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# Demosprudence in Comparative Perspective

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# DEMOSPRUDENCE IN COMPARATIVE PERSPECTIVE

BRIAN RAY\*

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## I. INTRODUCTION

Lani Guinier and Gerald Torres recently coined the term “demosprudence” to define legal practices that specifically target social movements and attempt to catalyze legal change (including constitutional change) through such movements.<sup>1</sup> Although their definition appears to allow for a wide range of lawmaking activity to fit within the rubric of demosprudence, in their initial work developing the concept both Guinier and Torres focus specifically on examples from the United States Supreme Court. Indeed, Guinier’s most developed account of demosprudence is devoted to the very specific practice of oral dissents.<sup>2</sup>

Demosprudence has sparked a debate even in its early stages of development. Gerald Rosenberg has criticized demosprudence in general, and Guinier’s account of oral dissents as a demosprudential device in particular, in a recent article that was part of an entire panel devoted to the concept and published as part of a symposium by the Boston University Law Review. In essence, Rosenberg’s critique is that political science literature has consistently shown that court decisions—even controversial majority opinions like *Roe v. Wade*,<sup>3</sup> much less oral dissents—generally have very little effect on social movements, except in very narrow circumstances, and the effect is minor compared with other influences on such movements.<sup>4</sup>

In that same issue, Guinier and Robert Post respond directly to Rosenberg.<sup>5</sup> Frederick Harris, a political scientist, offers a preliminary analysis of the precise mechanism through which oral dissents may influence social movements that can be viewed as at least a partial response to Rosenberg,<sup>6</sup> and Linda McClain connects demosprudence to several other literatures that examine the relationship between court rulings and social change.<sup>7</sup>

This article critically examines the debate over demosprudence. It adopts a comparative—specifically South African—perspective to consider what it means for a court to act demosprudentially and why the practice may have particular value in developing democracies like South Africa. Guinier connects demosprudence<sup>8</sup> to

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<sup>1</sup> See Lani Guinier, *Foreword: Demosprudence Through Dissent*, 22 HARV. L. REV. 4 (2008) [hereinafter Guinier, *Dissent*]; Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135 (2007); Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence – Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009) [hereinafter Guinier, *Courting*].

<sup>2</sup> Guinier, *Dissent*, *supra* note 1, at 23.

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> Gerald Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564 (2009).

<sup>5</sup> See Guinier, *Courting*, *supra* note 1, at 548–549; see generally Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 582 (2009).

<sup>6</sup> See generally Frederick C. Harris, *Specifying the Mechanism Linking Dissent to Action*, 89 B.U. L. REV. 605 (2009).

<sup>7</sup> See generally Linda C. McClain, *Supreme Court Justices, Empathy and Social Change: A Comment on Lani Guinier’s Demosprudence Through Dissent*, 89 B.U. L. REV. 589 (2009).

<sup>8</sup> Guinier, *Dissent*, *supra* note 1, at 56–57 (“Demosprudence has much more in common with another thread of scholarship that pays greater attention to the dialogic relationship between the courts

the broader concept of democratic constitutionalism developed by Reva Siegel and Robert Post.<sup>9</sup> Democratic constitutionalism in turn is part of what Jack Balkin describes as “a renaissance of liberal constitutional thought that has emerged in the last five years.”<sup>10</sup> This renaissance is characterized by three major themes: constitutional fidelity, democratic constitutionalism, and redemptive constitutionalism.<sup>11</sup> All three themes are connected by the notion that “[o]rdinary citizens, social movements and political parties make claims on the Constitution, arguing what the Constitution truly means, and calling for its restoration and its redemption.”<sup>12</sup> This article identifies examples from the South African Constitutional Court’s jurisprudence that reflect a demosprudential approach and the themes identified by Balkin to argue that demosprudence is a key feature of the Court’s approach to adjudication and part of a self-conscious effort by the Court to develop and enforce constitutional norms through non-judicial channels and mechanisms.

The South African Constitutional Court is a relative infant compared to the United States Supreme Court, and judicial review is a new concept in a judicial system historically characterized by a particularly strong form of parliamentary sovereignty, especially during the apartheid era.<sup>13</sup> As a result, the Court has been much more self-conscious in developing its role within the new democracy that was created in 1995 with the fall of apartheid. A major component of this self-consciousness has been deliberate and specific attempts to incorporate other actors—not only the political branches—but also civil society more generally into the process of constitutional development.<sup>14</sup>

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and the people. In what Reva Siegel and Robert Post call ‘democratic constitutionalism,’ the authority for interpreting the Constitution is shared between citizens who make claims about the Constitution’s meaning and government officials who ‘both resist and respond to these citizen claims.’” (quoting Reva Post & Robert Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007)).

<sup>9</sup> See, e.g., Post & Siegel, *supra* note 8, at 374 (coining the term “democratic constitutionalism”).

<sup>10</sup> See Jack Balkin, *The Return of Liberal Constitutionalism*, BALKINIZATION (May 26, 2009, 6:50 AM), <http://balkin.blogspot.com/2009/05/return-of-liberal-constitutionalism.html> [hereinafter Balkin, *Return*]. As Balkin notes in this post and a later one, this new scholarship has attracted a fair amount of media attention. See, e.g., Jess Bravin, *Liberals Sketch Out Dreams and Limits for Supreme Court*, WALL ST. J., May 26, 2009, at A14, available at <http://online.wsj.com/article/SB124328690467052025.html>; Jeffrey Rosen, *What’s a Liberal Justice Now?*, N.Y. TIMES MAG., May 26, 2009, available at <http://www.nytimes.com/2009/05/31/magazine/31court-t.html>; see also Jack Balkin *The Return of Liberal Constitutionalism – And a Note on Democratic Constitutionalism*, BALKINIZATION (May 31, 2009, 9:50 AM), <http://balkin.blogspot.com/2009/05/return-of-liberal-constitutionalism-and.html> (discussing the Rosen article) [hereinafter Balkin, *Note*].

<sup>11</sup> Jack Balkin, *The Return of Liberal Constitutionalism*, BALKINIZATION BLOG (May 26, 2009), <http://balkin.blogspot.com/2009/05/return-of-liberal-constitutionalism.html>

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., J.D. van der Vyver, *Depriving Westminster of Its Moral Constraints: A Survey of Constitutional Development in South Africa*, 20 HARV. C.R.-C.L. L. REV. 291 (1985).

<sup>14</sup> Theunis Roux has recently argued in a similar vein that the Court has used “its flexible separation-of-powers doctrine” and “a number of context-sensitive review standards” to manage its relationship with the political branches of South African government. Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT’L J. CONST. L. 106, 106 (2009). Roux draws the more cynical conclusion from this evidence that the Court has acted strategically by “trad[ing] off gains in legal legitimacy, achieved by principled decision making, against considerations of the likely impact of its decisions on its institutional security.” I address Roux’s argument in Part IV, below. While I agree that institutional security plays a role in the Court’s use of a demosprudential

The Court's more self-conscious attempts to develop a demosprudential approach, offers lessons for theorists in the U.S. and elsewhere like Guinier who seek to develop prescriptions for encouraging courts to act more demosprudentially more often.<sup>15</sup> It also offers a context-specific response to Rosenberg's critique of demosprudence by connecting demosprudential judging to theories of democratization and constitutionalization.

Part II of this Article outlines Guinier's and Torres' definition of demosprudence and traces the connections between demosprudence and four distinct but related literatures. First it draws connections with Balkin's liberal constitutional renaissance, and within that, Siegel's and Post's concept of democratic constitutionalism. Second, it shows that both demosprudence and democratic constitutionalism have strong affinities with Charles Epp's support-structure explanation for the emergence of constitution-based rights revolutions in several societies.<sup>16</sup> Finally, this section discusses the relationship between demosprudence's emphasis on non-judicial legal change and the literature on alternative forms of judicial review that create dialogic relationships between courts and other branches of government.

Part III addresses the debate over demosprudence. After summarizing Rosenberg's objections and the responses from Guinier and Post, this section draws on the social-science studies cited by Rosenberg to argue that the strong version of Rosenberg's argument—that the language of court opinions do not matter to social movements—is inconsistent with his own evidence. It connects those studies to Stephen Teles' concept of intellectual entrepreneurs to argue that demosprudential opinions can either play a role similar to an intellectual entrepreneur by providing a theoretical framework for social-movement activity or as the raw material for intellectual entrepreneurs to develop such frameworks.<sup>17</sup>

This section then uses a series of public opinion surveys of South Africans' views of the Constitutional Court by James Gibson and Gregory Caldera to develop a specifically South African response to Rosenberg. Drawing on Gibson's positivity theory—that exposure to courts and court symbols can stimulate respect for constitutions and courts—this section argues that the Constitutional Court's demosprudential approach is a mechanism for developing a constitutionalist culture in post-apartheid South Africa.<sup>18</sup>

Part IV traces the demosprudential aspects of the Constitutional Court's jurisprudence through several lines of cases. It opens with a discussion of Theunis Roux's recent assessment of the Court's approach as a mix of pragmatism and principle.<sup>19</sup> In Roux's view, the Court is generally able to take a strong stance on

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approach, I think that the Court is equally motivated by a genuine concern with developing a constitutional culture and including other elements of society in constitutional decisionmaking that a stronger form of review—what Roux calls “principled decision making”—would preclude.

<sup>15</sup> See Guinier, *Courting*, *supra* note 1, at 550 (responding to Rosenberg's critique in the same volume and emphasizing that “demosprudence through dissent is prescriptive rather than descriptive . . .”).

<sup>16</sup> CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

<sup>17</sup> STEPHEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

<sup>18</sup> James L. Gibson & Gregory A. Caldera, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. POL. 1 (2003).

<sup>19</sup> See Roux, *supra* note 14, at 108.

constitutional principle only where external political forces are aligned with the result.<sup>20</sup> I first argue that recognizing the demosprudential strain in the Court's approach provides a different explanation for these apparently politically motivated results. I then use Roux's discussion as both a framework and a foil to work through the cases in which the Court has adopted a demosprudential approach.

Part V considers two important implications for the Constitutional Court's demosprudential approach. It first circles back to Gibson's positivity theory and explains how the demosprudential examples just described can help build support for both the Court and the constitution more generally. It then examines the emergence of several shack-dwellers'-rights movements following the Court's first housing-rights case and argues that these movements offer anecdotal evidence that a demosprudential approach can stimulate social movement activity. Recognizing the force of Rosenberg's objection that such causal claims are ultimately empirical, it then proposes further research to assess the relationship between these groups and the Court's judgments.

## II. DEMOSPRUDENCE DEFINED

### A. *Guinier's and Torres' Definitions*

Guinier defines demosprudence as "a lawmaking or legal practice that builds on the collective wisdom of the people. It focuses on the relationship between the lawmaking power of legal elites and the equally important, though often undervalued, power of social movements or mobilized constituencies to make, interpret, and change law."<sup>21</sup> Her co-author, Gerald Torres, further explains that demosprudence is "the jurisprudence of social movements" which means that it is a call for:

[n]ew forms of representation (or criteria for power-sharing relationships) that ensure that the power shifts are not just pendulum swings between two different groups of elite actors (from the business elite to the academic elite or from the conservative think tankers to the liberal ones) but change that actually bring the voices and bodies of non-elites into the discourse.<sup>22</sup>

Demosprudence is distinct from other forms of legally-influenced social change because of the link demosprudence creates between cultural and legal change. Torres contrasts demosprudential lawyering with cause lawyering and argues that demosprudence's link to culture emphasizes the democratization of the legal process itself, rather than focusing on particular clients or causes: "Cause lawyering may try to shift the rules, which ultimately may change the culture, but the problem with cause lawyering is that decisions about which rules are being shifted and how

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<sup>20</sup> *Id.* at 126

<sup>21</sup> Guinier, *Dissent*, *supra* note 1, at 47.

<sup>22</sup> Torres, *supra* note 1, at 142.

those rule shifts are being enforced is ultimately made by elites.”<sup>23</sup>

Torres points to *Brown v. Board of Education*<sup>24</sup> as an example where cause lawyering resulted in legal change that failed to produce real social change. In his view, “the meaning of *Brown* was found in the capacity for individuals to exit rather than in a more profound redistribution of resources for communities.”<sup>25</sup> The lesson he draws from that experience “is the need to link culture shifting with democratic accountability that gives poor people and communities of color (not just individual people of color) voice, choice and power.”<sup>26</sup>

In a series of recent articles, Guinier focuses on dissents, and oral dissents in particular, as one form of demosprudence. Guinier describes “the foundational hypothesis of demosprudence [as] that the wisdom of the people should inform the lawmaking enterprise in a democracy.”<sup>27</sup> By drawing on this collective wisdom, a court “gains a new source of democratic authority when its members engage ordinary people in a productive dialogue about the potential role of ‘We the People’ in lawmaking.”<sup>28</sup>

Guinier identifies three key characteristics of demosprudential opinions. The first is thematic: they must substantively “engage[] with a core issue of democratic legitimacy, democratic accountability, democratic structure or democratic viability.”<sup>29</sup>

Style and rhetoric are equally important. A demosprudential opinion either tells a “good ‘public story’ built on shared experiences or common concerns” or is “organized around values critique or actions.”<sup>30</sup> The opinion also is “delivered in a dramatic tone” or “expressed poetically.”<sup>31</sup> Key here is the opinion’s ability to speak in terms that a lay audience understands and to avoid the typical language of legal argument.

Finally a demosprudential opinion “speaks to non-judicial actors, whether legislators, local thought leaders, or ordinary people . . . .” In doing so, the opinion “provides a powerful pedagogical opportunity to open up space for public deliberation and engagement.”<sup>32</sup>

Guinier focuses on oral dissents in particular because she believes that the informality of oral address and dissents more generally, are more amenable to the rhetorical aspects of demosprudence and because, unlike majority opinions they do not authoritatively settle the legal question and foreclose alternative understandings.<sup>33</sup> But she acknowledges that both written dissents and even concurring opinions can have demosprudential characteristics provided that they address the people directly and seek to open up a dialogue with a broader

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<sup>23</sup> *Id.* at 142.

<sup>24</sup> 347 U.S. 483 (1954).

<sup>25</sup> Torres, *supra* note 1, at 143.

<sup>26</sup> *Id.*

<sup>27</sup> Guinier, *Courting*, *supra* note 1, at 545.

<sup>28</sup> *Id.*

<sup>29</sup> Guinier, *Dissent*, *supra* note 1, at 49.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 51.

<sup>33</sup> *Id.* at 53–54.



audience.<sup>34</sup>

Guinier describes a “demosprudential continuum” with oral dissents at the most demosprudential end and written majority opinions at the other. Written majority opinions are constrained by the need to establish a clear rule that is attendant to legal texts and prior precedent. This limits their ability to engage in “colloquial prose or innovative formats” that speak directly to the people.<sup>35</sup> Furthermore, because majority decisions are backed by the “coercive power of the state” they typically do not open up space for dialogue and response by social movements or the political branches.<sup>36</sup>

### *B. Demosprudence and the Liberal Constitutional Renaissance*

Demosprudence’s emphasis on the connection between legal and social change connects it to other forms of popular constitutionalism.<sup>37</sup> Guinier most closely associates demosprudence with what Reva Siegel and Robert Post have termed “democratic constitutionalism.”<sup>38</sup> Siegel and Post explain that “[d]emocratic constitutionalism affirms the role of representative government and mobilized citizens in enforcing the Constitution at the same time that it affirms the role of courts in using professional legal reason to interpret the Constitution.”<sup>39</sup>

On one hand, democratic constitutionalism seeks to de-center the role that courts play in developing constitutional norms by recognizing the role that social movements have historically played in shaping that meaning and the responsiveness of courts over time to those movements. Indeed, the basis for understanding constitutionalism as “democratic” is precisely the fact that constitutional law is responsive to popular opinion.<sup>40</sup>

At the same time, however, democratic constitutionalism recognizes the important institutional role that courts play both in articulating constitutional meaning and serving as a focal point for contests over that meaning. Democratic constitutionalism highlights the paradox that arises from these dual emphases:

Those who wish to change the content of constitutional law thus face a dilemma: they must sway courts to their own constitutional values and yet they must also preserve the authority of courts to speak for the Constitution in the name of an independent rule of law.<sup>41</sup>

This paradox plays out in a dialectical process in which “[j]udicial review limits, channels and amplifies democratic politics” while “[d]emocratic politics, in turn,

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<sup>34</sup> *Id.* at 55.

<sup>35</sup> *Id.* at 52.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 56.

<sup>38</sup> *Id.* at 56–57 (quoting Siegel & Post, *supra* note 8).

<sup>39</sup> Siegel & Post, *Roe Rage*, *supra* note 8, at 379.

<sup>40</sup> *Id.* at 383.

<sup>41</sup> *Id.* at 385.

shapes the institution of judicial review.”<sup>42</sup>

Siegel and Post reject the twin concerns that political “backlash” against politically charged court decisions undermines the authority of the Constitution, and that courts should attempt to avoid such decisions for precisely that reason. Instead, they argue that a core function of the judicial role is to “channel and mediate conflict, guiding public dialogue about hotly controverted social practices and endeavoring to shape the social meaning of competing claims.”<sup>43</sup> Under this view, backlash is both a reasonable and necessary response to judicial review.

Democratic constitutionalism is one of three themes that Jack Balkin argues characterize a new vision for liberal constitutionalism that has emerged in the past five years and is sketched out in its most self-conscious form in the recently published collection *THE CONSTITUTION IN 2020*, edited by Balkin and Siegel.<sup>44</sup> Balkin identifies constitutional fidelity and redemptive constitutionalism as the other two themes. Constitutional fidelity “means fidelity. . . to the principles stated in the text or that underlie the text.”<sup>45</sup> While this sounds much like the originalism that this new vision rejects, the fidelity Balkin has in mind is much different. It assumes that “basic principles endure, but their applications can change over time.”<sup>46</sup> Each generation develops the constitutional constructions that best meet the needs of each era while staying true to these basic principles. In this way the constitution’s precise application changes over time in response to changing circumstances.<sup>47</sup>

Balkin cites his own earlier work including *Abortion and Original Meaning*,<sup>48</sup> in which he argues that a fidelity that stays true to “original expected application” rather than a fixed original meaning is the best explanation for the ways in which social and political movements have transformed constitutional understandings through U.S. history. Balkin argues that these transformations are “not ‘mistakes’ that we must grudgingly live with. They are applications of text and principle that have become part of our constitutional tradition . . . .”<sup>49</sup>

Redemptive constitutionalism begins with the recognition that “the Constitution contains commitments that we have only partially lived up to.”<sup>50</sup> It is really an extension of constitutional fidelity in that it recognizes that the principles in the Constitution have never been fully realized and that each generation is responsible for trying to create a society that adheres with greater fidelity to those principles. Balkin coined the term “redemptive constitutionalism” in an article responding to commentaries on his argument that “original meaning” can be understood as fidelity to a set of principles whose application changes over time.<sup>51</sup> In that same article, he articulates the connection between fidelity and redemption:

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<sup>42</sup> *Id.* at 399.

<sup>43</sup> *Id.* at 430.

<sup>44</sup> *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009).

<sup>45</sup> Balkin, *Return*, *supra* note 10.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jack Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 292 (2007).

<sup>49</sup> *Id.* at 302.

<sup>50</sup> Balkin, *Return*, *supra* note 10.

<sup>51</sup> Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427, 427–28 (2007).

In short, interpretive fidelity requires faith in the redeemability of the Constitution over time. That faith is three-fold: faith in the possibilities contained in the document, faith in the institutions that grow up around the document, and finally, faith in the American people who will ultimately determine the interpretation and direction of the document and its associated institutions.<sup>52</sup>

There are several key points in this quote. First, fidelity and redemption go hand-in-hand and require a living vision of the constitution because fidelity is tied to a set of unrealized principles that each generation must seek to uphold and perfect. Second, the redemptive effort is a political one. But constitutional politics differs from normal politics in that the underlying principles in the constitution “are designed to *channel* and *discipline* future political judgment . . . .”<sup>53</sup> They do this by providing “a grammar and vocabulary, a set of basic principles and textual commitments, and a practice of constitutional argument in which people reason about their rights.”<sup>54</sup>

Finally, Balkin’s emphasis on the American people and American institutions emphasizes that constitutional interpretation does not begin or end with courts. In describing how the Privileges or Immunities Clause of the Fourteenth Amendment could be the basis for a right to abortion, Balkin describes the process through which citizens and institutions construct rights:

There is nothing particularly strange or unusual about a dynamic conception of declaratory rights. People press for rights when they begin to feel aggrieved by their absence, and their aggrievement does not come all at once, but is triggered by new problems and changed circumstances. Then people press for protection of these rights, arguing that governments always should have protected them . . . .<sup>55</sup>

Demosprudence reflects all three of these themes, but democratic constitutionalism and constitutional redemption feature most prominently. Guinier’s emphasis on the rhetoric of judicial opinions and their pedagogical role offers important new components that diversify the texture of this vision and also focus attention on ways in which courts can self-consciously both acknowledge and participate in the dynamic relationship among courts, the political branches and the public that is central to this vision.

As noted above, Guinier herself draws a connection between democratic constitutionalism and demosprudence. Echoing Balkin’s quote above, Guinier writes that demosprudence shares democratic constitutionalism’s “premise that the Court is engaged in something like an ongoing conversation, albeit often a forceful one, with the American people.”<sup>56</sup> Demosprudence also recognizes that “constitutional meaning bends to the insistence of popular beliefs and yet retains

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<sup>52</sup> *Id.* at 439–40.

<sup>53</sup> *Id.* at 458.

<sup>54</sup> *Id.* at 460–61.

<sup>55</sup> Balkin, *supra* note 48, at 330–31.

<sup>56</sup> Guinier, *Dissent*, *supra* note 1, at 57.

integrity as law.”<sup>57</sup>

But demosprudence is not just a more specific version of democratic constitutionalism, instead it emphasizes “a discrete judicial practice for instantiating and reinforcing the relationship between public engagement and institutional legitimacy.”<sup>58</sup> Guinier focuses on dissents in particular because demosprudence is principally concerned with “democratic, rather than judicial, activism,” and she seeks to describe and prescribe a judicial role for enhancing the participation of non-judicial actors in legal and constitutional development.<sup>59</sup>

Demosprudence also differs from democratic constitutionalism in its deliberate focus on judicial opinions that do not definitively establish constitutional doctrine. While Siegel and Post emphasize the ways in which controversial majority opinions both respond to and catalyze political responses by “directly facing moral controversy,”<sup>60</sup> Guinier is more interested in opinions that leave open the ultimate constitutional question and encourage citizens to develop and then work for recognition of their own interpretations.<sup>61</sup>

Although Guinier does not discuss redemptive constitutionalism as an element of demosprudence, her emphasis on the important role that rhetoric and pedagogy play in demosprudential practice is linked to Balkin’s recognition that redemptive constitutionalism views the constitution as providing “a grammar and vocabulary, a set of basic principles and textual commitments, and a practice of constitutional argument in which people reason about their rights.”<sup>62</sup> In the same way, demosprudential opinions “enable[] a popular audience to convert its anger into critique and constructive involvement . . . .”<sup>63</sup> They do this in part by speaking in a language that is accessible to the public and by using metaphors and imagery designed to inspire political and social action.<sup>64</sup>

Demosprudence is also a redemptive mechanism. Redemptive constitutionalism sees the Constitution “as aspiring to greater justice and moral legitimacy” and as containing “language that can be adapted to changing times and circumstances” to achieve those ends.<sup>65</sup> Demosprudence is a judicial practice that translates those constitutional principles and that language into a public appeal to develop those principles. Redemption “demand[s] the continual improvement of

<sup>57</sup> *Id.* (quoting Post & Siegel, *Roe Rage*, *supra* note 8, at 376).

<sup>58</sup> *Id.* at 57–58.

<sup>59</sup> *Id.* Guinier notes further that “dissenters avoid the problem of judicial activism, however, because they are not using ‘the law’ in Professor Robert Cover’s ‘jurispathic’ sense, in order to kill alternative and inventive meanings, developed by the citizens themselves in favor of one restrictive mandate.” *Id.* (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4, 9, 11, 40 (1983)).

<sup>60</sup> Siegel & Post, *Roe Rage*, *supra* note 8, at 430.

<sup>61</sup> Guinier, *Dissent*, *supra* note 1, at 50 (“By illuminating an alternative view of the law [a demosprudential opinion] can invite critical reflection and inspire a sense of urgency among the people themselves.”).

<sup>62</sup> Balkin, *Redemption*, *supra* note 51, at 460–61.

<sup>63</sup> Guinier, *Dissent*, *supra* note 1, at 130.

<sup>64</sup> Guinier observes, for example, that Justice Antonin Scalia meets the second criteria for demosprudence, “by engaging his audience with accessible metaphors and memorable imagery” and cites his dissent in *Boumediene* as a prime example of this technique. *Id.*

<sup>65</sup> Balkin, *Redemption*, *supra* note 51, at 442.

our institutions” to better reflect the Constitution’s principles,<sup>66</sup> and demosprudence “teach[es] the public to identify with the constitutional values at stake and invite them to speak back in a voice that is all their own.”<sup>67</sup> Further, demosprudence “tracks the view that the call for a more perfect union in the Constitution’s preamble ‘initiated a project to make the Constitution a means for its own transcendence.’”<sup>68</sup>

### C. *Demosprudence and Epp’s Rights Revolution*

Balkin traces the origins of the new progressive constitutional movement to work developed in the past five years,<sup>69</sup> but the central insight behind this project as well as demosprudence—that constitutional meaning depends on and is developed through social and political processes—is rooted in earlier work by both legal scholars and political scientists. Prominent within this literature is Charles Epp’s famous study of the conditions that gave rise to what he calls the “rights revolution” in the United States.<sup>70</sup> Epp’s central thesis is that the Supreme Court’s rights-protective decisions in the 1960s and 1970s were the result of “deliberate, strategic organizing by rights advocates” made possible by a “support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing.”<sup>71</sup>

Epp explains that his thesis requires a revision of the typical emphasis on courts and constitutional text: “the common emphasis on constitutional provisions and judges is exaggerated, and the concern about undemocratic processes [resulting from judicial enforcement] is ill founded.”<sup>72</sup> In Epp’s view, the evidence suggests that courts typically follow, rather than lead, broad-based movement towards increased rights protections. Courts’ willingness to enforce rights claims was the culmination of the development of a broad societal support structure and organized collective action supported by significant resources from multiple sectors within society.<sup>73</sup> If Epp’s support structure theory is correct, then judicial decisions implementing those widely supported constitutional understandings are not undemocratic and instead reflect broader trends in society.<sup>74</sup>

Epp notes that shifting the focus to social movements means that “proponents of expanded judicial protection should not place *all* hope in judges or

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<sup>66</sup> *Id.*

<sup>67</sup> Guinier, *Demosprudence*, *supra* note 1, at 137.

<sup>68</sup> *Id.* at 58 (quoting Gary Wills, *Two Speeches on Race*, N.Y. REV. BOOKS, May 1, 2008, at 4, available at <http://www.nybooks.com/articles/21290>).

<sup>69</sup> See Balkin, *Return*, *supra* note 10.

<sup>70</sup> EPP, *supra* note 16.

<sup>71</sup> *Id.* at 2–3.

<sup>72</sup> *Id.* at 5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Balkin makes a similar point regarding the democratic nature of court decisions in a recent blog post: “[I]n the long run the Supreme Court is not countermajoritarian—it is nationalist . . . . It would be more correct to say that national political majorities turn to the courts to implement their values in ways that would be difficult or inconvenient otherwise, or might threaten to split their coalitions.” Jack Balkin, *Courts Gone Mild*, BALKINIZATION (June 5, 2009, 9:35 AM), <http://balkin.blogspot.com/2009/06/courts-gone-mild.html>.

constitutional reform but should provide support to rights-advocacy lawyers and organizations.”<sup>75</sup> In Epp’s account, judges and constitutional provisions are not irrelevant.<sup>76</sup> But judicial enforcement of constitutional rights must be viewed as only one among many factors that contribute to the development of new claims.<sup>77</sup>

Demosprudence draws from the same insight central to Epp’s support-structure thesis but does so from the perspective of the court. While Epp documents the historical evidence that “[r]ights revolutions originate in pressure from below in civil society, not leadership from above,” he also concludes that the revolution “reached its greatest height and strength through and interaction between supportive judges and the support structure for rights-advocacy litigation.”<sup>78</sup> Epp notes that the debate over the role of judges too often mistakenly “assumes either, on the one hand that judges lead by adapting the constitution to changing circumstances, or, on the other, that they follow by faithfully applying the ‘original intent’ of the constitution’s creators.”<sup>79</sup> Epp’s analysis suggests a middle ground in which rights—and, in particular judicial support for rights—are conditioned on the extent of a support structure for legal mobilization.<sup>80</sup> As a result, the continuation of rights revolutions depends “on broad support outside the judiciary,”<sup>81</sup> and the necessity of this broad support in turn democratizes the process through which rights are enforced.

Demosprudence picks up, in effect, where Epp’s analysis leaves off and considers first how courts themselves can recognize the part that they play in this broader process and second how courts could play a more direct role in developing the support structure for democratic constitutional development. Like the support-structure explanation, demosprudence begins with the assumption that meaningful legal change depends on, and derives legitimacy from, social mobilization and the corresponding integration of multiple constituencies into the constitutional development process.<sup>82</sup> As Epp emphasizes “in order to sustain a rights revolution, judicial support is necessary—although it is not sufficient.”<sup>83</sup> Demosprudence offers an account of the judicial role that recognizes its dependence on social movements and seeks to maximize its ability to support those movements.

Anticipating Gerald Rosenberg’s critique that judicial opinions make very little impact on the public, Guinier acknowledges that demosprudence’s focus on courts may “overestimate the power and authority of the Supreme Court.”<sup>84</sup> And in her response to Rosenberg, she makes the point directly, emphasizing that “it was never my intent to suggest that the Court should be central to any social movement.”<sup>85</sup> But she goes on to hypothesize three ways in which demosprudential

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<sup>75</sup> Epp, *supra* note 16, at 6.

<sup>76</sup> *Id.* at 5 (“Neither judges nor constitutional guarantees are irrelevant.”).

<sup>77</sup> *Id.* at 2 (Noting that “[c]onventional explanations tend to place particular emphasis on judicial leadership as the catalyst for the rights revolution.”).

<sup>78</sup> *Id.* at 197.

<sup>79</sup> *Id.* at 198.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 199.

<sup>82</sup> Torres’ critical assessment of *Brown* is relevant here. See Torres, *supra* note 1.

<sup>83</sup> EPP, *supra* note 16, at 201.

<sup>84</sup> Guinier, *Dissent*, *supra* note 1, at 129.

<sup>85</sup> Guinier, *Courting*, *supra* note 1, at 550.

dissents “can play an educative role, leading to more informed and engaged citizenry”: (1) they can draw attention to the connection between formal opinion and informal activity; (2) they “simultaneously broaden and limit the authoritative role that Justices play”; and (3) they “make the formal process of lawmaking more transparent and thus more democratically accountable.”<sup>86</sup>

In the end, Guinier’s claims for the role of demosprudence dovetail nicely with Epp’s understanding of the role that courts have played in the past to support social movements to accomplish legal change. As Guinier puts it “members of the Court can catalyze change when they help craft or expand the narrative space in which mobilized constituencies navigate the currents of democracy.”<sup>87</sup> But she agrees that “the Court rarely functions as the central power source for fundamental structural change.”<sup>88</sup> What demosprudence in particular—and the progressive constitutional project described by Balkin more generally—adds to Epp’s explanation is a set of ideas for reconceiving the role of courts that both acknowledges the limited role courts play but also exploits the possibilities inherent in recognizing a reciprocal relationship between courts and society.

In this respect, both projects are also focused on the problem of the supposed countermajoritarian difficulty posed by judicial review and the possibilities for democratizing it. Epp focuses on evidence that legal changes, which on the surface appear to be court-created, are in fact the result of democratic developments:

If the rights revolution developed out of the growth of a broad support structure in civil society, if rights litigation commonly reflects a significant degree of organized collective action, and if judicially declared rights remain dead letters unless they gain the backing of a broad support structure, then the rights revolution was not undemocratic or antidemocratic, even in the processes that created it.<sup>89</sup>

Guinier extends this insight and hypothesizes ways in which courts can self-consciously embrace this reciprocal relationship and further democratize the process of constitutional development.<sup>90</sup>

#### *D. Demosprudence and Weak-Form Review*

These same themes are linked in a somewhat different manner to the growing literature on alternative forms of judicial review—a literature that also predates Balkin’s five-year time-frame but is part of the broad emphasis on constitutional development outside of courts which characterizes that project. Rather than focusing on political and social movements, this literature examines the potential for formal constitutional structures and judicial practices to distribute the power to interpret constitutions beyond the courts. While dissents—even oral dissents—are judicial methods associated with traditional forms of judicial review,

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<sup>86</sup> Guinier, *Dissent*, *supra* note 1, at 131.

<sup>87</sup> Guinier, *Courting*, *supra* note 1, at 554.

<sup>88</sup> *Id.*

<sup>89</sup> EPP, *supra* note 16, at 5.

<sup>90</sup> See, e.g., Guinier, *Dissent*, *supra* note 1, at 58 (“[D]emosprudence seeks to describe a much more active and self-conscious role for judges (and other legal professionals) in creating space for citizens (not just judges) to advance alternative interpretations of the law.”).

the effect that Guinier ascribes to demosprudential opinions—provoking a political response to a court opinion that ultimately results in a change to the law—is the kind of process that theories of alternative forms of judicial review propose and analyze.

Mark Tushnet is one of the leading theorists of these new models of judicial review. Tushnet describes them as “weak-form” review to contrast them with the strong-form of review associated with the United States Supreme Court.<sup>91</sup> Weak-form review encompasses a range of techniques but each shares the characteristic that courts “do not have the final word on whether statutes comply with [constitutional] norms.”<sup>92</sup> Weak-form review can also develop in informal ways, including interpretive and remedial restraint by courts. Tushnet identifies the South African Constitutional Court’s first housing-rights decision, *Government of the Republic of South Africa v Grootboom*<sup>93</sup> as one example of this type of weak-form review.<sup>94</sup> In *Grootboom*, the court interpreted section 26 of the constitution to require the South African government to incorporate plans for dealing with the emergency needs of homeless citizens into national and regional housing policies.<sup>95</sup> The order, however, left it to the government to determine precisely how to comply with this requirement and also ordered only programmatic relief not individual relief for the plaintiffs in the case.<sup>96</sup> The limited interpretation of the right as providing programmatic but not individual relief and the highly general order that left the policy details to the government are key features of informal weak-form mechanisms.

Tushnet’s analysis of weak-form mechanisms shares demosprudence’s emphasis on the democracy-enhancing potential of these judicial practices. He emphasizes that “weak-form systems of review hold out the promise of reducing the tension between judicial review and democratic self-governance, while acknowledging that constitutionalism requires that there be some limits on self-governance.”<sup>97</sup> Weak-form systems reduce this tension by recognizing that constitutional provisions are often phrased in sufficiently general terms and are amenable to multiple reasonable interpretations. Under a system of strong-form review, the court has the final word on which of these reasonable interpretations are definitive.

While demosprudential judging looks to court opinions as potential catalysts for democratizing constitutional change, weak-form review focuses on institutional mechanisms and practices for creating that same kind of dialogue among the courts, the political branches and other non-judicial actors over constitutional interpretation. One key difference is that weak-form mechanisms operate along a much shorter time horizon than the mobilization process that

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<sup>91</sup> MARK V. TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* x (2008).

<sup>92</sup> *Id.* at ix.

<sup>93</sup> *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (2000) (CC).

<sup>94</sup> TUSHNET, *supra* note 91, at 242–43 (describing *Grootboom* as “a good example of a weak judicially enforceable social welfare right.”).

<sup>95</sup> *Grootboom*, 2000 (11) BCLR 1169.

<sup>96</sup> *Id.*

<sup>97</sup> TUSHNET, *supra* note 91, at 23.



demosprudence entails.<sup>98</sup> As a result, weak-form mechanisms do not necessarily create opportunities for non-elites to play a role in the democratic response.<sup>99</sup> Nonetheless, weak-form review shares the same general concern with democratizing judicial review by recognizing the role of non-judicial actors in the development of constitutional norms.

### III. THE DEBATE OVER DEMOSPRUDENCE

#### A. *Rosenberg, Romance and the Relevance of Supreme Court Opinions*

One panel of a recent Boston University Law Review symposium was devoted to the topic of demosprudence. In many respects, the panel revolved less around demosprudence itself than around Gerald Rosenberg's critique, which was part of the panel. Rosenberg raises three objections to demosprudence. The first is that decades of social science research has "repeatedly found that judicial opinions neither educate nor teach."<sup>100</sup> Here Rosenberg takes on Guinier's claim that judicial opinions can democratize constitutional politics by bringing non-elites into the process for developing constitutional meaning. Rosenberg cites several national surveys that found "large portions of the American public are unaware of even major opinions" like *Roe v. Wade*.<sup>101</sup> He argues that judicial opinions cannot possibly have the catalyzing effect Guinier attributes to them because "[o]rdinary people do not know about them, are unlikely to find out about them, and are not interested."<sup>102</sup>

Rosenberg concedes that Supreme Court decisions receive public attention when they "provoke 'sustained elite' reaction" because the media covers those reactions.<sup>103</sup> But he argues that the literature on the relationship between social movements and Supreme Court opinions demonstrates that judgments catalyze such movements only where there is "public and elite support, preexisting groups and resources committed to the issue, a committed leadership, and a predisposed target audience."<sup>104</sup> Rosenberg acknowledges that this literature supports Guinier's more modest claim that "[t]he real power of demosprudential dissents comes when the dissenter is aligned with a social movement or community of accountability that mobilizes to change the meaning of the Constitution over time," but he views this

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<sup>98</sup> TUSHNET, *supra* note 91, at 23 ("[W]eak-form judicial review provides mechanisms . . . that can be deployed more rapidly than constitutional amendment or judicial appointment processes.").

<sup>99</sup> This is particularly true of formal mechanisms, like section 33 of the Canadian Charter of Rights and Freedoms, which permits a legislative response to court rulings. See TUSHNET, *supra* note 91, at 44–47 (discussing section 33). Mechanisms like these simply shift power from one elite institution (the courts) to another (the legislature) and thus lack the ability to bring non-elites into the constitutional change process, which Guinier identifies as the characteristic feature of demosprudential judging.

<sup>100</sup> Rosenberg, *supra* note 4, at 564.

<sup>101</sup> *Id.* at 566–67.

<sup>102</sup> *Id.* at 564.

<sup>103</sup> *Id.* at 569 (quoting Charles H. Franklin & Liane C. Kosaki, *Media Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352, 360 (Lee Epstein ed., 1995)).

<sup>104</sup> Rosenberg, *supra* note 4, at 571–72.

as a significantly more qualified claim than the argument that oral dissents directly inspire social movements.<sup>105</sup> Rosenberg sums up this critique by arguing that “[w]hen all is said and done, social activists care about the substantive holding of Court opinions, not the existence and language of oral dissents.”<sup>106</sup> In other words, “[e]lites are seldom if ever motivated or inspired by the language of judicial dissents to act.”<sup>107</sup>

Rosenberg’s third critique is that Guinier’s analysis is too court-centric. It overstates the contribution of the Court to fostering democratic deliberation. Here, Rosenberg expands his critique beyond the practical problems of attributing direct causal effects to oral dissents and argues that Guinier’s focus on courts rather than social movements themselves exhibits a flaw characteristic of the legal academy, what he calls a romanticization of courts.<sup>108</sup> Rosenberg ultimately dismisses demosprudence as one more effort “in a long line of seemingly endless attempts to portray the Court as an effective and powerful agent of change and defender of minorities.”<sup>109</sup> He argues that “this analysis cannot be reconciled with decades of social science research that questions and qualifies claims of judicial efficacy.”<sup>110</sup>

In responding to Rosenberg directly in that same issue, Guinier makes three major points. First, she argues that Rosenberg “wrongly assumes that my claims [about oral dissents] are descriptive rather than aspirational.”<sup>111</sup> She points out that the context of her article was “the traditions associated with the Supreme Court foreword published every year in the November issue of the Harvard Law Review” and that she was focused on “explor[ing] the ways that judicial actors, in conjunction with mobilized constituencies, can redefine their roles consistent with ideas of democratic accountability.”<sup>112</sup> Demosprudence through oral dissent thus highlights how this form of judicial communication can play a part in such role redefinition. Second, Guinier acknowledges that “Rosenberg’s criticism that my argument is too ‘Court-centric’ is fair as far as it goes,” but explains that, here again, the format of the Harvard Law Review foreword entailed such a focus.<sup>113</sup>

Third, Guinier takes on what she sees as Rosenberg’s more fundamental claim that “law almost never influences politics or vice versa.”<sup>114</sup> On this point, which she characterizes as a “deep disciplinary tension about the nature of causation and the primacy of uniform metrics of measurement as well as the meaning of political participation and influence,” Guinier simply disagrees with Rosenberg.<sup>115</sup> She places herself in “the school that values ‘the texture and substance of dialogue’” and believes that “political engagement cannot simply be reduced to what can be measured.”<sup>116</sup>

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<sup>105</sup> *Id.* at 572.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 572–73.

<sup>108</sup> *Id.* at 575.

<sup>109</sup> *Id.* at 577.

<sup>110</sup> *Id.*

<sup>111</sup> Guinier, *Courting*, *supra* note 1, at 548.

<sup>112</sup> *Id.* at 548, 551.

<sup>113</sup> *Id.* at 551.

<sup>114</sup> *Id.* at 552.

<sup>115</sup> *Id.* at 553.

<sup>116</sup> *Id.* (quoting Post, *supra* note 5, at 585).

Robert Post participated in the same panel and responds to Rosenberg in a manner similar to Guinier. Post first concedes Rosenberg's point that Guinier's claims about the specific role that oral dissents can play in democratic deliberation "are original and perhaps vulnerable to some of the empirical points that Rosenberg advances."<sup>117</sup> Like Guinier, however, Post quickly moves to address Rosenberg's broader claim that court opinions rarely, if ever, contribute to democratic deliberation.

Post characterizes Rosenberg's argument as premised on the view "that participation [in political debate] is significant only when its substance is widely known or only when it is a necessary or sufficient cause for measurable changes in public opinion."<sup>118</sup> Post responds by pointing out that many aspects of political debate commonly assumed to be influential would not register on the metrics cited by Rosenberg.<sup>119</sup> He cites prominent legislators such as Henry Waxman and Orrin Hatch and the specific planks in the platforms of the Republican and Democratic parties as examples of such features that few members of the public would be able to identify specifically if asked in an opinion poll, yet most people would agree play a significant role in political debate.<sup>120</sup>

Guinier's conception, Post explains, reflects this more ordinary understanding of politics "as an agora in which political actors seek persuasively to articulate their polity's commitments and principles."<sup>121</sup> Post acknowledges that the empirical data Rosenberg cites can play a role in assessing the plausibility of claims about the effect a particular actor has in the process of political change, but he argues that "[w]e need a language capable of describing relationships among political actors in ways that are true to the lived experience of such agents without being understood as making claims that are merely causal."<sup>122</sup>

### *B. Rights Consciousness and Intellectual Entrepreneurs*

Central to both Post's and Guinier's response to Rosenberg is the concern that it is often difficult, if not impossible, to map with precision the causal relationship between judicial decisions—and more precisely, the language of judicial opinions—and changes in the larger political landscape. Both acknowledge this practical difficulty but point to, in Post's words, our "lived experience" that recognizes the multi-faceted and polycentric nature of political and legal change.

The social science evidence that Rosenberg cites, as well as other studies of social movements, provides potential support for this nuanced understanding of the effect of judicial opinions. Rosenberg himself acknowledges this dimension of the evidence he discusses when he agrees with Guinier's claim that demosprudential opinions are most effective when they are aligned with an existing social movement.<sup>123</sup> But Rosenberg's focus on Guinier's specific claims regarding

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<sup>117</sup> Post, *supra* note 5, at 583.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 583–84.

<sup>121</sup> *Id.* at 585.

<sup>122</sup> *Id.* at 586.

<sup>123</sup> Rosenberg, *supra* note 4, at 572.

oral dissents in particular ignores the substantial correspondence between Guinier's broad emphasis on the interdependence and interrelationship between courts and social movements and the social science evidence. Focusing on this broader theme, it is clear that, while in its prescriptive mode, Guinier's claims sometimes overstate the causal relationship between court opinions and social movements, her emphasis on the connection between the two is far from misplaced. Furthermore, the strong version of Rosenberg's claim—that the language of judicial opinions rarely, if ever, influences social movements<sup>124</sup>—is inconsistent with the social science evidence he cites.

### 1. *McCann and the Pay Equity Reform Movement*

Throughout the article Rosenberg cites Michael McCann's study of the pay equity reform movement in the United States.<sup>125</sup> Rosenberg argues that McCann's study shows that judicial opinions can affect politics only where there is "public and elite support, pre-existing groups and resources committed to the issue, a committed leadership and a predisposed target audience."<sup>126</sup> He quotes McCann for the conclusion that "[e]ven under the most propitious circumstances . . . the contributions of legal maneuvers to catalyzing defiant collective action will be partial, conditional, and volatile over time."<sup>127</sup>

As an initial matter it is important to note that Guinier's description of demosprudence is not inconsistent with this understanding of the role that law plays. Thus, in describing the "facilitative" dimension of a demosprudential dissent, Guinier suggests that it "may, for example, appeal to the audience's own experience or inspire them to participate in a form of collective problem solving."<sup>128</sup> She goes on to suggest that such opinions can play an "educational role."<sup>129</sup> While mass media publicizing the dissent could accomplish this directly, demosprudential opinions could also "function indirectly through organized constituencies publicizing the existence and content of the dissent."<sup>130</sup> Guinier allows that demosprudential dissents may play other, more direct roles, but throughout the article she emphasizes that any such influence depends on the existence of these kinds of responsive "organized constituencies."<sup>131</sup>

More importantly, McCann describes "a general path model for guiding

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<sup>124</sup> Rosenberg does not go this far in his article because he is focused on Guinier's claims about oral dissents in particular. The closest he comes is to argue that "[e]lites are seldom if ever motivated or inspired by the language of judicial dissents to act." *Id.* at 572–73. He does, however, argue that "[w]hen elites are favorably situated, as McCann finds, they may make use of opinions, but *the opinions alone are unlikely to matter much.*" *Id.* at 573 (emphasis added).

<sup>125</sup> *Id.* at 571 (citing MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994) and describing it as a "classic study" of the relationship of Supreme Court opinions to social movements.).

<sup>126</sup> *Id.* at 571–72.

<sup>127</sup> *Id.* at 572 (quoting MCCANN, *supra* note 125, at 137).

<sup>128</sup> Guinier, *Dissent*, *supra* note 1, at 49.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 49–50.

<sup>131</sup> *Id.* at 49.

analysis of legal mobilization activity in diverse types of situations.”<sup>132</sup> That model uses a series of interconnected, double-sided arrows to depict a dynamic relationship among several factors, including legal action, that work together to create the possibility for socioeconomic change.<sup>133</sup> In McCann’s description, which Rosenberg quotes, legal actions “can spark actual insurgency” in “‘ripe’ situations by cultivating the rights consciousness of identified movement constituents and their allies.”<sup>134</sup> Situations are ripe for legal action where “[i]ncreasingly favorable political opportunities . . . converge with preexisting organizational resources.”<sup>135</sup> All three factors—legal action, organizational resources and political opportunities—“are essential, though not sufficient, to the process of legal mobilization.”<sup>136</sup>

Rosenberg is clearly correct that McCann’s framework demonstrates that “opinions alone are unlikely to matter much.”<sup>137</sup> But that does not mean that judicial opinions are irrelevant. Instead, they play a key role, alongside these other, equally necessary factors, in creating the required conditions for legal mobilization. Understood in context, McCann’s caveat that the effects of legal actions are “partial, conditional and volatile over time” is not a claim that legal action does not matter, but only that it does not matter where these other two elements are absent. Legal action is “partial” because it is one of three required factors; it is “conditional” because it depends on existence of these other two factors; and its effects are “volatile” because all three factors rarely converge at the same point in time.

The importance of court decisions is even more evident in McCann’s description of how legal actions affected the pay equity reform movement. In a chapter titled “Law as Catalyst” McCann describes the roots of the pay equity movement in the broader civil rights developments that began in the 1960s. In language strikingly similar to Guinier’s, McCann highlights the U.S. Supreme Court’s decision in *Griggs v. Duke Power Co.*,<sup>138</sup> claiming it “provided new language that shifted the focus of fighting discrimination from discrete acts of individual ‘ill will’ to systematic biases in institutional practices and policies.”<sup>139</sup> Far from discounting the effect of legal opinions, as Rosenberg suggests, McCann says that “[t]his judicial recognition of ‘systemic discrimination’ *provided a direct catalyst of unparalleled significance . . .*”<sup>140</sup>

Moving into a description of the pay equity cases, McCann sounds a similar theme. The pay equity issue “burst into the national spotlight” in 1981 as a result of several developments, including the Supreme Court’s decision in *County*

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<sup>132</sup> MCCANN, *supra* note 125, at 136. In a footnote, McCann says that his model parallels the approach Rosenberg outlined in the 1991 version of his book HOLLOW HOPE. McCann then qualifies the parallel, stating that Rosenberg’s “court-centered, top-down approach contrasts somewhat with the dispute-centered, bottom-up approach to legal analysis generally adopted here, however.” *Id.* at n.35.

<sup>133</sup> *Id.* at 136.

<sup>134</sup> *Id.* at 136–37.

<sup>135</sup> *Id.* at 136.

<sup>136</sup> *Id.* at 137.

<sup>137</sup> Rosenberg, *supra* note 4, at 573.

<sup>138</sup> 401 U.S. 424 (1971).

<sup>139</sup> MCCANN, *supra* note 125, at 50.

<sup>140</sup> *Id.* (emphasis added).

of *Washington v. Gunther*<sup>141</sup>, where the Court held that Title VII's provisions extended to discrimination among different jobs as well as discrimination within a single position.<sup>142</sup> Echoing Guinier's description of the effects a judicial opinion can have on public debate, McCann quotes a Bureau of National Affairs study which said that "'*Gunther* marks the beginning of the modern debate on wage equality. The debate is, in part, a response to the decision.'"<sup>143</sup> He concludes that "[e]ven more important for the discussion here, however, is that the court decision 'jump started' the pay equity movement's activity and organization nationwide."<sup>144</sup>

A key federal district court decision in Washington State then played a central role "invit[ing] activists around the nation to rush in" to the pay equity movement.<sup>145</sup> Describing interviews with activists involved in the effort, McCann says that a "large majority" of them "credited the Washington State decision and other early cases as *primary educational cues that generated their own initial personal interest and involvement in the cause*."<sup>146</sup> And a Massachusetts report found that "'[i]n Massachusetts, and throughout the nation, the comparable worth debate has been influenced by . . . *AFSCME v. Washington*. It has had an enormous social and political impact' in sparking collective action on the issue."<sup>147</sup> From this evidence McCann concludes that "[s]uch dramatic correlations between highly publicized legal cases, participant testimony about raised hopes, and rapidly escalating organizational action around the nation thus provides strong evidence for *the significant role of litigation as a catalyst for the pay equity movement's development*."<sup>148</sup>

McCann is, of course, describing the effects of majority court opinions, not the oral dissents that are the focus of Guinier's article. And, as stated above, Rosenberg emphasizes the problems specific to attributing any causal effects to an oral dissent.<sup>149</sup> Nonetheless, McCann's analysis of precisely how these opinions influenced the pay equity movement in many respects mirrors Guinier's broader understanding of the influence a demosprudential opinion could have. For example, Guinier argues that "[b]y illuminating an alternative view of the law, [the dissenter] can invite critical reflection and inspire a sense of agency among the people themselves."<sup>150</sup> McCann finds that "[t]he movement drew its very normative logic as a rights claim from the evolution of antidiscrimination law in the postwar era."<sup>151</sup> This is because "legal victories signaled to potential activists that they might be able to count on judicial support" and that activists "appropriated the language of rights to interpret, or to 'name,' a long-experienced injustice in new, more compelling and sensible terms."<sup>152</sup>

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<sup>141</sup> 452 U.S. 161 (1981).

<sup>142</sup> *Id.* at 53.

<sup>143</sup> *Id.* at 53–54.

<sup>144</sup> *Id.* at 54.

<sup>145</sup> *Id.* at 55.

<sup>146</sup> *Id.* at 56 (emphasis added).

<sup>147</sup> *Id.* at 57.

<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> See *supra* Part III.A.

<sup>150</sup> Guinier, *Dissent*, *supra* note 1, at 50.

<sup>151</sup> MCCANN, *supra* note 125, at 88.

<sup>152</sup> *Id.* at 89. McCann notes that he "found little to suggest that the courts' alleged 'legitimation'

Guinier also emphasizes the educational role that demosprudential opinions can play: “A demosprudential dissent provides a powerful pedagogical opportunity to open up space for public deliberation and engagement.”<sup>153</sup> McCann similarly describes legal opinions as giving “primary educational cues”<sup>154</sup> and lawsuits serving as “consciousness raising” agents.<sup>155</sup> He specifically claims that “attention to high profile court cases helped to make ‘rights talk’ a staple discourse of the emerging social reform movement culture.”<sup>156</sup> And he notes that “the primary architects of pay equity litigation have since the early 1970s frankly touted the educational and mobilization potential of litigation.”<sup>157</sup>

Finally, Guinier emphasizes the connection between demosprudential opinions and what she calls “norm entrepreneurs.”<sup>158</sup> One principal potential effect of a demosprudential opinion is to provide intellectual capital to elites within a social movement that they can use to mobilize grass roots constituencies and help shape the broader debate within society.<sup>159</sup> This also tracks McCann’s explanation of the dynamics of consciousness raising within the pay equity movement. After describing the surge in publicity around the pay equity issue following key legal actions, McCann says that “such publicity campaigns were not aimed for the most part at the mass public. Rather, the primary targets of legal consciousness raising were more selective or ‘attentive’ audiences of potential movement activists.”<sup>160</sup> Leaders within the movement “distributed news and journal articles, press releases, and other information regarding court decisions to existing networks of political allies as well as to potentially interested unions and other associations.”<sup>161</sup> According to McCann, “it was through such targeted publicity efforts that movement leaders focused attention on” the pay equity issue.<sup>162</sup>

Rosenberg’s focus on opinion studies that show court judgments have little or no effect on public opinion ignores this important dynamic. Demosprudential opinions can form the raw material for intellectual entrepreneurs without directly penetrating public consciousness. Such opinions also create leverage for social movements by raising the possibility for real change. Rosenberg acknowledges that social movements use majority holdings to effect social and political change.

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capacity figured prominently in the movement process. *Id.* Instead, court opinions “seemed most important in altering the expectations of potential activists that already apparent injustices might realistically be challenged in a particular point in time.” While parts of Guinier’s analysis could be read as suggesting that demosprudential opinions play the kind of legitimating role McCann rejects, a better reading is that Guinier is concerned with mapping the possibilities for such opinions to alter expectations or understandings of existing and potential activists in the way McCann describes. *See, e.g.,* Guinier, *Dissent*, *supra* note 1, at 104–05 (describing how a demosprudential dissent could offer either a “legal roadmap” to existing social movement groups.).

<sup>153</sup> Guinier, *Dissent*, *supra* note 1, at 51.

<sup>154</sup> MCCANN, *supra* note 125, at 56.

<sup>155</sup> *Id.* at 63.

<sup>156</sup> *Id.* at 65, citing GOODWYN, LAWRENCE, *THE POPULIST MOVEMENT* (1978).

<sup>157</sup> *Id.* at 61.

<sup>158</sup> Guinier, *Dissent*, *supra* note 1, at 107 (“In sum, the goal of a demosprudential dissenter in Crawford might have been to give permission to norm entrepreneurs . . . to feel outrage and then act to generate constructive change in the public arena.”).

<sup>159</sup> *Id.*

<sup>160</sup> MCCANN, *supra* note 125, at 63.

<sup>161</sup> *Id.* at 64.

<sup>162</sup> *Id.*

McCann's study supports that argument but also complicates it. McCann notes that "contrary to most legal scholars' expectations, legal leverage can be gained without clearly or consistently favorable judicial statements of standards on issues at stake."<sup>163</sup> Instead, uncertainty about the legal outcome is sufficient in itself "to endow movements with significant bargaining power."<sup>164</sup> Demosprudential opinions, including dissents, can create that uncertainty by offering an alternative interpretation of the constitution. Guinier describes demosprudential dissents as playing this kind of role: "Dissenters can play a useful role in structuring the controversy to facilitate learning through a continuous process of public participation and engagement."<sup>165</sup>

This dovetails with the need to develop rights consciousness. Thus opinions can have two complementary effects: on the formal legal level, the mere fact of a dissent can create the kind of uncertainty that McCann says can create leverage. At the same time, a demosprudential dissent can provide the language and ideas the intellectual entrepreneurs can use to raise rights consciousness within a movement.

An important point is that the language of the opinion itself is unlikely to penetrate very far in this process. To be effective, it needs only to reach one or more influential entrepreneur. Whether the entrepreneur directly cites the opinion is irrelevant. This aspect of the influence mechanism also provides a partial response to the opinion studies, which Rosenberg cites, that show that court judgments rarely shift public opinion. It does not matter whether the general public or even the grass roots members of a particular movement are directly aware of the content of a particular opinion. All that matters is that opinion's capacity to serve as a resource for leaders within the movement to construct claims based on alternative interpretations of the constitution.

McCann makes this point in a slightly different fashion. He found that leaders in the pay equity movement "from the start deliberately worked to achieve [a] catalyzing effect on movement organization through legal action."<sup>166</sup> McCann describes "reams of written material and countless spoken words outlining the implications of court cases and defending the logic of pay equity rights flood[ing] selected sectors of grassroots America in the early 1980s."<sup>167</sup> That litigation-based education effort, however, was not aimed at the general public. Instead "the primary targets of legal consciousness raising were more selective or 'attentive' audiences of potential movement activists."<sup>168</sup>

## 2. *Teles's Intellectual Entrepreneurs*

The concept of norm entrepreneurs also features prominently in Stephen Teles's recent study of the rise of the conservative legal movement in the U.S.<sup>169</sup>

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<sup>163</sup> *Id.* at 169.

<sup>164</sup> *Id.*

<sup>165</sup> Guinier, *Dissent*, *supra* note 1, at 102.

<sup>166</sup> *Id.* at 61.

<sup>167</sup> *Id.* at 63.

<sup>168</sup> *Id.*

<sup>169</sup> TELES, *supra* note 17.



Like McCann, Teles describes the influence of intellectual entrepreneurs in language similar to Guinier's description of demosprudential dissents. Equally important, unlike McCann, who describes the effects of litigation victories on social movements, Teles focuses on the ways in which intellectual entrepreneurs use ideas to foster what he calls "oppositional consciousness" and mobilize resistance to existing legal frameworks.<sup>170</sup>

For example, Teles argues that "rhetorical formulations, or frames, that give intellectual substance to otherwise silent grievances" play an important role in mobilizing opposition to the dominant legal paradigm. Quoting Erik Bleich, Teles explains that these rhetorical formulations:

[H]elp actors identify problems and specify and prioritize their interests and goals; they point actors towards causal and normative judgments about effective and appropriate policies in ways that tend to propel policy down a particular path and reinforce it on that path; and they can endow actors deemed to have moral authority or expert status with added power in a policy field.<sup>171</sup>

This is because, according to Bleich, "oppositional consciousness" requires "ideational resources—ideas available in the culture that can be built upon to create legitimacy, a perception of injustice, righteous anger, solidarity, and the belief in the group's power."<sup>172</sup>

Like demosprudential dissents, these entrepreneurs work to "denaturalize" the existing regime by exposing the hidden normative assumptions . . ."<sup>173</sup> In doing so, "[t]he activity of intellectual entrepreneurs signals that a domain is vulnerable to challenge and provides the legitimacy for others to follow up their arguments with action."<sup>174</sup>

Intellectual entrepreneurs, in Teles's account, also serve a coordination function. They "provide countermobilizers with an alternative vision of social order, drawing upon examples from private orderings, foreign examples, logical argument, or the polity's past experiences."<sup>175</sup> Those ideas then "can generate 'coordination without a coordinator,' providing guidance for action, confidence that risks are worth taking, and reassurance that others will be acting as well."<sup>176</sup>

Teles does not specifically cite courts or court judgments as examples of intellectual entrepreneurs, but there are parallels between his description and Guinier's. As just noted, Teles describes intellectual entrepreneurs as "signal[ling] that a domain is vulnerable to challenge . . ."<sup>177</sup> Guinier argues that "a demosprudential dissent can explain the more vulnerable parts of a majority

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<sup>170</sup> *Id.* at 18

<sup>171</sup> *Id.* at 17–18.

<sup>172</sup> *Id.* at 18.

<sup>173</sup> *Id.* at 17.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 18.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

decision.”<sup>178</sup> Teles goes on to say that the activity of intellectual entrepreneurs “provides the legitimacy for others to follow up their arguments with action.”<sup>179</sup> Guinier summarizes the theme of several demosprudential dissents in similar terms: “[E]ach of these Justices, in their own way and with varying degrees of certainty, is saying: ‘This is the law currently, but this formulation of the law is unjust, and it is in the power of the people and their representatives to change it.’”<sup>180</sup>

Understood in Teles’s terms, a demosprudential opinion can either directly stimulate social movement activity in a similar—although much more limited—way as an idea proposed by an intellectual entrepreneur. Or, as is more likely the case, the opinion can serve as raw material for the work of intellectual entrepreneurs within a movement. Rosenberg correctly notes that the question whether judicial opinions have such effects is ultimately an empirical one. But McCann’s work is evidence that court judgments do provide raw material for social movements. And Guinier and others have documented similar anecdotal evidence of a connection between the dissenting opinions of conservative Supreme Court justices, in particular those of Justice Antonin Scalia, and the conservative legal movement that is Teles’s focus. In her article, Guinier cites Justice Scalia’s dissent in *Lawrence v. Texas*<sup>181</sup> as having demosprudential characteristics in its focus on the broader social context of the decision and his warning to “conservatives that, if they did not act, the Court would sanction gay marriage next.”<sup>182</sup> This warning did not go unheeded, and conservative activists used Scalia’s dissent as a tool to mobilize opposition immediately following the decision.<sup>183</sup> Martha Minow made a similar connection in an essay commenting on Reva Siegel’s notion of democratic constitutionalism:

Maybe the most specific legal residue from the clash of social movements are the explicit efforts by Justice Scalia to encourage mass mobilization against gay rights. His may not be the first judicial opinion to become a fund-raising letter, but [his] dissent in *Lawrence v. Texas* was ready for photocopying the day it was released.<sup>184</sup>

Siegel herself has analyzed the relationship between the gun-rights movement and the language of judicial opinions in a recent article discussing the Supreme Court’s decision in *District of Columbia v. Heller*,<sup>185</sup> where a five-member majority held that the second amendment protects an individual’s right to bear arms against federal gun control regulations.<sup>186</sup> Siegel argues that the majority opinion in *Heller*

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<sup>178</sup> Guinier, *Dissent*, *supra* note 1, at 102.

<sup>179</sup> TELES, *supra* note 17, at 17.

<sup>180</sup> Guinier, *Dissent*, *supra* note 1, at 115.

<sup>181</sup> 539 U.S. 558 (2008).

<sup>182</sup> Guinier, *Dissent*, *supra* note 1, at 101.

<sup>183</sup> *Id.* (“Randall Terry quoted Justice Scalia’s words in a fundraising letter seeking impeachment of the Justices who had joined the *Lawrence* opinion.”).

<sup>184</sup> Martha Minow, *Constituting the Constitution, Constituting Ourselves: Comments on Reva Siegel’s Constitutional Culture, Social Movement Conflict and Constitutional Change*, 94 CAL. L. REV. 1455, 1460 (2006).

<sup>185</sup> 128 S. Ct. 2783 (2008).

<sup>186</sup> Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L.

is an example of democratic constitutionalism because the majority opinion was the culmination of social and cultural changes influenced by the gun-rights movement and its connection to the emergence of the conservative legal movement described by Teles.<sup>187</sup> The article is rich with examples of the interplay of ideas between courts and social movements. Early in the article she cites an online editorial by a member of the Cato Institute who attributes the result in *Heller* directly to activism by his own publication and “the other pillars of the conservative and libertarian movements.”<sup>188</sup> The author goes on to highlight the fact that the language of both the majority and the dissent featured an originalist approach that his group and others had “worked for decades to make sure . . . was a respectable mode of constitutional interpretation . . . .”<sup>189</sup>

These examples show that at least some members of social movements pay close attention to courts and the language of court decisions. These examples also support the claim that individuals within those movements may be influenced by the language of a particular court opinion (or series of opinions)—opinions that themselves reflect the same social and political trends that gave rise to that movement. Those intellectual entrepreneurs could then translate and incorporate that language into a broader theoretical framework and then work through a range of channels to promote changes in the broader social and political context that ultimately result in legal change. In his recent book describing seminal dissenting opinions by the Supreme Court, Mark Tushnet posits just such a role for dissents:

So, dissents can matter, but in quite an indirect way: a dissent *might* be picked up by a social movement because the dissent expresses something the movement already has in its constitutional vision; the social movement’s constitutional vision *might* affect a political party and its candidates; successful candidates *might* nominate judges and justices because of their constitutional visions; and these new justices *might* conclude that the dissent . . . provides a better account of our Constitution than the majority opinion does.<sup>190</sup>

While Tushnet’s description supports the basic claim of demosprudence—that court opinions can influence social change—it nonetheless offers a far more tentative and indirect understanding of the causal relationship than the one Guinier describes. This suggests that both Rosenberg and Guinier may have overstated their cases to some extent. Rosenberg is wrong that the language of court opinions inevitably has little or no effect on social movements. But Guinier’s description of the ways in which oral dissents could influence social movements implies an overly direct causal relationship between the two.

Instead, demosprudential opinions can work in two ways that fit Tushnet’s

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REV. 191 (2008).

<sup>187</sup> *Id.*

<sup>188</sup> Dave Kopel, *Conservative Activists Key to DC Handgun Decision*,

HUMAN EVENTS (June 27, 2008), <http://www.humanevents.com/article.php?id=27229>.

<sup>189</sup> *Id.*

<sup>190</sup> MARK TUSHNET, *I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES* xix–xx (2008).

hypothesis. First, they can give support to organizations working for legal change by encouraging such organizations, in Epp's words, to "play for rules" rather than victory in a single case by working for political as well as legal change.<sup>191</sup> McCann concludes that "successful legal advocacy seemed most important in altering expectations of potential activists that already apparent injustices might be successfully challenged at a particular point in time."<sup>192</sup> A demosprudential dissent could provide similar encouragement to activists within a movement that success over time is possible. As Guinier describes it, "[i]n demosprudential terms, the dissent might have aimed to embolden a set of role-literate actors to engage with, and potentially influence over time, the Court majority's view of constitutional law."<sup>193</sup>

Second, where courts adopt the arguments of social movements—even in dissent—they help translate political debates into legal, and specifically constitutional, arguments. Minow describes this process of constitutionalization of social movement claims, noting that "a specifically legal constitutional culture emerges not only as competing groups internalize counterarguments, but also as the Supreme Court echoes debates between mobilized social movements."<sup>194</sup> McCann similarly credits legal mobilization within the pay equity movement with this kind of effect: "[A]ctivists appropriated the language of rights to interpret, or to 'name,' a long-experienced injustice in new, more compelling and sensible terms."<sup>195</sup> He concludes in language similar to Guinier's that "[i]n this way, the inchoate legal consciousness shared by many similarly situated citizens was collectively tapped, expanded, and focused on specific demands for legal change."<sup>196</sup>

Rosenberg clearly is correct to caution against an over-emphasis on the role of courts in this process. And, as he notes, McCann is also careful not to overstate the role of courts and legal mobilization more generally. But Rosenberg's argument that such groups do not need the Supreme Court to support their efforts ignores the potential contributions of a demosprudential approach that a more textured understanding of the factors that support sustained social movements reveals.<sup>197</sup>

The important point is that the Court's decisions contribute to the overall environment in which these individuals and groups decide to act. Rosenberg is plainly correct that attributing a direct causal effect to any Court judgment is difficult, and his critique of Guinier's version of demosprudence hits home on this point. But Guinier acknowledges this difficulty directly in the *Foreword*, noting generally that "[d]emosprudence through dissent may overestimate the power and authority of the Supreme Court" and that "it may fail to calculate the chances that a dissent is simply ineffectual."<sup>198</sup> Guinier also acknowledges that "[d]emosprudential dissents are admittedly a limited means of institutionalizing

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<sup>191</sup> Charles R. Epp, *Implementing the Rights Revolution: Repeat Players and the Interpretation of Diffuse Legal Messages*, 71 LAW & CONTEMP. PROBS. 41, 43–46 (2008).

<sup>192</sup> MCCANN, *supra* note 125, at 89.

<sup>193</sup> Guinier, *Dissent*, *supra* note 1, at 76.

<sup>194</sup> Minow, *supra* note 184, at 1459.

<sup>195</sup> MCCANN, *supra* note 125, at 89.

<sup>196</sup> *Id.*

<sup>197</sup> Post & Siegel, *supra* note 8, *passim*.

<sup>198</sup> Guinier, *Dissent*, *supra* note 1, at 129.

dissent within the democratic process, albeit with as yet untapped potential for enhancing our democratic system.”<sup>199</sup> The irony is that Rosenberg’s objection that Guinier—and the legal academy generally—overemphasizes the role of courts, is also the basic concern of demosprudence: the need for courts to acknowledge more explicitly and self-consciously the necessary and inevitable connection between constitutional change and social movements. The affinities between Guinier’s description of demosprudence and McCann’s and Teles’s studies illustrate that, far from departing from well-established social and political science understandings of the dependent and highly variable relationship between courts and social movements, demosprudence read broadly is closely aligned with that understanding and seeks to have courts acknowledge and engage more directly with the complexities inherent in it.

### C. *Legitimacy and Positivity Theory*

Before turning to the analysis of the South African Constitutional Court’s employment of a demosprudential approach, I want to explore one additional possible response to Rosenberg that is particularly relevant in the South African context. As I will argue in more detail below, the South African Constitutional Court acts demosprudentially primarily when it is attempting to trigger political involvement in a constitutional issue. In essence, the Court is attempting to build a culture of constitutionalism throughout all levels of South African society beginning with the political branches but also reaching out towards all citizens. In this respect, the Court is responding to the problem of building legitimacy identified by James Gibson and Gregory Caldiera in a series of surveys of the South African public’s views of the Constitutional Court.

Gibson and Caldiera conducted a panel survey of South Africans in 1996 and 1997 to test whether what they call “legitimacy theory” applies to the Constitutional Court.<sup>200</sup> Their central question is how courts, as institutions with relatively few formal powers, succeed in getting other institutions to comply with controversial decisions challenging the scope of those institutions’ authority.<sup>201</sup> Legitimacy theory hypothesizes that courts achieve the moral authority necessary to obtain such compliance where the society “view[s] courts as appropriate institutions for such decisions” and have a “dedication to the long-term health and efficacy of an institution [that] overrides dissatisfaction with its immediate outputs.”<sup>202</sup>

Gibson and Caldiera used a hypothetical decision regarding the civil liberties of political minorities to test whether particular groups within society would be willing to accept an unpopular result by the Court.<sup>203</sup> They concluded from the results that the Court enjoys relatively low levels of legitimacy compared to other high courts and “that the Constitutional Court is able to convert its legitimacy into acquiescence only in some circumstances and only with some

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<sup>199</sup> *Id.* at 130.

<sup>200</sup> Gibson & Caldiera, *supra* note 18, at 2.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 3.

groups.”<sup>204</sup> One of the implications they draw from their data is that courts in developing democracies like South Africa must actively seek publicity for their work in order to develop institutional loyalty within society. This is because “[j]udges have access to powerful symbols—even if they are only symbols of authority—that can contribute mightily to legitimacy, especially since extant research so strongly suggests that ‘to know’ courts is ‘to love them.’”<sup>205</sup>

Gibson conducted another survey in 2004 to study whether the Constitutional Court and the South African Parliament had developed legitimacy over time.<sup>206</sup> In this study, Gibson tested what he calls “a theory of ‘positivity bias.’”<sup>207</sup> Positivity bias posits that courts gain institutional legitimacy when citizens are repeatedly exposed to the symbols of the court itself, because such exposure develops an understanding and expectation that courts are separate from regular politics.<sup>208</sup> Gibson explains that it is repeated exposure that is important, not necessarily the substantive outcome that results in the exposure. Therefore, “even when the initial stimulus for paying attention to courts is negative (e.g., a controversial court decision), judicial symbols enhance legitimacy . . . .”<sup>209</sup>

Gibson’s positivity theory suggests that a demosprudential approach may be a mechanism for developing legitimacy not only for the Court but for the new constitutional order more generally. By issuing demosprudential opinions, particularly opinions that involve weak-form mechanisms that require a political response, the Court is actively managing a process of exposure both to the Court itself and, more importantly, to the constitutional principles that the Court is expected to defend. Viewed this way, the Court’s demosprudential opinions and weak-form remedies are an extension of this insight and are attempts to establish the legitimacy of the constitution itself rather than just the court. By issuing decisions that directly call on the political branches to take constitutionally responsible actions and to establish processes for bringing citizens directly into policy-making processes with constitutional dimensions, the Court is creating a set of mechanisms for the kind of exposure that Gibson describes.

On one level Gibson’s and Caldiera’s concern with courts developing an identity that is separate from politics is in tension with Guinier’s call for courts to play a self-conscious political role by acting demosprudentially. For example, Gibson and Caldiera associate legitimacy with courts relative success in “‘sett[ing]’ political conflicts, or at least mak[ing] it more difficult for opposition to continue to mobilize,”<sup>210</sup> a result plainly at odds with Guinier’s call for demosprudential dissents to instigate social and political opposition to majority opinions.

But, in the context of a newly established constitutional democracy, like South Africa, demosprudence and the legitimacy-building process described by

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 24.

<sup>206</sup> James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 230 (Francois du Bois & Antje du Bois-Pedain eds., 2009).

<sup>207</sup> *Id.* at 233.

<sup>208</sup> *Id.* at 233–34.

<sup>209</sup> *Id.* at 234.

<sup>210</sup> Gibson & Caldiera, *supra* note 18, at 5.

Gibson and Caldiera are—or at least can be—complementary. Demosprudence calls on courts to actively seek to bring as broad a range of actors into a dialogue over constitutional values. By doing so, courts can create exposure to the constitution that is necessary to develop respect for constitutional authority. This in turn can be an integral part of developing a culture in which the constitution—and by extension the courts as its interpreter—has legitimacy.

Connecting legitimacy and positivity theory to demosprudence in this way provides a further response to Rosenberg's objection to demosprudence. On the most basic level, Gibson's and Caldiera's empirical work suggests that courts and court opinions do—or at least may—matter to the general public's perceptions of the courts themselves, and the constitution more generally. For example, they cite experimental studies that conclude the U.S. Supreme Court "possesses a legitimacy-conferring capacity."<sup>211</sup> By acting demosprudentially, the South African Constitutional Court may be able to both develop legitimacy for itself and the constitution and, at the same time, confer legitimacy on the idea that the constitution can and should play an important role in South African society.

#### IV. DEMOSPRUDENCE IN SOUTH AFRICA

##### *A. Pragmatism and Principle on the Constitutional Court*

In a recently published essay Theunis Roux argues that, despite its relatively weak level of public support and youth as an institution, the South African Constitutional Court has managed to successfully preserve its institutional security while establishing some measure of legal legitimacy within the South African legal community by adopting a mix of principle and pragmatic compromise when deciding politically sensitive cases.<sup>212</sup> Roux analyzes the Court's record from its inception in 1995 and divides its cases into three categories:

(1) cases where the [Constitutional Court of South Africa or] CCSA was able to exploit the political context to hand down decisions of principle in the face of contrary public opinion or determined opposition by the political branches; (2) cases in which this was not possible, and where the CCSA was accordingly forced to compromise on principle to avoid a direct conflict with the political branches; and (3) cases in which the CCSA converted conceptual tests that were seemingly required by the constitutional text into more context-sensitive, multifactor balancing tests.<sup>213</sup>

Roux explains that where the Court was able to hand down decisions unpopular with the majority of South Africans, its position was generally aligned with that of the African National Congress (ANC), the dominant political party in South Africa

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<sup>211</sup> *Id.*

<sup>212</sup> Roux, *supra* note 14, at 108.

<sup>213</sup> *Id.*

since the end of apartheid.<sup>214</sup> In cases where the Court's decision rejected a policy adopted by the ANC government, Roux argues there was widespread popular support for the result.<sup>215</sup> In cases where the constitutionally principled result enjoyed neither ANC or popular support, Roux finds that the Court often compromised on principle and, more specifically, that it relied on a formalist understanding of separation-of-powers principles to defer to the political branches on sensitive issues.<sup>216</sup> He argues further that the Court often adopts multi-factor, context-dependent interpretive tests even in less politically charged cases to avoid establishing firm principles that it might later have to apply in a case that poses a greater threat to its institutional security.<sup>217</sup>

I agree with much of Roux's analysis of the Court's decisions and, in particular with his observation that "the explanation for the CCSA's record must lie outside formal legal doctrine (although the constraints imposed by formal legal doctrine still form part of the explanation)."<sup>218</sup> But Roux's explanation omits an equally important aspect of the Court's approach that many of the cases he analyzes as well as other cases reflect: a genuine and consistent concern with developing a broad-based constitutional culture that respects democratic values within South Africa. It is this concern at least as much as a narrow interest in self-preservation that helps explain many of the results that Roux argues represent a triumph of pragmatism over principle.

Applying Guinier's concept of *demosprudence* to the Court's record reveals this important strand and also offers a somewhat different explanation for some of the decisions that Roux views as compromises of constitutional principle. In addition, several of the cases Roux identifies as resting on constitutional principle—in particular the *Treatment Action Campaign* decision (*TAC*)<sup>219</sup>—reflect this concern with democratic process and from that perspective can be understood as part of a consistent pattern rather than in opposition to decisions where the Court adopts a more context-specific and flexible approach that Roux views as characteristic of some of its compromise decisions. Thus, in many of the cases where Roux characterizes the Court as acting as a careful manager of its relationship with the political branches "retreating from principle where such compromises were in the long-term interests of the constitutional project."<sup>220</sup> I see a Court concerned with developing a culture of democratic constitutionalism by engaging the political branches and South African society in a dialogue over constitutional values.

### B. *Demosprudence in the Socioeconomic Rights Cases*

Like many constitutions adopted in the twentieth century, the 1996 South African Constitution—which was a centerpiece of the peaceful transition from

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<sup>214</sup> *Id.* at 137.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 137–38.

<sup>217</sup> *Id.* at 135–36.

<sup>218</sup> *Id.* at 137–38.

<sup>219</sup> *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

<sup>220</sup> Roux, *supra* note 14, at 138.



apartheid—contains several social and economic rights provisions.<sup>221</sup> Most of these provisions contain a qualifying clause that requires the state only to “take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of these rights.”<sup>222</sup> In other words, the state’s obligation to provide access to the right at issue is limited by the resources available to it and the other demands made on those resources. The Constitutional Court has consistently interpreted this language as qualifying the substance of the right itself.<sup>223</sup> This means that, rather than adopting a two-step interpretive process in which it first determines what level of benefit each right requires in the abstract and then decides whether the government has demonstrated that resource constraints justify providing a lesser level of service, the Court collapses those analyses and asks only whether the challenged program is adequate in the context of a specific case. The Court has adopted what it calls a highly flexible “reasonableness” standard for this analysis that requires consideration of all relevant factors in each case.<sup>224</sup> Critics have charged that both the Court’s refusal to interpret each right independent of the resources limitation and the reasonableness standard undermine the effectiveness of these rights and leave far too much discretion to the Court.<sup>225</sup>

### 1. *The Treatment Action Campaign Case*

Roux argues that—with one notable exception—the Court’s socioeconomic rights cases are prime examples of the context-specific standards that permit the Court to prioritize managing its relationship with the political branches over adopting strong constitutional principles.<sup>226</sup> He highlights the *Treatment Action Campaign* decision (*TAC*)<sup>227</sup> as the single socioeconomic rights case where the Court was able to take a principled approach.<sup>228</sup> *TAC* also illustrates the rare situation where the Court acted against the interests of the ANC without risking its own security because of substantial public support for the result.<sup>229</sup>

The central issue in *TAC* was whether the South African government’s

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<sup>221</sup> See, e.g., S. AFR. CONST., 1996 §26 (right to housing), §27 (rights to health care, food, water and social security).

<sup>222</sup> *Id.*

<sup>223</sup> See generally Brian Ray, *Policentrism, Political Mobilization and the Promise of Socioeconomic Rights*, 45 STAN. J. INT’L L. 151 (2009).

<sup>224</sup> See, e.g., *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (2000) (CC) at paras. 41–42.

<sup>225</sup> See, e.g., Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 S. AFR. J. HUM. RTS. 473, 473–74 (2006) (“[T]he Court’s rejection of what can be called a ‘minimum core approach’ to the enforcement of ss 26(1) and 27(1) of the Constitution in favour of an administrative law-like ‘reasonableness approach’ . . . has been much lamented.”); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 8–10 (2003); Mark Kende, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 244 (2009).

<sup>226</sup> Roux, *supra* note 14, at 136 (observing “the CCSA’s strategy in these cases may have been to devise a review standard that allowed it greater flexibility to manage its relationship with the political branches . . .”).

<sup>227</sup> *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

<sup>228</sup> Roux, *supra* note 14, at 123.

<sup>229</sup> *Id.*

decision to restrict the provision of an anti-retroviral drug used to prevent mother-to-child transmission of the HIV virus to certain pilot sites violated the right to access to health care under section 27 of the constitution.<sup>230</sup> The manufacturer of the drug, nevirapine, had agreed to provide it at no cost and the protocol for prevention—a single dose to mother and child—was relatively inexpensive. The South African government argued that restriction to pilot sites was necessary to test the long-term safety and efficacy of the drug and to determine whether a more comprehensive (and expensive) protocol that included counseling was required to prevent later retransmission.<sup>231</sup>

In an unusually searching analysis, the Constitutional Court rejected each of the government's arguments with no apparent deference to its views on the complex policy and scientific issues in the case. The Court then for the first time in a socioeconomic rights case ordered a specific change to the government's policy by requiring it to remove the restrictions on provision of nevirapine and to facilitate the provision of nevirapine and facilities throughout the country.<sup>232</sup> The Court, however, specifically rejected the plaintiffs' request that it retain jurisdiction over the case to review the policy changes and ensure prompt enforcement of its order—an additional measure of relief that the trial court had issued.<sup>233</sup> While acknowledging the plaintiffs' "anxiety . . . to have the government move as expeditiously as possible" the Court noted that "[t]he government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case."<sup>234</sup>

Roux points out that *TAC* was "one of the most politically controversial cases to come before the CCSA in the first ten years of its existence" in large part because of the tremendous public distrust over the basis for the government's HIV/AIDS policies.<sup>235</sup> Then-President Thabo Mbeki on several occasions had publicly expressed skepticism over the link between AIDS and the HIV virus.<sup>236</sup>

Although the Court only obliquely acknowledged this political dimension of the case,<sup>237</sup> Roux notes that many credit its lack of deference to the government and willingness to order significant policy changes to the strong public opposition to the ANC's AIDS policies.<sup>238</sup> The Treatment Action Campaign, an AIDS-activist group which brought the case, supported its litigation efforts with "an effective mass mobilization strategy, through which they succeeded in creating a groundswell of public support" for overturning the policy.<sup>239</sup>

<sup>230</sup> *Treatment Action Campaign* 2002 (5) SA at paras. 10-16.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at para. 135.

<sup>233</sup> *Id.* at para. 129.

<sup>234</sup> *Id.* at paras. 129-30.

<sup>235</sup> Roux, *supra* note 14, at 123.

<sup>236</sup> See Mark Heywood, *Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health*, 19 S. AFR. J. HUM. RTS. 278 (2003).

<sup>237</sup> The closest the Court comes is when it says "[i]n our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention . . . . Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case." *Treatment Action Campaign* 2002 (5) SA at para. 20.

<sup>238</sup> Roux, *supra* note 14, at 125. See also Heywood, *supra* note 236.

<sup>239</sup> Roux, *supra* note 14, at 125

Roux concludes that the Court was able to make a principled decision in the case despite significant opposition from the highest ranks of the ANC leadership precisely because the ANC's policies lacked strong public support.<sup>240</sup> Unlike cases where the Court was able to make principled decisions in the face of strong public opposition to the outcome due to ANC support, *TAC* shows the Court aligning itself with the public against the ANC. But the important element in both situations that permitted a principled outcome, in Roux's view, was "the CCSA's ability, on occasion, to exploit the political context to hand down decisions of constitutional principle and, in this way, to build its legal legitimacy."<sup>241</sup>

Roux is clearly correct that the unusual political dynamics of the *TAC* decision played an important role in both the Court's willingness to employ a searching level of scrutiny and the ultimate decision to order a change in government policy. But his account of the litigation leaves out some significant details—details that reveal two important and related features of the decision. On the one hand, *TAC* was not a purely principled stand against the ANC. The Court's refusal to retain jurisdiction and the flexibility of the terms of the order was a partial but significant victory for the ANC compared to the trial court's order. At the same time, rather than simply aligning itself with the public against the ANC's leadership, the Court was concerned with creating a process that could bring both the ANC-led government and the public into a conversation to resolve the important constitutional issues underlying the decision.

This concern with developing effective long-term procedures to manage the often-controversial implications of social-welfare policies—and the specific aspects of the decision that reflect it—shares characteristics with the context-dependent and flexible remedies that Roux associates with the Court's pragmatic decisions. Focusing on this aspect of *TAC* connects it to those decisions, which, in turn, make up the broader strand of the Court's overall approach that is demosprudential in nature.

On a rhetorical level, the *TAC* decision at several key points constructs the kind of narrative that Guinier identifies as characteristic of demosprudence. The judgment opens with a series of quotes describing the HIV/AIDS pandemic as "the most important challenge facing South Africa since the birth of our new democracy" and a "scourge" that is the government's "top priority."<sup>242</sup> The Court then reveals that "[t]hese are not words of alarmists but are taken from a Department of Health publication in 2000 and a ministerial foreword to an earlier publication."<sup>243</sup> This paragraph does two things. First, it addresses the public directly—acknowledging the Court's own awareness of the seriousness of the AIDS crisis and that the stakes of the case go well beyond formal legal doctrine. Second, it depicts the government—whose policy is under attack—and the Health Ministry in particular, which has at this point gone on record as being willing to defy any court-ordered change in its policy, as deeply concerned about the pandemic and willing to take any necessary steps to address it. This second theme plays an important role throughout the judgment and in the Court's overall

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Treatment Action Campaign 2002 (5) SA* at para. 1.

<sup>243</sup> *Id.*

approach. Even as it rejects the government's program as patently unreasonable, the Court seeks to rehabilitate the government so that it will be willing to engage in a broader dialogue over the constitutional requirements of section 27 and the rest of the socioeconomic rights provisions.

The Court continues this second theme as it lays out the factual background. It first notes that “[g]overnment, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified nevirapine as its drug of choice for this purpose.”<sup>244</sup> The challenged policy is thus only a small part of a larger, “formidable” government strategy to combat HIV/AIDS. And, the medicine that plaintiffs seek to make available nationwide, is one the government itself determined is its “drug of choice” to prevent mother-to-child transmission.

In summarizing the government's reasons for restricting nevirapine to pilot sites, the Court acknowledges that “[a]ll of this obviously makes good sense from the public health point of view. These research and training sites could provide vital information on which in time the very best possible prevention programme for mother-to-child transmission could be developed.”<sup>245</sup> The Court then returns to invoking the tragic consequences of insufficient policies, noting that “[t]he crux of the problem, however, lies elsewhere: what is to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites?”<sup>246</sup>

In its ultimate finding that the government's policy is unreasonable, the Court once again softens the blow by acknowledging the challenges the government faces in its summary of the evidence, noting “[w]e know that throughout the country health services are overextended. HIV/AIDS is but one of many illnesses that require attention.”<sup>247</sup> And then, more generally, that “[w]e are also conscious of the daunting problems confronting [the] government as a result of the pandemic.”<sup>248</sup> It nonetheless, found that the restriction was unreasonable in light of the potential life-saving benefit of nevirapine.

In the remedial discussion, the Court moves from acknowledging the tremendous challenges the crisis presents the government to constructing a narrative of a responsible government committed to constitutional values. After noting that the government initially claimed that budget constraints prevented implementation of a comprehensive nevirapine program, the Court says that “[c]onditions have changed since these proceedings were initiated.”<sup>249</sup> Specifically, “[d]uring the course of these proceedings the state's policy has evolved and is no longer as rigid as it was when the proceedings commenced.”<sup>250</sup> This is because the government expanded the research and training sites and also increased the overall budget for HIV/AIDS prevention.

Finally, after a lengthy discussion of the breadth of its remedial power in

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<sup>244</sup> *Id.* at para. 4.

<sup>245</sup> *Id.* at para. 15.

<sup>246</sup> *Id.* at para. 17.

<sup>247</sup> *Id.* at para. 93.

<sup>248</sup> *Id.* at para. 94.

<sup>249</sup> *Id.* at para. 117.

<sup>250</sup> *Id.* at para. 118.

which the Court rejected the government's argument that its remedial authority extended only to issuing a declaration of unconstitutionality when enforcing the socioeconomic rights provisions,<sup>251</sup> the Court then declined to use full range of that authority. Emphasizing that "due regard must be paid to the roles of the legislature and the executive in a democracy" when deciding whether to issue an injunction,<sup>252</sup> the Court went on to reverse the injunction issued by the trial court and replace it with a more general order that the government remove the restrictions on provision of nevirapine and extend the program nationwide.<sup>253</sup>

The twin narratives *TAC* constructs—on the one hand describing the real-world consequences that the right to health has for the HIV/AIDS crisis and on the other reaching out to a resistant government by calling on its commitment to constitutional values—reflect the rhetorical aspects of demosprudence. But the Court's concern with democratic processes and its deliberate attempt to bring the government and civil society together into a conversation over the challenges raised by the HIV/AIDS crisis and the requirements of section 27 connects even more closely with demosprudence's core concern over democratizing the constitutional development process. This is most evident in the remedy itself, which incorporates the beginnings of a demosprudential remedial approach that ultimately develops into the engagement remedy discussed below.

Roux emphasizes the "intrusive nature of the remedy," in *TAC*, which, as noted above, for the first time forced a change in government policy in a socioeconomic rights case.<sup>254</sup> But the Court was careful to structure that remedy in ways that first left considerable discretion to the government to change policy and second, sought to bring civil society directly into the policy development process.

As already discussed, the Court specifically rejected the use of a structural injunction—a remedy that the lower court had imposed to create direct court oversight and prompt compliance by the government. In doing so, the Court invoked the government's demonstrated commitment to constitutional values and the rule of law.<sup>255</sup> The Court did so despite the fact that the government's conduct during the case—conduct that culminated in a declaration by the Minister of Health that it would not comply with a court-ordered policy change—demonstrated precisely the opposite. As with the government-responsibility narrative just described, here the Court was reaching out to the government and calling on it to live up to its constitutional commitments.

At the same time that it ordered the government to reverse course on the nevirapine policy, the Court returned substantial policy control. During its discussion of the range of remedial options available to courts, it first emphasized that, even where courts order policy changes to comply with the constitution "policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so."<sup>256</sup> Court-ordered policy changes must "therefore not be formulated in ways that

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<sup>251</sup> *Id.* at para. 106.

<sup>252</sup> *Id.* at para. 113.

<sup>253</sup> *Id.* at para. 135.

<sup>254</sup> Roux, *supra* note 14, at 123.

<sup>255</sup> *Minister of Health v. Treatment Action Campaign* 2002 (5) SA at para. 129.

<sup>256</sup> *Id.* at para. 114.

preclude the executive from making such legitimate choices.”<sup>257</sup> The final order then incorporated this precept by permitting the government to ignore the specific changes ordered by the Court and to adapt “its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.”<sup>258</sup>

In addition to calling on the government to commit itself to developing constitutionally sufficient policies, the Court also acknowledged the substantial role that civil society played in the litigation and emphasized the need for policy development to be open, transparent, and inclusive. This section of the judgment includes a one-paragraph sub-section titled “*Transparency*.”<sup>259</sup> The paragraph opens noting that, while three of nine provinces “have publicly announced programmes to realise progressively the rights of pregnant women and their newborn babies” to access nevirapine, the rest have not disclosed their policies “notwithstanding the pertinent request from TAC in July 2001.”<sup>260</sup> The Court then calls on society to work with government to resolve the HIV/AIDS crisis: “The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led.”<sup>261</sup> The Court concludes that “[t]his can be achieved only if there is proper communication” and that “for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be known appropriately.”<sup>262</sup> Several paragraphs later the Court devotes an entire paragraph to highlighting the need for civil society to work with government: “We consider it important that all sectors of the community, in particular civil society, should co-operate in the steps taken to achieve [the goal of combating HIV/AIDS].”<sup>263</sup>

Roux emphasizes popular support for changes to the ANC’s HIV/AIDS policies as the explanation for the result in *TAC*, but that same support connects these process values to demosprudence. In this way *TAC* is connected to the Court’s other socioeconomic rights cases that Roux cites as examples of the Court adopting a pragmatic, context-dependent test rather than developing strong constitutional principles.<sup>264</sup> This emphasis on process is even more evident in the Court’s most recent housing-rights cases in which it has institutionalized those process values through a remedy known as engagement. The following sections first draw a connection between *TAC* and the Court’s early housing-rights cases and then explain how the engagement remedy represents a particularly direct version of demosprudence.

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at para. 135.

<sup>259</sup> *Id.* at para. 123.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at para. 126.

<sup>264</sup> Roux, *supra* note 14, at 118–136.

## 2. *Weak-Form Review in Grootboom*

As *TAC* illustrates, the demosprudential character of the Court's approach is particularly evident in the socioeconomic rights context. This is so for two principal reasons. First the Court's reluctance to definitively interpret the socioeconomic rights provisions and its corresponding emphasis on developing political responses that bring civil society into the process directly incorporates the democratizing effect of oral dissents described by Guinier. While many have criticized the ambiguity inherent in the reasonableness standard, by taking a context-specific approach the Court is developing a remedial framework that creates systemic opportunities and incentives for the kind of broad-based dialogue and democratic constitutional development envisioned by Guinier. At the same time, a flexible remedy that emphasizes a procedure for interbranch and civil society-government dialogue over constitutional values allows courts, even in majority opinions, to adopt a demosprudential approach that Guinier associates principally with dissents. Rather than setting out an authoritative and final interpretation, the reasonableness standard combined with remedial flexibility permits the Court to issue opinions that create a largely political process for developing the content of these rights.

Second, because these rights literally implicate life-and-death issues, an empathetic and realistic treatment of the facts requires the kind of direct public address and non-legalistic/technical approach characteristic of demosprudence. Despite—or perhaps because of—its preference for remedies that emphasize enhanced democratic procedures over substantive policy changes, the Court has consistently departed from standard legal analysis. Its socioeconomic rights opinions and woven narratives highlight the dire plight of the many poor and homeless South Africans and the constitutional responsibility for that plight imposed by these rights on both government and society in general.

The Court's first housing-rights case, *Grootboom*, features both of these characteristics.<sup>265</sup> *Grootboom* presented a challenge by residents of a shack-dweller community outside of Cape Town to the City of Cape Town's eviction of the residents and destruction of their homes.<sup>266</sup> The Constitutional Court held that a set of regional and national housing policies failed to satisfy the right to access to adequate housing contained in section 26 of the Constitution because those policies did nothing to address the emergency needs of citizens like the *Grootboom* residents.<sup>267</sup> The case was an appeal from a trial court decision that found the housing policies unconstitutional on slightly different grounds.<sup>268</sup> The trial court issued an injunction requiring the relevant ministries to provide direct relief to the plaintiffs in the case and also retained jurisdiction to review the new policy developed by the government.<sup>269</sup>

As in *TAC*, the Constitutional Court adopted a less intrusive remedy and reversed the lower court's injunction. Unlike in *TAC*, however, where it ordered a

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<sup>265</sup> *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>266</sup> *Id.* at para. 4.

<sup>267</sup> *Id.* at para. 95.

<sup>268</sup> *Id.* at para. 16.

<sup>269</sup> *Id.*

specific change in policy, the Court instead issued a general declaration that the local, regional and national government lacked a constitutionally sufficient plan for dealing with emergency situations and called on the political branches to develop one themselves.<sup>270</sup>

This was the Court's first experiment with the kind of flexible remedy that has since come to characterize its socioeconomic rights jurisprudence. *Grootboom* predates *TAC* and follows the Court's first socioeconomic rights decision where it held that a policy for limiting dialysis treatment to patients who met certain criteria did not violate the right to access to health care—a result that many feared meant the Court might be unwilling to find any government policy unreasonable.<sup>271</sup> *Grootboom* put those fears to rest, but many criticized the Court's refusal to retain jurisdiction and have since pointed to the lack of significant housing-policy changes as evidence that the limited remedy was ineffective.<sup>272</sup>

The policy change ordered in *TAC* was a significant development towards the kind of direct enforcement those critics called for, but to this point *TAC* remains close to the high watermark in court policy intervention.<sup>273</sup> And, as discussed above, read closely, the *TAC* order actually incorporates much of the flexibility of the *Grootboom* declaration. In that respect, both remedies share demosprudential characteristics because they open up the possibility for legislative and executive dialogue. *Grootboom* largely leaves the courts out of the equation in the short-term, which brings it closer to demosprudence's emphasis on non-judicial constitutional development, but, unlike *TAC*, *Grootboom's* focus was exclusively on the government and did not incorporate civil society. *TAC* is more closely affiliated with Guinier's vision because the Court called on civil society to engage directly with government in the policy-development process.

*Grootboom* also includes many of the rhetorical characteristics of a demosprudential opinion. Throughout the decision the Court speaks directly to the South African public acknowledging the challenges of poverty and homelessness and the transformative promise of the new constitution. The Court opens in the first paragraph invoking "the people of South Africa" and their "commit[ment] to the attainment of social justice and the improvement of the quality of life for everyone."<sup>274</sup> In the next sentence it connects this commitment to the Constitution:

The Preamble of our Constitution records this commitment. The Constitution declares the founding values of our society to be "[h]uman dignity, the achievement of equality and the advancement of human rights

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<sup>270</sup> *Id.* at para. 99.

<sup>271</sup> *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC) at para. 36 (S. Afr.).

<sup>272</sup> See KENDE, *supra* note 225, at 248–49.

<sup>273</sup> In *Khosa v. Minister of Development*, 2004 (6) BCLR 569 (CC), the Court relied in part on the social-welfare provision of section 27 to order the state to extend social-welfare benefits to permanent residents with none of the flexibility to change policy that the *TAC* order includes. The complete inflexibility of this order represents the most direct role the Court has been willing to play in a socioeconomic rights case and is a clear anomaly in an otherwise unbroken line of socioeconomic-rights decisions following *Soobramoney* where the Court has adopted some degree of remedial flexibility. As an aside, *Khosa* also fits uneasily within Roux's typology of cases because it is an example of the Court acting in direct opposition to the ANC government where the issue had little public support.

<sup>274</sup> *Grootboom* 2000 (11) BCLR 1169 (CC) at para. 1.



and freedoms.” This case grapples with the realisation of these aspirations for it concerns the state’s constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa’s new constitutional order.<sup>275</sup>

In the next paragraph, the Court shifts to a moving description of the “intolerable conditions under which many of our people are still living” and acknowledges “the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream.”<sup>276</sup> It then addresses the residents and others living in these conditions directly: “People should not be impelled by intolerable living conditions to resort to land invasions. [But] self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country’s housing shortage.”<sup>277</sup>

After a lengthy description of the residents’ living conditions and the procedural history of the case—all in the same richly lyrical language rather than the typically dry recitation found in many cases—the Court tells the story of the eviction in empathetic terms critical of the municipal government:

[O]n 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted . . . . This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents’ homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings.<sup>278</sup>

The opinion is rich with examples like these. The Court’s palpable sympathy for the plight of the residents and its declaration that the right to housing is “a constitutional issue of fundamental importance to the development of South Africa’s new constitutional order”<sup>279</sup> stands in stark contrast, however, with its decision to deny specific relief to them and to limit the remedy to a general declaration that the state was required to develop a more comprehensive housing policy. But understood from a demosprudential perspective these two seemingly contradictory aspects of the decision complement each other.

First, on a rhetorical level the Court’s recognition of the large gap between the constitution’s transformative promise and the “harsh reality” of the lives of many South Africans echoes the redemptive dimension of demosprudence and Balkin’s liberal constitutional renaissance. The constitution promises much that it has not—and cannot yet—deliver. South African society and the state are constitutionally bound to work to fulfill those promises, but there are significant practical obstacles. Nonetheless, the Court recognizes that those practical limitations do not mean that South Africans should give up on the aspirations the constitution embodies nor do they relieve the state of the obligation to craft policies

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at para. 2.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at para. 10.

<sup>279</sup> *Id.* at para. 1.

that take all reasonable measures to fulfill those promises. Courts can play an important role in ensuring that the state lives up to its obligations, but it is a task for all of society to work through the tremendous practical challenges and craft policies that bring society closer to fulfilling its constitutional commitments.

This is where the limited remedy connects to the rhetorical dimension of the opinion. Far from representing an abandonment of the constitutional commitments the Court has invoked, the declaration is a mechanism for bringing other actors, most directly the national, regional and local governments, but also citizens themselves and the civil society groups that support them into the constitutional development process. The Court's rhetoric reminds them of the unmet promises of the constitution but rather than craft specific policy changes itself, it calls on civil society to work with government to do so.

On the one hand, the deferral of immediate relief and reliance on the political process to move policy in line with the constitution in *Grootboom* is a reaction to the reality of limited budgets. Ordering broad-based changes to the housing policies that would provide relief to the millions of citizens living in shack communities like Grootboom was impossible. But the Court was clearly seeking to do more than simply throw up its hands in the face of those practical limitations and sought to put in motion a process for ensuring that policy development in the future is attentive to constitutional values.

*Grootboom's* declaration arguably failed—at least in the short term—to do enough in that respect. But the Court did not stop there. In a series of later eviction cases, it began to more directly embrace the use of weak-form remedies to develop democratic processes for enforcing these rights. Balkin describes the progressive constitutional movement that includes demosprudence as “discourse shaping” because of its emphasis on de-centering the courts' role in constitutional development.<sup>280</sup> Balkin notes that there is a “rough analogy” between this discourse-shaping approach and the Vermont Supreme Court's 1999 decision holding that the state constitution requires the state to provide “the same benefits and protections afforded by Vermont law to married opposite-sex couples.”<sup>281</sup> In *Baker*, the court articulated the governing constitutional principles but left it to the legislature to determine the precise mechanism for extending equal benefits to same-sex couples. Balkin cites this in support of of discourse shaping that “brings the legislature into the process of articulating constitutional guarantees and therefore gives them a sense of democratic responsibility and ownership for the result.”<sup>282</sup>

The declaration in *Grootboom* has this same effect. But, rather than establish a specific process for resolving a single policy dispute, the Court's later cases demonstrate that the declaration in *Grootboom* is a first—and somewhat tentative step—in the development of a broad-based procedural remedy for democratizing enforcement of socioeconomic rights. This is, in turn part of an even broader theme in the Court's overall approach to constitutional adjudication that reflects Balkin's emphasis on courts operating to instigate constitutional discourse in the political and social realms.

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<sup>280</sup> Balkin, *Abortion*, *supra* note 48, at 347.

<sup>281</sup> *Id.* (quoting *Baker v. State*, 170 Vt. 194, 224, 744 A.2d 864, 886 (1999)).

<sup>282</sup> *Id.*

### 3. *Port Elizabeth and Courts as Managers of a “Stressful, Law-Governed Social Process”*

*Port Elizabeth Municipality v. Various Occupiers* set the stage for the development of the engagement remedy and also stands as the Court’s clearest articulation of its role as a manager of democratic processes when enforcing the socioeconomic rights provisions. The Port Elizabeth municipality sought a court order permitting it to evict residents of an informal settlement on private land under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, known as “PIE.”<sup>283</sup> Justice Albie Sachs wrote the unanimous opinion for the Court. After summarizing the procedural history, Sachs narrates the tragic history of forced removals during the apartheid era that inspired the passage of PIE. Sachs begins describing the highly formalist legal approach to evictions that masked and legitimized the inhuman effects of the apartheid-era law: “In the pre-democratic era the response of the law to a situation like the present would have been simple and drastic. . . . Once it was determined that the occupiers had no permission to be on the land, they not only faced summary eviction, they were liable for criminal prosecution.”<sup>284</sup> The eviction statute was part of a panoply of legislation “that gave a legal/administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations.”<sup>285</sup> These laws “resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones,” and “[i]n this setting of state-induced inequality the nominally race-free [eviction law] targeted black shack-dwellers with dramatically harsh effect.”<sup>286</sup>

Sachs tells this story to contrast the inhumanity of the apartheid legal framework with the transformed eviction regime under the new constitution and PIE. PIE is an “inver[sion]” of the apartheid eviction law because it decriminalized squatting and permits eviction only where the process and the circumstances surrounding satisfy rigorous conditions required by the new constitution.<sup>287</sup> PIE and the new constitution thus eliminated “the former depersonalised processes that took no account of the life circumstances of those being expelled” and replaced them with “humanised procedures that focused on fairness to all.”<sup>288</sup> One important consequence of this transformation was to turn courts from playing an “invidious role as instruments directed by statute to effect callous removals” into a “new complex and constitutionally ordained function: when evictions were being sought, the courts were to ensure that justice and equity prevailed . . . .”<sup>289</sup>

Like the demosprudential dissents Guinier analyzes, Sachs’ opinion tells a story in highly accessible and deeply compassionate terms of the humanization of law and the judicial function under the new constitution. After explaining the

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<sup>283</sup> *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at paras. 11–13.

<sup>284</sup> *Id.* at para. 8.

<sup>285</sup> *Id.* at para. 9.

<sup>286</sup> *Id.* at para. 10.

<sup>287</sup> *Id.* at para. 12.

<sup>288</sup> *Id.* at para. 13.

<sup>289</sup> *Id.*

intersection of PIE with the Bill of Rights in the constitution in the same expressive terms, Sachs concludes that the Constitution and PIE create a new right against arbitrary eviction and that this is in tension with traditional property rights also protected by the Constitution. This requires courts to adopt a new, more flexible, anti-formalist role:

The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.<sup>290</sup>

To accomplish this “[t]he court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.”<sup>291</sup> As a result, the entire court procedure is likely to look quite different from traditional litigation: “This has major implications for the manner in which [the court] must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make.”<sup>292</sup>

Both the historical narrative Sachs constructs and the powerful description he gives of the humanized and compassionate role courts must play under the new constitution feature the rhetorical qualities of demosprudence because they speak directly to the many citizens faced with potential eviction and call on courts to make judgments that are closely attentive to those conditions. But more importantly, the key features of this humanized judicial role is close to a prescription for a demosprudential approach to judging. The following quote illustrates the consonance between Sachs’ view of judging and demosprudence:

PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of

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<sup>290</sup> *Id.* at para. 23.

<sup>291</sup> *Id.* at para. 36.

<sup>292</sup> *Id.*

the need for human interdependence, respect and concern.<sup>293</sup>

Sachs then goes on to explain that this new approach will in many circumstances require courts to adopt a “managerial role” that “find[s] expression innovative ways.”<sup>294</sup> Principal among these innovations is a willingness to relinquish judicial control over disputes and instead to “encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions.”<sup>295</sup> Employing techniques like compulsory mediation that require the parties themselves to craft solutions is not only a practical solution to the complex issues often raised in socioeconomic disputes, it also creates a process for developing a culture of constitutionalism and instilling constitutional values in society:

In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness in the future. Nowhere is this more required than in relation to the intensely emotional and historically charged problems with which PIE deals.<sup>296</sup>

#### 4. *Olivia Road and Engagement as a Demosprudential Remedy*

The Court ultimately declined to order mediation in *Port Elizabeth* because the dispute had reached a point where in its view non-traditional approaches would be ineffective.<sup>297</sup> But the trend towards democratization of enforcement that began with *Grootboom* and that Sachs described with such elegance in *Port Elizabeth* reached its culmination in *Occupiers of 51 Olivia Road v City of Johannesburg*, another eviction case implicating the right to access to housing in Section 26.<sup>298</sup>

*Olivia Road* began as series of emergency applications in Witwatersrand High Court by the City of Johannesburg seeking to evict over 300 people from six inner-city buildings. The residents were organized by several NGOs and argued principally that Section 26 and *Grootboom* prevented eviction unless the City had alternative accommodation and counterclaimed seeking declaration that City failed to meet its obligation to have plan consistent with *Grootboom*'s declaration.<sup>299</sup>

The High Court issued an injunction preventing further evictions and ordering the City to develop a new housing plan. The intermediate appellate court, the Supreme Court of Appeal, reversed that order and replaced it with a much more

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<sup>293</sup> *Id.* at para. 37.

<sup>294</sup> *Id.* at para. 39.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at para. 43.

<sup>297</sup> *Id.* at para. 47.

<sup>298</sup> 2008 (5) BCLR 475 (CC) (2008).

<sup>299</sup> *Id.* at paras. 1–4.

limited one. Both sides appealed that judgment to the Constitutional Court.<sup>300</sup> Two days after oral argument the Court issued a highly unusual interim order requiring the parties to “engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and rights and duties of the citizens concerned.”<sup>301</sup>

The parties ultimately reached a remarkable settlement that permitted the residents to remain in the buildings with enhanced services from the City and also specific plans for medium- and long-term development of housing plans to address the needs of other squatter communities in the inner city.<sup>302</sup> But both parties both persisted with the appeal seeking a ruling on whether a revised housing plan submitted by the City satisfied its obligations under *Grootboom* and Section 26—a conclusion challenged by the residents and the NGOs that supported their case.<sup>303</sup>

The Court held that it was unnecessary to address this broader issue and instead focused the opinion on the engagement order. The Court first traced engagement back to its emphasis in *Grootboom* “on the relationship between reasonable state action and the need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity”<sup>304</sup> and its more specific discussion of court power to order mediation and similar processes in *Port Elizabeth*.<sup>305</sup> It then held that engagement is required not only by Section 26 but, more fundamentally, by the right to life, the right to human dignity and the preamble of the Constitution that calls on the state “to ‘[i]mprove the quality of life of all citizens and free the potential of each person.’”<sup>306</sup>

On a rhetorical level, *Olivia Road* connects the engagement process to fundamental constitutional values and then moves into the pedagogical mode Guinier identifies as characteristic of demosprudential judging, instructing the state, civil society and citizens on the need to reflect those values in each engagement process. As just described, the Court first invokes the constitutional values at stake from *Grootboom*.<sup>307</sup> It also quotes Justice Sachs’ description of “[t]he managerial role of the courts” and the need for innovative approaches.<sup>308</sup>

As it delineates the specific requirements of the engagement process, the Court directly addresses the state, citizens, and civil society. First, it calls on municipalities to “act reasonably and in good faith.”<sup>309</sup> State engagement must be systematic not ad hoc.<sup>310</sup> This means that long-term planning must incorporate

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<sup>300</sup> *Id.* at paras. 1–2, 7–8.

<sup>301</sup> See Interim Order Dated 30 August 2007 at para 1, *Occupiers of 51 Olivia Road v. City of Johannesburg CCT 24/07*, available at <http://www.constitutionalcourt.org.za/Archimages/10731.PDF>.

<sup>302</sup> Settlement agreement between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg dated 29 October 2007 at paras. 2–4. (copy on file with the author).

<sup>303</sup> *Occupiers of 51 Olivia Road* 2008 (5) BCLR 475 at paras. 32–24.

<sup>304</sup> *Id.* at para. 10.

<sup>305</sup> *Id.* at para. 12.

<sup>306</sup> *Id.* at paras. 16–17.

<sup>307</sup> *Id.* at para. 10.

<sup>308</sup> *Id.* at para. 12.

<sup>309</sup> *Id.* at para. 20.

<sup>310</sup> *Id.* at para. 19.

engagement from the outset.<sup>311</sup>

Second, citizens threatened with eviction and homelessness “must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands.”<sup>312</sup> Third, civil society groups have a specific constitutional role as facilitators of the process and to act as representatives of vulnerable populations: “People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be proactive and not purely defensive.”<sup>313</sup> Civil society has a specific and constitutionally mandated role to play: “Civil society organisations that support the peoples’ claims should preferably facilitate the engagement process in every possible way.”<sup>314</sup> Finally, the state must document its engagement efforts with the expectation of court review of both the process and the policy outcome, because “the constitutional value of openness is inimical to secrecy.”<sup>315</sup>

The *Olivia Road* decision and the engagement remedy more generally represent a form of demosprudence in two respects: First the decision has the rhetorical characteristics of demosprudence. In particular, it emphasizes themes of democratic accountability and speaks directly to constituencies outside of the formal lawmaking process including citizens and civil society groups. Second, and more importantly, the engagement remedy itself is a direct form of demosprudence. It brings together government actors, citizens and civil society groups in an interactive and deliberative process and dialogue on constructing constitutional norms and how to develop policies that meet the constitutional standards. Critical in this respect is the Court’s specific recognition of civil society’s constitutional role as facilitators of the process and representatives of vulnerable population. Bringing these groups into the process broadens each engagement beyond the facts at issue in each dispute at the same time that it protects against the bargaining disparity between poor citizens and the state.

The public-reporting requirement first ensures that the outcomes of each engagement are open and transparent. This then offers opportunities for critique of process and policies that result by others not directly involved in the process and thus enlarges the scope of participation.

Finally, the Court emphasized that engagement is a primarily a political, not litigation process: “It must be emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason.”<sup>316</sup> In other words, the state has an obligation to independently consider the constitutional effects of proposed policy changes and to engage residents and interested civil society organizations as early as feasible in any policy development process.

Using the same direct address technique, the Court emphasized its expectation of continued engagement by the City not only with these residents but others as well: “There is no reason to believe that the City will not in the future

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<sup>311</sup> *Id.* at para. 18.

<sup>312</sup> *Id.* at para. 20.

<sup>313</sup> *Id.* at para. 20.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at para. 21.

<sup>316</sup> *Id.* at para. 30.

engage meaningfully with other occupants whose evictions become either necessary or desirable.”<sup>317</sup> Finally, in the pedagogical mode emphasized by Guinier, the Court instructed the City to engage with others: “The City has undertaken to negotiate permanent housing solutions for the occupiers in consultation with them. It is not unreasonable to expect that the City will, in the ordinary course, adopt a similar approach in respect of other people who are affected in the future.”<sup>318</sup> This procedural dimension of engagement, in particular its de-linking of constitutional development from litigation creates opportunities for demosprudential activity much earlier in the policy development process, not just after litigation commences.

### C. *The Demosprudential Continuum*

The socioeconomic rights cases contain the most sustained evidence of the Constitutional Court’s commitment to the kind of democratic constitutional development demosprudence embodies and engagement arguably represents that commitment in a direct procedural form. But those cases are not unique. The Court has consistently expressed concern with developing broad-based commitment to constitutional values throughout South Africa and has employed both demosprudential rhetorical techniques and remedies like engagement that promote democratic processes in other cases. The following sections trace this commitment through several prominent decisions. They also offer further evidence that Roux’s focus on the political background as the principle explanatory variable for the Court’s decisions omits this important dimension.

#### 1. *Fourie, Gay Marriage and Law as a “Great Teacher”*

Section 9, the equality provision of the South African constitution, expressly prohibits discrimination on the basis of sexual orientation.<sup>319</sup> This textual commitment to sexual orientation equality was the result of active lobbying by gay rights groups within the ANC during the anti-apartheid struggle and the constitutional development process that followed.<sup>320</sup> Despite this strong textual commitment to equality, the issue of same-sex marriage did not come directly before the Constitutional Court until 2005. This was due in large part to a carefully structured litigation strategy adopted by a loosely organized coalition of gay rights groups. These groups chose to bring cases seeking to enforce Section 9(3) on a range of less-controversial issues such as criminal sodomy laws, pension and medical benefits for same-sex partners, gay adoption, and immigration rights for

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<sup>317</sup> *Id.* at para. 35.

<sup>318</sup> *Id.*

<sup>319</sup> S. AFR. CONST., 1996 §9(3) (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”).

<sup>320</sup> For a range of accounts of the history of the same-sex marriage debate in South Africa, see *TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA* (Melanie Judge, Anthony Manion, & Shaun de Waal eds., 2008).



same-sex partnerships.<sup>321</sup> The objective was to gradually accumulate the legal benefits of marriage and avoid a direct confrontation over the issue of same-sex marriage for which there was—and remains—strong public opposition in South Africa.<sup>322</sup> In each case, the Constitutional Court routinely overturned existing legislation that limited rights and benefits to heterosexual couples and in several instances called on Parliament to adopt comprehensive legislation remedying existing discriminatory provisions, including those in the Marriage Act.<sup>323</sup>

This line of decisions culminated in 2005 with *Minister of Home Affairs v. Fourie* in which a lesbian couple challenged the Marriage Act and the common law definition of marriage, both of which defined marriage as a heterosexual union, under Section 9(3).<sup>324</sup> Unsurprisingly, all members of the Court agreed that Section 9(3) required changes to both laws, but there was split over the appropriate relief. A majority of the Court, in an opinion written by Justice Sachs, held that it was appropriate to suspend court-ordered changes to the laws for one year to permit Parliament the opportunity to adopt implementing legislation.<sup>325</sup> Justice Kate O'Regan wrote a separate concurrence and partial dissent holding that the Court should change the marriage laws directly without waiting for Parliament.<sup>326</sup>

Roux argues that *Fourie* is an example of a majority of the Court adopting a less principled approach when faced with substantial popular opposition combined with relatively weak support from the ANC for the principled result.<sup>327</sup> He notes that the “battle for principle” was largely won by gay-rights advocates during the constitutional drafting process but cites O'Regan's partial dissent as evidence that the Court's suspended remedy represents a pragmatic compromise on the full implications of that principle.<sup>328</sup> Specifically, Roux argues that “what separates the judgments is a difference of opinion concerning the way in which the CCSA should go about building public support for decisions of constitutional principle.”<sup>329</sup> Sach's delayed remedy was an effort to “enlist the legislature's cooperation in the enforcement of legal change that was likely to be highly divisive.”<sup>330</sup> By contrast, for O'Regan denying immediate relief to the plaintiffs risked the loss of legal legitimacy that “was, ultimately, a more important factor in securing public support for the Court.”<sup>331</sup> But, in Roux's view, the underlying concern of both was to ensure public support for both the result and the Court more

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<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> See, e.g., *Du Toit v. Minister of Welfare and Population Development* 2002 (10) BCLR 1006 (CC) (granting the right to jointly adopt to same-sex partners); *Satchwell v. President of the Republic of South Africa* 2002 (9) BCLR 986 (CC) (granting pension benefits to same-sex couples); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC) (requiring that immigration benefits be also granted to same-sex couples); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) (finding criminal sodomy laws unconstitutional). For a thorough discussion of these cases, see KENDE, *supra* note 225, at 133–161.

<sup>324</sup> 2006 (3) BCLR 355 (CC).

<sup>325</sup> *Id.* at para. 154.

<sup>326</sup> *Id.* at paras. 163–73.

<sup>327</sup> See Roux, *supra* note 14, at 120–23.

<sup>328</sup> *Id.* at 120–22.

<sup>329</sup> *Id.* at 122.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

generally.<sup>332</sup> Roux attributes this heightened concern with public opinion to the fact that “the issue of gay and lesbian equality is one in which there is considerable disagreement within the ANC political elite.”<sup>333</sup> This meant that the ANC was less able—or less willing—to shield the Court from the effects of the strong public opposition to same-sex marriage.

I agree with Roux that—as in *TAC*—the political background played an important role in *Fourie*. But I draw somewhat different conclusions about the effect of those politics. Rather than seeking to ensure public support for itself as an institution, the majority’s decision to suspend the remedy is part of the same trend evident in the socioeconomic rights decisions towards adopting procedures that open up a dialogue with Parliament and the public more generally over the Constitution. Like the declaration in *Grootboom* and the engagement remedy in *Olivia Road*, the suspended order in *Fourie* created a process for provoking debate over constitutional meaning and for raising awareness of—and hopefully commitment to—constitutional values. Connecting *Fourie* to this larger project shows that it was not mere self-preservation that motivated the majority to defer to Parliament’s judgment on the specific legislative changes necessary to enforce Section 9, but, instead the hope that politicizing constitutional development would deepen public support for the constitution itself. Sachs’ opinion draws this connection directly and—like the socioeconomic rights cases—the opinion uses a demosprudential rhetorical approach as well as adopting a specific remedy that incorporates a demosprudential process.

Sachs opens in the story-telling mode characteristic of demosprudence with a humanizing account of the plaintiffs’ relationship and the failure of the marriage laws to recognize that relationship:

Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.<sup>334</sup>

As he did in *Port Elizabeth*, Sachs thus draws a connection between law and the lived reality of the citizens affected by those laws. Following a similar rhetorical pattern, Sachs then contrasts these legal legacies of the “pre-democratic era” with the transformative values in the new Constitution.<sup>335</sup>

Moving through the Court’s earlier decisions enforcing the sexual-

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<sup>332</sup> *Id.* (observing that “[w]hichever of the two views is correct, concern regarding the impact of the CCSA’s decision on its public support seems to have figured more prominently in *Fourie* than it had in *Makwanyane*.”) *State v. Makwanyane* 1995 (6) BCLR 665 (CC), was an equally controversial case in which the Court held the death penalty unconstitutional despite strong public support for the punishment. *See id.* at 118–20.

<sup>333</sup> *Id.* at 122.

<sup>334</sup> *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) at para. 1.

<sup>335</sup> *Id.* at para. 4.

orientation provision of Section 9, Sachs traces a consistent theme that laws which fail to recognize same-sex relationships create unfair discrimination that violates fundamental constitutional values:

This discrimination occurred at a deeply intimate level of human existence and relationality. It denied to gays and lesbians that which was foundational to our Constitution and the concepts of equality and dignity, which at that point were closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.<sup>336</sup>

Sachs then concludes this survey with an extended quote from an earlier decision emphasizing the distinctively transformative character of the South African Constitution:

In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalist, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.<sup>337</sup>

Sachs thus paints a picture of society in transition deeply committed to a set of transformative values that are as yet incompletely realized. The state's failure to implement comprehensive changes to provide legal status to same-sex couples is a disgraceful legacy of the "pre-democratic era" that is part of the incomplete transformation project. Echoing the redemptive theme of demosprudence, Sachs later directly equates same-sex discrimination with the racial marriage laws under apartheid: "Same-sex unions continue in fact to be treated with the same repudiation that the state until two decades ago reserved for interracial unions; the statutory format might be different but the effect is the same."<sup>338</sup>

Sachs' opinion is full of similar examples continuing to connect the story of incomplete transformation and unfulfilled constitutional values to the lives of same-sex couples, but the remedy the majority adopts connects the case most directly to the demosprudence and the socioeconomic rights cases. The majority's decision to suspend the direct changes to the law is an example of the creative remedies that characterize the socioeconomic rights cases and that feature demosprudential mechanisms for opening up a constitutional dialogue. Responding to O'Regan's argument that deferral of the remedy is unfair to same-sex couples, Sachs invokes the pedagogical role of constitutional values and the need for all

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<sup>336</sup> *Id.* at para. 50.

<sup>337</sup> *Id.* at para. 59 (quoting *State v. Makwanyane* 1995 (3) SA 391 (CC) at para. 262).

<sup>338</sup> *Id.* at para. 81.

branches of government to embrace their responsibility for developing and promoting those values:

[The law] serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principle functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law.<sup>339</sup>

Sachs then directly recognizes the power of a political approach to constitutional development to build broad-based support for constitutional norms: “Provided that the basic principles of equality as enshrined in the Constitution are not trimmed in the process, the greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted.”<sup>340</sup> Sachs sounds a similar theme as he rejects the plaintiffs’ request for interim relief and explains the need for a one-year deferral to permit Parliament to craft a legislative remedy:

Lying at the heart of this case is a wish to bring an end, or at least diminish, the isolation to which the law has long subjected same-sex couples. It is precisely because marriage plays such a profound role in terms of the way our society regards itself, that the exclusion from the common law and the Marriage Act of same-sex couples is so injurious, and that the foundation for the construction of new paradigms needs to be steadily and securely laid. It is appropriate that Parliament be given a free hand . . . to shoulder its responsibilities in this respect.<sup>341</sup>

In her response to Rosenberg, Guinier cites Congress’ passage of the Lilly Ledbetter Fair Pay Act<sup>342</sup> in response to the Supreme Court’s opinion in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>343</sup> as a prominent example of change resulting from a demosprudential dissent.<sup>344</sup> In *Ledbetter*, a five-member majority of the Supreme Court affirmed an Eleventh Circuit decision reversing a jury verdict for Lilly Ledbetter, a former Goodyear employee who alleged that the company paid male employees higher wages for the same work throughout her career.<sup>345</sup> The majority held that Ledbetter waived her right to sue because she failed to file her claims within 180 days of the first act of discrimination.<sup>346</sup> Justice Ruth Bader Ginsburg dissented both orally and in writing and spoke directly to women workers calling

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<sup>339</sup> *Id.* at para. 138.

<sup>340</sup> *Id.* at para. 139.

<sup>341</sup> *Id.* at para. 155.

<sup>342</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

<sup>343</sup> 550 U.S. 618 (2007).

<sup>344</sup> Guinier, *Courting*, *supra* note 1, at 540–44.

<sup>345</sup> 550 U.S. at 621.

<sup>346</sup> *Id.*

the majority's decision "egregiously wrong."<sup>347</sup> Ginsburg also called on Congress to correct the majority's "parsimonious reading" of the law.<sup>348</sup>

Ledbetter became a cause célèbre during the 2008 Presidential election and her testimony featured prominently in the congressional response, which amended the law to make clear that each paycheck constitutes a separate act of sex discrimination actionable under the statute.<sup>349</sup> Guinier notes that women's rights activists immediately picked up on Justice Ginsburg's dissent and that Ledbetter's own testimony cited Ginsburg's description of the disconnect between the majority's opinion and the lived experience of women in the workplace.<sup>350</sup>

But Guinier focuses on Ginsburg's direct call for a congressional response: "While Justice Ginsburg spoke frankly to and about the Lilly Ledbetters of the world, her real target was the legislature."<sup>351</sup> Guinier quotes a later interview with Ginsburg in which Ginsburg explained that she was "[s]peaking to Congress, I said 'you did not mean what the Court said. So fix it.'"<sup>352</sup> Guinier concludes that Ginsburg's "oral dissent and public remarks represented a set of *demosprudential* practices for instantiating and reinforcing the relationship between public engagement and institutional legitimacy."<sup>353</sup> This stimulated a successful effort by "social activists, legal advocacy groups, media translators and 'role literate participants'" to provoke a legislative response.<sup>354</sup>

Although it comes in the form of a majority opinion, *Fourie* follows the same pattern as Ginsburg's dissent in *Ledbetter*—a *demosprudential* opinion that calls on civil society groups to work with the legislative branch to change the law. Like the Ginsburg dissent, Sachs' judgment spoke directly to citizens affected by unjust laws that ignored their lived reality and called on them to work through the legislature to develop a response to effect the transformation promised by the constitution

The process that followed revealed the internal tensions within the ANC that Roux cites as well as the deep disconnect between the constitution's commitment to non-discrimination on the basis of sexual orientation and public opinion. Parliament held extensive public hearings before initiating the legislative process. Both those hearings and the debate on the legislation were marred by homophobic comments. During the floor debate over the legislation, one member of Parliament observed that during the public hearings "the extraordinary high level of homophobia and homoprejudice that exists in our country . . . some of the views expressed were just pure vitriol and malice."<sup>355</sup> The Lesbian and Gay Equality Project, which played a key role in the *Fourie* litigation, raised similar concerns

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<sup>347</sup> See Guinier, *Courting*, *supra* note 1, at 540–41.

<sup>348</sup> Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1, available at <http://www.nytimes.com/2007/05/31/washington/31scotus.html>.

<sup>349</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Guinier describes Ledbetter's testimony. See Guinier, *Courting*, *supra* note 1, at 542–44.

<sup>350</sup> Guinier, *Courting*, *supra* note 1, at 542–44.

<sup>351</sup> *Id.* at 541.

<sup>352</sup> *Id.* at 542.

<sup>353</sup> *Id.* at 544.

<sup>354</sup> *Id.* at 543.

<sup>355</sup> Transcript of Record of Civil Union Bill debate on Nov. 14, 2006 (copy on file with the author).

about the public consultation process. The group quoted one commentator on the process as cautioning that “we would do well to be suspicious of the farce of consultation on the same-sex marriage Bill that suggests that a vulnerable ‘minority’ is safe to victimize, and that government consultation processes are appropriate stages for hate speech.”<sup>356</sup>

Despite these significant problems, the demosprudential debate triggered by the majority’s decision to defer direct relief at least started the process of cultural transformation that Sachs envisioned. To begin with, the ANC ultimately succeeded in passing legislation that granted the marriage rights to same sex couples despite substantial dissent within the party and strong popular opposition.<sup>357</sup> The initial draft of the bill created a separate marriage regime for same-sex couples that was inconsistent with the Court’s requirements and highly objectionable to the gay and lesbian community.<sup>358</sup> Due in large part to sustained lobbying and a public education campaign by gay rights groups, that proposal was substantially modified and the final legislation adopted a dual regime that permits same-sex and heterosexual couples to enter into a civil union marriage that may be termed either a “marriage” or a “civil partnership” depending on the procedure chosen.<sup>359</sup>

Equally important, during the course of the legislative process, the ANC leadership embraced the Court’s rhetoric of constitutional transformation and the connection between same-sex equality rights and the foundational principles of the anti-apartheid struggle. The ANC Minister of Defence drew this connection directly during the floor debate. In his remarks, he first connects the legislation to the values during the anti-apartheid struggle:

The roots of this Bill lie in its pronouncements of our people over very many years and decades of struggle. . . . In the preamble to the [ANC] Freedom Charter, our people declared, and I quote: ‘Only a democratic state based on the will of all the people can secure to all their birthright without distinction of colour, race, sex or belief.’<sup>360</sup>

Noting that “the Constitution itself does not prevaricate on this question” he goes on to argue that the Court’s decision did not require parliament to change the law but instead it merely “drew our attention to the fact that we have granted the right to all South African citizens to choose who to marry or take as a life partner.”<sup>361</sup> He concludes with a stirring account of the substantial role gay and lesbian people played in the struggle that provoked applause in the chamber:

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<sup>356</sup> The Lesbian and Gay Equality Project, Submission on the Civil Union Bill, 2006, to the S. Afr. Home Affairs Portfolio Comm. 6 (6 Oct. 2006), available at <http://www.pmg.org.za/docs/2006/061016equality.pdf>.

<sup>357</sup> See Civil Union Act 17 of 2006. For a detailed account and analysis of the legislative process, see TO HAVE AND TO HOLD, *supra* note 320, at 73–208.

<sup>358</sup> See, e.g., Pierre De Vos, *A Judicial Revolution?: The Court-Led Achievement of Same-Sex Marriage in South Africa*, 4 *UTRECHT L. REV.*, no. 2, June 2008, at 162, 168.

<sup>359</sup> See *id.* at 169 (describing the specifics of the amended Civil Union Act).

<sup>360</sup> National Assembly *Hansard* 14 Nov. 2006 (S. Afr.), available at [http://www.parliament.gov.za/live/commonrepository/Processed/20091112/50789\\_1.doc](http://www.parliament.gov.za/live/commonrepository/Processed/20091112/50789_1.doc).

<sup>361</sup> *Id.*

I take this opportunity to remind the House, to remind those who know, and inform those who do not know, that in the long and arduous struggle for democracy, very many men and women of homosexual and lesbian orientation joined the ranks of the liberation and democratic forces. [Interjections.] Some went into exile . . . [Applause.] Some went into exile with the movement, yet others went into the prisons of the country with us. They accepted long prison sentences. Some stood with us, ready to face death sentences.<sup>362</sup>

Pierre De Vos, a South African constitutional law scholar who has written extensively on the issue, observes that many activists who initially opposed the majority's decision to defer the remedy, changed their minds after participating in the legislative-reform process precisely because it catalyzed a focused and high-profile debate over the constitutional commitment to equality:

[M]any of us who had criticized the majority in this regard, changed our minds. Although the public participation process that accompanied discussions about the adoption of the Civil Union Act was deeply flawed, it did open up a conversation about sexual orientation and provided an unprecedented platform in the media for those arguing in favour of respect of gay men and lesbians.<sup>363</sup>

De Vos also attributes the success of gay-rights activists in eliminating the separate marriage status for same-sex couples initially proposed in large part to the specific language of the majority judgment.<sup>364</sup> That language made it “easier to show how deeply problematic it was that civil partnerships” were reserved for same-sex couples and that such segregation “would endorse the view that homosexuals are somehow depraved, impure and tainted . . . .”<sup>365</sup>

*Fourie* and the legislative process it triggered illustrate that the apparent compromise on principle—the deferral of the remedy—was in fact a self-conscious attempt to trigger a more democratic process for implementing constitutional values. Instead of a court-mandated change to the legislation that might have permitted the ANC and the public more generally to blame an activist Court for failing to recognize traditional cultural values and for misinterpreting the Constitution, the deferred remedy provoked a messy and provocative debate over what the Constitution requires and whether the country was truly committed to the constitutional progressive vision of equality. The result was a direct embrace of those values by the ANC's leadership and, as De Vos observes, an opportunity for sustained attention to the problem of discrimination against gays and lesbians in South Africa. Like the engagement remedy and the declaration in *Grootboom*, *Fourie* is less an example of the Court avoiding confrontations over constitutional principle than an illustration of the Court's overriding concern with ensuring broad-

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<sup>362</sup> *Id.*

<sup>363</sup> De Vos, *supra* note 358, at 167 n.33.

<sup>364</sup> *Id.* at 168 (“LGBTI activists, assisted by the language deployed by the Constitutional Court, launched a sustained attack on the draft legislation.”).

<sup>365</sup> *Id.*

based respect for the Constitution and for developing a culture of constitutionalism in the new South Africa.

## 2. *Doctors For Life, Matatiele and Participatory Democracy*

The socioeconomic rights cases and *Fourie* are the most prominent and specific examples of the demosprudential strain within the Constitutional Court's overall approach. But the demosprudential commitment to democratic processes reflected in those decisions are evident throughout the Court's cases. This section traces that commitment through two cases that Roux uses as examples the Court acting on constitutional principle.<sup>366</sup>

Roux cites *Doctors for Life International v. Speaker of the Assembly*<sup>367</sup> and *Matatiele Municipality v. President of the Republic of South Africa*<sup>368</sup> as decisions where the Court "articulate[d] a deep, participatory conception of democracy more in keeping with South Africa's political tradition" and contrasts them with other cases where the Court compromised those same principles to avoid confrontation with the ANC.<sup>369</sup> The participatory conception of democracy Roux cites as an example of constitutional principle also connects both decisions to the demosprudential approach the Court adopted in the socioeconomic rights cases and *Fourie*. Together, these cases articulate a coherent and consistent view of a Court concerned with approaching constitutional enforcement less as a matter of deciding individual cases than as part of a broader project for developing respect for the Constitution and commitment to democratic principles.

*Doctors for Life (DFL)* involved a complaint by the NGO Doctors for Life International, a pro-life group of medical professionals,<sup>370</sup> against the National Council of Provinces (NCOP) for failure to engage in sufficient public consultation during the passage of several health-policy bills.<sup>371</sup> The challenged bills included legislation that would permit abortion under certain circumstances that was opposed by DFL.<sup>372</sup> NCOP is the upper house of the South African Parliament that consists of delegations from each of South Africa's nine provinces.<sup>373</sup> Section 72(1)(a) of the constitution requires NCOP to "facilitate public involvement in [its] legislative and other processes . . . and [those] of its committees."<sup>374</sup> Doctors for Life based its challenge on that provision and related language in section 118(1)(a).<sup>375</sup>

<sup>366</sup> Roux, *supra* note 14, at 130.

<sup>367</sup> 2006 (6) SA 416 (CC) [hereinafter *DFL*].

<sup>368</sup> 2007 (1) BCLR 47 (CC).

<sup>369</sup> Roux, *supra* note 14, at 130.

<sup>370</sup> See DOCTORS FOR LIFE INT'L, *About Us: Introduction*, <http://www.doctorsforlifeinternational.com/about/index.cfm> (last visited Nov. 24, 2010) (describing the group's purpose as bringing "together medical professionals to form a united front to uphold" certain principles, including "the sanctity of life from conception until death.").

<sup>371</sup> *DFL* 2006 (6) SA 416, at para. 2.

<sup>372</sup> See Press Release, Doctors For Life Int'l, Doctors for Life Int'l Challenges Parliament in the Constitutional Court in Respect of the New Abortion Act (Feb. 20, 2006), [http://www.doctorsforlifeinternational.com/about/media/releases/legal/2006-02-20\\_new\\_abortion\\_act.cfm](http://www.doctorsforlifeinternational.com/about/media/releases/legal/2006-02-20_new_abortion_act.cfm).

<sup>373</sup> See S. AFR. CONST., 1996 §§60-72 (1996).

<sup>374</sup> *Id.*, §72(a)(1).

<sup>375</sup> *DFL* 2006 (6) SA 416, at para. 4.



Justice Sandile Ngcobo wrote the majority opinion that invalidated two of the challenged bills, including the abortion bill, because NCOP failed to conduct public hearings despite substantial public interest in the legislation.<sup>376</sup> Both Justice Ngcobo's opinion and a concurrence by Justice Sachs featured extensive discussion of what the Court termed "participatory democracy in our constitutional order . . . ."<sup>377</sup>

In a rhetorical move reminiscent of Sachs' discussion of eviction practices in *Port Elizabeth* and equality rights in *Fourie*, Ngcobo connects the right to political participation to the apartheid struggle and the constitutional founding.<sup>378</sup> Quoting a member of NCOP, Ngcobo then describes a commitment to democratic process as central to the anti-apartheid struggle:

'Our struggle against apartheid was necessitated not just by our hatred of the apartheid system, and the suffering and injustice it inflicted on the people of our country; it was also inspired by our vision of a democratic alternative as opposed to a system based on an institutionalised racialism and exploitation . . . . We were also inspired by the idea of a participatory democracy as well as a system in which the people of our country would on an on-going basis participate in and have a say in every aspect of the lives in workplaces, communities, streets and schools.'<sup>379</sup>

In a section titled "The nature of our constitutional democracy," Ngcobo continues this theme in language that reflects Guinier's description of the "demosprudential intuition . . . that 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.'<sup>380</sup> Ngcobo cites the constitution's Preamble as creating a "[c]ommitment to principles of accountability, responsiveness and openness" and describes "one of the basic objectives of our constitutional enterprise [as] the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process."<sup>381</sup> He concludes that "the participation by the public [in the legislative process] provides vitality to the functioning of representative democracy."<sup>382</sup> Like the legislative process the Court ordered in *Fourie*, public participation in law-making "promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It

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<sup>376</sup> *Id.* at paras. 211–14.

<sup>377</sup> S. AFR. CONSTITUTIONAL COURT, *Media Summary: Doctors for Life Int'l v. the Speaker of the Nat'l Assembly and Others*, <http://www.constitutionalcourt.org.za/Archimages/7606.PDF>. Indeed, the Court highlighted this aspect of the judgment in a separate paragraph within the summary: "In the course of his judgment Ngcobo J dealt extensively with the importance of participatory democracy in our constitutional order and the nature of the constitutional obligation imposed on the legislature to facilitate public involvement." *Id.* at 3.

<sup>378</sup> *DFL* 2006 (6) SA 416, at paras. 108–09.

<sup>379</sup> *Id.* at para. 108 (quoting Proceedings of the National Council of Provinces, 4 Nov. 2005 at 102–3).

<sup>380</sup> Guinier, *Demosprudence*, *supra* note 1, at 48.

<sup>381</sup> *DFL* 2006 (6) SA 416, at para. 111.

<sup>382</sup> *Id.* at para. 115.

strengthens the legitimacy of legislation in the eyes of the people.”<sup>383</sup> Finally, invoking the same concern with transparency that played a prominent role in the requirements for engagement, Ngcobo emphasizes that public participation in an open and transparent process “is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”<sup>384</sup>

Justice Sachs picks up this theme in his separate concurrence, which he wrote specifically to draw attention to “the special meaning that participatory democracy has come to assume in South Africa.”<sup>385</sup> Like Ngcobo, Sachs opens by invoking the constitutional development process and the central role of public participation in that process:

I believe that it would be gravely unjust to suggest that the attention the Constitutional Assembly dedicated to promoting public involvement in law-making represented little more than a rhetorical constitutional flourish on its part. The Assembly itself came into being as a result of a prolonged and intense national dialogue. Then, the Constitution it finally produced owed much to an extensive countrywide process of public participation.<sup>386</sup>

Sachs later connects public participation to other foundational constitutional values, including dignity, equality and tolerance. Emphasizing that “[a] vibrant democracy has a qualitative and not just quantitative dimension,” Sachs says that “dialogue and deliberation” are “part of the tolerance and civility that characterise the respect for diversity the Constitution demands.”<sup>387</sup> Dialogue also plays an important role in promoting dignity and equality in a system of majority rule because it gives a voice to minority groups in the political process and ensures that “even if their concerns are not strongly represented, they continue to be a part of the body politic.”<sup>388</sup> For this reason, public participation “strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.”<sup>389</sup>

The question of the extent to which parliamentary processes implicate a right to public participation was also central in *Matatiele*, a decision handed down just one day after *DFL*.<sup>390</sup> In *Matatiele*, the Court invalidated a constitutional amendment that redrew a provincial boundary because the amendment process failed to incorporate sufficient public participation as required under section 118 of the constitution.<sup>391</sup> The lead judgment by Justice Ngcobo relied heavily on the *DFL* decision and featured the same emphasis on the democratic-process values as that case.

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<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at para. 226 (Sachs, J. concurring).

<sup>386</sup> *Id.* at para. 227.

<sup>387</sup> *Id.* at para. 234.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> See S. AFR. CONSTITUTIONAL COURT, *Media Summary: Matatiele Municipality and Others v. President of the Republic of South Africa and Others*, <http://www.constitutionalcourt.org.za/Archimages/7610.PDF>.

<sup>391</sup> *Matatiele Municipality v. President of the Republic of South Africa* 2007 (1) BCLR 47 (CC).

Ngcobo opened the discussion of public participation with a 30-line quote from *DFL* describing the centrality of “the principle of participation and consultation” in South Africa’s new constitutional democracy.<sup>392</sup> After surveying the range of constitutional provisions devoted to the principle of participatory democracy, Ngcobo concludes that South African democracy is founded on both representative and participatory elements that “reflect the basic and fundamental objective of our constitutional democracy.”<sup>393</sup> These principles combine to require a “law-making process that will then produce a dialogue between the elected representatives of the people and the people themselves.”<sup>394</sup>

Both *DFL* and *Matatiele* articulate a vision for a constitutional order that shares the central concern of demosprudence and the broader liberal constitutional renaissance with recognizing and maximizing the role of ‘we the people’ in constitutional development and law-making more generally.<sup>395</sup> This emphasis on democratic procedure and public participation in turn connects to the procedural innovations the Court developed in the socioeconomic rights cases and the direct call for legislative constitutional development in *Fourie*.

Guinier describes demosprudential opinions as “inviting the public into the hallowed halls of the courtroom, transforming an elite stage into a democratic agora.”<sup>396</sup> They also “teach the public to identify with the constitutional values at stake and invite them to speak back in a voice that is all their own.”<sup>397</sup> This triggers a process that “channel[s] the energy of ‘we the people’ into a revitalized, robust democracy.”<sup>398</sup>

In each of the cases described above, the Constitutional Court has sought to construct processes for doing precisely what Guinier describes. Engagement and the legislative response remedy transform not merely the courtroom but also seek to make the typically elite preserves of policy-development and the legislative processes themselves more democratic and accessible. Likewise, the deep concern with participatory democracy expressed in *DFL* and *Matatiele* and its connection to the founding values of both the anti-apartheid struggle and the new Constitution express a similar commitment to ensuring transformation to an open, inclusive and robustly democratic society. In this way these cases seek to channel the energy of all South African citizens into the transformation process and to teach them to identify with the values of the new Constitution.

## V. IMPLICATIONS OF THE COURT’S DEMOSPRUDENTIAL APPROACH

This final section first circles back to Gibson’s and Caldiera’s positivity theory and argues that the demosprudential dimension of the Court’s jurisprudence is a potentially powerful mechanism for creating the kind of exposure that Gibson says can build legitimacy. It then uses the relatively recent emergence of several

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<sup>392</sup> *Id.* at para. 50.

<sup>393</sup> *Id.* at para. 57.

<sup>394</sup> *Id.* at para. 58.

<sup>395</sup> Guinier, *Demosprudence*, *supra* note 1, at 48.

<sup>396</sup> *Id.* at 137.

<sup>397</sup> *Id.* at 137–38.

<sup>398</sup> *Id.* at 138.

shack-dweller's rights organizations to propose a tentative hypothesis about the effects of demosprudence in South Africa and also to develop an agenda for future research. The hypothesis is that these groups emerged—at least in part—in response to the Court's demosprudential jurisprudence on socioeconomic rights. The research agenda recognizes the empirical nature of this hypothesis and proposes applying McCann's methods to these groups to ascertain whether it is possible to identify a relationship between the Court's decisions and the emergence and work of these groups. Both points also incorporate responses to Rosenberg's objection that it does not matter whether a court acts demosprudentially because social movements and the public do not care about the language of judicial opinions.

*A. Demosprudence as a Tool to Create Positivity Bias; Or “‘to Know’ Courts [and Constitutions] is ‘to Love Them’”*

The Constitutional Court is clearly committed to incorporating something that looks much like demosprudence into constitutional adjudication. The apparent objective of taking this approach is to manage a process of building a democratic constitutionalist culture at all levels of South African society and instilling respect for the transformative values of the new constitution. Rosenberg's objection to demosprudence poses a direct challenge to that objective. If social movements and the public do not care about the language of judicial opinions, then it matters very little if the Constitutional Court delivers opinions that appeal rhetorically to the people of South Africa and democratic process values.

As the next section outlines, there is intriguing anecdotal evidence that the Court's demosprudential approach has influenced social movements in South Africa. But, even putting that evidence aside, by adopting remedies like engagement and the legislative response mechanism in *Fourie* that incorporate demosprudential processes directly, the Constitutional Court has to a large extent avoided the problem of inattention to the language of its decisions. At the same time—and perhaps more importantly—those same remedies create exposure to the Court and the Constitution that can help legitimize both.

As discussed above, Gibson's and Caldiera's studies suggest that exposure in and of itself—irrespective of whether a person agrees with the substantive outcome in a case—is sufficient to build legitimacy for courts as independent institutions in a democracy.<sup>399</sup> This “positivity” theory suggests that “the task for newly formed judicial institutions is to develop a separate ‘non-political’ identity that distinguishes it from the other, political institutions of governance.”<sup>400</sup> Gibson concludes that from 1996 to 2004 public support for the Constitutional Court has slowly grown—with significant differences among different racial and ethnic groups.<sup>401</sup> He goes on to argue that two things must happen for South Africa's

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<sup>399</sup> See Gibson, *supra* note 206, at 234 (“Exposure produces a positivity bias in the sense that even when the initial stimulus for paying attention to courts is negative (e.g., a controversial court decision), judicial symbols enhance legitimacy . . .”).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 260–62. In contrast to Roux, Gibson views the Court's strong stances on constitutional principle with respect to several politically controversial issues such as the death penalty as examples

democratic experiment to continue to succeed. The first is that “a democratic political culture must be nourished. Both the citizens and the elites must commit themselves to the institutions and processes of democracy.”<sup>402</sup> The second is that “effective and legitimate political institutions must be created and sustained.”<sup>403</sup> In Gibson’s view “the Constitutional Court is particularly important on this score, especially since the dominant problem of African democracies today is their illiberalism (their lack of respect for minority rights).”<sup>404</sup>

The Constitutional Court’s demosprudential approach described above can be viewed as a response to both of the requirements Gibson outlines. In a very direct sense, the weak-form remedies the Court has consistently employed in socioeconomic rights cases and the legislative-response remedy in *Fourie* are democracy-enhancing mechanisms for bringing South African citizens, civil society organizations and the political branches into an intermittent but sustained dialogue over constitutional values. At the same time, by structuring processes that institutionalize attention to the constitution over time, the Court has crafted remedies that create the kind of exposure that Gibson’s studies suggest build legitimacy.

The participatory democracy that is the centerpiece of *DFL* and *Matatiele* has similar potential with a particular focus on bringing citizens into the legislative process. As with weak-form remedies, by protecting participatory democracy and ensuring that Parliament robustly implements its duty of public consultation, the Court creates exposure both to itself and the Constitution. Whenever legislation is proposed, Parliament must pay attention to this constitutional requirement and interested and affected citizens know they can rely on courts to ensure adequate opportunity for participation.

### *B. Demosprudential Effects: Shack-Dweller Movements in South Africa as a Response to Grootboom*

There is some intriguing anecdotal evidence that the Court’s attempt at building support for the new constitutional democracy through exposure to constitutional values and enhanced democratic processes is in fact influencing the work of social movements in South Africa. Following *Grootboom*, several social movements organized around the right to housing have emerged in urban areas throughout South Africa. The two most prominent of these have emerged in Cape Town—the Western Cape Anti-Eviction Campaign<sup>405</sup>—and in Durban—Abahlali baseMjondolo.<sup>406</sup> These groups employ advocacy tools that include protests, political advocacy and public education campaigns to press for rights, including

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where the Court was viewed by the general public as acting politically and suffering a loss of legitimacy as a result. *See id.* at 260–61.

<sup>402</sup> *Id.* at 262–63.

<sup>403</sup> *Id.* at 263.

<sup>404</sup> *Id.*

<sup>405</sup> *See About Us*, WESTERN CAPE ANTI-EVICTION CAMPAIGN, <http://antieviction.org.za/about-us/> (last visited Nov. 24, 2010) (describing the group as “formed on November 2000 with the aim of fighting evictions, water cut-offs and poor health services, obtaining free electricity, securing decent housing, and opposing police brutality.”).

<sup>406</sup> *See* ABAHLALI BASEMJONDOLO, <http://www.abahlali.org/> (last visited Nov. 24, 2010).

housing, health care education, and other basic services.<sup>407</sup> Although comprised of many of the most desperately poor South Africans, these groups maintain active websites, e-mail listservs and other electronic resources to communicate with their members and publicize their efforts.<sup>408</sup> These online publications and communications articulate a theoretical basis for these groups in which the Constitution, rights and litigation play a prominent role. These writings as well as the litigation and advocacy strategies employed by these groups demonstrate a deep commitment to democratic process and close attention to the work of the Constitutional Court that suggests the Court's demosprudential efforts have played a role in their development.

The influence of the Constitutional Court is indirectly evident from the fact that these groups first began to emerge shortly after the Court issued its decision in *Grootboom* in October 2000. The Western Cape Anti-Eviction campaign describes itself as a movement that organized in November of that same year—one month after the judgment.<sup>409</sup> The Abahlali baseMjondolo movement began several months later in early 2005.<sup>410</sup>

This timing by itself suggests that the Court's judgments may have helped catalyze these movements, but the rhetoric these groups employ provides even more direct evidence of a Court influence. First, the Constitution, constitutional litigation and rights-based advocacy play a large role. The best recent example of this combination of constitutionally influenced tactics is the multi-pronged effort by Abahlali to protest proposed provincial legislation that would have greatly expanded the power of the government in KwaZulu-Natal to evict shack dwellers, the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Bill 2006.

Abahlali's website contains an entire section archiving the documents related to their protests against the legislation. The archive opens with a photo of a white sheet hand-painted with the words "We Are The Citizens This is Our City."<sup>411</sup> The caption locates the sign at the "Durban High Court, 6 November 2008," the date and site of a constitutional challenge brought by the group against the Act. Among the dozens of documents in the archive is a February 2008 press release describing the litigation brought by the group and detailing its extensive protest efforts that led up to the court case.<sup>412</sup> The press release notes that the group filed suit to declare the act unconstitutional and then calls "for a Housing Summit at which all democratic shack dwellers' organisations can negotiate a new partnership and new Act with government."<sup>413</sup>

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<sup>407</sup> See, e.g., ABAHLALI BASEMJONDOLO, REVOLUTIONARY UBUNTU: THE SHACK DWELLERS AND POOR PEOPLE OF SOUTH AFRICA, <http://www.eblackstudies.org.ebooks/ubuntu/pdf> (last visited Nov. 24, 2010).

<sup>408</sup> See, e.g., WESTERN CAPE ANTI-EVICTION CAMPAIGN, *supra* note 405.

<sup>409</sup> *Id.*

<sup>410</sup> *A Short History of Abahlali baseMjondolo, the Durban Shack Dwellers' Movement*, ABAHLALI BASEMJONDOLO, <http://www.abahlali.org/node/16> (last visited Nov. 24, 2010).

<sup>411</sup> *Eliminate the Slums Act - Original press statement and digital archive*, ABAHLALI BASEMJONDOLO, <http://abahlali.org/node/1629> (last visited Nov. 24, 2010).

<sup>412</sup> *Abahlali baseMjondolo Take the Provincial Government to Court Over the Notorious Slums Act*, (Feb. 13, 2008, 3:33 PM), ABAHLALI BASEMJONDOLO, <http://abahlali.org/node/3335>.

<sup>413</sup> *Id.*

After listing requirements for a new bill, the release describes the group's opposition efforts: "When the Bill was first circulated we read it in small groups line by line. We developed a critique."<sup>414</sup> They used this critique to organize a coalition of organizations to oppose the Bill, including the Center for Applied Legal Studies (CALs), a public interest law unit housed at the University of Witwatersrand that brought the litigation in *Olivia Road* and pioneered the engagement remedy.<sup>415</sup> The release explains that the CALs' attorneys "took instruction from our movement" and developed the court filings "in constant discussion with us." It further emphasizes that "[w]hen our lawyers step into court they will not only be carrying the hopes of thousands of people but they will also be guided by the thinking done in our communities."<sup>416</sup> The release then notes that this case is just one of many previously successful legal actions against the government: "we have never lost when we have taken the government to court. We have won many crucial court victories since 2005."<sup>417</sup>

The case eventually ended up at the Constitutional Court and the group organized a mass march in support of its case.<sup>418</sup> In a later account, the group describes the march as a broad-based, grass-roots effort that included several other social movements including the Western Cape Anti-Eviction Campaign "to see and witness the will of the people being brought forward in front of the highest Court in the land."<sup>419</sup> A media account of the march described members of the group at the Court "singing, dancing and heralding the Constitution as their 'bible.'"<sup>420</sup> It quotes a member of the group saying that "[l]istening to these judges today made me feel like I was part of this democracy again."<sup>421</sup> The Court invalidated the Act as unconstitutional, and Abahlali held a public celebration of the decision. They explained that "[t]he reason we are having this rally of celebration is so that the judgment can be read, discussed and analyzed, and provide a way forward . . . ."<sup>422</sup>

Second, a core principle of these groups is the same inclusive public participation that the Court's demosprudential judgments emphasize. In rhetoric that resonates with Guinier's description of a mobilized "we the people," these groups frequently express strong suspicions that organized NGOs and aid organizations ignore the true voices of the people that they purport to be helping. As one commentator who has worked extensively with Abahlali describes it:

Abahlali have democratised the governance of settlements . . . . From the beginning the meeting was the engine of struggle for the Abahlali . . . . The discussion at Abahlali meetings is not a performance of inclusion to

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<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Abahlali baseMjondolo Will Challenge the KZN Slums Act in the Constitutional Court on 14 May 2009*, ABAHLALI BASEMJONDOLO (May 6, 2009, 11:50 AM), <http://abahlali.org/node/5120>.

<sup>419</sup> *Celebrating Our Victory Against the Slums Act*, ABAHLALI BASEMJONDOLO (Oct. 29, 2009, 3:24 PM), <http://www.abahlali.org/node/5959>.

<sup>420</sup> Niren Tolsi, *Shack Dwellers' Victory Bus*, MAIL & GUARDIAN, May 24, 2009, available at <http://www.mg.co.za/article/2009-05-24-shack-dwellers-victory-bus>.

<sup>421</sup> *Id.*

<sup>422</sup> ABAHLALI BASEMJONDOLO, *supra* note 419.

legitimate an outcome determined elsewhere . . . . When the meeting produces a result everyone is committed to it. This is due to deeply valued ethical commitments. But it is also due to necessity. There is no other way to build and sustain popular consent for a risky political project amongst a hugely diverse group of vulnerable people with profound experiences of marginalisation and exploitation in multiple spheres of life, including political projects waged in their name.<sup>423</sup>

An article titled “Rethinking Public Participation from Below,” written by members of Abahlali, makes the point directly. The article argues that “[t]he modes, language, jargon, concerns, times and places of a genuinely democratic and democratising politics must be those in which the poor are powerful and not those in which they are silenced as they are named and directed from without.”<sup>424</sup> It goes on to describe an inclusive and deeply participatory process as necessary to sustain any democratic resistance movement:

Democratic popular struggle is a school and will develop its range and reach as it progresses . . . . It is necessary to create opportunities for as many people as possible to keep talking and thinking in a set of linked intellectual spaces within the settlements.<sup>425</sup>

This kind of deep and iterative participation ensures the continued vitality of the movement and ultimately can result in a transformed society: “If [the movement] remains a mass democratic project permanently open to innovation from below it will stay real . . . . It is this politics which can, if it can survive state repression, leftist vanguardism and NGO co-option, democratise society from below.”<sup>426</sup>

Abahlali’s website introduces another article on this same theme by emphasizing that the article captures the “problematization of orthodox ideas of what constitutes ‘democracy’” that “is at the heart of the continually developing thinking that has driven this movement.”<sup>427</sup> After documenting the movement’s strong sense of “democratic betrayal” at the hands of the political elite, the article says that “[t]he task of the Abahlali baseMjondolo is to reclaim the meaning of democratic politics.”<sup>428</sup>

The focus on deeply participatory democracy; the targeted use of constitutional litigation, and the many references to constitutional principles throughout the extensive literature these groups have produced collectively paint a picture of social movements deeply invested in using the processes of democracy and the tools of the Constitution to reshape the political institutions in the country

<sup>423</sup> Richard Pithouse, *Shack Dwellers on the Move in Durban*, ABAHLALI BASEMJONDOLO (Mar. 8, 2007, 4:13 PM), <http://abahlali.org/node/871>.

<sup>424</sup> Richard Pithouse, *Rethinking Public Participation from Below*, ABAHLALI BASEMJONDOLO (Jan. 31, 2007, 9:14 PM), <http://abahlali.org/node/585>.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> Xin Wei Ngiam, *Taking Poverty Seriously: What the Poor Are Saying and Why It Matters*, ABAHLALI BASEMJONDOLO (Oct. 19, 2006), <http://abahlali.org/node/27>.

<sup>428</sup> *Id.*



in ways that make them more responsive to the needs of the vast majority of poor citizens and thus more democratic.

There is a suggestive correspondence between the rhetoric of participatory democracy and the emphasis on inclusive and respectful engagement these groups employ and the Constitutional Court's demosprudential approach, but it is impossible to trace with any precision or certainty the precise relationship between the two. Rosenberg correctly points out that any reliable conclusion about such a causal relationship between courts and social movements requires empirical study. McCann's extensive study of the role legal mobilization played in the pay equity movement offers a useful model for such work. Direct engagement with members of these groups like McCann's interviews with members of the pay equity movement and close analysis of the relationship between court decisions and movement activity and educational efforts is crucial for ascertaining what, if any, effect the Constitutional Court has had.

