenth Amendment? Yes, but, he had not been born “subject to the jurisdiction of the United States.”⁹⁹ Thus he was ineligible for birthright citizenship (something the tribe itself might have been happy to hear even if John was not).¹⁰⁰ Thus his claim against the registrar of voters premised as it was on the rights guaranteed under the Fourteenth Amendment had to be dismissed.¹⁰¹ But this is not the end of the story.

If John is not a citizen by birth, then certainly he could be naturalized under the ordinary course of events.¹⁰² He could then vote and otherwise join the civic community of Nebraska. Not so fast: aliens can be naturalized, but it is not clear whether Indians are aliens because they are not foreign.¹⁰³ Indians are in a special relationship to the federal government, which can decide by treaty or statute whether a particular

⁹³ *Id.* at 95.

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.* at 96.

⁹⁸ *Id.*

⁹⁹ *Id.* at 102.

¹⁰⁰ Indians did not become citizens until 1924 with the passage of the Indian Citizenship (Snyder) Act of 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b) (2006)). This raises another question of compelled consent to membership in a polity.

¹⁰¹ *Elk*, 112 U.S. at 98, 109.

¹⁰² Admittedly, both immigration and naturalization law are notoriously complex.

¹⁰³ *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (holding that “an Indian tribe or nation within the United States is not a foreign state in the sense of the [C]onstitution”).

tribe is sufficiently civilized to be eligible for citizenship.¹⁰⁴ So by alienating himself from his tribe, Mr. Elk may have been a man without a country.

If he did not have birthright citizenship because he was not born under the jurisdiction of the United States, and he could not be naturalized in the ordinary course because he was not foreign, what else did those conditions imply? The answer requires examining both of those claims. First, by being born on a reservation he was born subject to the jurisdiction of the tribe and according to the Court not subject to the jurisdiction of the United States and thus not subject to the jurisdiction of the state of Nebraska.¹⁰⁵ Justice Marshall declared in *Cherokee v. Georgia* that Indians were not foreign sovereigns, for purposes of original jurisdiction of the Supreme Court, but were instead domestic dependent sovereigns,¹⁰⁶ as domestic dependent sovereigns tribes were not foreign in a constitutional sense. Since Indians were not foreign in a constitutional sense, then people who are born subject to tribal jurisdiction were not born under the jurisdiction of the United States, but they were also not born subject to a foreign jurisdiction. So John Elk could not be naturalized under ordinary immigration and naturalization laws, and he could not be a citizen by virtue of having been born in Nebraska, since the Fourteenth Amendment did not confer state citizenship onto people like Elk.

But what does the situation that John Elk found himself in say about the nature of the sovereignty retained by the tribes? If the tribe is sovereign, then you would naturally expect the tribe to be able to exclude the state and its processes, because even though the reservation may be within the territorial boundaries of the state, they are not technically within the legal boundaries of the state. *Worcester v. Georgia* stands for that proposition.¹⁰⁷ The elder Justice Marshall said that in Indian country there was only tribal jurisdiction and federal jurisdiction.¹⁰⁸ State jurisdiction

¹⁰⁴ See R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 188–94 (2003).

¹⁰⁵ *Elk*, 112 U.S. at 94, 109.

¹⁰⁶ *Cherokee Nation*, 30 U.S. at 17.

¹⁰⁷ 31 U.S. (6 Pet.) 515 (1832).

¹⁰⁸ *Id.* at 561.

can exist within Indian country only at the sufferance of the federal government.¹⁰⁹ Treaties outline that relationship very clearly.¹¹⁰ The jurisdictional structure that kept John Elk from voting and denied him birthright citizenship and membership in the polity defined a very clear, if unstable, tri-partite federal structure that was not rewritten in the blood of the Civil War, but had been written in the blood of numerous pre- and post-colonial wars culminating with the termination of the treaty making power in 1871.¹¹¹

Yet the instability of that structure is apparent both in the vivid history of the western expansion and in the dry precincts of Supreme Court doctrine.¹¹² If the tri-partite federalism described above ever had any reality, even at the time Justice Marshall announced it, it clearly has none now. Tribal sovereignty is something quite unlike federal or state sovereignty. What is it, and how did it get to be what it is? What we will see is that, as in the evolution of the principle in *Brown*, the doctrine evolved to fit the material circumstances and the political realities of popular and elite resistance. A recent case (and almost any of the recent cases could have been randomly chosen) illustrates this point.

A fellow named Floyd Hicks, a member of the Fallon Paiute-Shoshone Tribes of western Nevada, living on the Tribes' reservation, was suspected of having killed, off the reservation, a California bighorn sheep, a gross misdemeanor under Nevada law.¹¹³ In order to investigate the possible crime, a state game warden obtained a search warrant from state court that contained the following proviso: "SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.*, Treaty with the Cherokees (Treaty of Hopewell), U.S.-Cherokee Nation, art. III, Nov. 28, 1785, 7 Stat. 18, 19.

¹¹¹ FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES 289 (1994).

¹¹² There are at least seven distinct periods of federal policy toward Indian tribes. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 11–33 (4th ed. 2004). However, because ours is a precedent driven system, the case law, even with the application of canons of construction designed to favor tribes, cannot, as Isaiah Berlin put it in a different context, make anything straight from the crooked timber of their reasoning. *See generally* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY (Henry Hardy ed., Alfred A. Knopf, Inc. 1991) (1959).

¹¹³ *Nevada v. Hicks*, 533 U.S. 353, 355–56 (2001).

THE FALLON PAIUTE-SHOSHONE TRIBES.”¹¹⁴ The state court judge felt that the tribal-court authorization was necessary because “[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation.”¹¹⁵ After obtaining a search warrant from the tribal court, the search was conducted by the game warden accompanied by a tribal police officer and it yielded no evidence of a crime.¹¹⁶

While it is unclear what Floyd did to make people mad at him, about a year later he was once again accused of having an illegal bighorn sheep head in his home.¹¹⁷ The Game Warden again got a search warrant, although this time it did not contain the proviso directing him to get tribal court consent.¹¹⁸ Nonetheless, he sought approval from the tribal court, searched Hick’s home, and again came up empty.¹¹⁹

Because he claimed that his house and his sheep heads had been damaged during the search, and that the second search exceeded the bounds of the warrant, Mr. Hicks sued the Tribal Judge, the tribal officers, the state wardens in their individual and official capacities, and the State of Nevada in the Fallon Paiute-Shoshone Tribal Court.¹²⁰ He alleged “trespass to land and chattels, abuse of process, and violation of civil rights—specifically, denial of equal protection, denial of due process, and unreasonable search and seizure,”¹²¹ each remediable under 42 U.S.C. § 1983.¹²² As the case unfolded, the only claims that remained were those against the state officials in their individual capacities.¹²³

The Tribal Court held that it had jurisdiction over the claims, and that holding was affirmed by the Tribal Appeals Court.¹²⁴ On an appeal to the Federal District Court, the district court held (as the existing precedent would have suggested) that the state officials would have to exhaust any claims challenging jurisdiction, including claims of qualified immunity, in

¹¹⁴ *Id.* at 356.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 356–57.

¹²² *Id.* at 357 (citing 42 U.S.C. § 1983 (2000)).

¹²³ *Id.*

¹²⁴ *Id.*

tribal court.¹²⁵ An appeal to the Ninth Circuit was unavailing: “The Ninth Circuit affirmed, concluding that the fact that respondent’s home is located on tribe-owned land within the reservation is sufficient to support tribal jurisdiction over civil claims against nonmembers arising from their activities on that land.”¹²⁶ If the analysis that the court so abstractly announced in *Elk* were applicable, none of this would be surprising. Normal ideas of jurisdiction would prevail and all would be right with the world. The idea of place seemed dispositive to the Ninth Circuit. And while locus is not the sole determinant of jurisdiction,¹²⁷ it does create strong presumptions.

Here though the Supreme Court thought the question was more nuanced. It was not just whether the tribe had jurisdiction to adjudicate the case, because its power to adjudicate was premised either on its power to regulate (its legislative jurisdiction) or on some special grant of jurisdiction that flowed from the federal government. To Mr. Hicks the case seemed simple. Can the tribal court adjudicate a tort claim occurring on the reservation regardless of who commits the tort? Put another way, if an Oklahoman comes into Texas and commits a tort, do Texas courts have authority to adjudicate the claim brought by the injured Texan against the marauding Sooner? There may be defenses to the claim, but the court gets to determine the validity of those defenses. Not in this case, however. As Justice Scalia noted:

“As to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction . . .” That formulation leaves open the question whether a tribe’s adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction. We will not have to answer that open question if we determine that the Tribes in any event lack legislative jurisdiction in this case. We first inquire, therefore, whether the Fallon Paiute-Shoshone Tribes—either as an exercise of their inherent sovereignty, or under grant of federal authority—can

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999), *rev’d*, 533 U.S. 353 (2001)).

¹²⁷ *See, e.g., Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974).

regulate state wardens executing a search warrant for evidence of an off-reservation crime.¹²⁸

Now reconsider *Elk*. In that case, there was a fellow who left the reservation, wanted to become a citizen, and could not become a citizen. *Worcester* says that there is no state jurisdiction, and *Elk* says there is no Fourteenth Amendment federal jurisdiction. That would seem to make the reservation sovereign territory able to regulate activities that occur within its boundaries regardless of who the actor is.¹²⁹ On what theory are state officials immune from suit in tribal court for the tort they commit when they damaged Mr. Hick's house? There are at least two theories. One is that the processes of the state courts extend to every inch of territory within the state's boundaries except where the federal government has acted to exclude the state. Second, tribal courts are not courts of general jurisdiction, and so they cannot entertain a Section 1983 suit.

So how did we get here? Well, if you ask what sovereignty is about, one question you have to ask is: from whom does sovereignty derive? Answering that question requires examining what I call the "community of consent."¹³⁰ The community of consent, for constitutional purposes, means that sovereignty arises at least as a matter of a popular sovereignty, as a concept, by the people consenting to give up some of their power to the government in order to constitute a government. The powers exercised by the tribes were not constituted that way. But the mutual recognition contained in the community of consent that is at the heart of the Constitution and the union is also at the root of the retained sovereignty of the tribes.

Let me explain. The Treaty Clause of the Constitution permits the President to deal with the tribes through treaties, and treaties then have a status equal to the Constitution.¹³¹ They are more than ordinary statutes. But beyond that, what is the meaning of a treaty? Why would tribes want treaties? There is at least one simple reason. Regardless of what a treaty says, when you sign a treaty with me, what you are doing is agreeing that I

¹²⁸ *Hicks*, 533 U.S. at 357–58 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)) (footnote omitted).

¹²⁹ I recognize that I am leaving out a lot of history that makes the reservations anything but hermetically sealed territorial areas.

¹³⁰ See also Guinier, *supra* note 4, at 48.

¹³¹ U.S. CONST. art. II, § 2, cl. 2.

have the power to bind my community. That means that it is a separate political community, just as the President's agent has the power to bind his political community. Thus treaties were the mutual recognition of the existence of separate and preexisting political communities. Many tribes actually sought treaties.¹³² Moreover, until about 1871, tribes were a formidable military opponent in the United States.¹³³ One reason the United States wanted treaties was to end warfare.¹³⁴ But the treaties, the mutual recognition, created spheres of sovereignty.

However, tribal sovereignty is eroded by virtue of the following construction: the treaties have to be understood in a way that is consistent with the tribes' status as dependent domestic nations.¹³⁵ That construction is neutral as to all tribes, regardless of treaty; it is a formulation that elides all of the tribal differences and creates a kind of a false concreteness. It sounds as though "consistent with their domestic dependent status"¹³⁶ is self explanatory. But of course, it is not at all clear. In *Hicks*, the Court, citing *Fort Leavenworth Railroad Company v. Lowe*,¹³⁷ says that if the state process applies anywhere, it applies everywhere within the state.¹³⁸ Of course, *Fort Leavenworth Railroad Company* was not an Indian law case but dealt with the creation of a federal enclave and the deal that Kansas struck with the federal government in exchanging the land;¹³⁹ however, this is just one of many examples of cases coming to stand for things that they did not decide. That was the point of my discussion of *Brown*.¹⁴⁰ The changed understanding of the meaning "consistent with their domestic dependent status" is part of American western history, not a

¹³² PRUCHA, *supra* note 111, at 2–3.

¹³³ *See id.* at 6, 289 (discussing how tribes were once a formidable enemy to the United States, but after gaining an overwhelming position of strength in negotiations, the United States ended the practice of making treaties with tribes in 1871).

¹³⁴ *Id.* at 3.

¹³⁵ *Id.* at 2–7 (describing how treaties with tribes are fundamentally different from ordinary treaties).

¹³⁶ *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (characterizing "Indian tribes as domestic, dependent nations").

¹³⁷ 114 U.S. 525 (1885).

¹³⁸ *Nevada v. Hicks*, 533 U.S. 353, 364 (2001) (citing *Fort Leavenworth R.R. Co.*, 114 U.S. at 533).

¹³⁹ *Fort Leavenworth R.R. Co.*, 114 U.S. at 528.

¹⁴⁰ *See supra* Part III.

legal formulation. So the justification for the characterization by the federal courts of these tribal courts as incapable of adjudicating those causes of action given over to courts of general jurisdiction is really part of the Court's characterization of tribes as not quite civilized enough to exercise the jurisdiction that courts of general jurisdiction are ordinarily capable of exercising. This is the real meaning of the application of the *Montana* jurisdictional distinction.¹⁴¹

Hicks was the result of a changed understanding of the agreement that was reached between the tribes and the federal government. There is no federal statute that was implicated; it was, charitably, a judicial flaw. It could also be understood as the legal working out of changed social understanding, not just of the relationship of tribes as political bodies to the United States, but also of the changed understanding of the relationship of Indians to their tribes and to the non-Indian world that surrounds them. Sovereignty thus has no fixed meaning though it is a legal idea. It is a legal idea in process. A couple of other examples help illustrate this point.

In *Plains Commerce Bank v. Long Family Land and Cattle Co.*,¹⁴² the Supreme Court held five to four that a tribal court did not have jurisdiction over a discrimination tort claim against a South Dakota bank brought by Ronnie and Lila Long, an Indian couple, and their company, Long Family Land and Cattle Company, regarding the sale of land the bank owned as the result of a defaulted loan.¹⁴³ Although the Court's opinion makes clear that a discrimination suit cannot be brought against a non-Indian bank in tribal court for selling land it owns on a reservation to non-Indian purchasers,¹⁴⁴ it does not resolve larger questions about the intersection of federal banking law and *Montana v. United States*' limited grant of tribal jurisdiction over consenting non-members,¹⁴⁵ nor does it address the limits of tribal tort jurisdiction stemming from contracts with non-members generally.

The land at issue in *Plains Commerce Bank* is on the Cheyenne River Sioux Indian Reservation.¹⁴⁶ Ronnie Long's parents, one of whom was a

¹⁴¹ *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

¹⁴² 128 S. Ct. 2709 (2008).

¹⁴³ *Id.* at 2714–16, 2718–27.

¹⁴⁴ *See id.* at 2719.

¹⁴⁵ *Montana*, 450 U.S. at 565.

¹⁴⁶ *Plains Commerce Bank*, 128 S. Ct. at 2714.

tribal member, used the land at issue in 1989 as collateral for a loan to the Long Company, a fifty-one percent Indian owned corporation.¹⁴⁷ By the mid-1990s, the corporation was having financial trouble, and following the death of Ronnie Long's father, Ronnie and Lila Long negotiated a new loan contract with the bank in 1996.¹⁴⁸ The Longs deeded the land over to the bank to prevent foreclosure and then leased it back for two years with an option to purchase the land at the end of the lease in 1998.¹⁴⁹ During the negotiations, the Longs claim that the bank made and then rescinded an offer to allow the Longs to purchase the land with a twenty-year loan instead of paying the full purchase price at the end of the lease.¹⁵⁰ The bank allegedly said that it was forced to change the terms of the offer because of the risk that the transaction would constitute consent to tribal court jurisdiction to resolve any disputes arising out of the transaction.¹⁵¹ These negotiations, and the bank's stated reason for changing the loan terms, were the basis for the Long's discrimination claim against the bank.¹⁵²

The Long Company's finances became even more dire during the winter of 1996 to 1997 when they lost a significant portion of their cattle herd during blizzards.¹⁵³ Because of these losses, they were unable to exercise their option to purchase the land they were leasing from the bank when the lease expired in 1998.¹⁵⁴ The bank sold the land in 1999 to non-Indians.¹⁵⁵ The terms of the loan offered to the non-Indian purchasers were more favorable than the terms offered to the Longs.¹⁵⁶ The Longs refused to vacate a portion of the land even after it had been sold, and the bank sued in state court and in tribal court to evict the Longs.¹⁵⁷ The Longs sued the bank in tribal court in 1999, asserting both contract and tort claims.¹⁵⁸

¹⁴⁷ *Id.* at 2728 (Ginsburg, J., dissenting).

¹⁴⁸ *Id.* at 2715 (majority opinion).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 2715–16.

¹⁵³ *Id.* at 2715.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2716.

¹⁵⁷ *Id.* at 2715.

¹⁵⁸ *Id.*

The bank argued that the tribal court did not have jurisdiction over any of the claims, but the tribal court allowed the suit to go forward, resulting in a \$750,000 award to the Longs and an opportunity to purchase the portion of the land that they had refused to vacate, “effectively nullifying the Bank’s previous sale to non-Indians.”¹⁵⁹ The tribal court’s logic in finding jurisdiction was the bank’s “consensual relationship with the Longs and the Long Company.”¹⁶⁰ The bank appealed that jurisdictional finding to the United States District Court for the district of South Dakota, which granted summary judgment to the Longs, citing the consensual relationship between the Longs and the bank.¹⁶¹ The Eight Circuit affirmed that decision, noting that the discrimination claim “arose directly from their preexisting commercial relationship with the bank.”¹⁶² Only the torts claim was at issue before the Supreme Court.¹⁶³

Prior to reaching the question of whether the tribal court had jurisdiction to adjudicate the discrimination claim, the Court also addressed the Longs’ claim that the bank lacked standing to challenge the tribal court’s decisions, raised for the first time in its briefs to the Court.¹⁶⁴ The Longs argued that the bank lacked “injury in fact,” a necessary element to establish standing.¹⁶⁵ Both the majority¹⁶⁶ and the dissent¹⁶⁷ rejected the Longs’ argument. In so doing, the majority rejected the Longs’ claim that the \$750,000 damages award was “in fact premised entirely on their breach-of-contract rather than on their discrimination claim” because they had not sought compensation as a remedy for the discrimination claim, but rather the opportunity to purchase the land from the banks on the terms it had offered to non-Indians.¹⁶⁸ The majority noted that the jury verdict form allowed the jury to award a general verdict for damages on all of the

¹⁵⁹ *Id.* at 2716.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F. Supp. 2d 1070, 1077–78, 1080–81 (D.S.D. 2006), *aff’d*, 491 F.3d 878 (8th Cir. 2007), *rev’d*, 128 S. Ct. 2709 (2008)).

¹⁶² *Id.* (quoting *Plains Commerce Bank*, 491 F.3d at 887).

¹⁶³ *Id.* at 2714.

¹⁶⁴ *Id.* at 2716.

¹⁶⁵ *Id.* at 2717.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2727 (Ginsburg, J., dissenting).

¹⁶⁸ *Id.* at 2717 (majority opinion).

Longs' claims, including the discrimination claim, so it was impossible to rule out the possibility that the jury had awarded damages for that claim as well.¹⁶⁹

In addressing the jurisdictional issue, Chief Justice Roberts' opinion for the Court looked to *Montana v. United States*,¹⁷⁰ which has come to be regarded as a general rule that tribes do not have the authority to adjudicate disputes involving non-members that arise on reservations, even on land owned by Indians or by the tribe itself.¹⁷¹ As the Court noted in *New Mexico v. Mescalero Apache Tribe*,¹⁷² originally, *Montana* was understood to be itself an exception to a general rule of tribal sovereignty over anyone on the reservation: "*Montana* concerned lands located within the reservation but *not* owned by the tribe or its members."¹⁷³ Over time, however, *Montana* has come to stand for the proposition that tribes generally may not regulate the behavior of non-members on tribal land regardless of who owns it.¹⁷⁴ Citing *Strate v. A-1 Contractors*,¹⁷⁵ the Court noted that "[t]his general rule . . . is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians."¹⁷⁶

Montana created two exceptions to the now general rule that "tribes do not . . . possess authority over non-Indians who come within their borders."¹⁷⁷ The first exception is for the regulation of consensual relationships between members and nonmembers: "[a] tribe may regulate,

¹⁶⁹ *Id.*

¹⁷⁰ 450 U.S. 544 (1981).

¹⁷¹ CANBY, JR., *supra* note 112, at 77–78 (citing *Montana*, 450 U.S. at 564–66).

¹⁷² 462 U.S. 324 (1983).

¹⁷³ *Id.* at 330–31; ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 299 (5th ed. 2007). As Clinton, Goldberg, and Tsosie note, at the time, it appeared that "the *Montana* case was originally conceived of only as a limitation on tribal regulation of nonmember activity on non-Indian owned land within the reservation." CLINTON ET AL., *supra*, at 299.

¹⁷⁴ *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (holding that *Montana* applies to jurisdiction over nonmembers regardless of who owns the land on which the activities at issue take place).

¹⁷⁵ 520 U.S. 438 (1997).

¹⁷⁶ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2719 (2008) (citing *Strate*, 520 U.S. at 446).

¹⁷⁷ *Id.* at 2718.

through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”¹⁷⁸ The second exception gives a tribe “civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁷⁹ In analyzing the Longs’ discrimination claim against the bank, the Court held that neither exception applied.¹⁸⁰

The first *Montana* exception cannot justify tribal court jurisdiction under these circumstances, the Court held, because the bank would not have anticipated that their history of contractual relationships with the Longs would subject them to torts liability stemming from the sale of land the bank owned in fee simple to a non-Indian.¹⁸¹ Nor could the second *Montana* exception apply because the land in question “ha[d] already been alienated from the tribal trust. The tribe cannot justify regulation of such land’s sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to *be* tribal land.”¹⁸² Where land has already passed out of Indian hands, the Court said resale does no additional harm to the tribe, and the tribe cannot justify blocking, reversing, or even scrutinizing a sale by reference to any harm it would do to “the economic security, or the health or welfare” of the tribe.¹⁸³

According to the Court, because the land at issue had already passed from Indians to non-Indians, the tort claim brought under tribal law “operates as a restraint on alienation” by impermissibly limiting the rights of a non-Indian defendant to sell land owned in fee simple on a reservation.¹⁸⁴ For the majority, how the bank came to own the land and its connection to the Long Corporation was essentially irrelevant to the jurisdictional question. Once the land was owned in fee simple by a non-Indian, the tribe did not have the authority to adjudicate disputes arising

¹⁷⁸ *Montana v. United States*, 450 U.S. 544, 565 (1981) (citations omitted).

¹⁷⁹ *Id.* at 566 (citations omitted).

¹⁸⁰ *Plains Commerce Bank*, 128 S. Ct. at 2720.

¹⁸¹ *Id.* at 2724–26.

¹⁸² *Id.* at 2723 (emphasis in original).

¹⁸³ *Id.* at 2726–27.

¹⁸⁴ *Id.* at 2721.

from the sale of the land. This is the fundamental difference between the majority on the one hand and the dissent and the Eighth Circuit's decision below on the other.

The majority conceptualizes the series of interactions between the Longs, the corporation, and the bank as totally unrelated to the subsequent sale of the land to non-Indians:

The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions . . . [b]ut there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple.¹⁸⁵

The irony here, of course, is that the very reason the bank withdrew the offer of more favorable terms was the “possible jurisdictional problems’ posed by the Long Company’s status as an ‘Indian owned entity on the reservation.’”¹⁸⁶ The bank not only anticipated tribal jurisdiction—it penalized the Longs for it. Nevertheless, the majority held a possible tribal right to regulate the actual transactions between the Longs and the bank does not carry with it any authority to prevent the bank from discriminating against the Longs as Indians and tribal members during the course of their business relationship.¹⁸⁷ Apparently, while completed transactions may lead to tribal jurisdiction, attempted transactions or negotiations about a transaction cannot be regulated by the tribe.

Both the dissent and the Eighth Circuit’s opinion viewed the entire course of dealings between the bank, the Longs, and the corporation, as well as the involvement of the Bureau of Indian Affairs and the tribe in negotiating the deal, as the relevant set of facts to determine whether the bank consented to tribal tort jurisdiction for discrimination.¹⁸⁸ Viewed against the backdrop of the entire relationship, the dissent and the Eighth

¹⁸⁵ *Id.* at 2725.

¹⁸⁶ *Id.* at 2731 (Ginsburg, J., dissenting) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 882 (8th Cir. 2007), *rev'd*, 128 S. Ct. 2709 (2008)).

¹⁸⁷ *See id.* at 2720 (majority opinion).

¹⁸⁸ *Id.* at 2728–29 (Ginsburg, J., dissenting); *Plains Commerce Bank*, 491 F.3d at 886–88.

Circuit's opinion found that the bank had consented to jurisdiction.¹⁸⁹ The dissent adopted the Eighth Circuit's conception of the case—it is not about a sale of land on a reservation owned by a bank to non-Indian purchasers, but about “the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.”¹⁹⁰

Although the majority is unequivocal in rejecting tribal jurisdiction on these facts, the rule stated is so narrow that it leaves significant unresolved questions about tribal jurisdiction over torts committed by nonmembers. *Strate* already established that torts committed by non-members against non-members on the reservation that are not directly connected to the relationship with the tribe or with tribal members are not subject to tribal jurisdiction.¹⁹¹ In *Strate*, the non-Indian defendant construction company was sued for negligence in a tribal court by a non-Indian plaintiff for causing a traffic accident while driving to a construction site on the reservation on a public highway.¹⁹² The Court held that merely being on non-Indian land within a reservation in connection with performance of a contract, as the construction company defendant was in *Strate*, did not create consensual jurisdiction over a non-Indian defendant.¹⁹³ *Plains Commerce Bank* further restricts tribal jurisdiction over torts committed by non-Indians against Indians, but does not address what would happen when a non-Indian committed a tort on the reservation during the direct performance of a contract on a reservation. For instance, what if the construction company defendant from *Strate*, which had a contract with a tribe to build on a reservation, had, in the course of building the structure, negligently performed its contractual duties resulting in injury to tribal members?

Although *Plains Commerce Bank* eroded Indian jurisdiction and hinted that there may be further erosions to come, it would not apply to these facts. By reframing the issue so narrowly in stating that the main issue is

¹⁸⁹ *Plains Commerce Bank*, 128 S. Ct. at 2728 (Ginsburg, J., dissenting); *Plains Commerce Bank*, 491 F.3d at 888.

¹⁹⁰ *Plains Commerce Bank*, 128 S. Ct. at 2727 (Ginsburg, J., dissenting) (quoting *Plains Commerce Bank*, 491 F.3d at 887).

¹⁹¹ *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997).

¹⁹² *Id.* at 443.

¹⁹³ *Id.* at 457.

simply whether tribes have jurisdiction over torts arising from sales of land by non-Indians to non-Indians and ignoring the broader context of the Longs' relationship with the bank, the Court refused to address the broader question of whether a tribe can ever have jurisdiction over torts committed by non-members. Although ignoring the course of dealing between the Longs and the bank was detrimental to the Longs, it may have also prevented the Court from placing even more restrictive limits on tribal courts' power to adjudicate cases involving non-Indian defendants. In fact, some commentators believe that *Montana* will morph into a civil version of *Oliphant v. Suquamish Indian Tribe*,¹⁹⁴ which held that Indian tribal courts do not have jurisdiction over non-Indian defendants in criminal cases,¹⁹⁵ "creating the expectation that, sometime in the near future, the Court will adopt a bright-line rule eliminating civil jurisdiction over nonmembers, just as it adopted a bright-line rule in *Oliphant* eliminating criminal jurisdiction over nonmembers."¹⁹⁶ The court previously hinted at the possibility that it might hold that tribal courts never have jurisdiction over non-Indians in a footnote in *Nevada v. Hicks*,¹⁹⁷ calling it an "open question."¹⁹⁸

A similar, more subtle hint that this may be where the Court is headed appears in *Plains Commerce Bank*: "The bank *may* reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a *question we need not and do not decide*."¹⁹⁹ If such a bright-line rule is coming, the Court's narrowing of the issue in *Plains Commerce Bank* has granted tribes a temporary reprieve. The sheer illogic of the possibility that a tribe may regulate actual completed transactions between non-members and members, but cannot step in when members reject an offer that

¹⁹⁴ 435 U.S. 191 (1978).

¹⁹⁵ *Id.* at 195.

¹⁹⁶ Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 600 (2008). For an argument that the Court's jurisprudence since *Montana* should be seen as following the now rejected congressional policies of the allotment era, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

¹⁹⁷ 533 U.S. 353, 358 n.2 (2001).

¹⁹⁸ *Id.* at 358.

¹⁹⁹ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2725 (2008) (emphasis added).

discriminates against them on the basis of race or tribal membership, strongly suggests that this is where the Court is heading.

The Court was highly critical of the content of tribal law itself, which is quite peculiar given the current state of federal law and the facts that the Longs alleged. As the dissent pointed out, tribal law on racial discrimination in lending directly parallels the federal law.²⁰⁰ Although the majority called the claim “novel” and asserted that the tribal court required “the Bank to offer the same terms of sale to [the Longs] who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default,”²⁰¹ in fact, as the dissent pointed out: “The Tribal Court instructed the jury to hold the Bank liable on the discrimination claim only if the less favorable terms given to the Longs rested ‘solely’ upon the Longs’ ‘race or tribal identity.’”²⁰² Although there is no case law directly on point, this matches the Department of Justice’s position on discrimination against Indians in lending terms or refusing to lend to Indians at all to avoid tribal jurisdiction.²⁰³ Although the case did not go to trial, *United States v. Blackpipe State Bank* serves as a warning to banks that they may not discriminate against tribal members in loan terms or try to avoid subjecting themselves to tribal jurisdiction by refusing to lend to tribal members without subjecting themselves to a suit under the Equal Credit Opportunity Act and the Fair Housing Act.²⁰⁴

The real problem with the torts claim, which neither the majority nor the dissent addresses, is how a federal or tribal prohibition on discrimination against Indian borrowers can coexist with the first *Montana* exception for consensual transactions with tribal members. The *Montana* exception assumes that business transactions between the tribe or tribal members and nonmembers are consensual, presumably assuming that if a nonmember wishes to avoid tribal jurisdiction, they can simply refuse to do

²⁰⁰ *Id.* at 2732 (Ginsburg, J., dissenting).

²⁰¹ *Id.* at 2725 (majority opinion).

²⁰² *Id.* at 2731 (Ginsburg, J., dissenting) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 883 (8th Cir. 2007), *rev’d*, 128 S. Ct. 2709 (2008)).

²⁰³ Consent Decree at 2, *United States v. Blackpipe State Bank*, No. 93-5115 (D.S.D. 1993), *available at* www.usdoj.gov/crt/housing/documents/bpsbsettle.htm.

²⁰⁴ *Id.* (citing Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2006); Fair Housing Act, 42 U.S.C. §§ 3604–3605 (2000)).

business on the reservation.²⁰⁵ For many nonmembers, this is likely true. But for banks doing business in the surrounding area, refusing to make loans to residents of the reservation or refusing to accept Indian-owned tribal land as collateral violates federal law.²⁰⁶ Even if the motivation is jurisdictional and not racial, the Department of Justice's position is that seeking to avoid tribal jurisdiction is itself a violation of the Equal Credit Opportunity Act and the Fair Housing Act.²⁰⁷ Banks cannot refuse to lend to Indians, nor can they increase their prices to compensate for the perceived increased risks associated with tribal jurisdiction.

This inability to avoid consenting to jurisdiction by refusing to do business in a geographic area or to price according to differences in regulatory or adjudicatory jurisdiction is unique to Indian tribes. Banks may refuse to do business in particular states to avoid state court jurisdiction. If one state has stricter laws that create greater risks of losses for a bank, and it chooses to do business there, it may compensate for those risks by offering less favorable rates to residents of that state than to residents of other states. No federal law bars this sort of discrimination, but with Indian tribes, banks cannot avoid jurisdiction after *Blackpipe* without the possibility of subjecting themselves to investigation and suit by the Department of Justice.

Although some of the problems presented by the clash of federal lending law and *Montana's* first exception are peculiar to the intersection of banking and federal Indian law, this inconsistency is emblematic of a larger problem with tribal jurisdiction. Almost thirty years have passed since *Montana* and ten years have passed since *Strate*, yet the Supreme Court has still failed to adequately explain the limits of and justifications for tribal jurisdiction over nonmembers. The Court has gradually reduced the scope of tribal jurisdiction over nonmembers since *Montana*, and it appears that the Court may be heading towards eliminating it altogether.

What can tribes and tribal courts do in response to *Plains Commerce Bank* and the larger trend towards reducing tribal jurisdiction? To protect decisions in the short run, tribal courts should not offer the sort of general verdict damages award at issue in *Plains Commerce Bank*. If the tribal court instead asked the jury to assign damages for each claim, the Longs

²⁰⁵ *Montana v. United States*, 450 U.S. 544, 565 (1981) (citations omitted).

²⁰⁶ Consent Decree, *supra* note 203, at 2.

²⁰⁷ *Id.*

would likely not have lost their entire damages award. That way, if the federal courts continue to chip away at tribal jurisdiction, at least parts of verdicts will still stand. But the larger effort should be toward persuading Congress to clarify the scope of tribal jurisdiction as it did following *Duro v. Reina*,²⁰⁸ a case which held that tribal courts did not have criminal jurisdiction over nonmember Indians for crimes committed against Indians on the reservation.²⁰⁹ The “*Duro Fix*” legislation²¹⁰ was upheld by the Supreme Court as a valid reinstatement of tribal sovereignty in *United States v. Lara*,²¹¹ which suggests that recourse to Congress would be effective in preventing the Court from further eroding tribal sovereignty.

VI. CONCLUSION

While I have only briefly surveyed two areas of the law, I could have gone deeper in each or looked more broadly at other areas, like the women’s movement, the property rights movement, or the environmental movement to demonstrate my basic point. In a constitutional democracy the membrane separating law from politics is semi-permeable, and the process of creating both social meaning and legal meaning moves in both directions. Legal meaning creation is not solely in the province of the legal technical elite, and neither are political discourse and action separated from the social understanding that legal institutions and their processes produce. Comprehending how social movements affect our understanding of law and how law affects conceptions of the possible within social movements is only part of the puzzle. The other part, of course, is more technical. The transformation of social meaning has the effect of transforming what the technical elite thinks it is doing. That this process occurs is widely understood. How this process occurs is less widely known. What we have come to appreciate is that the dominance of social movements by lawyers and legal solutions has led to unstable change. Truly transformative change occurs only when technical legal change is accompanied by a

²⁰⁸ 459 U.S. 676 (1990).

²⁰⁹ *Id.* at 679.

²¹⁰ Pub. L. No. 101-511, 104 Stat. 1856, 1892 (codified as amended at 25 U.S.C. § 1301(2) (2006)).

²¹¹ 541 U.S. 193, 210 (2004) (holding that “the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians” and “that Congress exercised that authority in writing this statute”).

cultural shift that supports it. This is another way of saying that the people ultimately say what the law means, but the processes producing that meaning is neither fixed nor clean.