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Gerald Torres
University of Texas at Austin

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Democracy Means that the People Make the Law

Gerald Torres

Gerald Torres delivered The Robert C. Wood Lecture at the McCormack Graduate School of Policy Studies at University of Massachusetts Boston in 2006. This is his talk.

I would like to thank the Committee that selected me to be this year's Robert C. Wood Distinguished Visiting Professor. I especially want to thank Dr. Donna Haig Friedman, Dr. Françoise Carré, and Peggy Wood. I hope that I do justice to the judgment of the committee and the memory of Dr. Wood.

This is an honor I especially value because Professor Wood epitomized the ideal of the engaged intellectual. He was a man of enormous intellectual energy and curiosity and one who knew that the value of his work would be revealed in the working of society and its institutions. He believed in the power of institutions to make collective action possible, but he also believed in the power of people to make the changes in their lives that they needed to make. Through this accretion of individual and community change the institutions themselves could be transformed. He also understood the role of law in both facilitating and frustrating structural change. Remedial law was the term he used to summarize the device of the injunction as the prod for obdurate institutions whether they were school boards, city councils, federal housing agencies, or community groups themselves. So it is within that framework that I want to talk about social change, legal change, cultural change, and understanding constitutions as the current content of our collective commitment to each other as members of a political and legal community.

The University of Texas is a lovely place to teach and to live. The campus is dominated by the Tower that rises, because of the hill it sits on, higher than any other structure in Austin. If you walk out of the main entrance to the tower, you will be heading south. As you walk down the hill you move across a beautiful plaza through a mall bordered by classroom and office buildings terminating at a stairway that descends to an elegant old fountain on what used to be the southern boundary of the main campus,

Gerald Torres holds the Bryant Smith Chair in Law, University of Texas at Austin.

what we call the "forty acres." Four sculptured horses rear up and seem to be charging through the Littlefield Fountain, which is guarded by memorial statues honoring Robert E. Lee, Jefferson Davis; John Reagan, the first Railroad Commissioner of Texas and the postmaster general of the Confederate States; and Albert Sidney Johnston, the Secretary of War of the Republic of Texas, a General in the Confederate States Army and Commander of the Army of the Mississippi. Brass Memorials carved into the stone bases of the statues celebrate their lives and commemorate their deaths in defense of the Constitution.

Now, I will acknowledge reading the words on those statues with some interest. Though the memorials were constructed at some remove from actual hostilities between the Union Armies and the Armies of the Confederacy, they recount a justification for the war that was not one that I encountered in my anemic study of American history. I confess to not really thinking about what the rebellious South thought it was doing other than defending the indefensible institution of slavery. Yet as I stood there I reflected on the legends written in stone and heard the echoes of many conversations I have had with sons and daughters of the southern elite who continue to honor the blood shed by their ancestors. However much I might disagree with them, I do not think that either the memorials or these people are being disingenuous. Instead, I think that the current interpretation is both an attempt to honor those who died in defense of their homes as well as to suggest that the debate is more complicated than it seems.

The abolitionists recognized a fundamental truth about the compromises made to craft the constitution that would support the claims of the memorial inscriptions. The first constitution, that is, the pre-Civil War document, granted to a region both the authority and the right to perpetuate the institution of chattel slavery (although slavery existed in the North, as well). The states in their prerogatives would be protected and individual property claims would be defended by the document. Slavery was a reality that the framers had to accommodate if the dream of a federal union could be realized. Thus the attempts to regulate slavery beyond the agreed upon constitutional limits was understood as an assault on the basic agreement that bound the states together. Thus the war was not "about" slavery in this view; it was about the meaning of the constitutional order. The scaffolding of that order was unable to support the contradictions implicit in deals that enabled its enactment. Yet as Charles Black, one of the great constitutional lawyers of our time said: "We ought not to be too hard on those who wobbled and trembled in the awful shadow of slavery. Let the dead past bury its pitiful dead — but we ought not to leave that past buried in darkness. Nor the obligations created by past acts at the beginning of our life."[1]

In the face of that fear and trembling, the first constitution created a polity so circumscribed that most of the people subject to its authority had no say in the policies that issued from its institutions. The debates even

before the constitution was adopted suggested that limitations on the franchise, tied as they were to the legitimacy of the state, would not but create instability over time. The deaths suffered "in defense of the constitution" may have been given honorably, but the defeat of the South permitted the emergence of our second constitution. This one, as articulated by Lincoln at Gettysburg, looked back to the Declaration of Independence as our foundational source of legitimate political power and promised "a new birth of freedom."

As subtly, yet amply, demonstrated in his book *A New Birth of Freedom*, Charles Black shows us how the Civil War Amendments when harmonized with the Bill of Rights, especially the promise in the 9th Amendment that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people[.]", and the Declaration of Independence gave us a new warrant to protect human rights through the application of the legal commitments we have made to one another.[2] These protections would not emerge automatically, and there were those who would question the legitimacy of the proposed changes. But the constitution establishes, shapes, and empowers the structures of government. The transformed compact fired in the heat of the Civil War (or the war between the states or the war of northern aggression, take your pick) would have to speak directly to structures of government and to those freedoms named and unnamed to which the Constitution speaks.

That the Constitution and the other sources of our political legitimacy are *legal* documents and not essays in moral philosophy is important, because their meaning may be informed by philosophy, but their practical legitimacy is ultimately a question of law. The tools necessary for legal argument are those available for argument about what durable commitments we have made to each other. The impact of the rewriting of the Constitution after the Civil War was to change the nature of the political community, although as the *Slaughter House Cases*[3] and *Plessy v. Ferguson*[4] showed, just to take two examples, legal change unless coupled with institutional and cultural change is rarely enough. The slow unfolding of cultural and social change through the medium of law and politics is what we have been observing as the social compact has gotten remade. Yet because the new constitution and the redistribution in power that it permitted continued to deeply threaten economic and social relations quite apart from the devastation of the war, the law and its tools also became sources of resistance to the new federal constitution. Thus the legend on those statues really stated points of current opposition as much as they stated noble justifications for the carnage the nation suffered.

Those who have struggled with the promises unleashed by the slow dismantling of our version of apartheid have had to wrestle with advantage and loss both inside and outside of the law. Attempts to change this system reveal that the commands of the law, especially constitutional law, require

reasons and not just conclusions, but that the power of law comes as much from acquiescence as from the monopoly on violence that has historically defined the state. If compliance is a proxy for consent then all is well. But if it is merely a respite from an exhausting defeat, it could be the breathing space where reasoned resistance in the form of law could be constructed.

The reconstruction under state law of the machinery of racial oppression, combined with a developing mythology about a genteel southern tradition, the mythology of the lost cause, would lead over time to a construction of consent through the process of active disobedience. This was the consent of Martin Luther King, the consent to the higher sources of political legitimacy than the dictates of state law. If there existed a federal union and that union defended rights, then they were national rights, at a minimum and not those that could be overridden by parochial interests dressed up as law. The story of active, organized disobedience will come later, but suffice it to say here that the period from the Civil War to the modern Civil Rights Movement can be understood as a story of gathering resistance on both sides of the line of constitutional meaning and legitimacy: from interposition and massive resistance to mass civil disobedience in defense of the beloved community.

While we have been witnessing the current attempts to repeal the New Deal, in many ways that period stands in American life as a further articulation of the promises of national citizenship that were made through the Civil War and its immediate aftermath. The role of the government in the economy was viewed as a responsibility to all, not just to the largest economic actors. The business of America, contrary to President Coolidge, was not business, but the generation of social networks to supplement those we naturally created on our own and to insure that the great wealth the country was mining, logging, and manufacturing would redound to the benefit of all and not just a few. That the extractive nature of wealth generation in those early years of the twentieth century was tied to the natural bounty that providence had bestowed on us merely underlined the obligation of the government to create a broad path to opportunity and to promote "the general welfare."

The idea that social life and the economic relations on which it was based were beyond the scope of government powers was one of the ideological hurdles to be surmounted if the constitutional transformation initiated by the Civil War was finally to be ratified. The New Deal programs depended on the legitimate authority of the national government to address problems that were traditionally considered outside of the powers of a limited government. Yet, if the Civil War amendments did anything it was to create a basis for a statement of rights to be constructed out of the material of law. Moreover, these rights were not to be trampled by state governments, but were incidents of membership in the nation. Nonetheless, what became clear during this period was that the transformation of law as dominated by elites would occur only if those subject to the authority of the law made plain

their new understanding of what the proper role of a truly representative government was under the "new constitution."

I want switch gears here and to try to sketch out my understanding of the relationship between social change and legal change. Law functions, by and large, to slow the progress of social change. Its role is to cabin power by requiring legitimate justifications for its exercise. Constitutional practice is explicitly aimed at resisting wholesale change that is unratified in the constitutive understanding constructing the political community that is governed by it. Nonetheless, there has come to be a reliance on law to precipitate, not just validate social change. But even a cursory glance at recent history, suggests that legal change without corresponding cultural change may lead to a time of instability that opens the field for concerted political action, but will not, of itself, be transformative. I want to turn here to an essay by the late Professor Thomas Stoddard in which he sketched out the beginnings of a theoretical statement about the relations between lawmaking and social movement.[5] In many ways this work is complementary to the book by President Wood, ***Remedial Law***.[6] That book was concerned with the ways in which law was employed to move obdurate institutions, but concluded that the institutions had to change for the legal commands to have any real impact. Courts could not be administrators without the capacity to transform the institutions that were given over to their management. So the question I want to turn to is this: how do we piece together the relationship between legal change and fundamental social change? A more grand way to put it is: What is the transformative potential of legal action?

One thing seems to be clear: merely changing the rules will do nothing to fundamentally transform a society if there is no social pressure to insure that change. Similarly, the ratification of social change through altering the rules of social engagement is what Thomas Stoddard has called law making. This suggests that the legitimacy of social change really does hinge on consent even if consent is, after a fashion, the result of prolonged attempts at persuasion or achieved through some form of legitimate coercion.

According to Stoddard, law making has five general goals (1) To create new rights and remedies for victims; (2) To alter the conduct of the government; (3) To alter the conduct of citizens and private entities; (4) To express a new moral or ethical ideal or standard; and (5) To change cultural attitudes and patterns.[7] He is clear that unless each of these general goals is achieved, all that results is rule shifting. While rule shifting is not unimportant and unless the change is going to rely on some form of unsustainable coercion, the fifth goal is crucial. While I do not agree completely with his typology, it is useful to help us consider how culture might change and its role in enabling social movement to effect law making.

In this instance, the capacity of social movements and rule shifting to enable new understandings of the background narratives of social life is

critical for challenging entrenched relationships of power that are unlikely to yield easily. Thus storytelling and engaged dialog is central to the constituting of communities. It is through the constitution or reconstitution of those stories and those communities that law in its formal articulation can be changed. Perhaps more importantly it is how the underlying relationships of power can begin to be changed. Only by changing relationship in the economy of power can legal changes really reconfigure society.

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

This point is crucial, because neither just legal rule shifting nor cultural action through resistance or reframing will do the work of politics. But they are necessarily part of any political project, especially one that has as its goal a fundamental restructuring of institutions and the power represented by them. When that restructuring occurs it means that in some important sense there has been a cultural shift. This rarely occurs (with the exception of the Civil War) like the sudden shifting of tectonic plates, but more often through an episodic and gradual change in the landscape. Yet changes in the land shape the contours of life itself.

If you agree with me and with Professor Stoddard that law making requires a confluence of cultural change and rule shifting, then fights over the meaning of the Constitution can be understood as issues of concern to the many rather than just of concern to the elites or the experts. They are central because they are about the nature of our political relationship both to one another and to the state. That is, they are about the structure of the political community we will inhabit and about the obligations that arise from membership in that community. What remains important is that the

Constitution is like other legal instruments, subject to reasoned legal analysis. This is an open-ended process, but it is not unbounded, and changes in our fundamental understanding of the nature of our political commitments to one another must ultimately result in the way that what counts as reasoned legal analysis has also changed.

The debates that are current center around the text of the Constitution as a legal document and in some ways ignore its open textured quality, which preserves for the people the rights that we have always possessed. Importantly, many of the debates ignore the processes through which those rights have to be vindicated by changing many of the institutions and crabbed interpretations that have limited the scope of the binding document. The Civil War and the amendments that followed attempted to alter the nature of those commitments, and the movements for civil and economic rights of black people, women, and other subordinated communities are continued expressions of that process. Rejecting the doctrine of "originalism," which essentially holds that the Constitution only means what the drafters of the document intended (forgetting for a moment all of the attendant difficulties discerning a collective intent), modern theorists like my colleague Larry Sager in his important book, *Justice in Plainclothes*,8 demonstrates that understanding constitutional practice as a justice-seeking enterprise enlarges and enriches our understanding of our Constitutional tradition.

By suggesting that there is a minimum material content essential to the meaning of membership in the polity, the debate then shifts to what that minimum content might be. That is a good grounds for the debate since it would include the claims of many of the social movements that have so shaped our modern understanding of social life and would help explain how the way in which those movements change our understanding of belonging ultimately change the way we understand the minimum obligations of the law.

Two examples will suffice. The first comes from my home state where in the case of *Hopwood v. University of Texas*, the 11th Circuit Court of Appeals prohibited any consideration of race for admission to the University of Texas. While not ignoring the law, it was clear both to the leadership in the University at the time and to the Mexican- American and African-American members of the Texas legislature that such a rule would effectively resegregate the University. Moreover, because the University is a gateway institution, its resegration would ultimately lead to the resegreation of other important institutions in the state. Virtually all of the leadership in the state has some connection to one of the two flagship schools in Texas. What the legislature did was to respond to the challenge by committing to a different value, the value of hard work and fair play. They created what came to be called the Texas Ten Percent Plan that guaranteed to all graduates in the top 10 percent of their high school class a place in one of the flagship schools. Because Texas public schools remain

embarrassingly segregated, this meant that a large number of Mexican-American and African-American students would be eligible for admission to the school.

At UT this did two things. First, it meant that the school would remain somewhat integrated, and second, it led to an improvement of undergraduate education for all students. In order to accommodate those students who administrators feared might not be ready for a University-level education, changes were made to the freshman curriculum and advising program that have resulted in a general improvement in undergraduate education. Perhaps even more important than these changes, however, was the knowledge gained from watching these formerly excluded students excel. What it taught admissions officers and others is that perhaps we don't know all we think we know about who can succeed at a university of the quality of UT. That level of humility changed the ways in which we could appreciate the gaps in our own understanding. Yet without electoral reform, this education reform could not have occurred.

These stories illustrate that our understanding of how the polity is to be constructed, who belongs, ultimately can change the substantive content of our understanding of what we owe to each other. That is what I mean by the linkage of cultural change to rule change. Law making, in its deepest sense, is the expression of our durable commitments to one another as well as a recommitment to binding the future to our belief in democratic constitutional justice.

Notes

1. Charles L. Black, *A New Birth of Freedom: Human Rights Named & Unnamed*, (New York: Grosset/Putnam, 1997) 9.
2. Ibid.
3. 83 U.S. 36 (1871).
4. 163 U.S. 537 (1896).
5. Thomas Stoddard, "Bleeding Heart: Reflections on Using the Law to Make Social Change," *New York University Law Review* 72, 1997: 967
6. Robert C. Wood, *Remedial Law: When Courts Become Administrators* (Amherst, Mass., University of Massachusetts Press, 1990). See also, Gerald Rosenberg, *Hollow Hope* (Chicago: University of Chicago Press, 1993) which argues that courts are never the leaders in social change.
7. Thomas Stoddard, "Bleeding Heart: Reflections on Using the Law," 967.
8. Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (Austin: University of Texas Press, 2004).