
THE SUPREME COURT
2007 TERM

FOREWORD:
DEMOSPRUDENCE THROUGH DISSENT

Lani Guinier

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Question: I have a question about audience in dissenting — as distinct from majority — opinions. Your audience could be as narrow as the litigants and future benches or as broad as Congress or “the people.” Can you give examples of dissenting opinions in which you have attempted to speak to the people, and techniques you employed to reach them? Another way to phrase the question is, “Should Supreme Court Justices speak to the people? If so, how?”

Response: After just a few years on the Court, I was in California visiting with two of my children. We met at a restaurant for breakfast, where someone came to our table and said, “Are you Justice Kennedy?” I thought, “Oh boy, he’s probably some C-SPAN insomniac since he recognizes me.” He explained he was a solo practitioner in a small town in northern California. When the press reported the flag-burning decision, Texas v. Johnson, the gentleman’s father burst into his office, which was crowded with people, and said, “You should be ashamed to be a lawyer.”

There was a reason for the outrage: His father had been a prisoner of war in Germany. To keep up their spirits, the prisoners would knit U.S. flags from stray bits of cloth. When the flags were confiscated and

* Bennett Boskey Professor of Law, Harvard Law School. This article is part of a larger book project coauthored with Professor Gerald Torres, *CHANGING THE WIND: THE DEMOSPRUDENCE OF LAW AND SOCIAL MOVEMENTS* (forthcoming Oxford Press, 2010). Professor Torres and I have jointly developed the concepts, and their applications, that are the backbone of this Foreword. Betsy Bartholet, Derrick Bell, Marie-Claire Belleau, Ann Blair, Tomiko Brown-Nagin, Susan Carle, Guy-Uriel Charles, Mary Clark, Robert Clark, Andrew Crespo, Chris Desan, Jill Duffy, Heather Gerken, Vicki Jackson, Rebecca Johnson, Pam Karlan, Elizabeth Lambert, Jane Mansbridge, Martha Minow, Janet Moran, Charles Ogletree, John Payton, Robert Post, Leah Price, Harriet Ritvo, Reva Siegel, Samuel Spital, Susan Sturm, Jeannie Suk, and Mark Tushnet have given me invaluable feedback on this project and have generously shared their insights. I thank the faculty who participated in the September 19, 2008 workshop at American University Washington College of Law and those who attended the July 10, 2008 Harvard Law School Summer Workshop. I benefited from the superb research and editorial assistance of Emily Blumberg, Richard Chen, Gina Clayton, Zoila Hinson, Sophia Lai, Jennifer Lane, Kimberly Liu, Patrick Morales-Doyle, Joanna Nairn, Portia Pedro, and Sandra Pullman. I also appreciate the generous cooperation of the chambers of Justices Stevens, Scalia, and Kennedy in providing transcripts of their spoken words.

the prisoners punished, the prisoners would begin to knit again. Not knowing how else to respond to his father's anger, the attorney gave him a copy of my concurring opinion. The father returned to the office the next day and said, "You should be proud to be a lawyer."

The Constitution is the enduring and common link that we have as Americans and it is something that we must teach to and transmit to the next generation. Judges are teachers. By our opinions, we teach.

— Justice Anthony M. Kennedy, responding to a Harvard Law School student's question, Spring 2008

PROLOGUE

It is morning, June 28, 2007, in the august amphitheater of the United States Supreme Court. Three prominent black civil rights lawyers wait expectantly.¹ They, along with members of the press and public, are here to bear witness to the Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.² The case involved two cities separated by thousands of miles: Seattle, Washington, and Louisville, Kentucky. Local communities in these far-flung locales had voluntarily attempted to integrate their public schools.³

On this, the last day of his first full Term, Chief Justice John Roberts gavels the room to order. He then strikes down the plans in a matter of sentences. On behalf of himself and four colleagues, he declares Seattle's and Louisville's voluntary school integration plans unlawful because they consider race as a factor in student assignment. With a simple maxim, Chief Justice Roberts and his colleagues destroy what had taken the cities years to build: "The way to stop discrimination on the basis of race," their argument goes, "is to stop discriminating on the basis of race."⁴

¹ See Telephone Interview with Charles Ogletree, Jesse Climenko Professor of Law, Harvard Law School (June 17, 2008). Professor Ogletree was seated next to Ted Shaw and John Payton, then current and future director-counsels of the NAACP Legal Defense Fund, Inc.

² 127 S. Ct. 2738 (2007).

³ *Id.* at 2746.

⁴ *Id.* at 2768 (plurality opinion). In his opinion announcement, Chief Justice Roberts said, "the way 'to achieve a system of determining admission to the public schools on a nonracial basis' is to stop assigning students on a racial basis." Oral Opinion of Chief Justice Roberts at 12:53–13:04, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908) (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1954)), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion.

Moments after Chief Justice Roberts finishes speaking, a voice both incredulous and distressed pierces the High Court's etiquette. Bristling with barely concealed anger but tempered by the circumspection of the law professor he once was, Justice Stephen Breyer informs those assembled that he takes strong objection to Chief Justice Roberts's pronouncements of the law. Justice Breyer, too, offers a simple statement: "The majority is wrong."⁵

On a nine-person bench where the give and take between judges and lawyers usually involves rapid-fire exchanges, Justice Breyer proceeds to "hold court" alone for the next twenty-one minutes. No lawyers stand before him; no one is poised to answer questions or to persuade him of one side or the other. Indeed, joined in his dissent by Justices Stevens, Souter, and Ginsburg, Justice Breyer is not asking questions. Instead, he forcefully challenges Chief Justice Roberts's view of "the law" of the land. "The majority is wrong" to conclude that consideration of race is per se unlawful.⁶ To the contrary, when used to include rather than exclude, taking race into account is constitutional. The plans in question, adopted democratically to overcome racial isolation by creating racially diverse schools, are "partly remedial, partly educational, partly civic."⁷ "These plans are not affirmative action plans," he explains.⁸ "School placement here has nothing to do with any students' merits. . . . Until today the law has allowed school districts to implement these kinds of plans."⁹ The Supreme Court has routinely given "significant practical leeway"¹⁰ to democratically elected school boards to make educational policy that "tries to bring people together."¹¹ The five Republican appointees, he suggests,

Compare this statement with Justice Blackmun's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), where he wrote: "In order to get beyond racism, we must first take account of race. There is no other way." *Id.* at 407 (opinion of Blackmun, J.). Or compare Justice Marshall's opinion in *Bakke*:

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.

Id. at 401-02 (opinion of Marshall, J.).

⁵ Oral Opinion of Justice Breyer at 19:53, 21:18-21:22, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_908/opinion [hereinafter Breyer's Oral Dissent].

⁶ *Id.*

⁷ *Id.* at 21:05-21:09.

⁸ *Id.* at 20:41-20:45.

⁹ *Id.* at 20:45-21:13.

¹⁰ *Id.* at 25:25-25:27.

¹¹ *Id.* at 25:16-25:18.

are dictating their own policy preferences in the name of the law.¹² Justice Breyer denounces Chief Justice Roberts's temerity with sixteen memorable words: "It is not often in the law that so few have so quickly changed so much."¹³

For those actually seated in the courtroom that day, Justice Breyer's oral dissent, a speech only publicly available on audio file,¹⁴ was an unusual moment of high drama. Unfortunately, it never reached the written page. Justice Breyer's twenty-one-minute oration was based on a distinct and still *unpublished* document.¹⁵ The dissent Justice Breyer had written for publication featured seventy-seven heavily footnoted pages; it carefully chronicled the history of school segregation in Seattle and Louisville.¹⁶ It was twice as long as any dissent Justice Breyer had previously authored,¹⁷ but like those other opinions, it was characterized by a lengthy, detailed, and dense display of legal reasoning.¹⁸ The dissent he actually published reflects a manner of writing little different than the style he would have used had he written the Court's majority opinion.¹⁹ Interestingly, unlike his oral dissent, Justice Breyer's written dissent failed to include the most memorable line of the day.²⁰

¹² See *id.* at 33:00–35:02.

¹³ *Id.* at 32:54–33:01. Similarly, Justice Stevens noted in his written dissent in the case, "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007) (Stevens, J., dissenting).

¹⁴ Breyer's Oral Dissent, *supra* note 5.

¹⁵ Although these oral dissents are characterized as summaries of the written dissents, they are often separate documents, crafted for a more popular audience. See *infra* pp. 23–24.

¹⁶ *Parents Involved*, 127 S. Ct. at 2803–10 (Breyer, J., dissenting).

¹⁷ Breyer's Oral Dissent, *supra* note 5, at 21:25–21:29.

¹⁸ In the dissent he actually published, and contrary to the style of his oral dissent, Justice Breyer's sentences were long and sometimes hard to follow. For example, he wrote:

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. . . . In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality.

Parents Involved, 127 S. Ct. at 2800 (Breyer, J., dissenting).

¹⁹ As one blogger noted: "At first . . . Breyer's 77-page dissent struck me as somewhat pedestrian. Not that it was poorly argued — Breyer's opinion is carefully reasoned, tightly argued, and very compelling — but that there were very few particular moments that stood out as 'wow.'" The Debate Link, <http://dsadevil.blogspot.com/2007/06/desegregation-opinions-breyers-dissent.html> (June 28, 2007, 16:16).

²⁰ "It is not often in the law that so few have so quickly changed so much." Breyer's Oral Dissent, *supra* note 5, at 32:54–33:01; cf. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 335–36 (2007) ("At this direct slap directed to 'the hijacking of *Brown*,' Alito roused himself and stared across the bench at Breyer. Roberts didn't change expression, but the muscles in his jaw twitched."); Telephone Interview with Robert Barnes, Supreme Court Reporter, *Wash. Post* (July 16, 2008). Barnes was in the Court when Justice Breyer

The difference between Justice Breyer's oral and published dissents is telling. In the courtroom on June 28, Justice Breyer's passionate exposition hinted at a new genre of judicial speech. He began by looking straight at the three prominent black civil rights lawyers, silently noting their presence as he delivered his dissent.²¹ He surveyed the section cordoned off for members of the Supreme Court Bar. He continued by getting the attention of the reporters then seated in the courtroom and through their megaphone reached out to the college-educated people who may not read the official Supreme Court Reports but do listen to Nina Totenberg on the radio or read Linda Greenhouse in the *New York Times*.²² Justice Breyer's words quickly reverberated throughout the blogosphere, inviting other non-judicial dissenters to speak up in more traditional media.²³

Justice Breyer's oral dissent, also known as a dissent from the bench, used some of the same authoritative texts and legal conventions that are Supreme Court Justices' standard fare. But he also summoned memories, values, and practices that might — were his oral dissent widely distributed — have resonated with a less educated audience, including those who never graduated from high school but had seen evidence in their own lives of what he described. Justice Breyer was at once serious and conversational. "Let me deviate so I can give an example," he said.²⁴ Or, he offered, "I'll read you the

delivered his oral dissent in *Parents Involved*. After Justice Breyer delivered this line (which everyone went to look for in his written opinion, only to find it was missing), several people thought "this was the liberal summation of the whole [October 2006] Term." *Id.*

²¹ Professor Ogletree said:

I was sitting next to Ted Shaw and John Payton. We had gotten word that the case would come down that day. He was looking right at us as he was reading his dissent. This was his coming out as a dissenter. I felt overwhelmed by it. Here was a Justice who clearly understood the significance of the issue and was outraged that his colleagues turned *Brown v. Board* on its head. It was unusually harsh language for a justice known as a conciliator. It was a gripping day. The courtroom was 90% full but there would have been no empty seats at all except a lot of people stayed at their law offices because they could get a copy of the opinion quicker that way.

Ogletree, *supra* note 1. Or as John Payton remembered, "Most of the time when you read an opinion you inject your own feelings. This time their emotions were absolutely evident. It was refreshing." Interview with John Payton, Director-Counsel, NAACP Legal Defense Fund, Inc. (LDF) (Aug. 17, 2008).

²² Linda Greenhouse, who retired after the end of the October 2007 Term, was a legend among Supreme Court reporters as well as the non-legal public. See *infra* note 103 (discussing the reliance of other reporters on Greenhouse's quick analysis of the decision in *Bush v. Gore*).

²³ Civil rights advocates, who had seen a different kind of legally sanctioned indifference to principles of equality in the 1950s and 1960s, were animated by Justice Breyer's tone to give voice to the parallels they perceived in the Court's ruling. For example, Jack Greenberg, former Director-Counsel of the NAACP LDF and one of the lawyers who had argued *Brown v. Board of Education*, told the *Chicago Tribune* that the Court's decision on June 28 "was essentially the rebirth of massive resistance in more acceptable form." Editorial, *Diversity the Right Way*, CHI. TRIB., July 1, 2007, § 2, at 6.

²⁴ Breyer's Oral Dissent, *supra* note 5, at 28:03–28:05.

list.”²⁵ His short, sturdy sentences invited reiteration rather than repetition. In this sense, he appealed to shared and heartfelt values, not just compelling logic and clear reason. He seemed to sense that the premises behind the logic, the stories and not just the explanations, really mattered.²⁶ He spoke, in other words, with confidence that, “in the final analysis,” he had “advocates in the hearts of [his] audience.”²⁷

Of course, it is possible that he spoke with such power because he assumed only a small and influential audience of friends and acquaintances was listening, a group that would understand both the normative and the technical dimensions of his critique. In the close-knit atmosphere of a decision hand-down, other than the tourists who come simply to gawk, it is the “the elite of the elite” who are usually present in their Supreme Court “clubhouse.”²⁸ Without a doubt, neither those with a stake in the outcome nor their proxies were widely represented when Justice Breyer delivered his dissent from the bench.

Inside the Court, for example, there was no call and response, as there most certainly would have been had Justice Breyer given the same speech as a sermon in a black church. Missing was the sound of people taking the deep, contemplative breaths characteristic of a Quaker meeting. No hands clapped. No fingers snapped as might have greeted a politician delivering an equally forceful message. Absent were the obvious signs of audience involvement that would have characterized a contemporary form of comparable theater, whether a political rally or a spoken word “poetry slam.” Except for the single moment when someone cleared his throat, the only sound for twenty-one dramatic minutes was Justice Breyer’s highly charged, determined voice.

That the intensity of the moment was not punctuated by cheers, whoops, catcalls, or even polite applause does not, however, make his oral dissent less noteworthy. Its tone and its craft contained the outlines of a different kind of social criticism. Although he did not speak to a youth culture steeped in the theatrical art of “spoken word,”²⁹ his

²⁵ *Id.* at 28:13–28:14.

²⁶ *Cf.* MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 75 (1987) (“Prophecy aims to arouse remembrance, recognition, indignation, repentance.”).

²⁷ *Id.* at 76 (quoting MOSHE GREENBERG, BIBLICAL PROSE PRAYER 56 (1983)).

²⁸ The “legal elite club” theory of oral dissents is based on the fact that Linda Greenhouse, for example, is personal friends with members of the Court. To the extent the atmosphere inside the court is one of social intimacy, that atmosphere arguably changes the “public” nature of the decision handed down. Certainly there would be greater potential for the Court to speak to a broader audience were oral opinions available online to the same extent as written ones.

²⁹ *Cf.* Bryonn Bain, A History of the Spoken Word Movement 3 (unpublished manuscript, on file with the Harvard Law School Library) (“Spoken word poetry is a contemporary art form fusing elements of verse, music and theater. Though widely popular throughout the United States in the early 21st century, its roots trace from the protest songs of the Civil Rights Era, to the blues

conversational style nonetheless equipped him with twenty-first-century tools to reach out to new listeners. The platform of Justice Breyer's oral dissent offered a novel and potentially interactive pedagogical space, one that, with the right technology and a democratizing agenda, could spark a lively conversation among, and with, a decidedly non-professional and non-elite audience. In this sense, Justice Breyer's oral dissent hinted at the possibility of a larger phenomenon, a new forum for deliberative democracy being carved out of the formal authority and awe-inspired reverence associated with the Supreme Court of the United States. Although few nonlegal actors actually heard Justice Breyer's *cri de coeur*, it represented a gestational move in the direction of greater democratic accountability.

As I describe later, some ordinary people were listening. The Roberts majority may have moved the law as if it were a mere chess piece, but Justice Breyer's critique had legs in directly affected communities like Louisville, Kentucky.³⁰ Local civil servants, like Pat Todd, an educational administrator in Louisville, used the dissent to remind herself, her colleagues, and Louisville residents that they controlled some chess pieces too. Affirmed in part by Justice Breyer's dissent, elected officials, high school principals, and community leaders began developing a system to explore the options still available as a result of Justice Kennedy's concurrence.³¹ Todd and her cohorts began operating within the public spaces of our democratic system to elaborate the normative claims of the dissenters by exploring the practical options preserved by the Kennedy concurrence.

Democratic accountability for unelected judges is traditionally associated with judicial deference to elected legislatures or other formal expressions of majority will. But dissenting Justices also enjoy access to an alternative and more informal path into the democratic process, one that is consistent with the prestige and authority of the Court. Dissenters can spark a kind of deliberation that is not the same as partisan politics, but is rooted in the deeply democratic practices of constitutional governmental institutions. For example, Todd armed herself with Justice Breyer's dissent, which she read aloud at the beginning of all of her community forums.³² She and others in Louisville readied

and sermonic traditions of the American South, and as far back as the ancient storytelling tradition of African griots.”).

³⁰ See *infra* notes 167–170 and accompanying text (describing the post-*Parents Involved* imaginative efforts in Louisville to stay within the bounds of the Court's decision while reinforcing the school board's commitment to public school diversity).

³¹ Justice Kennedy left open the possibility, for example, of integrating elementary and secondary school education based on neighborhood mapping rather than individual identity. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

³² See *infra* note 167 and accompanying text.

themselves to continue the struggle within the framework of our democratic system. Their goal was to elaborate ideas and practices of racial integration in ways that may eventually realign our constitutional law with the prevailing view of constitutional culture.³³ Emboldened by the dissent, Todd and her cohorts are “norm entrepreneurs” who are pushing back on the majority’s formulation because it is inconsistent with the values of the community they represent.³⁴

To the extent Justice Breyer’s dissent triggered an ongoing conversation with thought leaders and norm entrepreneurs like Todd, he created a dynamic relationship of accountability. Though few people may actually have heard his oral dissent, it is the Todds of the world whose participation jumpstarts the process of democratic accountability. When social and cultural intermediaries like Todd tune in, they can act as amplifiers and translators for the Court. Even if the conversational loop they join does not ultimately yield policy change, the outcome may still be democracy-enhancing. First, these intermediaries can make oppositional constitutional norms more salient based on the lived experience of ordinary people. Second, the interactive dialogue can engage more people in the decisionmaking process.

In other words, Justice Breyer’s dissenting opinion was not just an internal response to a perceived judicial hijacking by his current or future colleagues. His dissent made conflict on the Court transparent to nonlegal actors and opened a new window on pathways toward “sub-formal” democratic accountability. To the extent he spoke in a voice that nonlegal actors understood, he made the work of judicial interpretation accessible to a larger audience. And through that interaction he played an important role, consistent with his theory of “active liberty,” in increasing public understanding of, and participation in, the evolution of constitutional jurisprudence.³⁵

Indeed, for ideas to move through organized or networked constituencies and ultimately reach ordinary people, the speaker cannot merely speak out once in protest. Ideas get a toehold when there is an ongoing conversation between the speaker and her audience. As Professor Jane Mansbridge demonstrates in her study of “everyday feminists,” the arguments of movement elites, feminist intellectuals, and respected authorities may circulate slowly but can ultimately gain

³³ See *infra* pp. 59–63 (discussing the relationship between constitutional law and constitutional culture); see also *infra* note 264 (citing polling data that a majority of Americans support racially diverse public schools).

³⁴ See *infra* notes 267–268 and accompanying text for a discussion of norm entrepreneurs.

³⁵ See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

traction in popular culture.³⁶ In the 1980s and 1990s, for example, ordinary women felt emboldened by the feminist rhetoric of “male chauvinism” to respond creatively to instances of manifest unfairness in their own lives.³⁷ In borrowing the terminology of the feminist movement to frame their own lived experience, calling some of the men in their lives “male chauvinist pigs,” these everyday feminists became part of the process of making and interpreting new ideas about right and wrong anchored in new understandings of what might be lawful and unlawful.³⁸

In this Foreword, I argue that oral dissents, like the orality of spoken word poetry or the rhetoric of feminism, have a distinctive potential to root disagreement about the meaning and interpretation of constitutional law in a more democratically accountable soil. Ultimately, they may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process. Oral dissents can become a crucial tool in the ongoing dialogue between constitutional law and constitutional culture.

As the epigraph suggests, Justices teach by their opinions. This is as true of dissenting Justices as it is of those writing majority opinions. Many academics and even some Justices recognize this dynamic, but they tend to locate the pedagogical value in future terms. Dissents are important to the extent they influence the actions of judicial majorities twenty years from now or broaden the jurisprudential range (think originalism) of the next generation of law students whose imaginations are captured by particularly catchy written dissents in their law school casebooks.³⁹ In a contemporary context, however, dissenting Justices may educate, inspire, and mobilize citizens to serve the present as well as the future goals of our democracy.⁴⁰ Using the dissent’s narrative techniques, its substantive message, and its resonance through conver-

³⁶ See Jane Mansbridge, *Everyday Feminism* (unpublished manuscript, draft on file with author) (describing the proliferation of the feminist term “male chauvinist pig” by women who began to use it in everyday talk to describe the men in their lives from the 1970s on).

³⁷ See *id.*

³⁸ *Id.* See generally Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) (explaining how the defeat of the Equal Rights Amendment created an interaction between citizens and officials that led to the constitutional prohibition of sex discrimination).

³⁹ See Posting of Dan Slater to The Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2008/05/30/law-blog-chats-with-scalia-part-ii-master-of-the-dissent/> (May 30, 2008, 21:04).

⁴⁰ In Part IV, I address concerns that an appeal to the public in the present tense is an overtly political act, one that undermines rather than affirms the Court’s legitimacy. See, e.g., Posting of Mark Tushnet to Beacon Broadside, <http://www.beaconbroadside.com/broadside/2008/07/dissenting-a-vi.html> (July 30, 2008, 10:21) (suggesting that a direct appeal to the contemporary public is a “disquieting” explanation that “might trouble those who think that judges shouldn’t play a political role but should only, as Chief Justice Roberts put it at his confirmation hearings, call balls and strikes”).

sations among non-elites, we might discern the outlines of both the innovative and the democracy-enhancing potential in the dissenting Justice's role in today's, not just tomorrow's, world.

In this regard, oral dissents — and here I use the term dissent in its functional rather than formal sense — could become an important tool for exploring the merits of two competing sources of judicial authority. On the one hand, the Chief Justice is pushing for fewer dissenting opinions.⁴¹ His role model is Chief Justice John Marshall, who presided over the Supreme Court for thirty years, a reign that included few dissents or concurrences.⁴² For Marshall and for Chief Justice Roberts, the Court gains authority when it speaks with an institutional rather than an individual voice.⁴³ On the other hand, in the digital age, there are reasons to think that the Court gains more in democratic accountability by expanding its audience, a practice that oral dissents might facilitate. The issue, of course, is not merely whether the dissenters manage to have their voices heard by a broader public. The question is whether dissenting Justices can engage that public in a kind of deliberation that is rooted in the deeply democratic practices of constitutional governmental institutions.

Oral dissents have enjoyed a resurgence over the last few years, with an average of four a year in the last ten years.⁴⁴ Since Chief Justice Roberts took his post, there have been twelve oral dissents: three in the October 2005 Term, seven in the October 2006 Term and two in the October 2007 Term.⁴⁵ The dramatic spike in 2006 and the equally dramatic decline in 2007 suggest that the Court may be poised at the intersection of these two opposing forces. Will the push for unanimity, in other words, trump the push for democratic accountability?

To draw attention to the role of democratic accountability in this equation, Professor Gerald Torres and I coined the term “demosprudence.”⁴⁶ Demosprudence is a democracy-enhancing jurisprudence. It describes lawmaking or legal practices that inform and are informed

⁴¹ See JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 224–26 (2007) (citing his interview with Chief Justice Roberts).

⁴² *Id.* at 55.

⁴³ *Id.* at 55, 224–26.

⁴⁴ Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents Issued by the U.S. Supreme Court Justices 2* (Aug. 22, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

⁴⁵ *Id.*

⁴⁶ We are engaged in a collaborative effort to rethink the role of legal actors across a range of lawmaking practices. In other work, we are developing the heuristic of demosprudence as an interpretive tool to spotlight the relationship between the lawmaking power of formal legal authorities (whether judges or legislators) and the equally important though often undervalued power of social movements or mobilized constituencies to make and interpret law. See LANI GUINIER & GERALD TORRES, *CHANGING THE WIND: THE DEMOSPRUDENCE OF LAW AND SOCIAL MOVEMENTS* (forthcoming 2010).

by the wisdom of the people. Demosprudence, unlike traditional jurisprudence, is not concerned primarily with the logical reasoning or legal principles that animate and justify a judicial opinion. Demosprudence is instead focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites. Demosprudence through dissent attempts to understand the democracy-enhancing potential implicit and explicit in the practice of dissents. In this Foreword, I use the practice of dissenting from the bench to explore the role of conflict in a democracy and in particular the democratic potential of dissenting opinions to engage a wider constituency in debates about the core conflicts at the heart of democracy.⁴⁷ This juxtaposition frames the consideration of the October 2007 Term in light of Chief Justice Roberts's expressed preference for narrower opinions and fewer dissents.⁴⁸

This Foreword proceeds in four Parts. Part I places the practice of dissent in its historic context. Here I focus on the question of who constitutes the audience of Supreme Court opinions, starting with the upsurge and then gradual decline in the judicial/academic conversation about law in conjunction with the evolving role of dissents by Supreme Court Justices in the last 100 years. I use the recent flurry of oral dissents to compare the elements traditionally considered in evaluating impressive dissents with the qualities I shall identify in Part II that make dissents "demosprudential." In particular, I draw out the democracy-enhancing potential of three salient oral dissents from the October 2006 Term.

Part II introduces the concept of demosprudence through dissent by emphasizing the potential of oral dissents to expand the audience for judicial decisionmaking and to engage that audience in democratic deliberation about constitutional law. I propose three "constitutive elements" of demosprudence through dissent: 1) an issue of democracy is at the core of the conflict; 2) the style of the dissent is accessible to the public; and 3) the Justice's approach appears to inspire nonjudicial actors to participate in some form of collective problem solving. Although I organize these constitutive elements around the practice of dissenting from the bench, I do not limit the idea of demosprudence

⁴⁷ As I discuss in section II.C, Professor Torres and I build on recent scholarship about popular constitutionalism and, even more closely associated, democratic constitutionalism. In 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 citizens' claims. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007). Professors Siegel and Post affirmatively embrace the idea that public engagement "guid[es] and legitimat[es] the institutions and practices of judicial review" because it roots "professional reason . . . in popular values and ideals." *Id.*

⁴⁸ ROSEN, *supra* note 41, at 224, 226–28, 230 (citing his interview with Chief Justice Roberts).

through dissent to its oral form. The demosprudential features of an oral dissent may be present in a written dissent or a concurring opinion, as in Justice Stevens's concurring opinion this Term in *Baze v. Rees*.⁴⁹ Occasionally, those features define a majority opinion as well. Nevertheless, I shall argue that oral dissents are a valuable demosprudential prism because of their potential to map out an alternative source of democratic accountability for judicial decisionmaking. Oral dissents use a symbolically important organ of the state to speak in an amplified forum but do not use the coercion of the state to impose a certain outcome.

Part III uses the constitutive elements of demosprudence, as defined in Part II, to analyze the October 2007 Term for its demosprudential qualities in light of the dynamic relationship between constitutional law and constitutional culture. While my focus is on oral dissents, of which there were two, the audio for these opinion announcements was not available at the time of writing.⁵⁰ Because a full understanding of the constitutional law/constitutional culture dynamic depends, among other things, on historical distance, subsequent developments, and oral familiarity, my views of the demosprudential qualities of these opinions are tentative. Nevertheless, with the values and metrics I identify in Part II in mind and consistent with my claim that oral dissents are a window on demosprudential qualities, I consider both oral dissents as well as three written dissents and a concurrence. After examining these cases along a continuum that is both marked by and distinct from the metrics of demosprudence itself, I conclude that the 2007 Term represents a set of missed demosprudential opportunities to inspire and/or teach a larger audience. I illustrate some of that untapped potential in alternative demosprudential approaches to the decision in *Crawford v. Marion County Election Board*.⁵¹

Part IV explores the implications of demosprudence through dissent. In this Part, I return to the relationship between the qualities of demosprudence and the basic commitment of democracy to rule by the people. This relationship is especially significant in an era where an electoral minority may get to exercise indefinite dead-hand control through the life tenure of young, ideologically conservative, and demographically homogeneous members of the Supreme Court. Finally, I consider the potential upside and attendant danger, in the context of both the law/politics debate and the competing views of how best to ensure the Court's continued authority in our democracy, in shifting a

⁴⁹ 128 S. Ct. 1520, 1546, 1548–49 (2008) (Stevens, J., concurring in the judgment).

⁵⁰ The audio files should be available as of October 2008 at oyez.org.

⁵¹ 128 S. Ct. 1610 (2008).

dissenting Justice's attention away from a legal or even legal academic audience toward a nonlegal and nonjudicial audience.

I. DISSENT AND THE AUDIENCE QUESTION IN HISTORICAL AND CONTEMPORARY CONTEXT

A. *Norms of Dissent and the Audience Question*

Professor Mark Tushnet, in his book *I Dissent*, identifies three qualities of a great dissent.⁵² First, the dissent accurately predicts the future. Second, it endures because of powerful rhetoric that captures the imagination. Third, it “set[s] out an account of democracy and self-government that cannot fail to move the reader.”⁵³ Tushnet links all three qualities to the dissenter's ability to convince future generations that his or her view of the doctrine is correct, but he also contemplates the important role played by a dissenter's compelling “vision of democracy and the Constitution.”⁵⁴ In other words, a dissent may be important because, like Justice Harlan's dissent in *Plessy v. Ferguson*,⁵⁵ it becomes the bible for a social movement, not just because it accurately predicts the path of future doctrine.⁵⁶

As far back as 1898, dissents were understood “as appealing over the head of the Court directly to ‘the people.’”⁵⁷ Dissenting opinions, like Supreme Court opinions more generally, are “addressed to particular audiences” and are “designed to accomplish particular ends.”⁵⁸ But their particular significance derives from institutional conventions and contexts that have changed over time.

⁵² I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 98–99 (Mark Tushnet ed., 2008) (describing Justice Brandeis's concurrence in *Whitney v. California*, 274 U.S. 357 (1927)).

⁵³ *Id.* at 98.

⁵⁴ *Id.* at 99.

⁵⁵ 163 U.S. 537 (1896).

⁵⁶ Justice Harlan's dissent stands as one of the classic dissents in this regard. Harlan wrote about the nature of full and equal democratic participation and the power of one group to subjugate another. While the opinion did include focused legal reasoning about, for example, whether a railroad counted as a public highway, Justice Harlan used common sense to demonstrate that the statute at issue betrayed the principles of the Fourteenth Amendment for which the United States had received so much praise. He also enhanced the dissent's demosprudential qualities by employing evocative language: “The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.” *Id.* at 560. (Harlan, J., dissenting).

⁵⁷ Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1356 (2001) (citing *Evils of Dissenting Opinions*, 57 ALB. L.J. 74, 75 (1898)).

⁵⁸ *Id.* at 1289.

The early Supreme Court did not distance itself from the people or present itself as a monolithic institution. The 1789 Judiciary Act assigned two Supreme Court Justices to each of three “circuits.”⁵⁹ The Justices were “to ride across [each] region and act as lower federal court judges.”⁶⁰ They were thus “the only federal officials with . . . regular ongoing contact” with the populace and “it was . . . through their contact with the Judges sitting in these Circuit Courts that the people of the country became acquainted with [the] new institution, the Federal Judiciary.”⁶¹

Moreover, unanimous decisions were not the norm for the early Court. Before John Marshall became Chief Justice in 1801, the Justices on the Court had delivered their individual opinions seriatim, each standing to deliver his own decision.⁶² Chief Justice Marshall quashed this practice in favor of unanimity; thereafter, the Court issued a single institutional opinion, an “Opinion of the Court.”⁶³

With pre-1925 mandatory review, the Court strained under its clogged docket.⁶⁴ Opinions were short and written quickly.⁶⁵ Dissents were few. The norm of unanimity was strong, both because of institutional constraints (there was little time to spare during the Term) and because of institutional preferences (the Court should speak with one voice in order to preserve confidence in the “law”). In particular, the Court’s “norm of acquiescence”⁶⁶ precluded a potentially dissenting Justice from appealing to the people: “[T]he reputation and prestige” of the Court, its “influence and weight,” depended upon it speaking with “absolute certainty” in order to demonstrate “judicial infallibility.”⁶⁷

⁵⁹ Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1727 (1998).

⁶⁰ *Id.*

⁶¹ *Id.* at 1728 (quoting 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 58–59 (1926)).

⁶² ROSEN, *supra* note 41, at 55.

⁶³ *Id.*

⁶⁴ In 1921, for example, there were 669 new cases and 343 cases that had been carried over from the 1920 Term. Post, *supra* note 57, at 1276. The Court thus confronted an appellate docket of some 1012 cases. *Id.* For comparison, note that in the 2007 Term, the Court considered and disposed of fewer than eighty cases on the merits. In the period leading up to the 1925 Act, the Court wrote full opinions in approximately 33% of its docket each year. *Id.* at 1278. In the Term ending in 1998, the Court wrote full opinions in 1% of its docket. *Id.* at 1279.

⁶⁵ In 1924, the Court wrote 231 full opinions; seventy years later, in 1994, the Court delivered 89 full opinions. *Id.* at 1279; see also *id.* at 1287. In a paean to concision and diligence, Justice Holmes foreshadowed my argument about oral dissents. He proclaimed that an opinion should not “be like an essay with footnotes, but rather should be *quasi* an oral utterance.” *Id.* at 1292–93 (quoting Letter from Oliver Wendell Holmes to Harold J. Laski (Nov. 21, 1924), in 1 HOLMES-LASKI LETTERS 675, 675 (Mark DeWolfe Howe ed., 1953) [hereinafter Holmes Letter]).

⁶⁶ *Id.* at 1357.

⁶⁷ *Id.* (quoting Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 928 (1962)). Canon 19 of the American Bar Association’s 1924 edition of the Canons of Judicial Ethics explicitly asserted the norm against dissent: “It is of high importance that judges constituting a court of

Dissent was seen both as “evidence that the Court’s decisions were not compelled by legal necessity”⁶⁸ and as an evil that subverted the confidence of the people in the rule of law.⁶⁹

Following the 1925 Judiciary Act,⁷⁰ the practice of dissenting opinions evolved significantly. Professor Robert Post, in an excellent account, describes a revolution in which the norms shifted away from Chief Justice Marshall’s prized consensus toward a less institutionalized view of judicial authority.⁷¹ This revolution also brought about the emergence of a view of law as a process of “achiev[ing] social purposes” rather than the assertion of “fixed and certain principles”⁷² and a turn toward a broader audience among the legal public. Together, these developments convinced some Justices of the need to locate the Court’s legitimacy and authority in the specialized wisdom of the legal academy.⁷³

The 1925 Act changed the Court from a court of last resort, whose primary function was to “correct[] errors arising in ordinary private litigation,”⁷⁴ to a “ministry of justice,”⁷⁵ a “constitutional tribunal that resolved public policy issues of national importance.”⁷⁶ The 1925 Ju-

last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision.” *Id.* at 1284 (quoting ABA Canons of Judicial Ethics, Canon 19, in LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 137, 137 (1992)).

⁶⁸ *Id.* at 1356.

⁶⁹ In 1898, the *Albany Law Journal* reprinted and “commend[ed] . . . to careful consideration” the following remarks made by Henry Wollman:

A dissenting opinion is to some extent an appeal by the minority — from the decision of the majority — to the people. What can the people do? They can’t alter it; they can’t change it; right or wrong, they must respect and obey it. Why shake the faith of the people in the wisdom and infallibility of the judiciary? Upon the respect of the people for the courts depends the very life of the Republic.

Henry Wollman, *The Stability of the Law — The Income Tax Case*, Address Before the Greenwood Club, in *Evils of Dissenting Opinions*, 57 ALB. L.J. 74, 75 (1898). Professor Robert Post writes that the sharp distinction between law and politics is at the root of this argument. Post, *supra* note 57, at 1357 (“Discontent with judicial decision-making is deemed irrelevant because courts are imagined as implementing the law, and the law is conceived as entirely distinct from popular will.”).

⁷⁰ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (current version codified at 28 U.S.C. §§ 1251–1294 (2000)).

⁷¹ See Post, *supra* note 57.

⁷² *Id.* at 1274.

⁷³ See Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUDICATURE SOC’Y 78, 78 (1942) (explaining that only those with access to “scholarship, history and reason” can properly appreciate “a considered and well stated dissent”).

⁷⁴ Post, *supra* note 57, at 1273 n.29 (quoting Peter G. Fish, *Judiciary Act of 1925*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 476, 477 (Kermit L. Hall et al. eds., 1992)). As a “tribunal of ultimate resort,” the Supreme Court had been “the highest and the last source of appellate review, whose chief function was correctly to discern and to protect the federal rights of litigants.” *Id.* at 1272.

⁷⁵ Gregory Hankin, *U.S. Supreme Court Under New Act*, 12 J. AM. JUDICATURE SOC’Y 40, 40 (1928).

⁷⁶ Post, *supra* note 57, at 1273 (quoting Fish, *supra* note 74, at 477).

diciary Act consolidated the practice of petitioning for certiorari, which drastically *reduced* the Court's caseload and *heightened* its discretion.⁷⁷ These changes unlocked the restraints on dissent, and the unanimity norm buckled under the new conditions of judicial review.

Changes in the Court's personnel also fueled renewed interest in dissent. In an era when law schools were assuming more influence in the legal profession, the arrival of Justices who had honed their skills as law professors altered the tacit norms regarding opinions, including dissents. The Justices on the Court began to express a personal and not just an institutional view of justice.⁷⁸ By the end of the 1940s, Post tells us, the "norm of acquiescence had utterly collapsed."⁷⁹ By the end of the twentieth century, dissenting opinions, especially in controversial cases of public importance, became the norm.⁸⁰

The post-1925 transformation of the Court's docket did more, however, than just precipitate a new norm regarding dissents. A new understanding of the Court's audience emerged. The Court began to see its opinions not merely as "a statement of the law" but as "a written intervention, addressed to particular audiences, and designed to accomplish particular ends."⁸¹ Chief Justice William H. Taft explained:

The real work [which] the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it. . . . Its main purpose is to lay down important principles of law and thus to help the public at large to a knowledge of their rights and duties and to make the law clearer.⁸²

Yet it seems that the audience that Chief Justice Taft intended the Court to reach was not the People as a whole; he believed the Court should speak to a subset of the public, the "legal public," those who

⁷⁷ *Id.* at 1272 ("Taft . . . conceived and pushed through Congress the Judiciary Act of February 13, 1925, which 'cut . . . to the bone' the mandatory appellate jurisdiction of the Supreme Court, substituting therefore discretionary review by writs of certiorari." (quoting FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 299 (1928))).

⁷⁸ For Justice Brandeis, for example, the question was less about constitutional justice and more about constitutional law as a form of "statesmanship," a negotiation between context and principle that "requires continuous flexibility and growth." *Id.* at 1352. Justice William O. Douglas, one of the most consistent dissenters on the Court, also rejected ideas about the finality of law. For Douglas, "philosophers of the democratic faith . . . rejoice in the uncertainty of the law and find strength and glory in [that uncertainty]." William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 105 (1948); see also Post, *supra* note 57, at 1285 ("When Harlan Stone joined the Taft Court in March 1925, for example, he drew on his background in legal academia to draft long and intricate opinions. These were sharply criticized by the other Justices."). As Justice Stone began to associate more with Justices Brandeis and Holmes, his willingness to join the majority declined. *Id.* at 1321.

⁷⁹ Post, *supra* note 57, at 1355.

⁸⁰ See *id.* at 1283–84.

⁸¹ *Id.* at 1289.

⁸² *Id.* at 1273 (quoting William Howard Taft, Address to the New York County Bar Association (Feb. 18, 1922), *microformed on* William H. Taft Papers, Reel 590 (Libr. of Cong.)).

needed to know the meaning of federal law or those who were directly concerned with the development of American law.⁸³ The legal public included state courts and lower federal courts, the legal profession, and national and local legislators.⁸⁴

Despite its lofty aim to “make the law clearer” for the public at large, the Supreme Court in the 1930s, 40s and 50s began to speak more directly to, and with, a small community of legal actors: legal academics. Some Justices explicitly acknowledged that legal academics were leaders in legal thought and constituted their audience;⁸⁵ they began citing law review articles in their opinions.⁸⁶ By the middle of the twentieth century, “law schools had become a “fourth estate” of the law,”⁸⁷ competing with members of the Court for status and recognition regarding “the mantle of expert authority.”⁸⁸

Instead of fulfilling the expectations of an internal audience, offering guidance only to the parties and the legal system, the Court began an external conversation with legal scholars. Post argues convincingly that the change in audience and the change in norms fundamentally altered perceptions about the source of authority of the Supreme Court. As he wrote in 2001, “The authority of our Supreme Court

⁸³ See *id.* at 1304 (stating that “Taft was an especially articulate spokesman” for a vision that “the audience for a Supreme Court opinion was the general legal public,” for whom opinions served “to clarify standards of federal law so as to provide guidance for those who needed to know the law”).

⁸⁴ *Id.*

⁸⁵ Justice Stone, for example, acknowledged looking for his audience in “those who study our work with painstaking care and appreciate its significance.” *Id.* at 1359–60 (quoting Letter from Harlan Fiske Stone to Felix Frankfurter (Jan. 16, 1930), *microformed on* Harlan F. Stone Papers, Box 13 (Libr. of Cong.)). Justice Stone, who believed that the authority for Supreme Court opinions came from their scientific quality, found his audience of experts in the institution of legal “scholarship.” *Id.* at 1360.

⁸⁶ Justice Stone, for example, sought to bolster the institutional prestige of the Court with the institutional expertise of the academy. See, e.g., *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 576 n.7 (1944) (Stone, J., dissenting) (citing the *American Law Review*); *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 215 n.8 (1933) (Stone, J., dissenting) (citing the *Columbia Law Review* and the *Harvard Law Review*). He was not alone. In his dissents, Justice Brandeis began citing law review articles. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 411 n.8, 412 n.9 (1932) (Brandeis, J., dissenting) (citing six different articles in the *Harvard Law Review*); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 282 n.2, 283 nn.3–4, 284 nn.5–6, 302 n.43, 305 n.46, 306 n.47 (1932) (Brandeis, J., dissenting) (citing articles from eight different law reviews). Justice Benjamin Cardozo, who joined the Court in 1932, also identified legal academics as leaders in the “march of legal thought.” Benjamin N. Cardozo, *Introduction to SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS* vii, ix (Ass’n of Am. Law Sch. ed., 1931).

⁸⁷ Post, *supra* note 57, at 1361–62 (quoting Charles E. Hughes, *Foreword*, 50 *YALE L.J.* 737, 737 (1941)).

⁸⁸ *Id.* at 1362. Post also describes the story of a Yale law professor who “dared to trespass” on the Court’s province to declare the law. *Id.* at 1368. The professor wrote a letter to each of the Justices critiquing their interpretation of a legal procedure, *id.* at 1367–70, thus “inadvertently” crossing the “boundary between reason and action,” *id.* at 1373.

is different from that of the Taft Court because modern opinions now routinely engage in an ongoing dialogue with American legal academia.”⁸⁹

In the twenty-first century, both the audience and form of Supreme Court opinions are shifting once again. The Court’s conversation with the academy has changed considerably as legal scholars have shifted their attention away from doctrinal analysis toward interdisciplinary work with internal conversational partners within the academy.⁹⁰ The new Chief Justice of the Court has taken Chief Justice John Marshall as his model and is firmly committed to restoring the post-1801 and pre-1925 norm of unanimity. For Chief Justice Roberts, the legitimacy of the Court depends on his colleagues taking an institutional perspective on the Court’s role, precisely the perspective that dominated in the nineteenth and early twentieth centuries.⁹¹ This perspective is obviously in tension with the more robust and participatory role I argue for.

B. Why Focus on Oral Dissents? Democratic Accountability

I focus on oral dissents, in particular (though not exclusively), because they offer an intriguing prism on the way that dissents provide alternative sources of democratic legitimacy and important pathways toward democratic accountability.⁹² Oral dissents tend to be short. They are conversational in style. They have no footnotes. As with Justice Breyer’s delivery in *Parents Involved*, they are often impassioned.⁹³ In the October 2006 Term, there were seven oral dissents, a record number that brought new attention to the genre.⁹⁴ The fact

⁸⁹ *Id.* at 1275.

⁹⁰ See *infra* pp. 133–34 (describing move away from doctrinal scholarship).

⁹¹ See ROSEN, *supra* note 41, at 224–28 (citing interview with Chief Justice Roberts).

⁹² The issue of the dissenting judge’s “role” raises questions of expectations and audience. See Joel B. Grossman, *Dissenting Blocs on the Warren Court: A Study in Judicial Role Behavior*, 30 J. POL. 1068, 1070–76 (1968). Professor Grossman explains that “role definers or role expectations of Supreme Court justices are many; they include the general public, the political world, the history and traditions of the Court, and perhaps most important, the articulate portions of the bench and bar . . .” *Id.* at 1071.

⁹³ See *supra* pp. 8–10; see also Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1 (describing Justice Ginsburg’s “passionate and pointed” dissents from the bench as a defining moment in the October 2006 Term). The October 2006 Term “will be remembered as the time when Justice Ruth Bader Ginsburg found her voice, and used it.” *Id.*

⁹⁴ See Duffy & Lambert, *supra* note 44, at 2. Since 1994, there have been approximately forty-seven dissents from the bench. *Id.* Justice Scalia, with eleven oral dissents, has dissented from the bench most frequently. *Id.* at 3. Justice Stevens has ten oral dissents, Justice Ginsburg has eight, and Justice Breyer has dissented from the bench seven times since October 1994. *Id.* At the low end are Justices Anthony M. Kennedy and Clarence Thomas, who dissented three and two times, respectively. *Id.* at 3 (Thomas), 22–27 (Kennedy). Justice Kennedy did, however, read aloud from two concurrences during this period, including his partial concurring opinion in *Parents Involved*. *Id.* at 5, 10.

that all seven oral dissents were delivered by the “liberal” wing of the Court, and that six of the seven were in 5–4 cases, also did not escape notice.⁹⁵ In the October 2007 Term, *Boumediene v. Bush*⁹⁶ and *District of Columbia v. Heller*,⁹⁷ two of the Term’s most important cases, were both accompanied by oral dissents.⁹⁸ This is not surprising. Oral dissents are usually reserved for cases of “unusual significance” and, as the media often note, they underscore the dissenter’s disapproval.⁹⁹ Occasionally the press will also acknowledge the drama of the moment itself.¹⁰⁰ I became personally aware of the oral dissents’ performative element when I went hunting in the published opinion for Justice Breyer’s most memorable line in his oral dissent from *Parents Involved*. It was not there. I then realized that oral dissents are not necessarily literal summaries excerpted word-for-word from the written dissents. Instead they represent a novel space that combines the theatrical and subversive traditions of performance art with the dialogic and democratizing traditions of law.

A few months after I received the hard-to-get printed copy of Justice Breyer’s oral dissent in *Parents Involved*, I watched *Recount*,¹⁰¹ an HBO docudrama about the events leading up to the Supreme Court’s decision in *Bush v. Gore*.¹⁰² Two scenes had me riveted. One was the camera close-up on the actors portraying the individual Justices as they delivered the words each Justice had written in the opinion initially enjoining the Florida recount. Part of me examined with a critical eye the extent to which the actors approximated the “look” of the real Justices. But another part of me was captivated by the voice quality and the gestures as the actor/Justices spoke. I “heard” more clearly what the Justices were saying by being able to watch “their” mannerisms and witness “their” words move through “their” body language even as the bodies were those of actors. Although others impersonated the Justices, I felt drawn to each Justice’s individual persona.¹⁰³

⁹⁵ Barnes, *supra* note 20 (suggesting that Justices use oral dissents strategically, and interpreting the 5–4 rulings and the seven oral dissents by “liberal” members of the Court as a sign of polarization); see also Linda Greenhouse, *In Latest Term, Majority Grows To More Than 5 of the Justices*, N.Y. TIMES, May 23, 2008, at A1 (discussing polarization of Court during 2006 Term resulting in many 5–4 conservative majorities).

⁹⁶ 128 S. Ct. 2749 (2008).

⁹⁷ 128 S. Ct. 2783 (2008).

⁹⁸ See Duffy & Lambert, *supra* note 44, at 4.

⁹⁹ Jeff Bleich et al., *Dissenting from the Bench*, S.F. ATT’Y, Spring 2008, at 30, 33.

¹⁰⁰ See, e.g., Greenhouse, *supra* note 93.

¹⁰¹ RECOUNT: THE STORY OF THE 2000 PRESIDENTIAL ELECTION (HBO Films 2008).

¹⁰² 531 U.S. 98 (2000).

¹⁰³ The second scene was the chaos that greeted the Court’s final word, four days later, in the decision that gave George W. Bush the presidency. The outcome was not clear from the first few paragraphs of the majority opinion. With T.V. cameras shoved in their faces, the reporters outside

The humanizing approach that *Recount* took may seem trivial, but it enabled me to better understand the actions of those in positions of “authority.” Our tradition of judicial anonymity borrows from the British, whose judges wear not only robes but also white wigs to camouflage their individual identities and to promote the sense of “the” law as generic and above petty human foibles. Watching *Recount*, I, too, experienced the law as powerful, but for a very different reason. In that moment of listening and watching one human being after another actually moving her lips as the words emerged, I was compelled by the law’s human presence.¹⁰⁴

Therefore, the potential to reach a broader public is the first answer to the question of why I am interested in oral dissents. Oral dissents are performance art, whose structure invariably creates a relationship with an audience, even temporarily. Oral dissents function as an ideal window “into the kind of public/broad/mass/democratic, even subversive, appeal that law could aspire to.”¹⁰⁵ An oral dissent is “written to be performed.”¹⁰⁶ Its dramatic effect derives in part from the juxtaposition, within the courtroom, of a theatrical stage from which both the playwright and the actor perform. Like spoken word poetry, also known as “performance poetry,” the full meaning of the oral dissent may not be “realized completely” until “performed or recited.”¹⁰⁷ Although spoken word poets are more likely than oral dis-

the Supreme Court could not restate the Court’s holding. They turned page after page of the opinion, scrambling to figure out who had just won the election. A college degree and above-average intelligence, alone, were not enough for them to decipher the Court’s prose on their own. Many of them clustered around Linda Greenhouse of the *New York Times* waiting for her pronouncement. Only Greenhouse, who had been writing about the Court for thirty years, could reliably report the news.

¹⁰⁴ By contrast, I have witnessed in the classroom the consequences for my law students of authority that is remote and virtually anonymous. When I mention the Supreme Court Justices who authored a particular opinion by name, my students give me blank stares. They do not have in their mind’s eye an image of the Justices. They don’t know what each Justice looks or sounds like; nor do they have a sense of each individual Justice’s jurisprudence or background, other than perhaps if I ask them about Justices Scalia or Thomas. As a result, they have difficulty remembering or distinguishing one case from the other or making sense of opinions that deal with the same subject matter but reach very different results. Moreover, as Professor Elizabeth Bartholet said at a recent faculty workshop, teaching law would be much more rewarding were the Court to write opinions accessible to law students. To the uninitiated, the holding is often unclear even after reading the opinion several times. She suggests that the bottom line of the opinion should be stated in the first paragraph. In the same vein, it might help law students remember and distinguish cases from one another if they could hear the Justices speak. This would help them to recognize the style of each Justice and would humanize authority that is so often virtually anonymous.

¹⁰⁵ Email from Professor Jeannie Suk to Lani Guinier (July 17, 2008) (on file with the Harvard Law School Library).

¹⁰⁶ Bain, *supra* note 29, at 3 (quoting Meta DuEwa Jones, *Understanding the New New Black Poetry*, SOULS, Winter 2003, at 16, 19–20) (referring to performance poetry).

¹⁰⁷ *Id.* at 2.

senters to “utilize the dynamic range of the voice and engage the subtle nuances of vernacular speech and physical expression,”¹⁰⁸ orality nevertheless encourages even the reticent oral dissenter to look at the faces of her listeners, to establish eye contact, to respond to or at least note expressions of recognition or displeasure.

By fusing the interlocutory element of law with the performative and subversive elements of theater, oral dissents open up a space for “democratic theater.” They become a portal by which those previously excluded can enter, engage with, and destabilize dominant (or majority) legal discourse.¹⁰⁹ The oral format also preempts some of the “tics” common to legal discourse, such as excessive length and preoccupation with footnotes,¹¹⁰ that intimidate the uninitiated. These conventions emphasize learnedness or networkedness rather than stories or context. By contrast, oral dissents are more accessible. They are a useful template because the text itself is more informal and thus malleable. The dissenter can give reasons based on the “law,” but she can also tie those to reasons based on the “culture” — that is, reasons grounded in shared stories.¹¹¹ Reasons from the culture tap into rational, emotional, and psychic values that are anchored in an underlying set of communal commitments.¹¹² The potential of the oral dis-

¹⁰⁸ *Id.*

¹⁰⁹ The relationship between the African American literary and vernacular traditions is one example of how an oral discourse can engage with, illuminate, and destabilize a written one. See HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* (1988). There is an idea in linguistics, anthropology, and literary theory that speech is “primary, present, natural, interior, real, authentic, and whole” whereas writing is “secondary, artificial, exterior . . . a substitute for speech that is removed from reality.” Email from Jeannie Suk, *supra* note 105. This classic binary appears in myriad texts in the Western canon, including Claude Lévi-Strauss’s *Tristes Tropiques*, Ferdinand de Saussure’s *Course in General Linguistics*, and Jean-Jacques Rousseau’s *Essay on the Origin of Languages*. Rousseau famously says writing is a “supplement” to speech, a “destruction of presence” and a “disease of speech,” to be distrusted. Jacques Derrida, in *Of Grammatology*, takes on this notion of writing as a dangerous supplement to speech, and he deconstructs both the speech/writing distinction and the hierarchy of speech over writing. I thank Jeannie Suk for suggesting this line of inquiry and providing the intellectual resources to support it. But cf. Dahlia Lithwick, *Justice Grover versus Justice Oscar*, SLATE, Dec. 6, 2006, <http://www.slate.com/id/2154993> (noting that Justice Scalia does not look at his audience when he speaks and appears to be “happiest in his head,” which suggests that — for some Justices — orality is indistinguishable from writing).

¹¹⁰ See, e.g., Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 744 (1997) (describing instructions to publish three 100-page law review articles with 400 footnotes to secure tenure).

¹¹¹ For an example, see the description of Justice Ginsburg’s oral dissent in *Ledbetter v. Good-year Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), *infra* pp. 40–45.

¹¹² Reasons from the culture are stories rather than just arguments. “Stories disrupt . . . rationalizing, generalizing modes of analysis with a reminder of human beings and their feelings, quirky developments, and textured vitality. . . . And stories at the moment seem better able to evoke realms of meaning, remembrance, commitment, and human agency than some other methods of human explanation.” Martha Minow, *Stories in Law*, in *LAW’S STORIES* 24, 36 (Peter Brooks & Paul Gewirtz eds., 1996). They are not just a series of intellectual or abstract claims in service of

sent, therefore, comes from its pedagogical transparency and cultural resonance, not just its audience centrality.

Building on a line of theory in linguistics, anthropology, and literary theory (going all the way back to classical texts), there is an important difference between spoken and written communication.¹¹³ The idea is that speech is primary, present, natural, interior, real, authentic, and whole, and writing is secondary, artificial, exterior, a representation of speech, a substitute for speech, removed from reality, a subversion or corruption of the original speech. Speech is more likely to reach an audience's "inner core."¹¹⁴ Justice Holmes's advice to his colleague not to think of opinions as "essays with footnotes" draws on this distinction. He urged Justice Sanford to consider opinions instead as if they were "theoretically spoken."¹¹⁵

The second answer to the "why study oral dissents" question is the "speaking one's mind" quality of an oral dissent. Theater, as dramatist and professor Anna Deavere Smith explains, creates a performative space, "a house for contradictions and extremes that both disturb us and inspire us in the same way our dreams do."¹¹⁶ It is a place where we are encouraged to disrupt habits of mind. It engages an audience on an intellectual as well as emotional level. But theater as performance art is also used to inspire people to act, not just to think.¹¹⁷ During the civil rights movement, for example, "[t]he Free Southern Theater . . . [or] Bertolt Brecht in the South, [w]as a way of attracting attention, to encourage people to stick up and stand up for the vote."¹¹⁸ Oral dissent is not just a stage for conventional speech; it stands as a sanctuary for the free expression of dissent. One could argue that the focus on oral dissents constructs judicial orality (speech) as a kind of dangerous supplement in the sense of its potential to subvert dominant (or majority) legal discourses, but also privileging speech over writing, with some similarity to the way the canonical dichotomy has functioned.

a principle. Good stories have a trajectory, a narrative arc, a beginning and most importantly an ending. See also Marshall Ganz, *Organizing: People, Power and Change* 3 (Sept. 2006) (unpublished course materials, on file with the Harvard Law School Library).

¹¹³ See *supra* note 109.

¹¹⁴ See, e.g., Daniel Bergner, *Can Leah Daughtry Bring Faith to the Party?*, N.Y. TIMES, July 20, 2008, § 6 (Magazine), at 25 (noting the importance of religious speech in the political context).

¹¹⁵ Post, *supra* note 57, at 1293–94 (quoting Holmes Letter, *supra* note 65).

¹¹⁶ Lani Guinier & Anna Deavere Smith, *Rethinking Power, Rethinking Theater: A Conversation Between Lani Guinier and Anna Deavere Smith*, THEATER, Fall 2001, at 31, 32.

¹¹⁷ See generally AUGUSTO BOAL, *LEGISLATIVE THEATRE: USING PERFORMANCE TO MAKE POLITICS* (Adrian Jackson trans., 1998).

¹¹⁸ *Id.* at 5; see also LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 214–16 (2002); Jan Cohen-Cruz, *Theatricalizing Politics: An Interview with Augusto Boal*, in *PLAYING BOAL: THEATRE, THERAPY, ACTIVISM* 227, 234–35 (Mady Schutzman & Jan Cohen-Cruz eds., 1994).

Third, oral dissent is a format that resonates with the oral traditions and lived experience of those who have historically been excluded from the “consent community” of citizens capable of constitutional meaning-making. The mystical power of the spoken word has historical antecedents in many traditions, from “the meditative poetry of the Eskimo to mediaeval Chinese ballads.”¹¹⁹ The roots of the widely popular contemporary art form of spoken word poetry, for example, “trace from the protest songs of the Civil Rights Era, to the blues and sermonic traditions of the American South, and as far back as the ancient storytelling tradition of African griots.”¹²⁰

Orality lends itself to storytelling, which will be discussed in Part III in the context of the *Crawford* voter ID case. In *Crawford*, a reframing of the facts and an emphasis on the poignant voices of those who sought to register to vote might have emphasized the moral implications of the majority’s legal analysis, aroused the popular conscience more broadly about the inequity in states deciding who gets to vote even in national elections, or presented the issue as a larger cause, not just a case-by-case grievance, such that the framework might change from an adversarial to an inspirational one.

The fourth reason to focus on oral dissents is the democratizing prospect of their “viral” mutability. For purposes of reaching a larger audience (for whom the Justices are otherwise invisible and indistinct from one another), the orality of delivering a dissent from the bench, which is then available on audiotape to the larger public, seems to be a potentially revolutionary communication “technology.”¹²¹ Were the themes, rhythms, and word choices of oral dissents to be picked up and incorporated by spoken word artists, for example, alternative narratives might emerge, consistent with the oral tradition of using speech as a coded means of resistance. Judicial orality would then become a kind of “dangerous supplement” both because of its potential to subvert conventional legal discourses, and because it may privilege speech over writing in ways that reach a larger audience.¹²²

¹¹⁹ Bain, *supra* note 29, at 3 (describing religious traditions from Judeo-Christian to Islamic to Hindu that attach mystic significance to the power of the word as utterance); *id.* (“In the beginning was the word, and the word was God” (quoting *John* 1:1)).

¹²⁰ *Id.* at 2.

¹²¹ By technology I mean not only the audio feed and the web download availability, but also the technology of hearing the sound waves of a Justice’s voice spoken from one human being to the other.

¹²² Of course the privileging of speech over writing both contributes to its “dangerous” quality and makes it vulnerable to academic criticism that aims to defend the “canon.” See Bain, *supra* note 29, at 3 (“Various incarnations of spoken word have been condemned as ‘poor’ poetry by academic critics like Harold Bloom who famously dubbed the popular poetry slam competition ‘the death of art.’ It has been written off entirely by others as not poetry at all.”). But cf. GATES, *supra* note 109, at 22 (describing “the speakerly text” as the free oscillation between “oral and written voices”); Adriaan Lanni, Social Norms in the Courts of Ancient Athens (Aug. 4, 2008) (un-

Thus, in the august amphitheater of the Supreme Court, the initial audience might be entirely passive. But eavesdroppers and subsequent audiences are better positioned to realize the democratic potential of oral dissents, especially were the mechanisms for their transmission more accessible.¹²³ Like the movement activists in the 1960s, these secondary audiences can more actively participate in interpreting and disseminating the text. Were members of each audience to share the dissent with others or use it to tell their own story, they might go far in creating a “multiplicity of . . . legal meanings” out of the “exiled narratives and . . . divergent social bases”¹²⁴ represented in dissents. In the age of the internet, those stories could “go viral” through YouTube or e-mail forwarded to like-minded friends. By so doing, “[t]he stories the resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their judicial office and their law.”¹²⁵

I realize that many of the Justices, including those who have delivered numerous oral dissents, may not intend to create or seek to participate in such a communications revolution.¹²⁶ Nor is it clear that members of the Court are well-positioned to fulfill this role of communicating to the public at large. Many Justices are probably most comfortable as traditional authority figures speaking to members of the “club” when they deliver an oral dissent.¹²⁷ Court opinions, even if delivered orally, may still be too opaque for a general audience.¹²⁸ Consider, for example, Linda Greenhouse’s bird’s-eye view of the highly “structured process” by which opinions “write”:

Except when they are on the bench or at their twice-weekly conferences, the justices spend most of their working day alone in their chambers, or in their chambers with their law clerks. They don’t pop in to one another’s offices to chew over some interesting idea. Their interactions are quite formal, usually on paper. The reason for this, I’ve heard one or another

published manuscript, on file with author) (relying, as a “classicist,” on a corpus of court “speeches” delivered to “juries” of up to 501 persons to understand the role of legal norms in ancient Athens).

¹²³ See *infra* pp. 53–54 (giving a step-by-step chronology of current oral dissent transmissions).

¹²⁴ Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 19 (1983).

¹²⁵ *Id.* at 68.

¹²⁶ See, e.g., Associated Press, *On Cameras in Supreme Court, Souter Says, “Over My Dead Body,”* N.Y. TIMES, Mar. 30, 1996, at A24.

¹²⁷ It may be that the Justices’ voice quality, their passion, and their humanness come through only because they are speaking to members of the same “elite of the elite” club. Some may not see this as democratizing. See *supra* note 28 and accompanying text.

¹²⁸ Justice Scalia, speaking to the Seventh Circuit Judicial Conference, declaimed against the law review/legal English style of “parajudicials” — that is, law clerks who write the footnotes in Supreme Court opinions — as well as the pompous style of practitioners. See *America and the Courts: Justice John Paul Stevens and Justice Antonin Scalia* (C-SPAN television broadcast July 19, 2008).

justice say, is that nuance is everything, and unless an opinion “writes,” with all its nuances, you really don’t have anything. So getting an “O.K., sounds fine to me” type of verbal agreement is quite meaningless — what you need are four other people to sign your actual written opinion, and thus make it an opinion for a majority. It’s quite a structured process and rather far from what people imagine.¹²⁹

Given a writing-oriented culture, it should not be surprising if some of the Justices are reluctant to be seen outside of their official or conventional authorial role.¹³⁰ Yet the number of reclusively-inclined Justices is shrinking. Several sitting Justices have written books and gone on book tours.¹³¹ They accept speaking engagements, some suggest, in order to engage directly with the people.¹³² Moreover, even when they do not claim that they are speaking to an audience of the public, Justices who deliver dissents from the bench know that the press is present and that their words will carry beyond the room.¹³³

In sum, I see oral dissents as a skylight that can open up a Justice’s meaning to a lay audience. Their oral dissents remind us that Supreme Court Justices have a choice of audience — one that is not limited to the actual litigants, the Justices, or the “constitutional law mafia.” Deciding to expand the Supreme Court’s audience has im-

¹²⁹ Linda Greenhouse, Talk to the Newsroom: Supreme Court Reporter (July 14, 2008), <http://www.nytimes.com/2008/07/14/business/media/14askthetimes.html>. Justice Lewis Powell’s metaphor suggests that the Supreme Court functions as “nine small, independent law firms.” The process is structured by a competitive, entrepreneurial culture. Lewis Powell, *What the Justices are Saying* . . . , 62 ABA J. 1454, 1454 (1976).

¹³⁰ Traditionally, most of the Justices’ “speaking” is in writing — they send memos to each other rather than visit each other’s chambers. And while they do “speak” in their conferences, they often speak “at” rather than “to” each other. See generally TOOBIN, *supra* note 20.

¹³¹ Justices Scalia, Thomas, and Breyer have all had an active television presence when promoting their books. Justice Stevens cooperated with a *New York Times Magazine* cover story. See *infra* note 557.

¹³² The act of oral dissent involves naturally speaking to, rather than at, an audience. Members of the Court eventually may feel more confident, once they get practice and access to tools that enable them to use twenty-first-century technology, to reach out to a wider audience. We might contemplate this moment as one where the Court is poised at the brink of a technological revolution comparable to the development of the printing press.

¹³³ In light of increasingly rapid dissemination and adoption of internet capacity, the intimacy, brevity, and accessibility of oral dissents could enable the Court in the twenty-first century to begin to reach an even broader audience of nonjudicial actors not limited to academics or lawyers, but ordinary folk, educated elites, movement activists, interested citizens — all of whom have a stake in the outcome and its effects. See Posting of Ward Harkavy to The Village Voice: Press Clips, http://blogs.villagevoice.com/pressclips/archives/2008/06/democracy_dot_c.php (June 16, 2008, 07:40) (describing the results of a Pew survey, AARON SMITH & LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, THE INTERNET AND THE 2008 ELECTION (2008), available at http://www.pewinternet.org/PPF/r/252/report_display.asp, that finds the internet is becoming an increasing part of the norm of political participation; people are using it to read the news, share their views, or to get others to take political action). The orality of delivering a dissent from the bench, which is then audiotaped and available on audiotape to the larger public, is a potentially revolutionary communication “technology.”

plications for the role of the Justices as teachers and curators of democracy, and may involve rethinking our understanding of the Court's ultimate authority and the law/politics distinction.¹³⁴ Were the Court to engage the people more directly in dialogue about the issues being raised in constitutional adjudication, we might come to realize that constitutional adjudication by a Court majority is often not, at least over time, the final word.

The compression effect of the “technology” of oral dissents tends to make them more colloquial, informal, and even direct. The oral dissent is a performance — literally a theatrical act. But in terms of the ability to reach to an audience or to inspire the general public as distinct from the legal community, there is a continuum between the oral and the written.¹³⁵ Performances have unique characteristics, but so do written documents. Their capacity to address and inspire specific audiences are often analogous — think of the essays of Frederick Douglass (as distinct from his speeches) or the influence of the Gettysburg address, initially delivered orally but republished and read with equally dramatic effect. Written opinions can be short; they can be drafted by Justices who, like Justice Hugo Black, seek to be understood, not just revered.¹³⁶ A vital national seminar can happen orally, or it can happen in written form over the internet. Although oral dissents exemplify a different function of dissents in mobilizing political response, written dissents can also serve this purpose.¹³⁷ In fact, as we shall see in Part III, concurrences also offer demosprudential opportunities.¹³⁸

¹³⁴ As Bill Moyers says about journalism, oral dissents can help make Supreme Court dissents a form of speech “against which the people can measure the veracity of all the claims.” Bill Moyers, *Is the Fourth Estate a Fifth Column?*, IN *THESE TIMES*, July 11, 2008, at 30; see also GUINIER & TORRES, *supra* note 118 (explicating the theory of democracy that animates demosprudence and serves as the foundation for this Foreword).

¹³⁵ I argue that the unique experience of an oral dissent may enable a Justice to speak more plainly, emotionally, and succinctly. However, I do not argue that written dissents should necessarily be modeled after oral dissents. Nor am I prepared to say that written dissents should be written after, rather than before, the oral dissents. It may be that some Justices can deliver a succinct oral dissent only if they first write the published version. Whatever the case, we should take oral dissents more seriously as enduring and publicly accessible documents. The means of dissemination of oral dissents is thus quite relevant. See *infra* pp. 53–54 (describing the stages of transmission).

¹³⁶ Unlike Justice Frankfurter, whose experience as a professor influenced him to write “learned essays masquerading as opinions,” Justice Black’s varied background stirred him to write opinions so that his “uncle down on the farm plowing the field [could] read them.” ROGER NEWMAN, *HUGO BLACK: A BIOGRAPHY* 292 (1997).

¹³⁷ I thank Robert Post for suggesting that the relationship between oral and written dissents is not a polarity but a continuum.

¹³⁸ See *infra* section II.B (discussing the spectrum from oral dissents to written opinions in terms of their democracy-enhancing potential). Moreover, in Part III, I discuss a written concurrence that has elements of what Jane Mansbridge calls “deliberative accountability,” see *infra*

C. Oral Dissents and Questions of Biography

I have suggested that oral dissents are the most obvious and prominent example of a type of dissent that speaks to ordinary people in ways that both authorize and legitimize the role of the Court in our democracy. I associate oral dissents with democratic practice because the transparency effect can be illuminating and engaging for the nonlegal public. Yet even as they provide the public at large with a window into an institution that often appears remote or speaks in a language that is impenetrable, Justices who dissent from the bench expose themselves to close scrutiny. For example, the first Justice Harlan was criticized when, in delivering an oral dissent, he:

... pounded the desk, shook his finger under the noses of the Chief Justice and Mr. Justice Field, turned more than once almost angrily upon his colleagues of the majority, and expressed his dissent from their conclusions in a tone and language more appropriate to a stump speech at a Populist barbecue than to an opinion on a question of law before the Supreme Court of the United States.¹³⁹

But the point I aim to emphasize in this section is the way that an oral dissent can resonate with a particular grievance of those left out of the consent community. To the extent that the oral dissent reaches this specific audience, it can help convert the grievance into a cause. The connection between the audience for the dissent and the dissenter's own experience, however, is often not accidental.

Perhaps inspired by the example set by Justice Harlan in the nineteenth century or by Justice Brandeis in the early twentieth century, Thurgood Marshall became a committed dissenter when he was a Supreme Court Justice.¹⁴⁰ Not surprisingly, his most memorable dissents came in the areas in which he was most influential as an advocate — education segregation, residential segregation, and criminal rights. Indeed, in the area of death penalty jurisprudence, Justice Marshall was known as a perpetual dissenter.¹⁴¹

p. 111, a quality that is more often present in oral dissents and one that ultimately leads me to imagine this spectrum in “demosprudential” terms. See *infra* section III.A.1.

¹³⁹ David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 177 (1951) (quoting CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 451 (1943)). According to the *New York Tribune*: “Old lawyers who had practiced at that tribunal for more than a quarter of a century sat aghast as sentence followed sentence.” *Id.* (quoting *New York Tribune*, May 21, 1895).

¹⁴⁰ See Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 454 (2008); see also Thurgood Marshall's Controversial Views, as Interviewed by Juan Williams, available at <http://www.thurgoodmarshall.com/interviews/controversial.htm> (last visited Oct. 5, 2008).

¹⁴¹ See Larsen, *supra* note 140; see also Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1864 (2008) (“Thurgood Marshall famously persisted in dissenting from all Supreme Court dispositions inconsistent with [his] belief that the death penalty is per se cruel and unusual punishment . . .”). For example, in *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Marshall wrote that “the American people are largely un-

In the spring of 1973, for example, Justice Marshall dissented in *San Antonio Independent School District v. Rodriguez*.¹⁴² The Supreme Court denied an equal protection claim that challenged a Texas school financing scheme that gave significantly more money to schools in wealthy white neighborhoods than to those in poor minority neighborhoods. The lawsuit alleged that education was a fundamental right and that wealth was a suspect classification, and that therefore the law should be examined under strict scrutiny. The Court found that only rational basis scrutiny was required and upheld the scheme. Justices Brennan, White, and Marshall wrote dissenting opinions, but only Justice Marshall's dissent seems specifically focused on explaining the issues in simple terms appropriate for lay people. In addition, the opinion connected inequalities in education to democratic concerns.¹⁴³ Justice Marshall expressly recognized that democracy was not necessarily achieved through majority rule or politics, particularly when not all citizens could participate equally.¹⁴⁴

A year later, Court observers witnessed Justice Marshall dissent from the bench in a school segregation case, this one involving the city of Detroit, Michigan. In *Milliken v. Bradley*,¹⁴⁵ the Supreme Court reversed a district court order requiring the State of Michigan to implement a metropolis-wide desegregation plan in order to remedy findings of de jure racial segregation in Detroit schools. Justice Marshall saw the decision as the Court's first major departure from its holding in *Brown*.¹⁴⁶ Like Justice Breyer criticizing the Roberts-led majority three decades later, Justice Marshall used his dissent to expose what he

aware of the information critical to a judgment on the morality of the death penalty." *Id.* at 232 (Marshall, J., dissenting). Following this statement, he proceeds to "educate" them. *See id.* at 232–41.

¹⁴² 411 U.S. 1 (1973).

¹⁴³ He argued, for example, that the disparities in the Texas financing scheme were enough to "deprive[] children in their earliest years of the chance to reach their full potential as citizens," thus connecting quality education with true democratic participation. Quality education was further linked with meaningful equality: "In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record." *Id.* at 71 (Marshall, J., dissenting).

¹⁴⁴ *Id.* at 71–72 ("Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that 'may affect their hearts and minds in a way unlikely ever to be undone.'" (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954))).

¹⁴⁵ 418 U.S. 717 (1974).

¹⁴⁶ In his written dissent, he stated that, "After 20 years of small, often difficult steps toward [school desegregation], the Court today takes a giant step backwards." *Id.* at 782 (Marshall, J., dissenting). The text of the oral dissent is not available.

saw as a politically-driven decision and to iterate the potential negative effects that the decision would have not only on schools, but also on urban politics and race relations as a whole.¹⁴⁷

Justice Marshall's dissent in *Milliken* seemed to strike a tone crafted to spark public deliberation and to speak to the future in ways that gave eloquent voice to deeply held concerns. For Justice Marshall, school segregation implicated the functioning of democracy both on a large scale because of his belief that education was a "fundamental right," and on a small scale because it fueled white flight that created disjointed, unhealthy communities. Rather than deluging his audience with details of equal protection doctrine, Justice Marshall used accessible and engaging language to try to refocus the national debate, away from the pros and cons of busing, and back onto the deplorable state of education for black youth. Justice Marshall's dissent "kept the impact of racial isolation in the foreground, underlining the frustration of children who have been denied 'an equal opportunity to reach their full potential as citizens.'"¹⁴⁸

Milliken, and Justice Marshall's dissent, received a good deal of contemporaneous media attention for a Supreme Court case. The national press,¹⁴⁹ the black press,¹⁵⁰ and right-wing critics¹⁵¹ all focused on Justice Marshall's words, which they described as "biting,"¹⁵² and "unusually bitter."¹⁵³ They noted that this was the Court's first major step away from *Brown* and that the decision broke clearly along party

¹⁴⁷ Justice Marshall wrote:

Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities — one white, the other black — but it is a course, I predict, our people will ultimately regret. I dissent.

Id. at 814–15.

¹⁴⁸ Maria L. Marcus, *Learning Together: Justice Marshall's Desegregation Opinions*, 61 *FORDHAM L. REV.* 69, 81 (1992) (quoting *Milliken*, 418 U.S. at 783 (Marshall, J., dissenting)).

¹⁴⁹ See, e.g., *Desegregation: A Historic Reversal*, *TIME*, Aug. 5, 1974, at 55; Wayne E. Green, *Top Court Voids Detroit School Desegregation Plan By a 5–4 Vote but Doesn't Rule Out Busing Concept*, *WALL ST. J.*, July 26, 1974, at 2 [hereinafter Green, *Top Court Voids*]; John P. MacKenzie, *5–4 Vote by Court Hits Urban Backers of Desegregation*, *WASH. POST*, July 26, 1974, at A1; Warren Weaver, Jr., *Decision by 5 to 4; Curb on Detroit Area Busing Stirs Bitter Marshall Dissent*, *N.Y. TIMES*, July 26, 1974, at 1. But see Wayne E. Green, *Brighter Outlook: Civil-Rights Lawyers Shed Some of Gloom Caused by Detroit Case*, *WALL ST. J.*, Nov. 22, 1974, at 1.

¹⁵⁰ See, e.g., Willie L. Hamilton, *Thurgood Marshall Blasts Court's Busing Decision*, *N.Y. AMSTERDAM NEWS*, Aug. 3, 1974, at A1; United Press International, *Thurgood Blasts Ban on Busing*, *CHI. DEFENDER*, July 27, 1974, at 1.

¹⁵¹ See, e.g., George F. Will, *Busing: The Impact of the "Detroit Decision,"* *WASH. POST*, July 30, 1974, at A19.

¹⁵² Hamilton, *supra* note 150.

¹⁵³ Weaver, *supra* note 149.

lines.¹⁵⁴ Thus, like Justice Breyer, Justice Marshall was able to use the genre of oral dissent to draw attention to the deep democratic implications of the Court's retreat from *Brown*. Well aware that the tide of public opinion was turning against busing and further desegregation efforts, Justice Marshall presciently warned of the larger political problems that would arise as the gap between suburbs and big cities continued to grow.

In the 1950s, as a young black lawyer literally being chased out of Southern towns by racist whites, Thurgood Marshall had been able to help craft some of the most groundbreaking constitutional law ever. Thirty years later, sitting on the highest court in the land, he had to sit back and watch as those gains were rolled back. Prompted by the dissonance between these competing elements in his own biography, Justice Marshall seemed to refocus on the crucial role that popular advocacy can play in constitutional lawmaking. Mark Tushnet's take on Justice Marshall's approach to the audience question seems to support this claim:

Further, because of changes in the Court's composition, Marshall relatively quickly found himself placed on the margins of the Court's work by many of his colleagues. Unable to exert much influence beyond casting his vote, Marshall reacted as many proud people would: instead of futilely trying to influence his colleagues inside the Court, he concentrated on making sure that his views reached the public through the pages of the *United States Reports*.¹⁵⁵

Let us return for a moment to consider the audience question in Justice Breyer's oral dissent in *Parents Involved*. One of Breyer's obvious audiences was the Court itself. Justice Breyer may have been trying to alert the Court and "the country" to his deep frustration with the Court's radically new direction. He warned that the nation would come to regret Chief Justice Roberts's majority opinion, especially its flagrant abandonment of prior precedent and disregard for the democratically-enacted policies of the communities of Seattle and Louisville. Justice Breyer certainly emphasized the "political" dimension of the Court's decision. In his view, Chief Justice Roberts's conclusion was a *choice* to use the Court's power to shield historically privileged members of the *majority* against disappointment and thus to abandon the *Brown* Court's concern with the intangible factors that "deprive the children of the *minority* group of equal educational opportunities."¹⁵⁶

It was not, in Justice Breyer's accounting, "the law" that compelled the Roberts Court's shift in attention from the plight of the Negro

¹⁵⁴ See, e.g., Green, *Top Court Voids*, *supra* note 149.

¹⁵⁵ Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2109–10 (1992); see also *id.* at 2129.

¹⁵⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

children in *Brown* to the disappointment of the white children in Seattle or Louisville.¹⁵⁷ In Justice Breyer's mind, President Bush's two recent appointees moved the Court further to the right by doing precisely what Senator John McCain and other conservatives have condemned as judicial activism: they substituted their "own opinions for settled law and the democratic process."¹⁵⁸ Combined with the Court's splintered decision, Justice Breyer's oration raised the specter of the Court as "a political institution" with Justices as "occasional legislators" who privilege their individual values above a tradition of democratic constitutionalism.¹⁵⁹

But it may be that Justice Breyer was not primarily or at least not exclusively concerned with reminding either his colleagues or the country as a whole that the Court was violating the often loosely defined law/politics distinction. Through his oral dissent, he may be linking himself to the civil rights community, and especially civil rights attorneys. Perhaps he issued an impassioned oral dissent — to which the civil rights lawyers bore witness — to show that "he gets it," that he is not just a technocrat with a steady but relatively quiet record on civil rights. He understands the monumental nature of the decision, the break with the past, and he will stand up and be counted. Conceivably, Justice Breyer is *making a record for the history books* by differentiating himself from the racial isolationism of the Court's conservative

¹⁵⁷ Similarly, for Jack Greenberg, who was the NAACP Legal Defense Fund (LDF) Director-Counsel in the 1960s and argued one of the cases in *Brown* before the Supreme Court in 1953, the semantic debate between Justice Breyer and Chief Justice Roberts had an Alice-in-Wonderland quality. In pressing his interpretation of prior precedent, Chief Justice Roberts simply opted for a cynical view of equality based on his values, not technical categories. Posting of Jack Greenberg to The Huffington Post, http://www.huffingtonpost.com/jack-greenberg/roberts-breyer/louisvil_b_60000.html (Aug. 10, 2007, 17:09) (alluding to Justice Stevens's written dissent) ("Roberts's opinion reminded him of Anatole France's observations: '[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.'").

¹⁵⁸ *Morning Edition: McCain Expresses Support for Conservative Judges* (NPR radio broadcast May 7, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90245800>. The newly reconfigured and now even more conservative majority are "judicial activists" as defined by Senator John McCain and other conservative politicians. In McCain's words, "They want to be spared the inconvenience of campaigns, elections, legislative votes and all of that. They don't seek to win debates on the merits of their argument. They seek to shut down debate by order of the court" *Id.*

¹⁵⁹ See RICHARD A. POSNER, *HOW JUDGES THINK* (2008). Judge Richard Posner, a conservative member of the Seventh Circuit, writes that the absence of unanimity reveals the Supreme Court to be a "political court," *id.* at 269–323, with Justices "as occasional legislators," *id.* at 78–92, navigating uncharted water with the compass of experience, emotions and often unconscious beliefs, *id.* at 93–121.; See also *supra* note 157; Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

wing, thereby gaining the (deserved) admiration of the social justice community.¹⁶⁰

Yet were his goal to arouse the social justice community, surely he would have published the oral dissent, or at least have incorporated some of its more memorable lines in what he did publish. Relying on the media to disseminate his viewpoint is not the same as allowing cameras in the courtroom, at least for decision hand-downs.¹⁶¹ Although some news outlets mediate the dissemination of the oral opinion, the public that listens to NPR or reads the *New York Times* is quite a select group, primarily college-educated and middle- to upper-income.

There is yet another audience, however, with whom Justice Breyer may have felt a special kinship. Unlike Justice Marshall, Justice Breyer was not a civil rights litigator. He did not have a public presence in the civil rights or social justice community before he ascended to the bench. But he did have a background in administrative law and a biography that rooted him in the experience of local school board administrators. Consider the possibility that Justice Breyer's oral dissent was intended for a very specific audience: local school board officials. This was also the audience on which he seems to have had some practical impact.

In both his oral and his written dissents, Justice Breyer expounded on the great irony of the majority overruling the choices of the local school boards to desegregate. For decades, post-*Brown*, the Court had compelled local school boards to desegregate; now, pre-*Parents Involved*, localities were willing to desegregate on their own. Then, the Supreme Court stepped in and said “No,” quashing a democratic consensus in favor of school desegregation.¹⁶² In his written dissent, Justice Breyer said:

I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our

¹⁶⁰ I thank Professor Tomiko Brown-Nagin for suggesting this line of inquiry and for reminding me that when President Clinton nominated Justice Breyer, many on the left were skeptical.

¹⁶¹ The underlying argument against televising the announcement of opinions is that the Justices would play to the cameras. As I have suggested, however, this is not necessarily as disruptive as traditionalists might imagine. Cf. *supra* pp. 24–25 (discussing *Recount*).

¹⁶² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting) (“The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education* long ago promised — efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake.” (citation omitted)); see also *id.* at 2833 (“Given the conditions in which school boards work to set policy, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital — the limited use of broad race-conscious student population ranges.” (citation omitted)).

serious problems of increasing *de facto* segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁶³

Passion comes through the written words there, just as it does in the dissent from the bench. But it is not just passion in the abstract in either domain. Personal and professional contexts provide helpful clues about Justice Breyer's authorial voice. Justice Breyer, of course, taught administrative law, and his father was the lawyer for the Superintendent of Schools in San Francisco. That Justice Breyer is speaking to school boards, rather than directly to the people or to the people via Linda Greenhouse and her colleagues, suggests a distinctive avenue for democratic engagement.¹⁶⁴ It is Justice Breyer's experience, not his identity, that connects him to people like Pat Todd in Louisville. Todd may not realize, as she carries his dissent to local community meetings, that Justice Breyer has a special interest in educational administration. But Justice Breyer's background uniquely situates him to perceive the dispiriting effect on people like Pat Todd of the Court's sudden jurisprudential shift.

One provocative question: is Justice Breyer encouraging lawbreaking? In one sense, he does not have to, since Justice Kennedy's concurring opinion endorses some types of race-conscious action. School districts can still take race at the neighborhood or community level into account.¹⁶⁵ On the other hand, Justice Breyer's stridency on the balance of power between judges and elected school boards with regard to school assignment plans is striking. Arguably, he is telling them: do not feel paralyzed by the majority because the law is on your side and the Court is acting as a renegade. In other words, though dissents lack the coercive power of the state, Justice Breyer's words should not be sold short. At the very least, he may be exhorting localities to persist in endeavors that he strongly believes are lawful. If

¹⁶³ *Id.* at 2833–34 (quoting *id.* at 2768 (plurality opinion)).

¹⁶⁴ As Tomiko Brown-Nagin writes, "As a local legalist, participatory democracy/empowered democracy enthusiast, local units of government present extraordinarily promising opportunities for civic engagement. It's *really exciting* to consider that a [Supreme Court] justice is speaking to school boards, telling them to continue to fight the good fight on race matters. This move dovetails precisely with your definition of demosprudence via dissent." E-mail from Tomiko Brown-Nagin (July 7, 2008) (on file with author).

¹⁶⁵ See *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring).

these same words came from Justice Scalia, we might think he was providing instructions to the troops.¹⁶⁶ Why not the same here, with Justice Breyer?

Indeed, that is exactly how Pat Todd read Justice Breyer's dissent. Todd is sixty-one. Having taught every grade before becoming an administrator, Todd has seen the role that elementary and secondary school education can play in cultivating opportunity and invigorating our democracy. She takes Justice Breyer's exhortation seriously by persisting in endeavors that seek an integrated student population, a just and righteous cause in service of democracy. During the summer and fall of 2007, Todd traveled through the county, taking the pulse of local residents. She started every presentation by reading Justice Breyer's dissent.¹⁶⁷

Because Justice Kennedy's concurring opinion left some wiggle room for race consciousness at a group rather than an individual student level,¹⁶⁸ Todd used Justice Breyer's strongly worded dissent not just to rally the troops, but also to come up with an alternative assignment plan that might still be lawful. Accordingly, beginning in September 2009, Louisville, Kentucky will assign students based on neighborhood demographics, not an individual's race.¹⁶⁹ The student assignment plan is based on a computer-generated map of low opportunity districts¹⁷⁰ that combines considerations of intergenerational poverty and high concentrations of people of color.

In conjunction with Justice Kennedy's concurring opinion, Todd and her team of administrators and researchers initially used Breyer's dissent as a clarion call. Justice Breyer's dissent did not suggest the contours of the new class-plus-race formula, which was adapted from plans used by other localities to fit the unique circumstances in Jefferson County. But Justice Breyer's dissent did "authorize" and inspire Pat Todd and others to explore new ways to accomplish their shared goals.

¹⁶⁶ See *infra* p. 101 (discussing the effect of Justice Scalia's dissent in *Lawrence*).

¹⁶⁷ Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, § 6 (Magazine), at 38.

¹⁶⁸ *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring) ("[The court's ruling] should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds."). Districts could also be "race conscious" in considering the composition of a neighborhood when they drew school boundaries, chose sites for new schools, and directed money to particular programs. *Id.* at 2792.

¹⁶⁹ Bazelon, *supra* note 167, at 41. Todd's team was convinced by research on the role of class in predicting student achievement and the power of mapping low student performing communities by combining indicators of intergenerational poverty (such as parents' and grandparents' educational levels) and racial isolation. *Id.*

¹⁷⁰ *Id.* The map is organized around income level and parents' educational attainment as proxies for class.

Justice Ginsburg has also offered dissents spurring real world action. She has engaged in an ongoing conversation about the meaning of right and wrong in what Professor Neal Katyal might call “advicegiving” to Congress¹⁷¹ or what Professor Joe Sax called a “legislative remand.”¹⁷² Justice Ginsburg, a leading litigator and advocate for women’s equality before she joined the judiciary, urged Congress to act in her oral dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁷³ in the October 2006 Term. Congress was Justice Ginsburg’s immediate audience, but she also spoke so directly to the experience of many women that they, like Lilly Ledbetter herself, were roused to take a public stand.¹⁷⁴

Lilly Ledbetter was a former middle manager at a Goodyear plant in Alabama who was paid considerably less than the men she worked next to, even men with less seniority. Ledbetter convinced a jury that she had been discriminated against, but the five-Justice majority, led by Justice Samuel Alito, ruled that Ledbetter’s complaint was not timely. Ledbetter was out of luck because she did not file when the discrimination started, even though she did not know about it until she eventually received an anonymous piece of paper in her mailbox with the salaries of three of her male colleagues.¹⁷⁵ The majority’s parsimonious reading of the statutory deadline for filing a sex discrimination case prompted Justice Ginsburg to dissent from the bench. Often relying on the personal pronoun, Justice Ginsburg spoke directly to “you” — the women who had been paid less but had no redress because the Court chose to grandfather in the discrimination each time a new pay decision was made. “Indeed initially *you* may not know that men are receiving more for substantially similar work If *you* sue only when the pay disparity becomes steady and large enough to enable *you* to mount a winnable case, *you* will be cut off at the Court’s

¹⁷¹ Katyal, *supra* note 59.

¹⁷² JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 157 (1971) (discussing how courts can serve as “a catalyst, not a usurper” of the legislative process).

¹⁷³ 127 S. Ct. 2162 (2007).

¹⁷⁴ See Robert Barnes, *Exhibit A in Painting Court As Too Far Right*, WASH. POST, Sept. 5, 2007, at A19 (“Since the decision, Ledbetter has testified before Congress and had an op-ed article published in the Christian Science Monitor. She stars on YouTube courtesy of Norman Lear, the television producer and founder of the liberal People for the American Way, who sent a film crew to her red-brick rambler in Jacksonville and produced a series of videos.”).

¹⁷⁵ The majority ruled that, under federal law, the limitations period for filing a complaint started from the day Ledbetter first received her shortchanged paycheck many years prior. She thus did not meet the 180-day deadline within which to seek legal redress. *Ledbetter*, 127 S. Ct. at 2169.

threshold for suing too late.”¹⁷⁶ Women like Lilly Ledbetter, Justice Ginsburg explained, were being punished when they were paid less. They were then punished a second time because the Court denied them the right to challenge their unequal pay. This double whammy ignored the reality of being the first woman, as Ledbetter was, to work in a male-dominated workplace. In a job previously filled only by men, women “understandably may be anxious to avoid making waves.”¹⁷⁷

Appalled at the Court’s decision to set aside a jury verdict finding that Lilly Ledbetter had been the victim of pay discrimination, Justice Ginsburg urged Congress to address the matter. Like Justice Breyer in *Parents Involved*, she took the unusual step of reading her dissent, on behalf of herself and three colleagues, from the bench. “In our view, this court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination,” Justice Ginsburg began.¹⁷⁸ She told Congress the “ball again lies in [its] court.”¹⁷⁹

Justice Ginsburg’s oral dissent helped convert Lilly Ledbetter’s loss in the Supreme Court into a legislative crusade.¹⁸⁰ In fact, Justice Ginsburg intentionally used her *Ledbetter* dissent “to attract immediate public attention and to propel legislative change.”¹⁸¹ Within months of Justice Ginsburg’s call to action, the U.S. House passed a bill to eliminate the Court-sanctioned capricious time limit, so that victims could seek to win back pay and damages whenever they became aware of an injustice, instead of only within 180 days of the first discriminatory paycheck. The bill, the Fair Pay Restoration Act, is still

¹⁷⁶ Oral Opinion of Justice Ginsburg at 4:25, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_1074/opinion [hereinafter Ginsburg’s Oral Dissent, *Ledbetter*].

¹⁷⁷ *Id.* at 8:30–8:37.

¹⁷⁸ *Id.* at 4:00.

¹⁷⁹ *Id.* at 10:17–10:58 (“This is not the first time this Court has ordered a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose. In 1991, Congress passed a civil rights act that effectively overruled several of this Court’s similarly restrictive decisions, including one on which the Court relies today. Today the ball again lies in Congress’s court. As in 1991, the legislature has cause to note and to correct this Court’s parsimonious reading of Title VII.”). At a recent appearance, Justice Ginsburg again made it clear that she had a particular audience in mind when she issued her *Ledbetter* dissent: Congress. See Harvard Law School, The Lone Woman on the Supreme Court Shares Her Experience with Generations of HLS Women, <http://www.law.harvard.edu/news/spotlight/civil-rights/ginsburg.html> (last visited Oct. 5, 2008) [hereinafter Ginsburg, Harvard Conversation].

¹⁸⁰ Barnes, *supra* note 20. Barnes believes that Justice Ginsburg’s decision in *Ledbetter* would not have gotten nearly the attention it did without her oral dissent. It was detailed but it was also “calling out her colleagues.” She was “signaling” that this was an “important case” and it was a case “making changes in the Court’s” jurisprudence. *Id.*; see also *supra* note 174; *infra* notes 181–182.

¹⁸¹ Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html.

pending in the Senate.¹⁸² Nonetheless, *Ledbetter* was an important moment for working women like Lilly Ledbetter. It was also a transformational moment for Justice Ginsburg.¹⁸³

It is particularly appropriate that Justice Ginsburg found her own voice in dissent and by initiating this legislative crusade. It is appropriate because of her critique of the ACLU's strategy in *Roe v. Wade*;¹⁸⁴ she believes legislative and political strategies for reform are more sustainable.¹⁸⁵ And now here she was, on the Court in *Ledbetter*, suggesting a legislative solution to an adverse Court decision. It is also appropriate because she was modeling for other women the importance of their own "dissents" against convention. The role of social critic, for example, is one that Lilly Ledbetter has moved into seamlessly, inspired, in part, by Justice Ginsburg's forceful dissent.¹⁸⁶

In using her oral dissent to invite women like Lilly Ledbetter into the public sphere, Justice Ginsburg took the same approach that Justice Breyer had taken in *Parents Involved*. In his *Parents Involved* dissent, Justice Breyer communicated with people selected through subformal democratic processes — people like Louisville, Kentucky's Pat Todd. Similarly, Justice Ginsburg's oral dissent in *Ledbetter* enabled ordinary people to operate within the framework of our democratic system. She helped authorize women to push back on the dominant norms of the Court's conservative majority and to elaborate their own stories.

The special capacity of oral dissents to reach a nonlegal audience is evident in a comparison of Justice Ginsburg's written and oral dissents

¹⁸² See THOMAS, Bills, Resolutions: S. 1843 Status, <http://thomas.loc.gov> (search by bill number: "S. 1843," then click on "Bill Summary & Status") (last visited Oct. 5, 2008).

¹⁸³ Ginsburg had been nominated to the Court as the "Thurgood Marshall of the women's rights movement." Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, at § 6 (Magazine), at 60. *United States v. Virginia*, 518 U.S. 515 (1996), the Virginia Military Institute Case, had been a moment of triumph for her. But after that, her voice had not often been heard; she had existed on the Court in relative quietude, no great intellectual force, not even in dissent. Justice O'Connor, as the swing vote, had often overshadowed her.

¹⁸⁴ 410 U.S. 113 (1973).

¹⁸⁵ See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

¹⁸⁶ See, e.g., *Ledbetter v. Goodyear Equal Pay Hearing*: Lilly Ledbetter, <http://www.youtube.com/watch?v=jRpYoUu5XHo> (last visited Oct. 5, 2008). Testifying before Representative George Miller's committee, Ledbetter forcefully argued that Goodyear, her former employer, continued to treat her as a "second-class worker to this day" because her pension and her social security is based on the amount she earned while working there. *Id.* at 4:30–4:40. "Goodyear gets to keep my extra pension as a reward for breaking the law. My case is over and it is too bad that the Supreme Court decided the way it did. I hope though that Congress won't let this happen to anyone else. I would feel that this long fight was worthwhile if at least at the end of it I knew that I played a part in getting the law fixed so that it can provide real protection to real people in the real world." *Id.* at 4:40–5:11; see also *infra* note 619.

in *Gonzales v. Carhart*.¹⁸⁷ Justice Ginsburg's oral dissent was about nine minutes long and strongly worded.¹⁸⁸ The majority had held that a federal statute prohibiting "partial-birth" abortions was constitutional. Justice Ginsburg focused on the lack of a health exception, noting that all district courts to consider the law found that there was significant medical evidence that the procedure was the safest one in at least some cases.¹⁸⁹ The dissent was scathing in its refutation of the majority's assertion that it was protecting women by prohibiting this choice and in its response to the majority's belief that as-applied challenges were sufficient. Justice Ginsburg also noted the impact of recent changes in the Court's composition on its abortion decisionmaking.¹⁹⁰ "[S]he is saying . . . that this is not law, it's politics," Professor Pamela Karlan explains.¹⁹¹

Justice Ginsburg's oral dissent is both accessibly and passionately worded and is clearly aimed at a broader audience than her colleagues on the bench. The tone of the dissent certainly sparked discussion among academics as well as the public more broadly.¹⁹² The written opinion, in contrast to the oral one, has a more detailed analysis of each of its arguments. It cites more authorities for its conclusions, par-

¹⁸⁷ 127 S. Ct. 1610 (2007) (so-called Partial-Birth Abortion Ban Act case).

¹⁸⁸ See Oral Opinion of Justice Ginsburg, *Carhart*, 127 S. Ct. 1610 (No. 05-380), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_380/opinion/ [hereinafter Ginsburg's Oral Dissent, *Carhart*].

¹⁸⁹ *Id.* at 10:50.

¹⁹⁰ *Id.* at 15:28. In subsequent comments at Harvard Law School, Justice Ginsburg explicitly linked the Court majority's rulings in the first year after Justice O'Connor's retirement to her absence from the Court. Ginsburg, Harvard Conversation, *supra* note 179. Justice Breyer was even more explicit in underscoring the effect of the change in the Court's composition, observing in his oral dissent in the Louisville and Seattle school integration cases, "It is not often in the law that so few have so quickly changed so much." Breyer's Oral Dissent, *supra* note 5, at 32:54-33:01.

¹⁹¹ Greenhouse, *supra* note 93 (quoting Professor Karlan). The "politics, not law" distinction here suggests that the Court ruled arbitrarily, independent of changed circumstances or shifting public sentiment. Professor Karlan is referencing the conventional dichotomy between "law" and "politics" where "politics" means the Justice's personal or ideological bias and "law" means an objective or neutral set of principles that emerges through careful textual analysis, logical reasoning, and the accumulation of legal precedent.

¹⁹² A Google News search performed in June of 2008 found more than 220 articles discussing the decision, all of which mentioned Justice Ginsburg. See, e.g., Joan Biskupic, *Court Takes Harder Stance on Abortion: Ginsburg Says Ruling "Recalls Ancient Notions" About Women*, USA TODAY, Apr. 19, 2007, at 2A. Moreover, a number of issue groups posted online material involving Justice Ginsburg's dissent. See, e.g., Nat'l Org. for Women, Selections from Justice Ginsburg's Dissenting Opinion in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* (Apr. 18, 2007), http://www.now.org/issues/judicial/supreme/ginsburg_dissent.html. Similarly, a Westlaw search at the same time found more than 100 academic articles that discussed Justice Ginsburg's dissent in the case. See, e.g., David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1 (discussing Justice Ginsburg's dissent and her role in the case); Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519 (2008) (discussing the development of the Court's abortion jurisprudence, with considerable attention to Justice Ginsburg's role in *Carhart* and other cases).

ticularly the medical ones, and has a much more in depth discussion of precedent. Other than that, the written dissent tracks the oral one fairly closely, and includes portions used verbatim in the oral dissent.¹⁹³ However, the oral opinion is clearly more powerful due to its brevity and simplicity.

The oral dissents delivered by Justices Breyer and Ginsburg in the October 2006 Term have a latent power, a power that does not come from simply questioning the position of judicial colleagues with a pinched view of the role of race and gender in our democracy. Justice Breyer's and Justice Ginsburg's voices, at their most persuasive, are those of social critics who know of what they speak.¹⁹⁴ To the extent that Justices Breyer and Ginsburg reach out *from their own biographies* to those not traditionally associated with the responsibility of law enforcement, they help expand the notion of who participates in the normative project of defining what is law. It is not just elite judges who draw from their own political well to determine public values. Through their oral dissents, Justices Breyer and Ginsburg reminded their listeners that law can also be made by ordinary people, including those women who work, as Lilly Ledbetter did, in previously all-male occupations, or those administrators in Seattle and Louisville, who together with local legislators are mobilizing citizens to make sure the same opportunities for quality education are available to blacks and non-blacks.

In this role, they do not themselves function as judicial activists. They overrule no legislative majorities, decide no law, and coerce no outcome. Indeed, both Justices Breyer and Ginsburg have used oral dissents to express their exasperation with judicial self-aggrandizement. Instead, using the genre of dissents from the bench, both Justices Breyer and Ginsburg are showcasing the possibility of expanded roles for nonjudicial actors and other public lawmakers. They suggest that Justices may be motivated to dissent, and to dissent from the bench, because of a special set of experiences and commitments that are organized around their respective communities of accountability. Even if robust popular participation is not their direct goal,¹⁹⁵ it may

¹⁹³ See, e.g., Ginsburg's Oral Dissent, *Carhart*, *supra* note 188, at 11:40, 13:20, 13:33 (reading portions of the written dissent verbatim).

¹⁹⁴ Justice Ginsburg, in a speech at the beginning of the 2007 Term, indicated that she remains committed to issuing such clarion calls in the future. "I will continue to dissent if, in my judgment, the court veers in the wrong direction when important issues are at stake," she said. *No Turning the Clock Back on Abortion, Justice Ginsburg Says*, WASH. POST, Oct. 22, 2007, at A5 (internal quotation marks omitted). Before the two oral dissents in the 2006 Term, Justice Ginsburg had only issued "six oral dissents over 14 years on the court." *Id.*

¹⁹⁵ In Justice Ginsburg's case, however, there is evidence that she does intend to disseminate her oral dissents widely. See Barnes, *supra* note 20 (discussing how Justice Ginsburg hands out printed copies of her oral dissents to the press on the day she delivers them).

be the indirect consequence of their own biography as well as the style and substance of their medium.¹⁹⁶

For Justice Ginsburg, oral dissents are a means to express disagreement where, in the opinion of the speaker, “the Court’s opinion is not just wrong, but importantly and grievously misguided.”¹⁹⁷ They give eloquent expression to deeply held concerns about the majority’s opinion.¹⁹⁸ Some scholars have recently begun to explore oral dissents’ consciousness-raising potential “as a feminist legal method”¹⁹⁹ because Justice Ginsburg has recently become such a prominent oral dissenter.²⁰⁰ Professor Mary Clark, for example, suggests that there may be “something powerful, even transgressive, in a woman judge speaking out in such a direct and public way.”²⁰¹

But oral dissents are not a tool of one particular “side” of the Court. Last Term, a year after Justice Ginsburg’s oral dissent in *Carhart*, Justice Antonin Scalia launched the “politics, not law” grenade from the other side of the ideological spectrum. Justice Scalia delivered a blistering oral dissent in *Boumediene v. Bush*,²⁰² in which a 5–4 Court ruled that prisoners at Guantánamo Bay have a right to challenge their detentions in the federal courts.²⁰³ Justice Scalia ac-

¹⁹⁶ In each of the instances discussed here, the Justice has both a personal and a pre-bench professional connection to the subject matter. Marshall not only argued *Brown* and helped create modern Equal Protection doctrine through his advocacy, but he also grew up going to segregated schools in Baltimore, and went to Howard Law School in part because the University of Maryland Law School would not admit black students. Ginsburg not only dealt with gender discrimination as an ACLU attorney, she also, again and again, had the experience of being a woman pioneering into all-male workplaces (like Ledbetter). Breyer not only taught administrative law and so was familiar with the difficulties placed on agencies actually responsible for implementing policy, but he knew of the struggles of school administrators up close from his father. In each case, the Justices had experienced these issues from multiple perspectives, as members of different communities of accountability, before coming to the bench.

¹⁹⁷ Ginsburg, *supra* note 181.

¹⁹⁸ See, for example, Justice Benjamin Curtis’s dissent from the Court’s 1856 decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Justice Ginsburg says she “would place Justice Breyer’s dissent in last term’s school integration cases in the same category.” Ginsburg, *supra* note 181. Like the more traditional written dissent, oral dissents are also a form of “damage control.” See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

¹⁹⁹ Mary L. Clark, *Speaking Out: Some Reflections on Justice Ruth Bader Ginsburg’s Oral Dissents in the U.S. Supreme Court’s October 2006 Term* 11 (Apr. 2008) (unpublished manuscript, on file with the Harvard Law School Library) (citing Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990)).

²⁰⁰ Justice Ginsburg has dissented eight times from the bench since 1994. Other than Justices Scalia and Stevens, Ginsburg has been the most consistent oral dissenter. Duffy & Lambert, *supra* note 44.

²⁰¹ Clark, *supra* note 199, at 11 (citing Bartlett, *supra* note 199); see also Greenhouse, *supra* note 93.

²⁰² 128 S. Ct. 2229 (2008).

²⁰³ Justice Scalia called the Court’s decision a “self-invited . . . incursion into military affairs,” Transcript of Oral Opinion of Justice Scalia at 3, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195).

cused the majority of “elbow[ing]” aside the military while at the same time “striking a pose of faux deference to Congress and the President.”²⁰⁴

Indeed, Justice Scalia has been the most active oral dissenter, logging in eleven oral dissents since 1994.²⁰⁵ He has been a perpetual oral dissenter, often using oral dissents to transform a case into a cause.²⁰⁶ Justice Scalia and Justice Thomas, for example, in 2004, 2006, and 2008 have lodged a combined total of four oral dissents in the three cases involving the scope of executive authority to determine the rights of noncitizen detainees captured outside the United States and held at Guantánamo Bay.²⁰⁷ But despite his persistence as well as his talents as a wordsmith and an advocate, Justice Scalia recognizes that he is “not going to persuade [his] colleagues” or “persuade most of the federal bench.”²⁰⁸ Instead he is counting on the next generation to “see the advantages of going back to the way we used to do things.”²⁰⁹ Known as the “master of the dissent,” Justice Scalia sees dissent as a means of “advocating for the future . . . for the next generation and for law students.”²¹⁰ Both Justices Scalia and Ginsburg have suggested that they use oral dissents, as they use written dissents, to speak to the “intelligence of a future day,” not just to their current colleagues.²¹¹

(transcript on file with the Harvard Law School Library) [hereinafter Scalia’s Oral Dissent], that “will almost certainly cause more Americans to be killed,” *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting). See also Robert Barnes, *Justices Say Detainees Can Seek Release*, WASH. POST, June 13, 2008, at A1.

²⁰⁴ *Boumediene*, 128 S. Ct. at 2295–96 & n.1 (Scalia, J., dissenting).

²⁰⁵ See Supreme Court Library, Dissenting and Concurring Opinions Announced from the Bench (Jan. 23, 2008) (on file with author).

²⁰⁶ See, for example, Justice Scalia’s oral dissents in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), *Roper v. Simmons*, 543 U.S. 551 (2005), *Lawrence v. Texas*, 539 U.S. 558 (2003), *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Romer v. Evans*, 517 U.S. 620 (1996).

²⁰⁷ See, for example, Justice Scalia’s oral dissents in *Boumediene*, 128 S. Ct. 2229, *Hamdan*, 126 S. Ct. 2749, and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); see also Justice Thomas’s oral dissent in *Hamdan*, his first, he said, in fifteen years on the bench. See Oral Opinion of Justice Clarence Thomas, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), available at http://www.oyez.org/cases/2000-2009/2005/2005_05_184/opinion/. But compare *Charlie Rose* (PBS television broadcast June 30, 2006) (interviewing John Yoo, former clerk for Justice Thomas, who suggested that this was actually Justice Thomas’s second oral dissent). On the question of whether Justice Thomas has orally dissented once or twice in his tenure on the Court, see Duffy & Lambert, *supra* note 44.

²⁰⁸ Slater, *supra* note 39.

²⁰⁹ *Id.*

²¹⁰ *Id.* (describing Scalia as a “blogger”); see also Dahlia Lithwick, *Persuasion: Justice Antonin Scalia Is Persuadable. Or He Finally Thinks You Are*, SLATE, May 10, 2008, <http://www.slate.com/id/2191013/> (“[Justice Scalia] writes for law students and the case books; it’s ‘too late’ for the rest of us.”).

²¹¹ See Ginsburg, *supra* note 181 (“A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.” (quoting Chief Justice Hughes with approval)); see also Interview by Nina Totenberg with Justice Ruth Bader Ginsburg (National

A form of judicial speech enjoying renewed popularity,²¹² oral dissents are lifting the curtains on the lawmaking process. A new discourse is emerging that enables the public to see — and hear — the law being made and interpreted by fallible and deeply passionate human beings. When the Court uses the medium of oral dissents to come from behind the door of its technical isolation, it may stir the pot of public controversy. Though this may make the conflict at the core of the case more concrete, it also enhances democratic participation by creating important cross-currents of democratic exchange.

II. DEMOSPRUDENCE THROUGH DISSENT

A. *What Is a Demosprudential Dissent?*

Supreme Court Justices teach. In this Part, I connect my focus on the particular “teaching moment” of dissenting opinions, especially those delivered as dissents from the bench, with my claim that dissenting opinions are a potent source of democratic accountability. When spoken aloud or written with a popular audience in mind, dissenting opinions can be powerful pedagogical tools. When delivered in a democratic rather than authoritative voice, they present a unique opportunity to explore one aspect of the larger concept of “demosprudence,” by reexamining the sources of democratic authority for legal elites²¹³ in our democracy.

Demosprudence is 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. In the context of dissents, demosprudence is a democracy-enhancing jurisprudence. It invites Justices of the Supreme Court to build on the “many minds” view that

Public Radio broadcast May 2, 2002), available at <http://www.npr.org/programs/morning/features/2002/may/ginsburg/>; Slater, *supra* note 39 (“I’m advocating for the future.”).

²¹² See *supra* notes 94–95. There is also growing attention — among commentators and academics — to the phenomenon. See, e.g., Bleich et al., *supra* note 99; Clark, *supra* note 199; Duffy & Lambert, *supra* note 44.

²¹³ In our forthcoming book, Professor Torres and I define legal elites as formal legal authorities — both judges and legislators — and those with special access to such authorities, such as lawyers. Demosprudence through dissent emphasizes the teaching role rather than the “political role” (negotiating the rule of five) of the judge who is in a permanent minority. This examination of the dissenter’s role is part of a broader effort to reimagine the “roles” of institutional players in a democracy, from the lawyer to the politician, from the law school professor to the judge. See generally Lani Guinier, *Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger*, 71 MOD. L. REV. 1 (2008); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007).

broad participation makes democratic practice more transparent, more adaptive, and more legitimate by dispersing power and distributing leadership.²¹⁴

Demosprudence is not a call to ordinary politics, whether electoral or quasi-electoral. It is not focused on voter participation through the isolated yet sanctified moments of choice offered by representative elections or referenda or initiatives. Its democratic faith rests on a more deliberative view of the relationship between lawmaking and democracy — that elections are valuable aggregation devices but that they are not the only way to legitimate lawmaking.²¹⁵ Instead, demosprudence as a lawmaking or legal practice is animated by the intuition that citizen participation over time in the form of deliberation and iteration is vital to the legitimacy and justice function of lawmaking and to the sustainability of democracy itself.²¹⁶

The demosprudential *intuition* is 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.”²¹⁷ Nonlawyers, nonpoliticians, and nonjudicial actors — from social and cultural elites to the ordinary people who form the backbone of social movements — can, should, and often do play a range of roles in influencing the meaning of constitutional doctrine and the interpretation of statutes.²¹⁸

The practice of dissent in the context of judicial decisionmaking cannot be true judicial activism, defined as members of the judiciary imposing their view on the rest of the polity. Unlike a majority opin-

²¹⁴ See Helene Landemore, *Democratic Reason: The Mechanisms of Collective Intelligence in Politics* (June 2008) (unpublished manuscript, on file with the Harvard Law School Library). *But cf.* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS (forthcoming 2009) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087017 (expressing skepticism about the ability of “many minds” to perform a task more “accurate[ly]”).

²¹⁵ For further elaboration of this idea, see, for example, Guinier, *supra* note 213.

²¹⁶ By “democracy,” Professor Torres and I mean something similar to what Robert Hutchins, former President of the University of Chicago, said in a 1962 interview: “Every member of the community must have a part in his government. The real test of democracy is the extent to which everybody in society is involved in effective political discussion.” ROBERT M. HUTCHINS WITH JOSEPH P. LYFORD, *THE POLITICAL ANIMAL* 2 (1962).

²¹⁷ These democratic lawmakers are not limited to those present at the time of the adoption of the Constitution. Nor is the community of consent measured only by electoral, legislative, or poll-tested majorities. See *infra* p. 111 (discussing the negotiation over time between those who were included and those who were excluded from the original consent community).

²¹⁸ Such participation involves a range of concerns, including monitoring the basic structures of democratic accountability. Cf. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 154 (2004) (“External institutions, including courts, are needed to ensure that the background conditions that sustain democracy . . . remain properly structured.”). This monitoring role is especially important when the institutional structures on which our government depends were established for and by a very different community of consent.

ion, a dissent announces no new law. It neither overrules an electoral majority nor prescribes any policy. It is a story told without the coercive power of the state. It disrespects no ethical injunctions and yields no binding precedent. It may express a Justice's moral outrage or it may be used simply to challenge the logic or reasoning of the majority view. An "impressive dissent" may successfully influence a current or future judicial majority to refine or change its position,²¹⁹ but that is not what makes it a demosprudential dissent.

Rather, a demosprudential dissent has three particular interrelated elements that enable it to reach beyond a traditional judicial or purely legal audience. First, on a substantive level, the dissent probes or tests a particular understanding of democracy. It engages with a core issue of democratic legitimacy, democratic accountability, democratic structure, or democratic viability. Second, its style likely deviates from the conventional point-by-point refutation of the majority's logical flaws. It may set forth the facts of the case followed by a different, imagined alternative. It may tell a good "public story," built upon shared experiences and common concerns.²²⁰ It may be organized around values, critique, or actions.²²¹ It may be delivered in a dramatic tone, as an oral dissent, or expressed poetically, as a written dissent best understood when read aloud.

Third, at a procedural level, the dissenting opinion speaks to non-judicial actors, whether legislators, local thought leaders, or ordinary people, and encourages them to step in or step up to revisit the majority's conclusions. If the first element is substantive, and the second is stylistic, then the third element is facilitative. It may, for example, appeal to the audience's own experience or inspire them to participate in a form of collective problem-solving. By providing greater transparency to the deliberative process internal to the Court, it may jumpstart the process of educating the public. This educational role need not be dependent on the extent to which the media picks up the dissent. It may function indirectly through organized constituencies publicizing

²¹⁹ See Ginsburg, *supra* note 181 ("[T]here is nothing better than an impressive dissent to improve an opinion for the Court. A well reasoned dissent will lead the author of the majority opinion to refine and clarify her initial circulation."). And in the rare case, the dissent may become the opinion of the Court. *Id.*; see also I DISSENT, *supra* note 52.

²²⁰ A good public story links the storyteller to the audience, and the audience members to each other, through the articulation of shared and resonant experiences. According to Marshall Ganz, a good public story is built upon three components:

... a story of self, a story of us, and a story of now. Our story of self allows other[s] to experience the values that move us to lead. Our story of us allows us to make common cause with a broader community whose values we share. And a story of now calls us to act, so we can shape the future in ways consistent with those values, and not be trapped by it.

Ganz, *supra* note 112, at 58.

²²¹ See *supra* note 112 (describing reasons in culture as distinct from reasons in law).

the existence and content of the dissent. It teaches rather than proselytizes. It is written or spoken with the knowledge that judges, however, are not just teachers. They are waymakers, scouts, and guides. They clear away the brush, knowing that it is often up to we the people to chart the path.

A demosprudential dissent uses multiple stylistic or narrative tools (element two) to facilitate an ongoing public conversation (element three) about the issue at the heart of the conflict (element one) in ways that inform (but do not necessarily prescribe) the relationship between future lawmaking and democracy. A demosprudential dissent is animated by a commitment to “democratic reason” — a form of deliberative democracy in which leadership or power is dispersed among the many rather than concentrated among the few.²²² A demosprudential dissent is crafted with the understanding that the Court does not function in a cultural vacuum. Precedents and protocol shape its rulings, but the Court’s legitimacy depends on more than a judicious interpretation of existing law. The Court’s legitimacy — its ability to engender confidence in its judgments — also depends on its ability to engage dialogically with nonjudicial actors and to encourage them to act democratically.²²³

To perform a demosprudential function, a dissent must speak to members of the public at large rather than to the dissenter’s usually sequestered colleagues. It may inform current legislative majorities of the need to act to change the law. Simply by contesting the view of the Court majority, the dissenter may reveal a more transparent deliberative process of lawmaking. By illuminating an alternative view of law, she can invite critical reflection and inspire a sense of agency among the people themselves. In some cases, these dissenters are vindicated by history when they influence future judicial majorities.²²⁴ But to the extent theirs are prophetic voices, they are not merely that of the missionary or the messenger. The dissenter speaks to the future in ways that permeate popular culture by virtue of speaking from an important place and usually giving eloquent expression to deeply held

²²² I borrow here Helene Landemore’s idea of “democratic reason” or the “distributed intelligence of the many.” Landemore, *supra* note 214, at 3 (making the claim that “given conditions of sufficient education and freedom amongst the members of a regular group of human beings, the rule of the many beats any alternative of the rule of the few as a decision-procedure regarding collective choices for that group”).

²²³ Judicial deference to legislative or electoral majorities may be useful as a default in the ordinary case. But majority rule, by itself, cannot per se define the role of the judiciary in a democracy when the majority in question has historically and contemporaneously disenfranchised groups of people based on wealth, gender, and race or when the control of the election system lies with incumbent politicians or partisan administrators whose interests lie in constraining rather than expanding the electorate.

²²⁴ See *supra* notes 210–211 and accompanying text.

concerns.²²⁵ Mere public grandstanding, however, is insufficient to achieve this effect. Nor is self-indulgence the primary motivation for a demosprudential dissent.²²⁶ Instead a demosprudential dissent provides a powerful pedagogical opportunity to open up space for public deliberation and engagement. At their best, these demosprudential dissenters are “teachers in a vital national seminar,”²²⁷ who invite the people to play a significant role in the relationship between democracy and lawmaking.²²⁸ From a demosprudential perspective, the judge’s role in dissent becomes that of an activist on behalf of “democracy.”²²⁹

Oral dissenters become demosprudential dissenters when they help “institutionaliz[e] channels for dissent within the democratic process.”²³⁰ This is precisely what Justice Ginsburg did in *Ledbetter*, in which she found her own voice and then helped working women find theirs. In *Carhart*, Justice Ginsburg showed she well understands how expressive harms that demean women based on nineteenth-century stereotypes discourage their active participation in democracy.²³¹

Oral dissenters become demosprudential dissenters when they work in partnership with national or local thought leaders (what Professor Reva Siegel calls “role-literate participants”) to enable a nonlegal audience to identify and respond to flaws in our democratic struc-

²²⁵ Notable examples of dissenters of this type include Justices John McLean and Benjamin Curtis in their oral dissents from the Court’s 1857 decision in *Dred Scott v. Sandford*, 163 U.S. 393 (1857), see Bleich et al., *supra* note 99, at 31, and Justice Harlan in his written dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

²²⁶ But see Tushnet, *supra* note 40 (“The business of writing dissenting opinions seems to be a form of self-expression and, like others of the type, is chiefly valuable for its subjective effect. I find that I rest better after writing them, which perhaps is a sufficient justification.” (quoting Chief Justice Harlan Fiske Stone)).

²²⁷ Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 962 (1992) (quoting Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)).

²²⁸ In this sense it tracks Justice Brennan’s view that the dissenting opinion “reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas.” WAYNE V. MCINTOSH & CYNTHIA L. CATES, *JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS* 10 (1997) (citation omitted). But see *infra* section IV.C (addressing the argument that a demosprudential dissenter is engaging in politics, not law).

²²⁹ Professor Torres and I specifically contrast “democracy” with “politics,” to the extent that the former is open to multiple forms of collective decisionmaking and the latter is dependent almost exclusively on sanctified moments of choice through up/down votes. See Guinier, *supra* note 213, at 2. A full exploration of the meaning of democracy, however, is beyond the scope of this Foreword.

²³⁰ Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2005).

²³¹ Justice Ginsburg argued that the ability of women to access safe and legal abortion is essential for their ability to participate in society and to define their role therein. Further, the majority’s contention that it was protecting women by prohibiting this procedure raises concerns about the role of government vis-à-vis its female citizens. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1648–49 (2007) (Ginsburg, J., dissenting).

ture that can best be addressed by an “informed, civically militant electorate.”²³² In dissent, the Justice can reach out to inchoate social movements, helping to remind them of the source of their systemic exclusion. Unlike the judicial activists excoriated by the conservative right, demosprudential dissents summon the public — through their representatives or their own marching feet — to act in the name of democracy.

*B. The Demosprudential Continuum from
Oral Dissents to Written Opinions*

Although I have emphasized the democracy-enhancing jurisprudential power of oral dissents, there is a demosprudential spectrum that starts with oral dissents but can occasionally include written opinions. For the most part, written opinions have the least demosprudential power because they have competing commitments that limit the flexibility of their argumentation, the style of their presentation, and the goal of their authors. Written opinions have to inform lower courts and litigants in clear terms what the announced rule is. They must provide a rationale behind the decision in terms that are either consistent with precedent or consistent with a constitutional understanding that renders existing precedent invalid. They are subject to the standards of the “constitutional law mafia,” which does not grant much latitude for colloquial prose or innovative formats. As a result, written opinions have significant primary functions that tend to eclipse their demosprudential potential.

In addition, those writing a majority opinion are on the winning side, so they do not have the motivation or the need to enlist the demos in order to affirm their constitutional authority. They are backed by the coercive power of the state. Of course, when, as in *Brown*, the Supreme Court overrules lower courts which had supported, and arguably ratified, a broadly popular view among those who were acknowledged members of the polity, demosprudential considerations are salient. Indeed, Chief Justice Warren was clear that the *Brown* opinion should speak to the people: “[The opinion outlawing separate but equal] should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory.”²³³

²³² *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting). Role-literate participants are those people, not just judges, who see themselves as agents, interpreters, or movement leaders, and who understand the various ways that they are able to object to and/or potentially influence constitutional decisions by the courts. Interview with Reva Siegel (Sept. 22, 2008); see also Siegel, *supra* note 38, at 1339–48.

²³³ Memorandum from Justice Earl Warren to his colleagues concerning his draft opinion in *Brown v. Board of Education* (May 7, 1954) (cited in Bruce Hay, Earl Warren’s Theater of the Absurd (July 30, 2005) (unpublished manuscript, on file with the author)).

Compared to majority opinions, written concurrences are more likely to move in the demosprudential direction because they can be used to explain, using more colloquial language, what the majority opinion leaves out. Concurring opinions can be informal because the technical work is largely being done by the majority opinion. There are of course concurring opinions that are motivated simply by disagreements over craft, but where the Justice concurs in the rationale but not the result, a demosprudential opening may emerge. The Justice might issue an invitation to continue the debate in other fora or, as Justice Kennedy did in *Parents Involved*, the Justice might suggest remedial alternatives that he, as the crucial fifth vote, conceivably would support. By inviting experimentation at the local level, Justice Kennedy's concurrence energized "role-literate participants" to adapt new strategies of resistance, innovation, and public discourse. In conjunction with Justice Breyer's dissent, Justice Kennedy's concurrence opened up a deliberative space for local laboratories of democracy. Or, as we shall see in Part III, a Justice might package his "dissent" in a concurring opinion. Where a Justice feels bound to support the majority opinion as a technical matter, he may nevertheless, through his concurrence, invite an extended debate on the merits of the moral issue that was not squarely presented but nevertheless animated the Court majority.

Written dissents move even further along the continuum in a demosprudential direction because they are not on the winning side. Thus, they can evoke those currents in the culture that point to change and point out the ways in which the majority misunderstands the historical epic that it is in.

Oral dissents, of course, are loosest of all in style and in form. As live performances, they have the capacity to encourage the Justices to express feelings as well as cognitions. Although in some instances written dissents or concurrences engage an audience as viscerally as an oral dissent, I suspect there is something about the technology of oral dissents that has the potential to invite and affect a wider audience. Nevertheless, despite the special qualities to the orality of dissenting from the bench, some of those qualities may never be appreciated fully because the oral dissents are not widely broadcast. The dissent from the bench is initially disseminated by the reporters who are in the courtroom during the decision hand down. The journalists and others at the event report in the media, including blogs, whatever they have taken verbatim notes on. Thereafter, an audio tape is made available, usually by October of the following Term.²³⁴ There is no official tran-

²³⁴ The audio is also posted online. See Oyez, Frequently Asked Questions, <http://www.oyez.org/faq/> (last visited Oct. 5, 2008) ("The Supreme Court releases all its audio materials to the Na-

script of the oral dissent, with the exception of Justice Ginsburg's dissents, which are distributed in print to the press at the time she delivers them. The text of the oral dissent is not published alongside the written dissent, nor is reference made that there was a dissent from the bench.

As a result of the Court's resistance to twenty-first-century technology, most oral dissents do not yet realize their demosprudential potential. Yet the technology of their dissemination is ripe for change. Even now, those who were not present at the decision hand down can hear about it, or hear it through blogs, tape recordings, and computer networks. No longer do citizens have to rely on the notes or recollections of reporters sitting in the courtroom. The internet may eventually amplify the spoken word in multiple ways that a long winded written opinion cannot. Of course, were the Court to permit cameras in the courtroom, oral dissents could easily circumvent the twentieth-century conventions of dissemination and be broadcast directly in real time.

In sum, oral dissents are particularly but not exclusively well-suited to fulfill the three demosprudential elements: where a conflict about democracy is a core issue, accessibility rather than technical proficiency is a stylistic preference, and engaging in a larger public conversation is an implicit goal. By decoding legal language, they offer the Court new sources of constitutional authority that do not depend on mystery or opacity. They are bipartisan venues for making conflict more transparent without necessarily making it more threatening. They can provide contemporary forums that open the decisionmaking process to public voices and many minds. To the extent that they help reframe our understanding of the important role that mobilized or engaged constituencies play in legitimating the Court's constitutional role,²³⁵ oral dissents create salient moments of democratic accountability when constitutional law meets constitutional culture.²³⁶ They are a window into a new source of democratic accountability that

tional Archives in October following the Term in which cases were argued. The National Archives must accession the audio materials and make copies for use by research archivists. This process takes a few months.").

²³⁵ See *I DISSENT*, *supra* note 52; see also Brennan, *supra* note 198, at 435.

²³⁶ See *infra* p. 59–63 (discussing the relationship between constitutional law and constitutional culture). First Amendment scholars have observed the importance of participation in public debate when discussing the role of free speech in a democracy. See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1527 (1997) ("The rights of speakers are protected primarily because they create the opportunity for democratic citizens to come to identify with the collective will through their own potential active participation."); cf. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004) ("A democratic culture includes the institutions of representative democracy, but it also exists beyond them, and, indeed undergirds them. A democratic culture . . . is a participatory culture.").

gives us concrete tools for thinking about ways that dissenters might engage demosprudentially with the nonlegal public. They showcase Justice Holmes's admonition to his colleague that opinions should be "theoretically spoken."²³⁷

It is important to restate that I am using the terms oral dissent and demosprudential dissent in a functional rather than formal sense. The fact is that written dissents — as well as written concurrences — can also be demosprudential. The tools of demosprudence do not depend exclusively on orality to invite healthy discussion and stimulate public disagreements over the Constitution's meaning.

For example, as we shall see in Part III, last Term in *Baze*, the issue was the state's use of a particular lethal protocol in its regime of capital punishment. There Justice Stevens used the forum of a written concurring opinion to raise the ante and invite further debate about the state's right to implement the machinery of death in the first place. Last Term in *Heller*, the issue was the right of an individual to possess the tools of urban violence. There Justice Stevens in an oral dissent questioned the validity of a constitutional interpretation that enshrines a right to keep loaded guns in urban homes. The same Justice delivered an oral dissent and penned a written concurrence. It was the written concurrence in *Baze*, not the oral dissent in *Heller*, that ultimately showed greater demosprudential range. As is true of Justice Stevens's concurrence in *Baze*, written concurrences can provoke arguments that are orchestrated "by the people in the ordinary venues for political discussion."²³⁸

When oral dissents and their written companions create occasions for public participation in decisionmaking outside of the direct purview of the Court, these occasions for deliberation and normative dialogue are a crucial source of democratic accountability for the Court itself. When Justice Ginsburg addresses her dissent to Congress, but women like Lilly Ledbetter are also inspired by her message, or when Justice Breyer communicates with thought leaders identified through informal democratic processes, people like Louisville's Pat Todd, these dissenting Justices enable local activists and ordinary people to operate within the framework of our democratic system to elaborate these ideas. Democratic accountability for the lawmaking process can thus

²³⁷ In an exchange with Justice Sanford, Justice Holmes advocated opinion writing as a "quasi oral utterance" rather than "an essay with footnotes." Post, *supra* note 57, at 1292–93 (quoting Holmes Letter, *supra* note 65). Current members of the Court seem to be heeding Justice Holmes's advice, at least according to Linda Greenhouse, who claims that Justice Stevens is the "most-user friendly writer" and that other Justices, most notably Justice Breyer, "pride themselves on doing away with footnotes altogether. If they have something to say, they say it in the text." Greenhouse, *supra* note 129.

²³⁸ MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14 (1999).

be achieved when Justices use their opinions to chart pathways for public participation.

As I argue in Part IV, using dissent to create democratic accountability is consistent with the prestige and authority of the Court. Justices can engage in the kind of deliberation that is not the same as partisan politics through the voting booth. They can inspire the active, public participation of affected people, from local thought leaders and norm entrepreneurs to the people to whom they are accountable. Demosprudential opinions, both oral and written, demonstrate that democracy is broader than legislative decisionmaking. The Court can of course be responsive to the will of the people expressed through the legislature, but that is not the only way the Court is democratically accountable.

C. The Relationship Between Demosprudence and Popular Constitutionalism

Academics have variously described the process of democracy-enhancing negotiation and renegotiation between the Court and local activists as progressive constitutionalism, popular constitutionalism, democratic constitutionalism, new governance, and public guardianship. Demosprudence through dissent builds on these recent academic works that emphasize the role of the people in interpreting the Constitution as an antidote to judicial supremacy.

For example, an increasing number of prominent academics have used theories of popular constitutionalism to argue that the people can control constitutional meaning through their elected representatives in legislatures or school boards.²³⁹ But too often, these arguments remain court-centric.²⁴⁰ Some popular constitutionalists reserve the power and authority of constitutional interpretation for the judiciary — for the learned few. Some of these scholars neither seek to develop bottom-up mechanisms for grassroots influence nor address the courts' potential role in facilitating those mechanisms. Others focus on decreasing the power of courts as an institution but do not propose a vision for increased public participation in democracy.

Demosprudence has much more in common with another thread of scholarship that pays greater attention to the dialogic relationship between the courts and the people. In what Reva Siegel and Robert Post

²³⁹ These include LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); TUSHNET, *supra* note 238; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); and Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

²⁴⁰ For a critique of court-centric constitutionalism, see, for example, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1488–1511 (2005).

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.”²⁴¹ Siegel and Post affirmatively embrace the idea that public engagement “guid[es] and legitimat[es] the institutions and practices of judicial review” because it roots “professional reason” in “popular values and ideals.”²⁴² Demosprudence re-examines the judge’s role in a way that is consistent with the “democratic constitutionalism” of Siegel and Post. It shares their premise that the Court is engaged in something like an ongoing conversation, albeit often a forceful one, with the American people.²⁴³ Again, similar to demosprudence, democratic constitutionalism “shows how constitutional meaning bends to the insistence of popular beliefs and yet simultaneously retains integrity as law.”²⁴⁴

Compared to both popular and democratic constitutionalism, however, demosprudence is not simply a lens through which to understand the conflict between members of a polity and their government. It is neither a justification for, nor a critique of, judicial review.²⁴⁵ Instead, demosprudence through dissent describes a discrete judicial practice

²⁴¹ Post & Siegel, *supra* note 47, at 374.

We propose the model of democratic constitutionalism as a lens through which to understand the structural implications of [the] conflict [between the independence and integrity of the rule of law on the one hand and the need for democratic legitimacy based on the desire of a free people to influence the content of their constitution on the other]. We theorize the unique traditions of argument by which citizens make claims about the Constitution’s meaning and the specialized repertoire of techniques by which officials respond to these claims. Democratic constitutionalism describes how our constitutional order actually negotiates the tension between the rule of law and self-governance.

Id. at 376.

²⁴² *Id.* at 379.

²⁴³ See *id.* at 384–85 (“One might imagine this process as a series of ‘conversations between the Court and the people and their representatives,’ but the process is rarely as civilized and orderly as a conversation.” (quoting ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970))).

²⁴⁴ *Id.* at 376. Siegel and Post further explain:

The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as *their* Constitution. This belief is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning and to oppose their government — through constitutional lawmaking, electoral politics, and the institutions of civil society — when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution.

Id. at 374.

²⁴⁵ Like democratic constitutionalism, this analysis “does not yield a general normative methodology for deciding constitutional cases.” *Id.* at 377. However, it “does elucidate how competing system values shape the process of constitutional decisionmaking.” *Id.* In the spirit of a “platonic disquisition” between the people and the court, demosprudence asks whether and how a dissenting Justice should speak directly to non-elite constituencies of accountability for legal change.

for instantiating and reinforcing the relationship between public engagement and institutional legitimacy. It explores the way this judicial practice has been and could be implemented in the specific context of a dissenting opinion, an opinion that lacks the force of law. It is concerned, in other words, with democratic, rather than judicial, activism. While popular and democratic constitutionalism certainly reflect a normative commitment to public participation in the decisionmaking processes of democracy, demosprudence 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. These 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 citizens themselves, in favor of one restrictive mandate.²⁴⁶

Instead, demosprudence adapts Cover’s “jurisgenerative” approach to social and collective change. Jurisgenerative change creates new legal meanings.²⁴⁷ It 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.”²⁴⁸ Along these lines, demosprudential dissents, especially when issued in the style of oral dissents, provide Supreme Court Justices a chance to practice a jurisgenerative approach to lawmaking, by opening up an interactive and deliberative space between the people and the formal lawmakers. They may do so by appealing to the “brooding spirit of the law” or to the “intelligence of a future day.”²⁴⁹ They may sound a prophetic voice²⁵⁰ or model logical yet critical thinking for a contemporary audience.

Above all, these dissenting opinions teach. Whether they craft word pictures, tell stories, or unpack the process of lawmaking for nonjudicial actors, they authorize ordinary people to see themselves as members of a constitutional community with power to reinterpret or

²⁴⁶ See Cover, *supra* note 124, at 4, 9, 11, 40 (law is “a bridge linking a concept of a reality to an imagined alternative”; the creation of legal meaning, “jurisgenesis,” always takes place “through an essentially cultural medium”; social and collective change are jurisgenerative, that is, they create new legal meanings; by contrast, courts and the state tend to be jurispathic, that is, they destroy possible legal meanings).

²⁴⁷ See *id.* at 11.

²⁴⁸ Garry Wills, *Two Speeches on Race*, N.Y. REV. BOOKS, May 1, 2008, at 4, available at <http://www.nybooks.com/articles/21290>.

²⁴⁹ CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928); see also Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 317, 335–36 (Austin Sarat & Stuart Scheingold eds., 1998) (arguing that it is not just about “winning” in the present tense but making a record, that is, “remember[ing] the future”).

²⁵⁰ See WALZER, *supra* note 26, at 75.

remake the law. They forge a normative universe “held together by the force of interpretive commitments — some small and private, others immense and public” — that helps “determine what law means and what law shall be.”²⁵¹ They invite collectively mobilized people to discuss, to dissect, to interpret, and to make the law.

III. DEMOSPRUDENCE THROUGH DISSENT IN THE OCTOBER 2007 TERM

In this Part, I focus on the demosprudential qualities of dissenting opinions from the October 2007 Term. Demosprudential dissenters are not judicial activists, meaning they do not legislate from the bench. Instead demosprudential dissenters are activists for a kind of democratic accountability in which the people themselves are encouraged to participate in influencing the law — or at least in forging a more inclusive *constitutional culture* — from the ground up. That there is a healthy dialectic between an oppositional constitutional culture and the “legal constitution” is the organizing idea behind demosprudence through dissent.

Constitutional culture is the dynamic sociopolitical environment in which ideas about foundational legal meanings circulate, ferment, compete, and ultimately surface in formal venues, such as legal advocacy or legislative hearings, as well as in informal venues such as the academy or the media. Whereas constitutional *law* is the view of law from the judiciary’s perspective, constitutional *culture* is informed and influenced by the beliefs and actions of nonjudicial participants.²⁵² Constitutional culture may be reflected in the legislative byproducts of social movement activism, the public discourse of competing social movement perspectives, or the deeply ingrained principles and intuitions of ordinary people.²⁵³ Constitutional culture, unlike constitu-

²⁵¹ Cover, *supra* note 124, at 7.

²⁵² See THOMAS R. ROCHON, *CULTURE MOVES: IDEAS, ACTIVISM, AND CHANGING VALUES* 3–53 (1998) (discussing the role of critical communities in influencing public understanding and ultimately public action, both official and informal); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003); see also Cover, *supra* note 124, at 11–19 (“[T]he creation of legal meaning — ‘jurisgenesis’ — takes place always through an essentially cultural medium. Although the state is not necessarily the creator of legal meaning, the creative process is collective or social.” (footnote omitted)); cf. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law To Make Social Change*, 72 N.Y.U. L. REV. 967 (1997).

²⁵³ Siegel, *supra* note 38, at 1324–25 (“[T]he formal and informal interactions between citizens and officials that guide constitutional change . . . include but are not limited to lawmaking and adjudication; confirmation hearings, ordinary legislation, failed amendments, campaigns for elective office, and protest marches . . . [Such interactions] may provide occasion for citizen deliberation and mobilization and for official action in response to constitutional claims. . . . [T]he term ‘constitutional culture’ . . . refer[s] to the understandings of role and practices of argument that

tional law, is not limited to the internal perspective through which the judiciary evaluates its own work product. Constitutional culture shapes and is shaped by “both popular and professional claims about the Constitution.”²⁵⁴

Within a demosprudential framework, constitutional law and constitutional culture are linked. They are “locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”²⁵⁵ Or, as Reva Siegel reminds us, social movements change constitutional understandings. These understandings, when instantiated by the judiciary, become constitutional law.²⁵⁶ Changes in constitutional understanding emerge from the interactions between citizens and their representatives, whether judicial or political, appointed or elected.²⁵⁷ Constitutional law, in other words, is not autonomous from the beliefs and values of nonjudicial actors and mobilized constituencies. Concomitantly, the beliefs and values of nonjudicial actors are influenced by the judiciary’s internal perspective on the meaning of law.

Demosprudence through dissent is grounded in the intimate relationship between culture shifts and rule shifts. When organized constituencies mobilize to produce culture shifts, subsequent and responsive rule shifts by a Court majority are more apt to permeate popular understanding and thus become sustainable over time.²⁵⁸ And when a majority of the Justices do not respond to culture shifts, demosprudence through dissent becomes particularly important.

In the past, for example, demosprudential dissents have inspired iterative responses, as well as action among social movement activists, ordinary citizens, and their elected representatives. Witness Justice Ginsburg’s oral dissent in *Ledbetter*, after which the House of Representatives responded quickly to her call for a legislative fix to the

guide interactions among citizens and officials in matters concerning the Constitution’s meaning.” (footnote omitted)).

²⁵⁴ *Id.* at 1325. Some who refer to constitutional culture, calling it elite opinion or popular sentiment, rest interpretative agency in the hands of government officials. In this account, these officials infuse the interpretation of constitutional texts with changing social mores. *See id.* at 1337. Siegel’s assessment of constitutional culture, however, takes stock of the important role that social movement conflict — the “culture wars” — plays in guiding this interpretive process.

²⁵⁵ Post, *supra* note 252, at 8 (“[T]he Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law.”).

²⁵⁶ *See* Siegel, *supra* note 38, at 1323.

²⁵⁷ In the demosprudential sense, the distinction between government officials and elected representatives is artificial. *Cf.* *Wells v. Edwards*, 409 U.S. 1095, 1096–97 (1973) (White, J., dissenting) (critiquing the idea that elected judges do not represent people, they serve them).

²⁵⁸ *Cf.* Stoddard, *supra* note 252, at 990–91 (arguing that rule shifts are less likely to reflect sustainable change without culture shifts).

Court majority's crabbed reading of a congressional statute.²⁵⁹ Despite the fact that she represented a minority view, Justice Ginsburg's appeal to the political branches gave that view greater traction. As Reva Siegel describes in *Constitutional Culture*,²⁶⁰ members of the Supreme Court in the 1970s engaged in an ongoing conversation with social movement actors on both the right and the left in ways that influenced both constitutional culture and constitutional law. In the 1970s, Siegel argues, the constitutional culture shifted as a result of the highly publicized and contentious discourse between feminist supporters of the Equal Rights Amendment (ERA) and those, like Phyllis Schlafly, who opposed the amendment and organized a grassroots campaign to fight ratification.²⁶¹ Although the ERA was never adopted, the Court, in a series of cases, began to interpret the Fourteenth Amendment as if the ERA had in fact become law.²⁶² Changes in constitutional culture guided the Court's hand.²⁶³ The Court's sex equality decisions helped legitimate the forces fighting for the ERA. The robust nature of the law/culture exchange over time also had a salutary effect. Popular acceptance of women's equality rose as women not only debated, but began to assume, new roles in both public and private life.

We witness a contemporary example of this dialectic between constitutional culture and constitutional law in the reaction to the Court's decision in *Parents Involved*. Justice Breyer's dissent, which three other Justices joined, failed to convince a majority of his colleagues that their "rule shift" was a constitutional orphan with no legitimate historical pedigree. Yet his impassioned plea, accompanied by Justice Kennedy's effort in his concurring opinion to chart a path through the morass, tapped into views widely held by the lay public.²⁶⁴ It was not

²⁵⁹ See Barnes, *supra* note 20 (predicting that Congress would not have responded so quickly without Justice Ginsburg's oral dissent).

²⁶⁰ Siegel, *supra* note 38.

²⁶¹ See *id.* at 1369 ("[A]n extended and highly structured national conversation about questions of equal citizenship and the family focused public debate on how the abstract principles of the constitutional tradition applied to concrete practices, and provided material on which different members of the Court would draw as they argued over the meaning of the Constitution's equal protection guarantee in the ensuing decade. Interaction between movements and the Court helped forge the understanding that the Equal Protection Clause prohibited classifications 'on the basis of sex,' as well as understandings about the particular practices this prohibition constrained.").

²⁶² *Id.* at 1403–09 (citing relevant sex equality cases including *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971)).

²⁶³ See *id.* at 1323 ("[C]onstitutional culture channels social movement conflict to produce enforceable constitutional understandings . . ."). In the case of the de facto ERA, changes in constitutional understandings were fueled both by the contentious public discourse that raised popular awareness of the arguments for and against the ERA's passage as well as by the feminists' litigation strategy, in which Ruth Bader Ginsburg was a major player. See *id.* at 1377–1409.

²⁶⁴ See, e.g., Robert Barnes & Jon Cohen, *Fewer See Balance in Court's Decisions*, WASH. POST, July 29, 2007, at A3. A majority of people polled "disagreed with the [C]ourt's decision

only the three black civil rights lawyers seated in the first row of the courtroom who felt affirmed by Justice Breyer's overt dismay. A majority of those polled following the decision apparently did not support the Court majority's position. In explaining the poll results, the president of the Alliance for Justice, Nan Aron, said, "People really don't want to go backwards on civil rights."²⁶⁵ Justice Breyer's dissent — to the extent it was widely disseminated — arguably helped fortify popular opinion. But even if it only reached within the ranks of the "middle elite," it helped rally Pat Todd and other local school board administrators to keep up the good fight. Their energies and commitment to diversifying public education — and their willingness to experiment with new ways of mapping inequality — may ultimately fortify a constitutional culture that is in even greater opposition to the views of the Court majority. Should Justice Breyer's oral dissent, in conjunction with Justice Kennedy's concurrence, actually help catalyze practical alternatives, not just a critical discourse about the majority's analysis, his views may ultimately forge a new path through the constitutional culture that indirectly and over time influences constitutional law. This is simply one, still hypothetical, example of how a demosprudential dissent could create a pivotal link in the chain between culture and law.

While demosprudential dissents can and do speak to democratically elected bodies such as Congress, as in Justice Ginsburg's *Ledbetter* dissent, they can also provide both the raw material and the story line that enables civic organizations, politicians, and local community activists to reach out to "we the people."²⁶⁶ Dissenting Justices have an opportunity to motivate thought leaders and norm entrepreneurs²⁶⁷ at the national and local level. Norm entrepreneurs function as catalysts who can influence agenda formation at the local level.²⁶⁸ These agents

that sharply restricted the ability of local school boards to use race when making school assignments to achieve diverse student bodies. Fifty-six percent of those polled disapproved of the decision; 40 percent approved." *Id.*

²⁶⁵ *Id.*

²⁶⁶ This vision is in contrast to Neal Katyal's explanation of the role of judges in giving advice to government actors. See Katyal, *supra* note 59.

²⁶⁷ C. Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT'L L. & POL. 115, 117, 126 (2007) (describing the critical role that non-state actors play in shaping human rights discourse and influencing agenda formation through complex processes such as "norm cascades," "spirals," or "boomerang patterns"). In the international law arena, other scholars position norm entrepreneurs in "epistemic communities" (groups of knowledge-based experts who share a commitment to advancing a particular norm or group of norms) or advocacy networks, defined by the centrality of principled ideas or values in motivating their formation. *Id.* These individuals or groups may function as the interpreters, the translators, or the prophetic voices of a constituency of accountability.

²⁶⁸ Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2006).

of change are “role-literate,” meaning that they understand the social, cultural, political, and intellectual resources at their disposal. Role-literate actors are contextually savvy; they are adept at manipulating a range of argument, advocacy, or organizational strategy that enables them to object, contest, resist, and possibly mobilize their friends and neighbors. From norm entrepreneurs to judicial catalysts, role-literate participants learn from conflict and ultimately may influence its resolution in the form of constitutional lawmaking.²⁶⁹

This Part seeks to understand the demosprudential dynamic between law and culture as expressed in the October 2007 Term. The first goal is to tease out and apply metrics that allow us to identify the qualities that reveal a dissent’s demosprudential potential. I compare the dissenting opinions of two of the Court’s most prominent dissenters, one from the left and one from the right. I assess Justice Stevens’s oral dissent in *District of Columbia v. Heller*, concerning the Second Amendment right to private ownership of guns for nonmilitary self-defense purposes, and his written concurrence in *Baze v. Rees*, concerning the constitutionality of capital punishment through a particular lethal injection protocol. I analyze Justice Scalia’s oral dissent in *Boumediene v. Bush*, concerning the habeas corpus rights of enemy combatant detainees, and his written dissent in *Washington State Grange v. Washington State Republican Party*,²⁷⁰ concerning the constitutionality of a candidate-centered system. The second goal is to imagine what a vigorous demosprudential dissent might look like. Here I present alternative dissent strategies for *Crawford v. Marion County Election Board*, a case involving Indiana’s voter identification requirement, to illustrate how an intentionally demosprudential dissenter might approach her task. I will also explore the irony in having the most demosprudential jurist of the Term, Justice Stevens, writing for himself and two other Justices in *Crawford*, the least democracy-enhancing opinion of the Term. The third goal is to assess the demosprudential developments in the October 2007 Term in relation to the constitutional law and constitutional culture distinction. Justice Scalia’s dissenting opinion in *Washington State Grange* showed some elements of a demosprudential dissent, but was ultimately a missed opportunity, while his majority opinion in *Heller* was a direct beneficiary of demosprudence in action.

²⁶⁹ I first heard the term “role-literate” from Reva Siegel. See *supra* note 232 and accompanying text. Role-literate participants are similar to the “catalysts” that Joanne Scott and Susan Sturm describe, or the norm entrepreneurs in the literature cited by Cora True-Frost. See *supra* notes 267–268.

²⁷⁰ 128 S. Ct. 1184 (2008).

A. *Justices Stevens and Scalia's Opinions in the October 2007 Term:*
A Demosprudential Perspective

1. *Baze v. Rees*, 128 S. Ct. 1520 (2008) (Stevens, J., concurring). — In *Baze*, the Court addressed the constitutionality of a method of execution and whether that method violates the Eighth Amendment. Kentucky executes death row inmates with a lethal injection containing three different chemicals.²⁷¹ If the inmate is still conscious after the first chemical, he will suffer severe pain from the second and third chemical injections.²⁷² The record contained undisputed evidence that any and all of the current chemicals could be replaced with other chemicals that would pose less risk of pain than the tri-chemical cocktail currently used.²⁷³ The petitioners, Ralph Baze and Thomas Bowling, Jr., were both convicted of murder and faced execution by lethal injection in Kentucky.²⁷⁴ Although they agreed that Kentucky's method of execution by lethal injection would be humane if proper protocol were followed, petitioners alleged that the method was unconstitutional under the Eighth Amendment because of the extreme pain resulting when protocols were not followed.²⁷⁵ They proposed an alternative method of execution. The Court held that Kentucky's method of execution — the tri-chemical cocktail injection — was constitutional; it did not violate the Eighth Amendment.²⁷⁶

In dissent, Justice Ginsburg used powerful, descriptive language. She said that Kentucky's method of execution, if not implemented correctly, “would cause a conscious inmate to suffer excruciating pain. Pancuronium bromide paralyzes the lung muscles and results in slow asphyxiation.”²⁷⁷ The two men were going to be killed in a manner that might “pose[] an untoward, readily avoidable risk of inflicting severe and unnecessary pain.”²⁷⁸ She described the procedure with great clarity, but she also used a good number of medical terms, repeatedly calling the cocktail's ingredients by their scientific names: sodium thiopental, pancuronium bromide, and potassium chloride.²⁷⁹ Although she expressed concern regarding the extraordinary pain that these men, and all the other Kentucky death row inmates, might suf-

²⁷¹ *Baze v. Rees*, 128 S. Ct. 1520, 1527 (2008) (plurality opinion).

²⁷² *Id.* at 1530.

²⁷³ *Id.* at 1531.

²⁷⁴ *See id.* at 1528–29. Baze was convicted of fatally shooting a sheriff and a deputy as they were trying to arrest him, and Bowling was convicted of killing two people and wounding their two-year-old son. James R. Carroll, *Ky. Case May Settle Issue of Execution*, COURIER-JOURNAL (Louisville, Ky.), Sept. 26, 2007, at A1. Both Baze and Bowling are white men.

²⁷⁵ *Baze*, 128 S. Ct. at 1530 (plurality opinion).

²⁷⁶ *See id.* at 1529.

²⁷⁷ *Id.* at 1567 (Ginsburg, J., dissenting).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

fer, Justice Ginsburg did not include many details about the petitioners or emphasize their humanity in her dissent. She explained other state practices, alluded to precedent, and carried out a doctrinal evaluation of Kentucky's method to reach a different conclusion than the Court's judgment. As a result, her dissent reads more like her vision of a correct majority opinion than a demosprudential dissent.²⁸⁰

By contrast, Justice Stevens's concurring opinion is profoundly demosprudential. In the first paragraph he alludes to his main purpose in writing: to generate debate about the merits of capital punishment.²⁸¹ He succeeds initially by prompting Justice Scalia to fire off a special concurrence, accusing Justice Stevens of both an "astounding" retreat from Stevens's previous views and of substituting his own views for those of state legislatures elected by the people.²⁸² "It is Justice Stevens's experience that reigns over all," Justice Scalia warned.²⁸³ Stevens's position was "insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes."²⁸⁴

Of course, Justice Stevens is not privileging his views, but rather suggesting that democratic bodies need to have a real debate on the matter. The debate Justice Stevens seeks to spark goes beyond sparring with his colleagues on the bench. He begins by advising states to reconsider their use of pancuronium bromide, the drug that "masks any outward sign of distress" during execution.²⁸⁵ In Justice Stevens's view, "[s]tates wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide."²⁸⁶

His advice-giving to the states on the merits of Kentucky's protocol for execution is then followed by a general plea to Congress and the courts to contemplate more seriously and more rigorously the merits of the death penalty itself. He explains the issue in democratic terms, suggesting that the decision to employ capital punishment is not due to

²⁸⁰ Given the chance, Justice Ginsburg would have decided differently. *See id.* ("I would not dispose of the case so swiftly given the character of the risk at stake.").

²⁸¹ *See id.* at 1542–43 (Stevens, J., concurring in the judgment) ("Instead of ending the controversy, I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of the paralytic agent, pancuronium bromide, but also about the justification for the death penalty itself.").

²⁸² *Id.* at 1552 (Scalia, J., concurring in the judgment) (writing "to provide . . . needed response to Justice Stevens's separate opinion").

²⁸³ *Id.* at 1555.

²⁸⁴ *Id.* at 1552.

²⁸⁵ *Id.* at 1543 (Stevens, J., concurring in the judgment). He notes that, for this reason, several states bar the use of the drug in animal euthanasia. He goes on to state that the use of the drug is "particularly disturbing" because it serves "no therapeutic purpose." *Id.*

²⁸⁶ *Id.* at 1546.

an “acceptable deliberative process.”²⁸⁷ More specifically, Justice Stevens states:

The thoughtful opinions written by the Chief Justice and by Justice Ginsburg have persuaded me that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.²⁸⁸

Because the three rationales for the death penalty — incapacitation, deterrence, and retribution — have been called into question, “[s]tate-sanctioned killing is . . . becoming more and more anachronistic.”²⁸⁹ Justice Stevens calls upon the Court and the state legislatures to engage in a “dispassionate, impartial” cost-benefit analysis, and to ask themselves the question posed by a former Texas prosecutor, judge, and now professor: “Is it time to Kill the Death Penalty?”²⁹⁰

Next, Justice Stevens explains his own concerns with capital cases. These concerns include the rules depriving the defendant “of a trial by jurors representing a fair cross section of the community,” the higher risk of error as compared to other cases, the risk of discriminatory application, and the irrevocable nature of the death penalty.²⁹¹ Justice Stevens ends this section with a widely quoted paragraph:

I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”²⁹²

In closing, Justice Stevens admits his own moral dilemma. Although he now believes that the death penalty is wrong, he feels bound by the Court’s precedent.²⁹³ And under that precedent, the petitioners did not prove that Kentucky’s lethal injection protocol violated the Eighth Amendment.²⁹⁴

Perhaps the most important facet of Justice Stevens’s opinion was that, as a concurrence, it simultaneously respected and challenged two

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1548–49.

²⁹⁰ *Id.* at 1548 (citing Lupe S. Salinas, *Is It Time To Kill the Death Penalty?: A View from the Bench and the Bar*, 34 AM. J. CRIM. L. 39 (2006)).

²⁹¹ *Id.* at 1550–51.

²⁹² *Id.* at 1551 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (alteration in original)).

²⁹³ *See id.* at 1552.

²⁹⁴ *See id.*

aspects of the Court's prevailing view. In one sense, Justice Stevens's challenge was to the death penalty itself. In another sense, by drawing Justice Scalia's fire, Justice Stevens was also undermining Chief Justice Roberts's goal of greater unanimity. As one commentator noted: "Scalia's fusillade aimed at Stevens — and the fractured nature of a decision that featured seven separate opinions — showed that Chief Justice Roberts's oft-stated goal of more unanimity and cordiality among the justices remains elusive."²⁹⁵

Justice Stevens's concurring opinion was widely reported in the media.²⁹⁶ Although his opinion was not delivered orally and the nature of the opinion was low-key, Linda Greenhouse's article was reverent.²⁹⁷ The *Providence Journal Bulletin* in Rhode Island, which has opposed the death penalty for more than 100 years, commended Justice Stevens for speaking out and stepping up the rhetoric. The editorial transformed Justice Stevens's attempt to "generate debate" on the death penalty into a demand for legislatures and courts "to face the matter squarely" and "put the death penalty to rest."²⁹⁸ The editorial pages of other newspapers also helped translate Justice Stevens's careful words into a clarion call.²⁹⁹ The coverage was abetted in part by the intense reaction of Justice Stevens's colleagues, especially Justice Scalia. One commentator referred to the exchange between Justices Scalia and Stevens as a "duel" in which "Justice Scalia assailed Justice Stevens's opinion with the ferocity of a gladiator."³⁰⁰ One paper, after

²⁹⁵ James Oliphant, *Stevens New Foe of Death Penalty*, CHI. TRIB., Apr. 17, 2008, § 1, at 1.

²⁹⁶ As of August 24, 2008, a Westlaw search in allnews for "<Justice Stevens" and ("Baze v. Rees" or "lethal injection")> after the opinion came down returned ninety-one results. See, e.g., Linda Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22. Coverage of the concurrence extended from Baltimore to Bismarck. See Jennifer McMenamin, *Justices Uphold Lethal Method*, BALT. SUN, Apr. 17, 2008, at 1A; *Legal Opinions — Supreme Court*, DAILY REC. (Balt., Md.), May 19, 2008; Nat Hentoff, Op-Ed., *Sanitizing the Death Penalty*, BISMARCK TRIB. (Bismarck, N.D.), May 10, 2008, at 8A.

²⁹⁷ Greenhouse, *supra* note 296 (describing the remarkable trajectory of a Republican antitrust lawyer renouncing the death penalty "in the 33rd year of his Supreme Court tenure and four days shy of his 88th birthday"); see also Robert Barnes, *In Reversal, Stevens Says He Opposes Death Penalty*, WASH. POST, Apr. 17, 2008, at A12; James Oliphant, *Stevens Reverses Himself*, L.A. TIMES, Apr. 17, 2008, at A12.

²⁹⁸ Editorial, *End the Executions*, PROVIDENCE J. BULL., May 6, 2008, at B4 ("Justice Stevens began his 33-year career on the court as a death-penalty supporter. His change of heart apparently arose from years of seeing it recklessly applied. This newspaper, since the mid-19th Century opposed to capital punishment, views the potential for error as one of the strongest reasons for a ban. We commend Justice Stevens for speaking out.").

²⁹⁹ See, e.g., Editorial, *To Ensure Humane Capital Punishment*, FORT WORTH STAR-TELEGRAM, May 5, 2008, at D2 ("[T]he splintered reasoning by which seven justices came to the same ultimate conclusion already is fueling more debate about how 36 states (plus the federal government) carry out the ultimate punishment.").

³⁰⁰ Bruce Fein, Op-Ed., *Dueling Justices on the Death Penalty*, WASH. TIMES, Apr. 29, 2008, at A14 ("Justice John Paul Stevens dueled with Justice Antonin Scalia in *Baze v. Rees* (April

quoting from Stevens's concurring opinion, suggested that Stevens's call to abolish the death penalty "scandalized" Justice Scalia, who "exploded."³⁰¹ Commentators also noted that Justice Stevens, the longest-serving Justice and part of the Court majority that reinstated the death penalty in 1976, was now the first Justice to renounce the death penalty since 1994, when Justice Blackmun changed his mind on the issue.³⁰² Later, at a public appearance, Justice Stevens drew additional attention to his position by comparing the death of those subject to lethal injection in Kentucky to the Kentucky Derby horse Eight Belles, suggesting the latter had probably experienced a more humane death.³⁰³

Although this opinion is not a blueprint — even if there could be one — for a demosprudential decision, Justice Stevens's concurrence is highly demosprudential. It contains all three characteristics of a demosprudential opinion: an issue of democracy is at the core of the conflict (Justice Stevens particularly notes the current absence of real, democratic deliberation over the continued use of the death penalty, and the deference instead to habit);³⁰⁴ his style is accessible and his position clear; and he intentionally frames his view as one that respects the Court's precedents as a matter of formal law but cannot abide the Court's conclusions without inviting a larger conversation about matters of morality and justice. His opinion combines all three qualities: the substantive, the stylistic, and the invitational. Even though the issue of lethal injection or the death penalty might not be inherently about democracy in the electoral sense of the word, Justice Stevens's concurrence makes democracy central. He does this by concurring in the result, which makes it all the clearer that he does not think the ultimate solution will be found in the Court — he does not even bother to dispute the holding or the reasoning on these facts. But he wants the public conversation about the deeper issue to take place, and he gets the ball rolling with some factors that merit consideration. Although Justice Stevens did not appeal to the public by name, he did appeal to state legislatures, Congress, and the Court. His concurrence probably gave death-row prisoners and death penalty abolitionists

16, 2008) over the death penalty in a detour from upholding the constitutionality of lethal injections.”).

³⁰¹ Hentoff, *supra* note 296.

³⁰² Justice Stevens's repudiation of his own position also stoked the public debate by providing “some comfort to death penalty abolitionists on a day when they suffered a setback at the hands of the court.” Oliphant, *supra* note 295.

³⁰³ Monica Mercer, *Justice Expands on Lethal Injections*, CHATTANOOGA TIMES, May 10, 2008, at A1 (“Supreme Court Justice John Paul Stevens drew a round of applause Friday night in Chattanooga when he suggested that the recently euthanized Kentucky Derby horse Eight Belles [sic] had probably experienced a more humane death than prisoners who die on death row.”).

³⁰⁴ See *Baze v. Rees*, 128 S. Ct. 1520, 1546 (2008) (Stevens, J., concurring in the judgment).

hope.³⁰⁵ He also advised states to reconsider the specific lethal method at issue. Such a broad invocation has serious potential to involve the public at large.

While the opinion continues beyond the ideal length for a demosprudential dissent, the length is not dispositive. Part of the reason for the length of Justice Stevens's opinion is that it is a concurrence: he explains why he now calls the death penalty into question, but still concurs in the judgment. Additionally, the reports in the media show that the Justice's main point — calling for a renewed deliberative process on the death penalty — was not lost due to length or use of medical and chemical jargon. Most of the quotations in the media were of the pithy and memorable sentences that Justice Stevens employed in this effort. Justice Stevens's concurrence differed from traditional, jurisprudential opinions in that he spent the majority of his analysis discussing an issue that was not a question presented in the case at hand: Is the death penalty constitutional and should it be allowed to continue?³⁰⁶ The Justice spent no time quibbling between the rule offered by the majority and the rule offered by Justice Ginsburg in her dissent, nor did he squander space applying a rule to the specific facts at hand.

In his concurrence, Justice Stevens was more restrained than in his earlier *dissent* in *Uttecht v. Brown*,³⁰⁷ a case from the October 2006 Term that allowed jurors to be excluded for cause in capital cases if they disagreed with the death penalty, even if they said they could apply the law fairly. In her analysis of Justice Stevens's dissent, Linda Greenhouse says that *Uttecht* “appears to have been, for [Justice Stevens], the final straw.”³⁰⁸ Perhaps his reaction in *Uttecht* was prompted by a demosprudential logic. Justice Stevens had been one of the co-authors of the 1976 decision that reauthorized the death penalty.³⁰⁹ But *Uttecht* may have prompted the Justice to worry that the jury sending a convicted person to death might no longer be a jury of the person's peers, or that the system was in some way discriminatory. This real or threatened loss of democracy might have pushed Justice Stevens to his current anti-death penalty stance. For Justice Stevens, *Uttecht* arguably represented a triple-loss for democracy: the loss to the defendant who may no longer be judged by a jury of his peers; the

³⁰⁵ A number of newspaper articles quoted Elisabeth Semel's statement that “[t]he door [to challenging the constitutionality of the death penalty] is not closed.” See, e.g., Oliphant, *supra* note 295; *supra* note 302. At minimum, Justice Stevens's opinion was an invitation for discussion, legislation, and new avenues for litigation.

³⁰⁶ See *Baze*, 128 S. Ct. at 1546–50 (Stevens, J., concurring in the judgment).

³⁰⁷ 127 S. Ct. 2218 (2007).

³⁰⁸ Greenhouse, *supra* note 296.

³⁰⁹ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

loss to the “[m]illions of Americans” who might not be allowed to fulfill their civic duty — or participate fully in society by voicing their opinion on a death penalty jury — by serving as a juror in such a case;³¹⁰ and the loss to legitimacy and fairness in a justice system that continues to execute people while excluding a segment of society from the deliberation producing such an absolute decision.

Justice Stevens’s concurrence in *Baze* was more low-key, less dramatic, and more restrained than his dissent in *Uttecht*, yet his concurrence in *Baze* was more explicitly demosprudential. In *Baze* he gestured toward a source of democratic authority beyond the force of precedent. That source of authority involved active engagement by a larger audience in constitutional discourse about the morality of the death penalty itself. It seems that the Court’s role in decreasing the democracy of the death penalty gave Justice Stevens a sense of his demosprudential duty regarding this issue. The relationships between these two cases generally and Justice Stevens’s opinions in these cases particularly, warrant further study. Justice Stevens’s opinions in *Baze* and *Uttecht* serve as a resource for understanding how and why demosprudential opinions or a demosprudential Justice can develop, and they suggest the important role of constitutional culture in making constitutional law.³¹¹

2. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (Stevens, J., dissenting) (oral dissent). — On June 26, 2008, for the first time in American history, the Supreme Court held that the Second Amendment protects the individual right to own a gun for private, nonmilitary purposes.³¹² Justice Scalia wrote the majority opinion and announced the 5–4 decision. *Heller* is a case in which the majority opinion was arguably more demosprudential than the dissent. At a minimum, the demosprudence in the majority opinion called for, but did not receive, a demosprudential response.³¹³

³¹⁰ *Uttecht*, 127 S. Ct. at 2238 (Stevens, J., dissenting).

³¹¹ That the *Uttecht* Court limited democracy in various ways may have prompted Justice Stevens to call for a more public review of the death penalty’s constitutionality in *Baze*, a case where that issue was not directly presented. That *Uttecht* continued to haunt him seems significant, as Greenhouse points out, because Justice Stevens is “[o]ne of the court’s most frequent dissenters,” but he “does not look back on every loss with such a sense of stinging disappointment.” Greenhouse, *supra* note 296. As a result, Justice Stevens went beyond even what the *Baze* defendants were asking for. He shows that it is never too late for a Justice to respond in a demosprudential manner, even if he or she did not do so, or did not do so successfully, in an earlier case or a case that was more on point.

³¹² As was also true of Justice Breyer’s oral dissent in *Parents Involved*, almost a year to the date earlier, this decision came down on the last day of the Term.

³¹³ See Reva B. Siegel, *The Supreme Court, 2007 Term—Comment: Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (describing the longstanding use of Justice Scalia’s originalism jurisprudence by the New Right social movement, which culminated in the *Heller* opinion).

Robert Barnes, the Supreme Court reporter for the *Washington Post*, was present for the decision hand down. As Justice Stevens delivered his dissent from the bench, “people were hanging on every word in the courtroom.”³¹⁴ Speaking for the four-Justice minority, Justice Stevens declared, “there is no untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in urban areas.”³¹⁵ Justice Stevens sent “an unmistakable signal that he deeply disagreed with the majority.”³¹⁶ In a tone more even-keeled than Justice Breyer’s in 2007, he nevertheless denounced the Court’s “new constitutional right” and declared that decisions about gun control should be made by legislatures, not judges.³¹⁷

Part of what made *Heller* so dramatic was the back and forth between Justice Scalia and Justice Stevens, and the differences in their approaches.³¹⁸ As Justice Scalia read his own opinion, “Stevens occasionally shook his head in disbelief.”³¹⁹ According to Barnes, when Justice Scalia began he was careful to say that he was giving a summary of the majority opinion but any one who suspected any inaccuracies in how he reported the decision could go read the “154 pages.”³²⁰ After Justice Scalia finished speaking, Justice Stevens said, “Do not accept the summary you have just heard.”³²¹ By contrast with Justice Scalia, Justice Stevens did not merely summarize his written dissent. He shifted the issue from a disquisition on originalism to a straightforward challenge to the majority’s form of conservatism. For Justice Stevens, the members of the majority were imposters: they were not “genuine judicial conservatives.”³²² Genuine conservatives were those

³¹⁴ Barnes, *supra* note 20. What is particularly striking about this interview is that Barnes was on vacation when I spoke to him; he did not have access to his notes. His comments were based on his memory of an event that was by then three weeks old. Yet his recollection of the oral dissent, the transcript of which neither of us had seen at the time, is almost pitch perfect. See *supra* Parts I and II (discussing the iterative quality and democratic accountability that may come from Justices actually delivering their opinions in front of a live audience).

³¹⁵ Transcript of Oral Opinion of Justice Stevens at 4, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (on file with Harvard Law School Library) [hereinafter Stevens’s Oral Dissent, *Heller*].

³¹⁶ Linda Greenhouse, *Justices, Ruling 5–4, Endorse Personal Right To Own Gun*, N.Y. TIMES, June 27, 2008, <http://query.nytimes.com/gst/fullpage.html?res=9F05EEDD143AF934A15755CoA96E9C8B63&sec=&spon=&partner=permalink&exprod=permalink> (last visited June. 27, 2008).

³¹⁷ *Excerpts from the Opinions*, WASH. POST, June 27, 2008, at A7.

³¹⁸ Many media reports in fact picked up on the “dueling” quality of the two Justices. See, e.g., *id.* (noting that Justices Scalia and Stevens “engaged in a line-by-line battle over the meaning of the amendment”).

³¹⁹ Posting of Tony Mauro to The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2008/06/supreme-court-1.html> (June 26, 2008, 11:56).

³²⁰ Barnes, *supra* note 20.

³²¹ Mauro, *supra* note 319.

³²² *Id.* (“With emphasis on the word ‘genuine,’ Stevens said that ‘a genuine judicial conservative’ would not have inserted the Court into the ‘political thicket’ of the gun rights debate as Scalia had done.”). In his oral dissent Justice Stevens said:

like Justice Felix Frankfurter, who advocated deference to the considered judgment of a democratically elected city legislature, a body more in tune with the needs and challenges of its urban constituency.³²³

Unlike his oral dissent, which, according to Barnes, seemed to be “directed to the politics” of gun control — an issue the demos should decide — Justice Stevens’s written dissent was a detailed Second Amendment response to Justice Scalia.³²⁴ In that written dissent, he argued that the majority opinion caused “a dramatic upheaval in the law,”³²⁵ as it employed a “strained and unpersuasive reading”³²⁶ of the Second Amendment to claim that the amendment “enshrined” the individual right to own a gun.³²⁷ Justice Stevens’s analysis suggested that the majority disregarded the amendment’s “omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense.”³²⁸ He used textual and historical analysis of the amendment and other documents to demonstrate how the majority opinion misinterpreted unanimous precedent, namely *United States v. Miller*,³²⁹ and created a new constitutional right to own and use firearms for private purposes.³³⁰ Justice Stevens also noted, as he did in the oral dissent, that ignoring precedent and bypassing “judicial restraint” caused the majority to throw the Supreme Court into a “political thicket,” a risk about which the “real” judicial conservative, Justice Frankfurter, had warned half a century ago.³³¹

Although Justice Stevens writes in clear and accessible language, several features of his written dissent in *Heller* suggest that it is written primarily for his colleagues and other members of the legal com-

It was only a few years after the decision in *Miller* that Justice Frankfurter wrote his famous opinion warning of the perils of this Court’s entry into a political thicket. The political thicket that the Court has decided to enter today is different from, but no less controversial than, the one that concerned Justice Frankfurter, a genuine judicial conservative.

Stevens’s Oral Dissent, *Heller*, *supra* note 315, at 4. Listening to the oral dissent, it was clear that for Justice Stevens “this is a political issue, which the Court should not be getting into.” Barnes, *supra* note 20.

³²³ Stevens’s Oral Dissent, *Heller*, *supra* note 315, at 4.

³²⁴ *But cf. Heller*, 128 S. Ct. at 2846 n.39 (Stevens, J., dissenting) (comparing with disfavor the majority’s failure to exercise judicial restraint in circumventing a political process that was working to “mediat[e] the debate between the advocates and opponents of gun control” with the “political thicket” of legislative districting — where the political process was *not* working and thus the Court’s intervention was ultimately necessary).

³²⁵ *Id.* at 2824.

³²⁶ *Id.* at 2823.

³²⁷ *Id.* at 2846.

³²⁸ *Id.* at 2825.

³²⁹ 307 U.S. 174 (1939).

³³⁰ *Heller*, 128 S. Ct. at 2845–46 (Stevens, J., dissenting).

³³¹ *Id.* at 2846 n.39; *see also id.* at 2847 (suggesting that the majority opinion would result in a “far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries”).

munity. That dissent is over fifteen thousand words, compared to his oral dissent of approximately one thousand words.³³² Most of the written dissent consists of close textual and historical analysis of the Second Amendment and other documents or contexts — such as the seventeenth-century Bill of Rights, early state proposals, postenactment commentary on the Second Amendment, and Blackstone’s *Commentaries on the Laws of England*³³³ — not texts that nonlawyers will read anytime soon. Furthermore, it is clear that Justice Stevens is not addressing the public in an attempt to bring about change; rather, unlike his concurrence in *Baze*, his dissent in *Heller* is primarily in conversation with Justice Scalia, who authored the majority opinion, and with members of the legal profession. In his written dissent, the conversation with Justice Scalia, however, is mostly one-way. Justice Scalia’s majority opinion makes frequent references to Justice Stevens’s dissent,³³⁴ but Justice Stevens makes fewer explicit references to the majority opinion. The most demosprudential aspect of Justice Stevens’s written dissent may be the fact that he read part of it in oral dissent.

Justice Stevens’s oral dissent clearly meets the first and second demosprudential criteria. It meets the first criterion, as an issue of democracy is at the core of the conflict: the Court’s power to reinterpret the constitutional text and impose its new interpretation on the locally elected D.C. governing bodies. Moreover, as will be discussed later in this Part, his challenge to originalism itself has the potential to bear democracy-enhancing fruit.³³⁵

Justice Stevens’s oral dissent also easily meets the second demosprudential criterion concerning accessibility of style and structure. His assertion that the militia interpretation is the “most natural reading of the 27-word text” applies the no-nonsense principle that form follows function; he is clear in his appeal to general common sense.³³⁶ Although his use of eight points exceeds the classic three-point protocol for maintaining an audience’s attention, Justice Stevens keeps those points concise and comprehensible for listeners. He uses simple language that refers to case precedents plain to the average high-school-

³³² Yet Justice Stevens managed to “hit most of the highlights of the written dissent” in his short oral dissent. Barnes, *supra* note 20.

³³³ *Heller*, 128 S. Ct. at 2831–39 (Stevens, J., dissenting).

³³⁴ *Id.* at 2789, 2794–97, 2804–07, 2813–14, 2816 (majority opinion).

³³⁵ See *infra* p. 111 (discussing originalism’s failure to acknowledge the ratification condition — that those who were deliberately excluded from the original constitutional community have never had the opportunity to ratify the original terms, which were simply grandfathered into the “living constitution”). On the other hand, Justice Stevens in many ways capitulated to originalism by having the fight on that ground instead of focusing on the impact of the law now, which might have made this a more demosprudential dissent. Cf. Siegel, *supra* note 313, at 197.

³³⁶ Stevens’s Oral Dissent, *Heller*, *supra* note 315, at 1.

educated listener. The oral dissent is brief and accessible, leaving out technical and detailed historical analysis and dismissing the individual rights argument in two sentences.³³⁷ However, the oral dissent seems to be a direct response to Justice Scalia, in which case it is less demos-prudential and more of an internal conversation within the Court.

At first, it might seem that the oral dissent also meets the third criterion of demosprudence — encouraging democratic deliberation — by arguing for a political resolution to gun control policy. The issue of the right to bear arms and its limitations is of clear concern to the American public, and in that sense, has implications for democratic engagement. Justice Stevens reaffirms the exclusive role of the political branches of government in addressing “complex and critically important questions of public policy,” such as gun control.³³⁸ Emphasizing this point, Justice Stevens notes the reliance of “countless legislatures” on a particular perspective on the Second Amendment.³³⁹ Moreover, he acknowledges, but does not necessarily encourage, the broader public discourse over gun control by questioning the impact of the Court’s decision outside the judicial realm on the “ongoing debate between the advocates and opponents of gun control.”³⁴⁰

Yet, Justice Stevens’s oral dissent does not fully realize the third prong of distributive or deliberative accountability. In introducing the eight reasons “why most judges would endorse” his viewpoint, Justice Stevens implicitly limits the conversation to judicial actors.³⁴¹ And in treating the mindset of James Madison and the “Framers of the Amendment,” as well as that of the Court in the 1939 *Miller* case, as authoritative and definitive, Justice Stevens excludes the contemporary public from exercising agency in deciding this matter.

In fact, Justice Stevens’s engagement of the public in democracy-enhancing deliberation in this dissent appears to be more of an after-

³³⁷ For example, in his oral dissent Justice Stevens stated: “[R]egulation of the civilian use of firearms raises complex and critically important questions of public policy that have heretofore been resolved exclusively by the political branches of our government. This Court should stay out of that political thicket.” Stevens’s Oral Dissent, *Heller*, *supra* note 315, at 3. That same idea was articulated in the written dissent, in a less straightforward manner:

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court’s announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a “law-abiding, responsible citizen[]” the right to keep and use weapons in the home for self-defense is “off the table.”

Heller, 128 S. Ct. at 2846 (Stevens, J., dissenting).

³³⁸ Stevens’s Oral Dissent, *Heller*, *supra* note 315, at 3.

³³⁹ *Id.*

³⁴⁰ *Id.* at 5.

³⁴¹ *Id.* at 1.

thought or side effect. His contention that Justice Frankfurter is a “genuine judicial conservative,” for example, could be interpreted as either Supreme Court-oriented criticism of his “conservative” peers or as public shaming of the “conservatives” on the Court to increase debate in American society about the Court’s role in such political matters. While the objectives of censuring the other judges and evoking public outcry are not mutually exclusive, had Justice Stevens intended to be demosprudential he would have been more attuned to the constitutional culture that made the majority’s opinion possible in the first place.

Indeed, Justice Scalia’s majority opinion — which most commentators acknowledge was, as Justice Stevens argued, “a dramatic upheaval in the law” — reflected the intriguing convergence between constitutional law and constitutional culture. Professor Cass Sunstein argues, for example, that the Court’s remarkable departure from prior law “cannot be adequately understood by reading what the justices wrote.”³⁴² Rather, the Court’s decision was in large part the result of “the efforts of many citizens over the last two decades to establish the existence of an individual right to bear arms for purposes of hunting and self-defense.”³⁴³ The Court’s broad interpretation of the Second Amendment is best explained by “a change in the public climate in which Republican appointees, in particular, [became] sympathetic to the gun right.”³⁴⁴ And that sympathy was cultivated in part by changes in the constitutional culture involving the right to privacy (and thus the right to self-defense in one’s own home); such changes were driven by the convergence of several movements, from the gay rights movement and the women’s movement to the gun rights movement, led by the National Rifle Association (NRA).³⁴⁵

The majority opinion in *Heller* represented the triumph of one social movement in particular. As Reva Siegel recounts in her Comment, Justice Scalia’s originalist jurisprudence, which had given the New Right gun lobby much of its intellectual energy, also served as its political compass.³⁴⁶ Or as Cass Sunstein writes: “[The Court’s deci-

³⁴² Cass Sunstein, Op-Ed., *America’s 21st-Century Gun Right*, BOSTON GLOBE, June 27, 2008, at A13.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ Cf. Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism: Heller As Griswold*, 122 HARV. L. REV. 246, 262–63 (2008).

³⁴⁶ See Siegel, *supra* note 313 (describing originalism as a political project in part because the nonjudicial participants, such as Attorney General Ed Meese and NRA President Charlton Heston, were literate about the kind of arguments they needed to make and the mileage they gained in associating themselves with Justice Scalia’s jurisprudence; thus the jurisprudence of originalism bestowed constitutional legitimacy upon their arguments about the individual right to bear arms).

sion in *Heller*] is a stunning development . . . [that] reveals a much broader point: Constitutional change often comes from the efforts of energetic political movements, of which the movement for gun rights is merely one example.”³⁴⁷

A counter-movement, armed with a Supreme Court Justice’s dissenting voice, might have been invigorated to resist and ultimately to narrow the majority’s holding. But to realize this demosprudential potential, an oral dissent needed to have more explicitly identified and affirmed the agency of gun control advocates. Or a demosprudential dissent might have anchored its critique in what Cass Sunstein describes in his Comment as the ongoing constitutional law/constitutional culture conversation about the right to privacy.³⁴⁸ As Justice Stevens noted in his criticism of the majority’s view that the Second Amendment codified a common law rule, the *Heller* decision is “not subject to amendment by the legislature” in the same way that other common law rulings are.³⁴⁹ Nevertheless, a demosprudential dissenter could have alluded to the role that a mobilized public might play at the local level to ensure that the Court’s reading of the Constitution was implemented in its most narrow formulation in gun-ravaged urban environments. In 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.

Had the dissent been framed with greater demosprudential intentionality, its message might have reached a broader audience, or influenced the terms of engagement for national thought leaders. The means of transmission — the mainstream media as well as the blogosphere — were already primed. Indeed, media coverage of Justice Stevens’s dissent, like that of his concurrence in *Baze*, was widespread. Most major news sources covered *Heller* and discussed Justice Stevens’s dissent as a counterbalance to the majority opinion. The news sources in most cities were sympathetic to Justice Stevens’s opinion, but some commentators criticized him for engaging in “law office history,”³⁵⁰ debating the issue on Justice Scalia’s grounds, ignoring the travesty of post-Reconstruction holdings, and being too “concerned with scoring points in smaller disputes.”³⁵¹

³⁴⁷ Sunstein, *supra* note 342. Professor Sunstein points out: “As recently as 1992, then Chief Justice Warren Burger, a conservative, publicly declared that ‘the Second Amendment doesn’t guarantee the right to have firearms at all.’ And until 2007, not a single federal court had invoked the Second Amendment to strike down a restriction on gun ownership.” *Id.*

³⁴⁸ See Sunstein, *supra* note 345, 261–264.

³⁴⁹ Stevens’s Oral Dissent, *Heller*, *supra* note 315, at 4.

³⁵⁰ Posting of Sanford Levinson to The Huffington Post, http://www.huffingtonpost.com/sanford-levinson/dc-v-heller-a-dismaying-p_b_109472.html (June 26, 2008, 17:56).

³⁵¹ Text & History, <http://theconstitution.org/blog.history/?p=410> (June 27, 2008); see also Ronald A. Cass, *DC v. Heller: Ending the Term with a Bang*, RealClearPolitics.com,

In part because Justice Stevens's dissent did not frame the debate in obviously demosprudential terms, many gun control advocacy groups sent out press releases calling for legislative action but did not focus on either Justices Stevens's or Breyer's dissents. Many small-town newspapers focused on the impact on local gun restrictions and their viability under the new holding. Justice Stevens's critique of the politicization of the judiciary gained some traction among non-elites, but he did not leverage it as Justice Ginsburg did in the *Ledbetter* case, to help oppositional community representatives respond productively to the majority's opinion.

Justice Stevens missed an opportunity to address thought leaders around the country and model for them multiple ways to keep a more dynamic conversation going. Justice Stevens could have directed his dissent, as Justice Breyer seemed to do in *Parents Involved*, to local public officials and urban community leaders who would be crucial in mobilizing public sentiment and orienting public concerns to play a productive role in the gun debate. Instead, he directed his written dissent to a different audience — law professors and judges, especially his colleague Justice Scalia. Despite this limitation, however, Justice Stevens's written concurrence in *Baze* and, to a lesser degree, his oral (as opposed to his written) dissent in *Heller* (taken in conjunction with Justice Scalia's majority opinion) were the most demosprudential opinions of the Term.

3. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (*Scalia, J., dissenting*) (*oral dissent*). — The question in *Boumediene v. Bush* was whether a non-citizen detainee captured outside the United States and held at Guantánamo Bay was entitled to a hearing before a federal judge. In an opinion by Justice Kennedy, the Supreme Court held that detainees in these circumstances are entitled to “prompt” habeas corpus review by a civilian court under the Suspension Clause.³⁵² These hearings must be sufficiently comprehensive to reduce the likelihood of an erroneous designation as an enemy combatant.³⁵³ The detainee must also have the assistance of a lawyer and the opportunity to refute evidence offered by the Pentagon.³⁵⁴ Release of some kind must remain a potential remedy.³⁵⁵

http://www.realclearpolitics.com/articles/2008/06/dc_v_heller_ending_the_term_wi.html (June 27, 2008) (“Politicians now will debate what our gun laws should be.”).

³⁵² *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

³⁵³ *Id.* at 2266.

³⁵⁴ *Id.* at 2260.

³⁵⁵ *Id.* at 2266–67. The holding did not address whether non-citizen detainees captured outside of the United States and held outside U.S. territory at locations other than Guantánamo Bay were similarly entitled to a hearing. The holding also left open the possibility that Congress could pass a law that successfully suspends the writ of habeas corpus for detainees held abroad, but it makes simply withdrawing jurisdiction over those cases much more difficult.

Chief Justice Roberts wrote a relatively tempered dissent, in which he accused the majority of striking down the most generous set of procedures ever afforded non-citizens detained as enemy combatants and leaving it to the federal courts to shape what procedures will eventually be put in place.³⁵⁶ His dissent reasoned that the detainees had been provided the essential elements of a habeas hearing through the military tribunals provided under the Detainee Treatment Act.

In addition to joining Chief Justice Roberts's dissent, Justice Scalia wrote his own dissenting opinion,³⁵⁷ clearly crafted to appeal to the broader public by playing into popular fears of terrorism. In that written dissent, he began not by discussing errors of law, but by asserting that "America is at war with radical Islamists."³⁵⁸ He made sure to frame the conflict in theatrically compelling terms: terrorists threaten not only our country, but "our homeland."³⁵⁹ Without stating it, he also implied that the Court acts undemocratically when it "elbows aside" both the military and Congress.³⁶⁰ Notably, he framed the issue as a political question and not a legal question; thus, in his view, the Court overstepped its boundaries by deciding what he perceived to be exclusively a policy question.³⁶¹ Although his criticism could be seen as an attack on the Court for acting anti-democratically, Justice Scalia chose to frame this criticism primarily in terms of the greater competency of the political branches and the greater authority of these branches as a matter of democracy and popular representation. Moreover, in his words, the majority opinion will not only hamper the ability of the President to fight terrorism, "[i]t will almost certainly cause more Americans to be killed."³⁶² "The Nation," he concluded, "will live to regret what the Court [decided]."³⁶³

Like his written dissent, Justice Scalia's oral dissent emphasized the relative competence of the Court and military authorities and accused the Court of overstepping its constitutional bounds.³⁶⁴ However, as in the written dissent, he did not discuss the democratic implications of a Court overturning legislation. He did not take the opportu-

³⁵⁶ *Id.* at 2279 (Roberts, C.J., dissenting).

³⁵⁷ *Id.* at 2293 (Scalia, J., dissenting).

³⁵⁸ *Id.* at 2294.

³⁵⁹ *Id.*

³⁶⁰ *See Id.* at 2295–96.

³⁶¹ First, he asserted that the Court failed to acknowledge its own statement in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that Congress could grant the President the power to detain non-citizen detainees. *Boumediene*, 128 S. Ct. at 2295–96 (Scalia, J., dissenting). Then he argued that the Court has neither the authority nor the competence to second-guess the decision of the Executive and Congress that "prisoners captured abroad [being] properly detained is important to success in the war that some 190,000 of our men and women are now fighting." *Id.* at 2296.

³⁶² *Boumediene*, 128 S. Ct. at 2294.

³⁶³ *Id.* at 2307.

³⁶⁴ *See* Scalia's Oral Dissent, *supra* note 203, at 3.

nity to highlight the democratic failings of the Court's opinion and to pursue a larger conversation about the Court's role in our democracy. Instead, Justice Scalia asserted his views, leaving little left for debate or public deliberation. In this respect, his oral dissent is not demosprudential. In discussing relative competence and constitutional bounds, however, Justice Scalia did invoke the principles of democracy. The effect may not be immediately recognizable as demosprudential, however, because it emphasized elements such as competence and constitutional restrictions over participation and majoritarianism. Such obscure references to democracy are unlikely to resonate with the nonlegal public.

In fact, Justice Scalia's oral dissent in *Boumediene* might be considered less demosprudential than the written one because the oral language seems far less likely to motivate laypersons.³⁶⁵ He leaves out from the oral dissent the phrase "more Americans [will] be killed," a key line in the written dissent. He also spends a relatively significant portion of his time on precedent and the history of habeas corpus. He would have been more demosprudential had he situated the decision in its historical context and in the Court's repeatedly finding the administration's provisions for addressing prisoners' habeas rights unconstitutional.³⁶⁶

Both Justice Scalia's oral and written opinions thus miss some opportunities for demosprudential impact. However, Justice Scalia did write in easy, comprehensible language, and his written dissent was almost vitriolic in its efforts to convince readers of the majority's errors. And even where his words do not seem to be aimed at providing a deliberative space for public engagement with the lawmaking/interpretative function of the Court, his role often accomplishes that goal. He effectively mobilizes activists on the Right to engage in and contest the terrain of public discourse. The ultimate demosprudential question may be, therefore, to what extent he is able in *Boumediene* to make a vision of democracy genuinely "audible" to his particular constituency of accountability, especially as he uses compelling language to get their attention.

³⁶⁵ According to Robert Barnes, the Supreme Court reporter for the *Washington Post*, who was present for Justice Scalia's oral dissent in *Boumediene*, "The written dissent made better reading than the oral dissent made listening." Barnes, *supra* note 20.

³⁶⁶ In his short oral dissent, Justice Scalia said, "[T]he rule of law includes limitations upon the courts, just as it includes limitations upon the other two branches." Scalia's Oral Dissent, *supra* note 203, at 3. He drew on the example of German prisoners in the United States during World War II and asserted, "In our entire history, no prisoner held by our military forces during an ongoing armed conflict has been given resort to our civil courts." *Id.* Then, he concluded, "We will live to regret this self-invited and unprecedented incursion of the judiciary into military affairs." *Id.* at 4.

4. *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008) (*Scalia, J., dissenting*). — Unsatisfied with a primary system instituted by the state legislature, 60% of the voters in Washington approved Initiative 872 in 2004.³⁶⁷ Initiative 872 was sponsored by the Washington State Grange, a nonpartisan, grassroots advocacy group with a long history of supporting populist ballot measures and women's political equality.³⁶⁸ By approving the initiative, voters adopted "a 'top two' primary system in which a [voter] ha[d] 'the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation of either the voter or the candidate.' . . . [T]he two candidates with the most votes advance[d] to the general election, regardless of political party preference."³⁶⁹ In other words, in this primary system voters choose candidates rather than political party standard-bearers. What had once been a political party *nominating* system now became a winnowing procedure. The new system was intended to make the primary election a nonpartisan process for reducing the number of contenders on the general election ballot to two candidates (possibly of the same political party).

The state political parties quickly challenged one feature of the new system: it allowed primary candidates to list their own party preferences on the ballot. Thus, in *Washington State Grange*, the question presented was whether a primary election system that lets a candidate self-identify a party preference, and then awards a general election ballot spot to the top two vote-getters, violates the rights of political parties to associate with the candidates of their choice.³⁷⁰ In an opinion by Justice Thomas, the seven-Justice majority found that Initiative 872

³⁶⁷ WASHINGTON STATE SECRETARY OF STATE, HISTORY OF WASHINGTON STATE PRIMARY SYSTEMS 2, available at <http://www.secstate.wa.gov/documentvault/HistoryofWashingtonStatePrimarySystems-920.pdf> (last visited Oct. 5, 2008) ("[T]he Secretary of State's Office receive[d] more than 14,000 phone calls and letters from voters opposed to the pick-a-party primary system. Post-primary surveys reveal[ed] that only 21% of voters supported the pick-a-party primary.").

³⁶⁸ The Grange is a farm-based fraternal, social, and civic organization "with both legislative programs and community activities." Washington State Grange, http://www.wa-grange.org/whats_the_grange.htm (last visited Oct. 5, 2008); see also HistoryLink.org, Washington Farmers Organize State Grange on September 10, 1889, http://historylink.org/essays/output.cfm?file_id=5670 (last visited Oct. 5, 2008). The women in Washington's Grange played a vital role in the organization from the start; while their leadership positions were initially limited to community-building efforts, they eventually held the same political positions as the men. Marilyn P. Watkins, *Political Activism and Community-Building Among Alliance and Grange Women in Western Washington, 1892-1925*, AGRIC. HIST., Spring 1993, at 197, 199. Today in Washington there are 40,000 Grangers (as their members are called), which represents the largest concentration nationally.

³⁶⁹ WASHINGTON STATE SECRETARY OF STATE, *supra* note 367, at 2 (quoting Initiative 872, as proposed in 2004).

³⁷⁰ *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1192 (2008).

does not necessarily force political parties to associate with candidates they do not endorse. It does not modify the messages the parties wish to convey. Nor does it compel the parties to engage in counterspeech to disassociate themselves from candidates whose positions on the issues are unwelcome. As prior cases had made clear, ballots are *not* forums for political expression but are primarily a means of electing candidates.³⁷¹ Thus Initiative 872 was consistent with the Court's prior jurisprudence.³⁷² The State had various options for avoiding voter confusion as to candidates' status as party representatives. As a facial challenge prior to any statewide election, the political parties' arguments about forced association and compelled speech were premature.³⁷³ Chief Justice Roberts wrote a separate concurrence, suggesting that the Court should wait and see before striking down the law because it might be "implemented in a manner that no more harms political parties than allowing a person to state that he 'like[s] Campbell's soup' would harm the Campbell Soup Company."³⁷⁴

Justice Scalia wrote a fairly conventional jurisprudential dissent in which he took on both the majority opinion and Chief Justice Roberts's concurrence. Justice Scalia's eleven-page dissent vigorously challenged the state's primary system as a "severe burden" on a political party's "vital" right of political association.³⁷⁵ Justice Scalia then boldly stated: "It is no mystery what is going on here. There is no

³⁷¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997); see also *Burdick v. Takushi*, 504 U.S. 428 (1992) (using similar logic to reject challenge to prohibition on write-in voting, when challenger wanted to cast a protest vote in the then-one-party state of Hawaii).

³⁷² See *Timmons*, 520 U.S. at 362–63 (holding that political parties do not have a "right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate"). Justice Thomas acknowledged the possibility that this popularly enacted election process might ultimately infringe on political parties' freedom of association or freedom of speech. Initiative 872 might complicate the party's interest in vetting or endorsing those who proclaim themselves legitimate holders of the party's banner, but, Justice Thomas said, that was sheer speculation at that point. See *Wash. State Grange*, 128 S. Ct. at 1193.

³⁷³ As in the *Crawford* challenge, discussed *infra* pp. 85–110, no actual election had yet been held at the time of the lawsuit. Thus petitioners were held to the standards for those making a facial challenge, which "must fail where the statute has a 'plainly legitimate sweep.'" *Wash. State Grange*, 128 S. Ct. at 1190 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739–40 & n.7 (1997) (Stevens, J., concurring in the judgments)). Especially where a law had been adopted by a vote of "the people," a "facial challenge" was inconsistent with principles of judicial restraint, according to Justice Thomas, and served primarily as a means of shortcircuiting the democratic process. *Id.* at 1191.

³⁷⁴ See *id.* at 1200 (Scalia, J., dissenting) (alteration in original) (quoting *id.* at 1197 (Roberts, C.J., concurring)).

³⁷⁵ *Id.* at 1198. In particular, "Washington has done more than merely decline to make its electoral machinery available for party building. . . . [It] seeks to reduce the effectiveness of [the party] endorsement" and "makes the ballot an instrument by which party building is impeded, permitting unrebutted associations that the party itself does not approve." *Id.* at 1199 (highlighting "the special role that a state-printed ballot plays in elections").

state interest behind this law except the Washington Legislature's dislike for bright-colors partisanship, and its desire to blunt the ability of political parties with noncentrist views to endorse and advocate their own candidates."³⁷⁶ In sum, Justice Scalia argued that the Washington system "distorts" the political parties' message, "hijack[s]" their "goodwill," and undermines their "most precious resource," their names.³⁷⁷

As a definitional matter, Justice Scalia's dissent certainly meets the first demosprudential criterion. The topic of the case — the rights of political parties to control who associates with them on the ballot — definitely addresses an issue of democracy. Justice Scalia's dissent is also demosprudential in language and style, the second demosprudential element. He embellished the careful jurisprudential detail of his dissent with florid prose, capped by his memorable reference to Chief Justice Roberts's Campbell's soup analogy, saying that Washington's law was the equivalent of allowing "Oscar the Grouch (Sesame Street's famed bad-taste resident of a garbage can)" to endorse Campbell's soup repeatedly, without allowing the soup company to disavow his statement.³⁷⁸ Arguably, the Justice uses his dissent to speak to other democratic actors — but it is also possible that the Oscar the Grouch line was less an effort to appeal to a lay audience and more a way of mocking his colleagues. Nevertheless, Justice Scalia's dissent certainly displays a certain cultural literacy with his reference to a Sesame Street character, and passion coursed through his dissent.

The harder question involves the third criterion, the extent to which the dissent invited a more extended debate about the issue at stake: in this case, the relative merit of a candidate-centered versus a political party-dominated approach. Although coverage of the case was extensive in media outlets throughout the state, the local media did not pay much attention to Justice Scalia's dissent. There were occasional mentions of the Oscar the Grouch line,³⁷⁹ but more from be-

³⁷⁶ *Id.* at 1202. Justice Scalia concluded, "We have here a system which . . . does not merely refuse to assist, but positively impairs, the legitimate role of political parties. I dissent from the Court's conclusion that the Constitution permits this sabotage." *Id.* at 1203.

³⁷⁷ *Id.*; see also Tony Mauro, *Oscar the Grouch Makes High Court Debut*, DAILY REP., Mar. 24, 2008, at 1.

³⁷⁸ See *Wash. State Grange*, 128 S. Ct. at 1201 (Scalia, J., dissenting); see also Mauro, *supra* note 377 ("March 18 was a historic day at the Supreme Court, not just because of the oral argument in the Second Amendment case *D.C. v. Heller*. It also marked the first time that Oscar the Grouch entered the annals of Supreme Court jurisprudence. Justice Antonin Scalia is the one to thank for this milestone."). A database check confirms this was the first time Oscar the Grouch has been mentioned in a Supreme Court opinion.

³⁷⁹ A Westlaw search in the "allnews" database for "<Scalia" & "Grange"> 201 days after the opinion came down returned twenty-three results mentioning the case, but only two of those results discussed Justice Scalia's dissent in any detail (not including their discussion of Justice Scalia's reference to Oscar the Grouch). Only an article by Richard Roesler really portrays the tone and strength of the dissent. See Richard Roesler, *"Top Two" Wins a Big One*, SPOKESMAN-

amusement than intense interest. The relative indifference of the local journalists may simply reflect a political culture where voters place less weight on party philosophy or party endorsement and more weight on the qualities of individual candidates. Most citizens in Washington do not share Justice Scalia's view "that adherence to party philosophy is 'an important — perhaps paramount — consideration in the citizen's choice.'"³⁸⁰ This may be a residue of the Grangers' effort over time to protect the rights of voters from "corporate" political parties.

Justice Scalia faced a particularly tough challenge as a demosprudential dissenter in this case, since there was in fact a mobilized constituency on the other side. The Washington State Grange was not merely the named petitioner in the case or a key sponsor of the Initiative. From its founding, the State Grange has always supported Populist political platforms, including direct primary elections, women's suffrage, and public power.³⁸¹ It was organized in 1889 by farmers opposed to the proposed constitution for the State of Washington, which they felt "favored railroads, eastern capitalists, secret sessions of the legislature, and formation of an office-seeking class, the most worthless class that can exist."³⁸² As Justice Thomas's majority opinion noted, the State Grange "supported the Washington constitutional amendment establishing initiatives and referendums and sponsored the 1934 blanket primary initiative."³⁸³ In the earlier, turn-of-the-century system, political conventions, not voters, had determined the party nominee. Pressured by the Grange and other grassroots groups, at the height of the Depression the state switched to a "blanket primary" system in which voters were allowed to choose candidates from different parties for different political offices.³⁸⁴

In 2000, however, the Supreme Court invalidated California's blanket primary system in *California Democratic Party v. Jones*.³⁸⁵ In response, Washington's Democratic, Republican and Libertarian parties challenged the state's blanket primary in court, on the grounds that blanket primaries "allow nonmembers to dictate the standard-

REV. (Spokane, Wash.), Mar. 19, 2008, at A1. Perhaps the lack of media coverage, however, is in part due to the fact that Justice Scalia's primary audience seemed to be the other Justices.

³⁸⁰ *Wash. State Grange*, 128 S. Ct. at 1202 (Scalia, J., dissenting) (quoting *Anderson v. Martin*, 375 U.S. 399, 402 (1964)).

³⁸¹ HistoryLink.org, *supra* note 368. As Justice Thomas's majority opinion notes, although the Grange was originally organized to represent farmers' interests, the Grange has advocated "women's suffrage, rural electrification, protection of water resources, and universal telephone service." *Wash. State Grange*, 128 S. Ct. at 1189 n.2 (majority opinion).

³⁸² HistoryLink.org, *supra* note 368.

³⁸³ *Wash. State Grange*, 128 S. Ct. at 1189 n.2.

³⁸⁴ WASHINGTON STATE SECRETARY OF STATE, *supra* note 367, at 1.

³⁸⁵ 530 U.S. 567 (2000).

bearer for parties against the parties' will."³⁸⁶ Meanwhile, Washington Secretary of State Sam Reed published a report of Washington citizens' feedback on the primary election system compiled from eleven statewide hearings.³⁸⁷ The report revealed that:

most of the voters (in Washington) are independent and want to continue to participate in the primary without having to affiliate with a political party and without being restricted to the candidates of only one party in the primary. . . . Voters highly value the independence and privacy that are the distinctive characteristics of the blanket primary.³⁸⁸

By ignoring the position of the voters, or the crucial role played by the Grange in Washington politics, Justice Scalia's dissent was unable to engage with the issue of democracy as it was understood in its local context.

To keep the debate about the role of political parties going, the Grangers, not just Justice Scalia's colleagues, needed to be part of the discussion. At minimum, a demosprudential dissent would presumably have sought to engage the longstanding skepticism of the Grange's membership that the political parties were simply part of "an office-seeking class" who did not represent the real interests of the people. Alternatively, the demosprudential dissenter would have identified an oppositional constituency to the Grange, an alternative group more receptive to the kind of intellectual energy Justice Scalia gave the gun rights lobby, which then successfully deployed his exposition of originalism as its political message, culminating in *Heller*.

Thus, Justice Scalia's written dissent probably triggered a limited response because it did not take into account the local political culture. Nor had he embedded himself in a social movement, as he had in his majority opinion in *Heller*, where his views over time had stimulated greater interest and debate. What was missing was his identification of a potential community of accountability with whom he was familiar or to whom he could knowledgeably speak. Even when supplemented by a vivid analogy and articulated in vigorous prose, assertions are often inadequate to trigger, much less sustain, a long-term interest within a nonlegal public.

³⁸⁶ Tony Mauro, *High Court to Revisit Primary-Election Politics*, FIRST AMENDMENT CENTER, Feb. 27, 2007, <http://www.firstamendmentcenter.org/analysis.aspx?id=18206>.

³⁸⁷ Matthew Daly, *Washington State's Primary System Argued*, USA TODAY, Oct. 1, 2007, http://www.usatoday.com/news/washington/2007-10-01-791443622_x.htm. The article recounts the following: "Washington state voters have a real passion for having the freedom to vote for individuals rather than political parties," Reed said after the hour-long hearing. "The people of Washington have been clear: They want and value this freedom on the ballot." *Id.*

³⁸⁸ See Press Release, Wash. Sec'y of State, Secretary of State Releases Report on Blanket Primary Hearings (Jan. 12, 2001), available at http://www.secstate.wa.gov/office/osos_news.aspx?i=Cqw%2FXW2h32lX8PCzGAoDqA%3D%3D (last visited Oct. 5, 2008) (quoting report on blanket primary hearings).

*B. The Best (Missed) Opportunity for Demosprudential Dissent:
Crawford v. Marion County Election Board*

Photo identification is the ordinary, everyday companion of those who drive and fly. For others, that small piece of plastic stands between them and their right to vote. In Indiana in 2005, every Republican state legislator voted *for*, and every Democratic legislator voted *against*, a law that would require those who vote in person to present a government-issued photo ID. The law, which applied to both primary and general elections, was widely viewed as among the most stringent in the nation.³⁸⁹ Its reach was broader, and its exceptions fewer, than similar laws in other states.³⁹⁰ The petitioners in *Crawford* contended that the voter ID law made it more difficult for seniors, the homeless, the disabled, and the poor to vote.³⁹¹ The respondents justified the law as a neutral, nondiscriminatory means of preventing voter fraud. Writing for himself, Chief Justice Roberts, and Justice Kennedy, Justice Stevens found insufficient evidence in the record to support a facial attack on the statute.³⁹² Citing the Court's opinion in *Washington State Grange*, he rejected the petitioners' claim as a broad and premature challenge to the statute that would invalidate it in all of its appli-

³⁸⁹ A voter who is indigent, who has a religious objection to being photographed, or who forgets to bring her photo identification may cast a provisional ballot. Unless that voter then signs an appropriate affidavit (or returns with the photographic identification) before the circuit court clerk within ten days following the election, her vote will not be counted. Only those who live in a nursing home, or who may vote by absentee ballot, are excused from presenting an ID to vote. No photo ID, however, is required to register to vote. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1613–14 (2008) (opinion of Stevens, J.).

³⁹⁰ *Id.* at 1613–14; *see also* Brief for Current and Former State Secretaries of State as Amici Curiae at 27–30, *Crawford*, 128 S. Ct. 1610 (No. 07-21) (compiling state voter identification statutes); Brief for Texas et al. as Amici Curiae at 10–13, *Crawford*, 128 S. Ct. 1610 (No. 07-21) (same), *cited in* *Crawford*, 128 S. Ct. at 1634–35 (Souter, J., dissenting); Joan Biskupic, *Split Court Could Uphold Indiana's Voter ID Law*, USA TODAY, Jan. 9, 2008, at 2A; Linda Greenhouse, *Justices Indicate They May Uphold Voter ID Rules*, N.Y. TIMES, Jan. 10, 2008, at A1 (calling the statute “the strictest voter-identification law in the country”); Press Release, Brennan Center for Justice, New Study Finds Certain Voters Least Likely to Have Valid Voter ID at Issue Before Supreme Court (Nov. 13, 2007), *available at* http://www.brennancenter.org/content/resource/new_study_finds_african_americans_low_income_voters_students_and_seniors_le/.

³⁹¹ As soon as the law was enacted, the Indiana Democratic Party and the Marion County Democratic Central Committee (Democrats) filed suit against the state officials responsible for its enforcement, seeking a judgment declaring the voter ID law invalid. Their suit was eventually consolidated with one brought by William Crawford, Joseph Simpson, the Concerned Clergy of Indianapolis, the Indianapolis Resource Center for Independent Living, the Indiana Coalition on Housing and Homeless Issues, the Indianapolis Branch of the NAACP, and United Senior Action of Indiana. *See Crawford*, 128 S. Ct. at 1614 & n.5 (opinion of Stevens, J.).

³⁹² A facial attack, in contrast to an as-applied challenge, requires the Court to adjudicate the constitutionality of a law “on its face,” meaning based on the statutory language rather than the way the statute has been enforced. The retreat from consideration of a facial attack in this case draws its strength in part from the analysis in Justice Thomas’s majority opinion of the challenge to Initiative 872 in *Washington State Grange*. *See id.* at 1622–23.

cations. Justice Scalia concurred, joined by Justices Thomas and Alito.

Justice Stevens had authored the Court's opinion in *Anderson v. Celebrezze*,³⁹³ a case in which presidential candidate John Anderson challenged Ohio's burdensome ballot restrictions for independent candidates. Justice Stevens borrowed the standard announced in *Anderson*, as modified by Justice White in *Burdick v. Takushi*,³⁹⁴ wherein a voter challenged a Hawaiian election law that prohibited write-in ballots. The Court considered the limited power of a state to regulate candidate qualifications in a national election in *Anderson*; it considered the right of a voter to have his ballot count as a protest vote in *Burdick*. And in *Washington State Grange*, the Court referenced this same line of cases to affirm that the primary function of the ballot is to choose candidates for election. *Crawford* neither raised questions about the First Amendment rights of a single disgruntled voter nor reached the ballot access question involving the requirements that face third-party or independent candidates. The question was instead quite straightforward: can a state condition the fundamental right to vote upon the voter's ability to obtain a government-issued photo ID — a document not readily available to indigent, elderly or disabled citizens? So *Crawford*, unlike the prior cases on which it relies, speaks to the uncontroverted core function of a democratic constitutional community: providing an opportunity for people who meet age, citizenship, mental competence, and geographic qualifications to cast a ballot. Do these otherwise qualified voters enjoy the basic right to vote in public elections where the outcome will affect their life, liberty, and pursuit of happiness?

The petitioners argued that obtaining a photographic ID unduly burdened, and therefore uniquely disadvantaged, an identifiable class of eligible but indigent, elderly, and disabled voters. They offered the deposition testimony of eager voters who could not easily obtain government-issued photo IDs.³⁹⁵ The Court, however, deemed the petitioners' claims vulnerable because none of them had actually been denied the right to cast a vote for want of a photo ID.³⁹⁶ In addition,

³⁹³ 460 U.S. 780 (1983).

³⁹⁴ 504 U.S. 428 (1992).

³⁹⁵ For example, the Lafayette Urban Ministry could only assist 75 of the 150 people it tried to help get IDs, since the remainder could not obtain a birth certificate, for which ironically they needed a photo ID. See Transcript of Oral Argument at 31, *Crawford*, 128 S. Ct. 1610 (No. 07-21), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-21.pdf.

³⁹⁶ Cf. *America and the Courts: Justice John Paul Stevens and Justice Antonin Scalia* (C-SPAN television broadcast July 19, 2008). Justice Stevens appeared on C-SPAN in a broadcast taped on May 16 (two weeks after *Crawford* came down on April 28). He was speaking at the Seventh Circuit Judicial Conference in Chicago. Justice Stevens spoke about the dissenting opinions of his own colleagues in the case. "The dissent was persuasive," he said, but it relied on "internet re-

Justice Stevens cited the report of a national commission, co-chaired by former President Jimmy Carter, that endorsed the need for photo identification as a prerequisite for voting.³⁹⁷ Although Justice Stevens acknowledged that there was no evidence that in-person voting fraud had ever “actually occur[red] in Indiana at any time in its history,” he deferred to the state’s interest in deterring such fraud.³⁹⁸ Finally, he found that petitioners had failed to establish the absence of any neutral or non-discriminatory reason for upholding the statute in response to a facial challenge.³⁹⁹ In other words, the state is not required to minimize the burdens associated with the exercise of the fundamental right to vote. Justice Stevens cast the trip to the Bureau of Motor Vehicles (BMV) and the advance assembling of documents necessary to establish one’s identity as a mere inconvenience rather than a formidable handicap.⁴⁰⁰

search.” The record had concentrated on the effects of the voter ID requirement in urban areas such as Indianapolis, but the real problem showed up in the number of voters affected in rural Indiana, where there was no public transportation. Those, he said, were not “facts” that a judge can deal with. Justice Stevens was raising two questions that are outside the scope of this Foreword but ultimately would be worth pursuing for a demosprudential dissenter. The first question is the relevance of internet research to a judge’s decision making — if demosprudence through dissent suggests the judge should reach out to engage in a conversation with a larger audience, and if that audience has relevant information, what should the judge make of that information that did not come to him or her through the record? Is he entitled, as Justice Stevens admitted doing in his concurrence in *Base v. Rees*, to rely on his own experience? The second question is the relevance of the lawyering strategy to the outcome. Justice Stevens seems to suggest that the lawyers erred in concentrating on urban voters when their real motherlode was in rural Indiana. Is this something that a demosprudential dissenter should raise in his or her opinion as part of engaging a larger audience in debating further a question that goes to the heart of democracy?

³⁹⁷ *Crawford*, 128 S. Ct. at 1618 (opinion of Stevens, J.) (citing COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS [hereinafter CARTER-BAKER REPORT] § 2.5 (2005)).

³⁹⁸ *Id.* at 1619 & n.12. Justice Stevens alluded to “scattered instances” of in-person fraud elsewhere in the country, including one person in Washington State who admitted “ghost voting,” and also appeared to rely on the fact that fraud involving absentee ballots had potentially affected an election for mayor in East Chicago, Indiana. *Id.* at 1619 nn.12–13. The statute at issue, however, did not seek to address absentee ballot fraud, since it excluded those voting absentee from the photo ID requirement. Furthermore, serious criminal penalties including five years in prison and a \$10,000 fine were already available, without the new statute, to prosecute in-person voting fraud. *Id.* at 1638 (Scalia, J., concurring in the judgment).

³⁹⁹ Justice Stevens found three such neutral reasons: deterring in-person fraud; correcting for the fact that Indiana had failed to properly maintain its voter registration lists, which were seriously inflated with the names of ineligible voters; and safeguarding voter confidence in the integrity of elections. *Id.* at 1619–20.

⁴⁰⁰ Justice Stevens responded to the statistics Justice Souter cited in his dissent regarding the unavailability of public transportation in many regions of the state by suggesting that elderly and indigent citizens may have an opportunity to obtain a photo identification at the BMV “either during a routine outing with family or friends or during a special visit to the BMV arranged by a civic or political group such as the League of Women Voters or a political party.” *Id.* at 1623 n.20 (opinion of Stevens, J.). In other words, the state’s obligation to ensure access to the ballot can be privatized.

Petitioners claimed, the Court acknowledged, and Judge Evans (dissenting in the Seventh Circuit) agreed, that the law was a Republican effort to disenfranchise Democratic voters.⁴⁰¹ Judge Evans called the State's voter fraud defense the "fig leaf of respectability" for what would otherwise be more appropriately called intentional disenfranchisement of those likely to support one's political opponents. Petitioners also argued — and Justice Stevens agreed — that the burden of obtaining an official photo ID was substantial for elderly persons born out-of-state, who might have difficulty obtaining a birth certificate; the indigent or infirm, who might find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed.⁴⁰² The primary interest the State of Indiana offered in defense of its law was the prevention of voter fraud, for which there are already criminal penalties.⁴⁰³ Like Justice Thurgood Marshall in his dissent in *Marston v. Lewis*,⁴⁰⁴ Judge Evans argued that the problem of deceased persons still on voting rolls is a problem of administrative "mismanagement, not electoral wrongdoing."⁴⁰⁵

Justice Souter dissented. His dissent shows glimmers of demosprudence, but is conventionally jurisprudential in nature. Consistent with the first demosprudential element, he addresses a core issue of democracy, affirming that voting is a fundamental, unfettered right.⁴⁰⁶ His initial sentence, however, sets an understated tone that continues throughout the opinion. His choice of language and style of writing is occasionally creative, consistent with the second demosprudential element. For example, he uses a poem to describe the state's flawed reasoning regarding its inability to provide evidence of actual instances of

⁴⁰¹ *Id.* at 1624. Justice Stevens cited District Judge Barker for the proposition that the litigation was the result of a partisan dispute that had "spilled out of the state house into the courts." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006). Likewise, Judge Evans of the Seventh Circuit began his dissent: "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic." *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting). Justice Stevens also raised this question during oral argument before the Supreme Court: "If you look at the real world impact and you ask whether the Democratic Party has standing to challenge the law, is it relevant that the State legislature is split entirely on party lines?" Transcript of Oral Argument at 61, *Crawford*, 128 S. Ct. 1610, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-21.pdf.

⁴⁰² See *Crawford*, 128 S. Ct. at 1622 (opinion of Stevens, J.).

⁴⁰³ *Crawford*, 472 F.3d at 955 (Evans, J., dissenting). As to the criminal penalty, Judge Evans noted that defenders of the law "candidly acknowledged that no one — in the history of Indiana — had ever been charged with violating that law." *Id.*

⁴⁰⁴ 410 U.S. 679 (1973).

⁴⁰⁵ *Crawford*, 472 F.3d at 956 (Evans, J., dissenting); cf. *Marston*, 410 U.S. at 682 (Marshall, J., dissenting).

⁴⁰⁶ See *Crawford*, 128 S. Ct. at 1627–28 (Souter, J., dissenting).

voter fraud.⁴⁰⁷ But his restrained tone is less consistent with the second demosprudential element's emphasis on transparency and audience accessibility. He refers to "nontrivial burdens," which does not necessarily translate for a nonlegal audience into a significant effect on "tens of thousands" of citizens.⁴⁰⁸ However, he then goes on to make that nontrivial burden more concrete with regard to travel time, travel costs, document fees, and the need for infirm or elderly voters to make these trips every time they seek to vote. He says, for example, that:

[p]oor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive; witness the fact that the BMV has far fewer license branches in each county than there are voting precincts. Marion County, for example, has over 900 active voting precincts yet only twelve BMV license branches.⁴⁰⁹

Some counties do not have public transportation systems; twenty-one of the counties which do, provide service only within certain cities, and thirty-two others restrict public transportation to regional county service, leaving only eighteen that offer countywide public transportation.⁴¹⁰ He describes the nontrivial burden as a "high hurdle" and cites the results of the 2007 municipal elections in Marion County, where thirty-four provisional ballots were cast, but only two provisional voters made it to the County Clerk's Office within the ten days.⁴¹¹ In these places, he speaks in accessible language.⁴¹² He also acknowledges that the burdens of an ID requirement may also fall disproportionately upon racial minorities.⁴¹³ Finally, Justice Souter openly and directly confronts the voter fraud justification: "Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country."⁴¹⁴ This is one of the most powerful sentences in the dissent, but it is almost buried.

⁴⁰⁷ See *id.* at 1637 & n.29.

⁴⁰⁸ *Id.* at 1627.

⁴⁰⁹ *Id.* at 1629–30 (citation and footnotes omitted).

⁴¹⁰ *Id.* at 1630.

⁴¹¹ See *id.* at 1632.

⁴¹² For example, Justice Souter states that the State "hardly even tried" to justify some aspects of the law. *Id.* at 1627.

⁴¹³ See *id.* at 1634 n.25 ("In 1994, the U.S. Department of Justice found that African-Americans in Louisiana were four to five times less likely than white residents to have government-sanctioned photo identification." (quoting Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 659 (2007))); see also *id.* (describing a June 2005 study by "the Employment and Training Institute at the University of Wisconsin-Milwaukee, which found that while 17% of voting-age whites lacked a valid driver's license, 55% of black males and 49% of black females were unlicensed, and 46% of Latino males and 59% of Latino females were similarly unlicensed").

⁴¹⁴ *Id.* at 1642.

In terms of the third demosprudential criterion, Justice Souter successfully poked holes in the State's argument,⁴¹⁵ but his analysis did not seem to provide hope, a way out, or a strategy for people to use in the future. The length of the dissent, the traditional analysis, and the word choices make the dissent less morally vigorous than it could be.

Justice Breyer also issued a short dissent. He confirmed that a poor, elderly, or disabled nondriver would face difficulty and expense voting under the law if the person did not already have a license,⁴¹⁶ but his dissent seemed aimed primarily at the other Justices, and not at some broader constituency. Justice Breyer's was not a particularly spirited critique of the Indiana law. His major contribution was to bring to the fore the fact that Indiana had failed to meet the terms on which the national Carter-Baker Commission had conditioned its recommendation for photo IDs.⁴¹⁷ Neither Justice Breyer nor Justice Souter seemed intentional in his identification with, or outreach to, a larger, nonlegal audience. But what Justices Breyer and Souter may have lacked in their capacity for empathy they surely made up in authoritativeness.

Consider the alternative possibility that they had used their dissents to tell in more graphic detail the story of those individuals who struggled to vote against all odds, an act that might have expanded and opened the public dialogue to include the voices of the petitioners themselves.⁴¹⁸ Dissents that craft or reiterate narratives of marginalized groups expand spaces for deliberation and authorize those who feel excluded to participate. At the same time, the expression of narratives in public spaces permits greater numbers of individuals to recognize their ties to the community.⁴¹⁹

A narrative style is often key to the second element of a demosprudential dissent. It is especially effective when it tells a story with a plot, a set of characters, and a moral. At minimum, it would have a beginning and an end. Judges in dissent have demonstrated the power

⁴¹⁵ Justice Souter did so by showing that the State did not adopt measures (such as a phase-in) proposed by the Carter-Baker Report that would have allowed people time to obtain IDs before implementation and by stating that the proper mechanism for the State to correct its inflated voter rolls would be to clean the rolls, not to burden voters with the ID requirement. *See id.* at 1640.

⁴¹⁶ *Id.* at 1644 (Breyer, J., dissenting).

⁴¹⁷ *See id.* The Commission conditioned its recommendations on the state making efforts to ensure that the requisite IDs were "easily available and issued free of charge" and that the requirement be "'phased in' over two federal election cycles, to ease the transition." *Id.* (quoting CARTER-BAKER REPORT, *supra* note 397).

⁴¹⁸ Cf. Richard A. Couto, *Narrative, Free Space, and Political Leadership in Social Movements*, 55 J. POL. 57, 59 (1993). Telling a story outside of a private "free space" can transform an inchoate resistance movement from a state of obscurity into a social movement. *Id.* at 77.

⁴¹⁹ *Id.* Consider the power of Fannie Lou Hamer's testimony to the Democratic National Convention in August 1964. *See infra* notes 445-446 and accompanying text.

of narrative to move audiences and inspire action.⁴²⁰ Personal narratives may be of particular value to dissenters because of what they can reveal about a majority opinion — they “expose the boundaries, exclusions, and hierarchies built into ‘objective’ social science and law, that is, the particularity of the experiences that are masked by the authorial voice.”⁴²¹ Narratives put individual experiences front and center, and operate through people’s emotions — their outrage, fears, and triumphs.⁴²² In other words, a story that does not resonate is not a story at all. One does not need institutional resources or credentials either to tell or to understand a story — the only commonality needed between storyteller and listener is a shared cultural or individual experience. Yet, institutional resources, such as those available to judges, can help disseminate the story. Consider Justice Blackmun’s famous dissent in *DeShaney v. Winnebago County Department of Social Services*:⁴²³

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles — so full of late of patriotic fervor and proud proclamations about “liberty and justice for all” — that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.⁴²⁴

This passage includes many of the major elements of narrative, including character (poor Joshua) and plot (his mistreatment first by his father, and then by the County Department of Social Services). The story ignites a sense of injustice that serves as a call to action. However, in the context of demosprudential element three, Justice Blackmun’s dissent does not create a sense of agency in the reader, nor advise a particular type of future action, two other functions of narrative.

Narrative is entirely absent from the Supreme Court opinions in *Crawford*. Although one could imagine several motivational main characters of a photo ID debate, the plaintiffs’ lawyers did little to aid

⁴²⁰ See *supra* pp. 32–45; see also NEWMAN, *supra* note 136, at 472–73 (describing Justice Black’s voice and style). Justice Black “started with people,” and the human factors were the “first thing he saw in a case.” *Id.* at 472.

⁴²¹ Francesca Polletta, *Contending Stories: Narratives in Social Movements*, 21 QUALITATIVE SOC. 419, 425 (1998).

⁴²² See *id.* at 424. Consider the per curiam opinion in *Cooper v. Aaron*, 358 U.S. 1 (1958), in which the Court affirmed the duty of Arkansas state officials to uphold *Brown*. The opening paragraph was drafted by Justice Black to give the opinion “punch and vigor” and a tone of “dramatic urgency.” NEWMAN, *supra* note 136, at 474–75. “When Black wrote an opinion, he presented the facts appealingly, choosing indisputable evidence that tugged at the heartstrings. Shorter sentences built up tension.” *Id.* at 473.

⁴²³ 489 U.S. 189 (1989).

⁴²⁴ *Id.* at 213 (Blackmun, J., dissenting) (alteration in original) (citation omitted).

the Court in telling a compelling narrative.⁴²⁵ As the district court judge wrote, the petitioners had “not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the law] or who will have his or her right to vote unduly burdened by its requirements.”⁴²⁶ At both the Seventh Circuit and the Supreme Court levels, the plaintiffs established standing to challenge the law based on its impact on the Democratic Party, not because it disenfranchised an actual voter.⁴²⁷ Although he allowed the challenge to go forward, Judge Posner, writing for the Seventh Circuit in affirming the district court’s decision, observed that it was “remarkable” that the challenged law did not act as a barrier to voting for a single one of the identified plaintiffs: all of the plaintiffs either had photo IDs or did not have IDs but did not say whether they would vote if they did.⁴²⁸ The litigants thus failed to give the dissenting Justices the resources to construct a narrative that might inspire democratic action.

Instead of telling stories of individual disenfranchisement, the *Crawford* Court took an aggregate approach. This forced all four opinions into a battle over empirical evidence — whether the possibility of voter fraud outweighed the potential for disenfranchisement.⁴²⁹ Justice Stevens discussed the need to “quantify either the magnitude of the burden on this narrow class of voters [those without IDs] or the portion of the burden imposed on them that is fully justified.”⁴³⁰ The other opinions followed suit. Although the aggregate focus was arguably dictated by the relevant legal standard — the *Burdick* balancing test⁴³¹ — the lack of good data and the malleability of the test made

⁴²⁵ In part this was a function of the stage at which one brings, and the evidentiary basis for, a facial challenge. A facial challenge is based on the potential for, rather than the systematic proof of, discrimination.

⁴²⁶ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006).

⁴²⁷ See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1615 n.7 (2008) (agreeing with the Seventh Circuit that the standing of the Democrats was sufficient for the case to go forward).

⁴²⁸ *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951–52 (7th Cir. 2007). Judge Posner further observed that “the inability of the sponsors of this litigation to find any such person to join as a plaintiff suggests that the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls.” *Id.* at 952.

⁴²⁹ See, e.g., *Crawford*, 128 S. Ct. at 1629–30 (Souter, J., dissenting) (detailing the number of polling places and Bureau of Motor Vehicles offices in several counties).

⁴³⁰ *Id.* at 1622 (opinion of Stevens, J.) (emphasis added).

⁴³¹ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (balancing the burden placed upon the right to vote and the relevant state interests). But note that *Burdick*, like *Anderson*, was technically a “ballot access” case, not a “right to vote” case. In ballot access cases, like *Anderson* or *Burdick*, the question was the petitioner’s right to get his name on the ballot as a candidate (*Anderson*) or to write in a protest vote on the ballot (*Burdick*). By contrast, the right to vote cases more typically anchor their view of democracy in Chief Justice Warren’s opinion in *Reynolds v. Sims*, 377 U.S. 533 (1964), with its paean to the personal, fundamental, and individual

the outcome legally ambiguous. This indeterminacy presented an opportunity to take a less jurisprudential approach.

Crawford presented an opportunity for the dissent to create a compelling narrative that would inspire popular mobilization against voter IDs or even encourage greater expansion of the franchise. The dissenting Justices could have countered the lead opinion with a forceful story (such as those that the press later publicized⁴³²) of a citizen who tried to cast a vote and was denied. That narrative might have reframed the debate as a story about how burdens on the right to vote depress already low rates of democratic participation. Instead of debating empirical nuances, the dissenters could have made the voter ID debate about individual citizens and their right to participate in their democracy. Instead, the legal debate surrounding photo ID laws has centered on empirical evidence and aggregate considerations.

In *Crawford*, none of the elements of narrative appear. There is no plot, no cast of characters, and no moral. The closest that any of the opinions comes to soaring prose is in Justice Souter's concluding thoughts:

The State's requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of every election, likewise translate into unjustified economic burdens uncomfortably close to the outright \$1.50 fee we struck down 42 years ago. Like that fee, the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.⁴³³

By referencing the poll tax struck down by the Court in *Harper v. Virginia State Board of Elections*,⁴³⁴ Justice Souter began to connect with a past that might resonate with many marginalized citizens, particularly the poor and people of color. He might have told a story that linked racially discriminatory poll taxes to the burden of photo ID cards. He might have brought these "economic burdens" to life by describing the kinds of people who have tried to cast a vote and have been denied. Instead, he described the poll tax for its legal precedential value.

Justice Breyer also expressed the problem in terms of probabilities and hypotheticals. He wrote, "For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and ex-

nature of the *right of the voter* (not the candidate) and the right of the voter simply *to cast any ballot* (not a particular type of ballot).

⁴³² After the case was decided, the *Los Angeles Times* ran a story about a group of nuns in their eighties and nineties who were turned away from the polls by a fellow sister and poll worker because the women did not possess valid Indiana photo IDs. See Scott Martelle, *ID Law Keeps Nuns, Students from Polls*, L.A. TIMES, May 7, 2008, at A14.

⁴³³ *Crawford*, 128 S. Ct. at 1643 (Souter, J., dissenting).

⁴³⁴ 383 U.S. 663 (1966).

pensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system.”⁴³⁵ Rather than describing a “poor Joshua” who could not reach the polls, he paints a sterile picture in hypothetical terms. Both dissenting opinions lack an appeal to that driving force of effective narrative: emotion.

Perhaps as a result of these opinions’ demosprudential limitations, opponents of photo ID laws have failed to mobilize the public against these franchise restrictions.⁴³⁶ The photo ID issue simply does not resonate with the average American citizen. Consider, for example, Professor Bradley Smith’s view that most Americans agree with Judge Posner that “it is exceedingly difficult to maneuver in today’s America without a photo ID (try flying, or even entering a tall building . . . without one . . .).”⁴³⁷ It is hardly surprising that a recent *Wall Street Journal*/NBC News poll found that 80% of Americans favored a photo ID requirement, with only 7% opposed.⁴³⁸ The *Crawford* dissenters missed an opportunity to tell a story that would resonate with the average American who does not understand the big deal over photo IDs.

Particularly given that the Court’s lead opinion indicated openness to future as-applied challenges,⁴³⁹ there was an opportunity for the dissents to use narrative to guide future litigants in challenging voter ID laws. Justice Stevens seemed to sketch out an outline of the unknown factors that could serve as a roadmap for data collection for a future challenge.⁴⁴⁰ But this outline did not, even implicitly, call upon “the people” to take democratic action; instead, it encouraged *experts* — social scientists, lawyers, and other elites — to mine the record for empirical evidence. The dissent could have either offered a framework for activists seeking to challenge voter IDs or, alternatively, called for in-depth reconsideration of the patchwork approach to state regulation of the franchise.

⁴³⁵ *Crawford*, 128 S. Ct. at 1644 (Breyer, J., dissenting).

⁴³⁶ Of course, the lawyers bringing these cases should also think more demosprudentially. See *infra* pp. 102–08, 113.

⁴³⁷ Bradley A. Smith, Opening Statement, *Debate: Voter ID: What’s at Stake?*, 156 U. PA. L. REV. PENNUMBRA 241, 244 (2007), <http://www.pennumbra.com/debates/pdfs/voterid.pdf> (quoting *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007)); *id.* (“Most Americans have almost certainly devoted little if any thought to voter ID laws, but most probably do not honestly believe that large numbers of people are voting fraudulently under assumed names. Nonetheless, to most Americans, I suggest again merely from personal experience, a requirement that a voter demonstrate that he is who he claims to be is considered a most minimal intrusion.”).

⁴³⁸ John Fund on the Trail, <http://www.opinionjournal.com/diary/?id=110008630> (July 10, 2006, 00:01).

⁴³⁹ See *Crawford*, 128 S. Ct. at 1623 (opinion of Stevens, J.).

⁴⁴⁰ See *id.* at 1623 n.20.

The next sections consider how a demosprudential dissent in *Crawford* might best have spoken to organizers, norm entrepreneurs, and their potential constituencies. Section 1 discusses possible storylines for a model demosprudential dissent that would speak to a broad, popular audience. Section 2 describes two efforts at mobilization against voter restrictions, each of which could serve as a template for post-*Crawford* mobilization. Both efforts provide useful tools for reframing the larger debate about the nature of the right to vote.⁴⁴¹

1. *How a Dissent's Content Can Motivate Ordinary People.* — The most demosprudential *Crawford* dissent would have motivated a broader audience to invest in a campaign against voter restrictions. In the sense that a dissent begins a dialogic relationship and opens up space for public deliberation, it should do more than decree; it must engage. A demosprudential dissent might have made any of the following four points to inspire ordinary people and norm entrepreneurs.

This is fundamentally wrong or unjust. This is the most abstract of the four storylines. It is rooted in the idea that it is fundamentally wrong in a democratic society to exclude disproportionately certain classes of people from the ballot.⁴⁴² Reach into history and compare the impact of voter ID laws today to the impact of the poll tax on African Americans.⁴⁴³ Invoke individual narratives to bring to life the real, unjust consequences of photo ID laws. Take a strong stance of righteous indignation.⁴⁴⁴ Consider the precedent of Fannie Lou Hamer's testimony at the 1964 Democratic National Convention on behalf of the Mississippi Freedom Democratic Party.⁴⁴⁵ Hear her recite her own words describing the beatings she took to become a first-class citizen and to live as "a decent human being."⁴⁴⁶ Recall the graphic

⁴⁴¹ See *supra* note 431 and accompanying text.

⁴⁴² This argument might also remind its audience of the already depressed voting rates in America and ask why we are trying to prevent more people from voting. It might express the belief that all American citizens have an affirmative, fundamental right to vote that the government has an obligation to foster.

⁴⁴³ In this regard the dissenter might seek to remind the Court and the broader audience about our two-hundred-year history of disenfranchised groups struggling just to be able to cast a ballot and have that ballot counted. See generally JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991).

⁴⁴⁴ The dissenter might have reminded her colleagues that the original consent community envisioned by the Framers was limited to property-owning white males. It took the suffragettes in the nineteenth and early twentieth centuries and voting rights activists in the 1960s to bring our democracy's promises to fruition, as disenfranchised communities organized to claim their rights to full citizenship.

⁴⁴⁵ Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention (Aug. 22, 1964), available at <http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html>.

⁴⁴⁶ *Id.* Fannie Lou Hamer, a Mississippi sharecropper and civil rights activist, recounted an attempted assassination, unspeakable police brutality, and continual racial epithets, "all of this is on account of we want to register, to become first class citizens." *Id.* Before the dissenter issues

details of her struggle and remind listeners of the parallel psychic effects induced by the State of Indiana's current willingness to treat its indigent, infirm, and elderly voters as second-class citizens. Cite the Court's words from that very same year: "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . ." ⁴⁴⁷ Search the record for vivid stories from Indiana like the one of the ninety-year-old nuns, several of whom were confined to walkers or wheelchairs, who were refused the right to vote across the street from their own convent. ⁴⁴⁸ Use such a story to bring to life the irony that the polling inspector who turned these women away was even better positioned than a photo ID to vouch for their identity. ⁴⁴⁹

her opinion, play for yourself the audio of Hamer's testimony before the Democratic National Convention in Atlantic City in 1964:

It was the 31st of August in 1962 that eighteen of us traveled twenty-six miles to the county courthouse in Indianola to try to register to become first-class citizens. We was met in Indianola by policemen, Highway Patrolmen, and they only allowed two of us in to take the literacy test at the time. After we had taken this test and started back to Ruleville, we was held up by the City Police and the State Highway Patrolmen and carried back to Indianola where the bus driver was charged that day with driving a bus the wrong color. After we paid the fine among us, we continued on to Ruleville, and Reverend Jeff Sunny carried me four miles in the rural area where I had worked as a time-keeper and sharecropper for eighteen years. I was met there by my children, who told me that the plantation owner was angry because I had gone down to try to register. After they told me, my husband came, and said the plantation owner was raising Cain because I had tried to register. Before he quit talking the plantation owner came and said, "Fannie Lou, do you know — did Pap tell you what I said?"

And I said, "Yes, sir." He said, "Well I mean that." He said, "If you don't go down and withdraw your registration, you will have to leave." Said, "Then if you go down and withdraw," said, "you still might have to go because we are not ready for that in Mississippi." And I addressed him and told him and said, "I didn't try to register for you. I tried to register for myself." I had to leave that same night.

Id.

⁴⁴⁷ *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (internal quotation mark omitted); *see also* *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966). Or the dissenter might remind her colleagues that it was Robert Moses, a civil rights organizer in Mississippi, who popularized the phrase "one person/one vote" to convince black sharecroppers that voting was not merely white people's business. ROBERT P. MOSES & CHARLES E. COBB, JR., *RADICAL EQUATIONS: MATH LITERACY AND CIVIL RIGHTS* (2001).

⁴⁴⁸ *See* Martelle, *supra* note 432. A dissenter may also take judicial notice of widely accepted historical or contemporary facts. And a Justice has incredible research talent at her side in the form of internet-savvy law clerks.

⁴⁴⁹ Deborah Hastings, *Indiana Nuns Lacking IDs Denied at Poll by Fellow Sister*, Associated Press, May 6, 2008, *available at* http://www.breitbart.com/article.php?id=D9oGBCNOo&show_article=1 ("Sister Julie McGuire said she was forced to turn away her fellow sisters at Saint Mary's Convent in South Bend, across the street from the University of Notre Dame, because they did not have photographic IDs."). "You have to remember," their fellow sister said, "that some of these ladies don't walk well. They're in wheelchairs or on walkers or electric carts." *Id.* If the purpose of the voter ID law is to verify the voter's identity, the law makes Sister McGuire's role inconsistent with its purpose.

Emphasize that there was not a shred of evidence of in-person voter fraud introduced when these women, who no longer could drive, nevertheless wished to perform one of the secular rituals of our community life.

Robin Carnahan, the Secretary of State of Missouri, recently posted an effective blog entry on the Huffington Post that details two such stories, albeit from Missouri:

Another Missourian, Birdie Owen[,] had a different story. Birdie relocated to Missouri after Hurricane Katrina and still uses her Louisiana ID. That's because she can't get a Missouri photo ID. Why? Because her birth certificate was lost in the hurricane. And because a birth certificate is one of the documents required in order to get a Missouri photo ID, without one, no government-issued ID . . . therefore, no right to vote.

Another affected citizen is Kathleen Weinschenk. Kathy has cerebral palsy and because of her disability is unable to make a consistent signature or mark — so her signature might not match the signature on her voter registration record required by the Missouri law . . . therefore, no right to vote.⁴⁵⁰

The stories of these two women effectively convey why these laws are *unjust*: they disenfranchise innocent, well-intentioned citizens who are otherwise eligible to vote. Moreover, both persons are members of vulnerable groups, demonstrating how the law disenfranchises, but also *discriminates* against the already marginalized.

A more difficult, but crucial, chapter in this storyline would go beyond describing the injustice in personal terms. It would confront the flawed justification for the discrimination. Election fraud does occur, but it is an inside job: election officials are almost wholly responsible for flawed election outcomes through sloppiness, administrative errors, and outright manipulation.⁴⁵¹ The very people charged with enforcing the photo ID provision are among those most likely to undermine the integrity of the election process.

Here it would be useful to mirror the skeptical tone and the plain language that Judge Evans used in his dissent in the Seventh Circuit to document the fact that the photo ID requirement is a solution that

⁴⁵⁰ Posting of Robin Carnahan to The Huffington Post, http://www.huffingtonpost.com/robin-carnahan/elections-cant-really-be_b_101030.html (May 9, 2008). According to Secretary Carnahan, the nuns in Indiana were not given provisional ballots because “it would be impossible to get them to a motor vehicle branch and back in the 10-day time frame allotted by the law.” *Id.*

⁴⁵¹ See, e.g., DAVID MOORE, *HOW TO STEAL AN ELECTION: THE INSIDE STORY OF HOW GEORGE BUSH'S BROTHER AND FOX NETWORK MISCALLED THE 2000 ELECTION AND CHANGED THE COURSE OF HISTORY* (2006). This would be key for those who grew up as Republicans in Chicago (think Justice Stevens) or who, like a majority of Americans polled, continue to share the misperception that in-person voter fraud is widespread. See, e.g., ADVANCEMENT PROJECT, *IN PURSUIT OF AN AFFIRMATIVE RIGHT TO VOTE* 22 (2008), available at <http://www.advancementproject.org/pdfs/RTV-Report-Final-Printed-Version.pdf>.

grossly misdiagnoses the problem. The photo ID requirement conflates the real problem of fraud by election officials with a fake problem: fraud by in-person voter impersonation. In other words, voters do not enter the polling booth once to cast a ballot as themselves and then put on fake moustaches and return to the polls to vote as their dead grandfathers. If this phenomenon were happening in massive numbers, then it would be understandable and, in fact, laudable for Indiana's legislature to take action to prevent this. However, as the Court itself acknowledged, there was *not one single* reported incident that anyone in Indiana had ever impersonated someone else or borrowed a name from a tombstone in order to vote.⁴⁵²

The key point of this storyline would be that Indiana residents who do not possess photo IDs are suffering an indignity thrice over. First, they are told by their own state that they are no longer worthy of the ballot. Second, they are told by the Court that this exclusion barely registers on the scales of justice. Finally, they are excluded from the ballot not just by arrogance or partisanship but by misfired logic. The State of Indiana, with the Court's blessings, is punishing the most vulnerable and least culpable of its citizens for the crimes of its most trusted gatekeepers.

I, or someone I know, might not be able to vote because of these laws. While the individual narratives that could accompany the first point elicit *sympathy*, many eligible voters would not personally identify with those protagonists. A second kind of story would bring the impact of photo ID laws closer to home. It would tell its audience that these laws affect not merely those "too lazy" to go to the Bureau of Motor Vehicles, but could conceivably affect them or their family members. For example, Carnahan offers the following scenarios about a proposed Missouri photo ID law:

⁴⁵² Justice Stevens pointed to only three instances of voter fraud. First, he cited the antiquated example of Boss Tweed in New York 150 years ago, which is hardly evidence that voter fraud happens today. Second, he discussed an investigation in Washington that uncovered a single instance of in-person voter fraud, which seems to show a *lack of* a problem, if anything. His third example applied to *absentee voting*, which is completely irrelevant evidence for a law that only requires IDs for in-person voting. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1619 & nn.11–13 (2008) (opinion of Stevens, J.). Studies by Professor Lorraine Minnite and Professor Spencer Overton, a former commissioner on the 2005 Commission on Federal Election Reform, have after careful analysis found Justice Stevens's claims largely overblown. LORI MINNITE & DAVID CALLAHAN, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 22–35, 39–43 (2003), available at http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf; see also BRENNAN CTR. FOR JUSTICE & SPENCER OVERTON, RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM (2005), available at http://www.brennancenter.org/dynamic/subpages/download_file_47903.pdf; LORRAINE C. MINNITE, AN ANALYSIS OF VOTER FRAUD IN THE U.S. (2007), available at http://www.demos.org/pubs/analysis_voter_fraud.pdf; SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006); Overton, *supra* note 413.

If you are [a] married woman whose name has changed and you want to get a government-issued ID to vote, you need to bring your marriage license. If you lost that marriage license, it will cost you time and money to get a new copy. If you are divorced and remarried, you better bring along a copy of your divorce decree.

If you were born out of state and you want to get a Missouri government issued ID to vote you will need to write a letter to that state and ask for a certified copy of your birth certificate. It may cost you up to \$30.00 to get a copy.

But in many states you'll face yet another problem . . . you are required to show a photo ID before they will provide a copy of your birth certificate.

. . .

If you lost your social security card, and you want to vote, you better make a trip to the social security office. You will also need to remember to bring along a copy of your birth certificate.⁴⁵³

These scenarios describe experiences that nearly every citizen will encounter, or can imagine encountering, at one time or another. They bring to life the burden on voting in a way that resonates with most people's actual experiences, rather than appealing to their sense of justice for others.⁴⁵⁴ And they are animated by democratic values rather than mathematical proofs.

The outcome of an election may change as a result of these laws. Beyond the harm of individual disenfranchisement, there is also the arguably more tangible (and thus, more serious) harm of an impact on the actual outcome of an election. While there may be individual dignitary benefits involved in casting a ballot, the practical importance of voting is aggregate.⁴⁵⁵ To connect with the members of the public who already possess photo IDs or those who see no point in voting anyway, tell the story of how the aggregate effect of such laws might affect the actual outcome of an election. Connect *Crawford* to *Bush v. Gore*⁴⁵⁶ — an election law decision that *has* resonated with a popular audience. Play off the *Crawford* majority's obsession with quantification of the empirics.⁴⁵⁷ Professor Spencer Overton offers a shock-inducing ac-

⁴⁵³ Carnahan, *supra* note 450.

⁴⁵⁴ Of course, for people without photo IDs and for people in certain disproportionately impacted classes (such as the elderly, the poor, the disabled), the first storyline actually serves both of these functions.

⁴⁵⁵ This explains both why the Democratic Party was the plaintiff with the most at stake in *Crawford*, and why economists find it efficient not to vote.

⁴⁵⁶ 531 U.S. 98 (2000).

⁴⁵⁷ Consider what Justice Ginsburg describes as the "in-house impact" of a dissent, where the majority is forced to answer the concerns of the dissenting Justices:

On the utility of dissenting opinions, I will mention first their in-house impact. My experience teaches that there is nothing better than an impressive dissent to improve an opinion for the Court. A well reasoned dissent will lead the author of the majority opin-

count of the consequences of restrictions purporting to prevent voter fraud:

[A] few months prior to the 2000 election, Florida Republican Secretary of State Katherine Harris — who . . . co-chair[ed] . . . the George W. Bush campaign in Florida — implemented an aggressive campaign to purge the election rolls of felons. In their zeal to remove all former felons from the voting rolls, Florida officials erroneously categorized thousands of voters as former felons. They used an over-inclusive computer program that purged any Florida voter whose name contained 80 percent of the letters of a name in a nationwide database of felons and was of the same race as the identified felon. Thus, as journalist Greg Palast explains, “[a]n Illinois felon named John Michaels could knock off Florida voter John, Johnny, Jonathan or Jon R. Michaels, or even J.R. Michaelson. . . . A black felon named Mr. Green would only knock off a black Mr. Green, but not a single white Mr. Green.” The company hired to perform the purge told Florida officials in an email, “Unfortunately, programming in this fashion may supply you with false positives. . . . This seems to be the approach you would prefer to choose, rather than miss any positive true matches.” The purge removed 8456 black voters from the rolls. Although Democrat Al Gore captured about 92 percent of the African-American vote in Florida, he lost to George W. Bush by 537 votes. Of the 4847 individuals who appealed their exclusion after the 2000 election, 2430 were deemed eligible voters.⁴⁵⁸

This story adds significance to the voter ID debate by exposing a negative consequence broader than a single individual being unable to vote. Moreover, it is another means of particularizing the debate over voter IDs by suggesting that documented historical practices are a more reliable source regarding the danger of disenfranchisement than are speculative mathematical models.

This particular law may be tolerable, but the next one will be much worse. Make the point that the law upheld in *Crawford* opens the door for far worse restrictions in the future. Instill urgency in organizers to mobilize now against what is bound to come next. Consider Justice Scalia’s dissent in *Lawrence v. Texas*.⁴⁵⁹ He warned:

Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral

ion to refine and clarify her initial circulation. An illustration: I wrote for the Court in the Virginia Military Institute case, which held that VMI’s denial of admission to women violated the Equal Protection Clause. The published opinion was ever so much better than my first draft, thanks to Justice Scalia’s attention-grabbing dissent.

Ginsburg, *supra* note 181.

⁴⁵⁸ Spencer Overton, *Stealing Democracy* 120–21 (unpublished manuscript, on file with the Harvard Law School Library), subsequently revised and published as OVERTON, *supra* note 452).

⁴⁵⁹ 539 U.S. 558 (2003).

disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ?⁴⁶⁰

According to Robert Post and Reva Siegel, these words “seem explicitly addressed to the general public and designed to mobilize political resistance to the Court’s decision.”⁴⁶¹ Justice Scalia’s writing style also seems aimed at a broader audience. Referring to the majority’s claim that it was not discussing government sanctioning of homosexual relationships, he spoke in the imperative: “Do not believe it.”⁴⁶² Justice Scalia’s dissent warned conservatives that if they did not act, the Court would sanction gay marriage next. In practice, his dissent positioned opposition to gay marriage as a site for conservative mobilization — although the facts of *Lawrence* were limited to private sexual intimacy. This perception of the importance of Justice Scalia’s words was not confined to academics. Within days, conservative activist Randall Terry quoted Justice Scalia’s words in a fundraising letter seeking the impeachment of the Justices who had joined the *Lawrence* opinion.⁴⁶³ The *Boston Globe*, reporting on the movement against gay marriage, wrote, “Sparking this mobilization was Justice Antonin Scalia’s warning, made in his dissent in the Supreme Court sodomy case, that extending privacy rights to gay relationships would inevitably lead to same-sex marriage.”⁴⁶⁴ In this sense, Justice Scalia’s opinion was an effective demosprudential dissent.

Although voter ID laws may not resonate with many citizens who have a state-issued driver’s license safely tucked away in their wallets, the idea that this is just the beginning of voter restrictions could carry more force. In Missouri, proponents of ID laws have gone further than the Indiana law, to require registrants to also show proof of citizenship.⁴⁶⁵

All four stories provide a chance to focus directly on the precarious status of our commitment to voting as a fundamental right. They present an opportunity to tie voter ID laws to the source of the disconnect between our rhetoric about democracy and the majority’s approach to the question of voter IDs. That disconnect is rooted in a tradition of

⁴⁶⁰ *Id.* at 604–05 (Scalia, J., dissenting) (citations omitted).

⁴⁶¹ Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 567 (2006).

⁴⁶² *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

⁴⁶³ See Post & Siegel, *supra* note 461, at 567.

⁴⁶⁴ Mary Leonard, *Gay Marriage Stirs Conservatives Again*, *BOSTON GLOBE*, Sept. 28, 2003, at A1.

⁴⁶⁵ See Ian Urbina, *Missouri Legislature Ends Session with Voter ID Amendment Still on Agenda*, *N.Y. TIMES*, May 17, 2008, at A13.

federal deference to thousands of state and local jurisdictions' controlling access to the ballot.

2. *Models for Organizing: Possibilities Post-Crawford.* — The Supreme Court should not try to limit its audiences to specific strategies for achieving change, whether in the form of a constitutional amendment to guarantee the affirmative right to vote or a federal registry to enforce at government expense uniform standards across the country in national elections.⁴⁶⁶ The Court lacks organizing expertise.⁴⁶⁷ Moreover, effective campaigns for social change must be locally based and community-specific. Certainly Katyal's model of Justice as "advice-giver" may seem inapt with respect to the audience of community organizers. Yet one of the goals of a dissent is to inform future litigants about alternative strategies, as well as innovative, even bold ways of reframing their goals, in the face of an unfavorable majority decision.⁴⁶⁸

Dissenters can play a useful role in structuring the controversy to facilitate learning through a continuous process of public participation and engagement. A demosprudential dissent can explain the more vulnerable parts of the majority decision.⁴⁶⁹ Such a dissent can also articulate in accessible language the jurisprudential justifications for popular efforts to change the significance of the Court's ruling. Here, change agents on the Left can learn from change agents on the Right how to generate interaction between the rule of law and principles of democracy.⁴⁷⁰ A demosprudential dissent, for example, might encourage lawyers in cases like *Crawford* to recalculate the odds of winning in court by supplementing the tactics of litigation with innovative strategies that stimulate greater public participation. Or it might inspire the League of Women Voters and other good-government groups to push for laws enforcing the status of voting as an affirmative right enshrined in constitutional law, not merely a privilege controlled and administered by state partisans.

⁴⁶⁶ Here the Advancement Project's work proposing a constitutional amendment guaranteeing the affirmative right to vote would be a useful resource. See Advancement Project, Our Work: Right To Vote, <http://www.advancementproject.org/ourwork/power-and-democracy/right-to-vote/index.php> (last visited Oct. 5, 2008) (proposing a constitutional amendment guaranteeing the affirmative right to vote); see also Samuel Issacharoff, *Three: Create A National Voter-Registration List, in Six Ways To Reform Democracy*, BOSTON REV., Sept./Oct. 2006, <http://bostonreview.net/BR31.5/gerken.php> (proposing that voter registration practices, including voter identification requirements, be federalized).

⁴⁶⁷ All of the current members of the Supreme Court are former appellate court judges; none has run for political office. This is a historical anomaly. See *infra* pp. 122–23 (comparing, for example, the composition of the Taft Court).

⁴⁶⁸ See sources cited *supra* note 466.

⁴⁶⁹ See *supra* note 431 and accompanying text.

⁴⁷⁰ Cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1017 (2004); Siegel, *supra* note 313.

(a) *The Rhode Island Reenfranchisement Campaign.* — A recent campaign for reenfranchisement of ex-offenders in Rhode Island offers a useful example of the possible payoff were a dissenter in *Crawford* interested in developing a jurisprudential repertory to enhance democratic accountability. The Rhode Island campaign not only provides evidence of the dialogic nature of contests over issues addressed by the *Crawford* Court, but it also shows how a demosprudential dissent might extend the debate and indeed ownership of the lawmaking role beyond the Court. In order to structure the controversy around voter IDs to facilitate learning and public participation, a demosprudential dissenter might cite to the campaign in Rhode Island, whose three important components could be equally important in a campaign against voter ID laws.⁴⁷¹

Impact Research. The Family Life Center (FLC), a Rhode Island group dedicated to felon reintegration into society, used its position as a local organization to document in detail the impact of felons' disenfranchisement on their community. By involving the community of ex-offenders and their families in their movement, the FLC gained access to unique resources, particularly powerful stories that came directly from the neighborhoods that many legislators represented. The FLC also formed a partnership with the state Department of Corrections, which gave them access to all the relevant data on the effects of disenfranchisement in Rhode Island right down to the neighborhood level. Before taking any legislative action, FLC released a study that showed in detail the extent of disenfranchisement in Rhode Island.⁴⁷² This component would be particularly important in any significant effort to counter voter ID laws, given the Court's framing of the debate around the empirical impact of such laws.⁴⁷³

Use of a Ballot Referendum. After presenting the legislature with data on the impact of disenfranchisement laws, the FLC worked with the Brennan Center to draft an amendment to the state constitution restoring voting rights to people with felony convictions upon release from prison. This gave the legislature the relatively "painless" option of simply placing the amendment on the state's next ballot to be put to

⁴⁷¹ See Alec Karakatsanis, Rhode Island Reenfranchisement (May 13, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

⁴⁷² NINA KEOUGH & MARSHALL CLEMENT, RHODE ISLAND FAMILY LIFE CENTER, POLITICAL PUNISHMENT: THE CONSEQUENCES OF FELON DISENFRANCHISEMENT FOR RHODE ISLAND COMMUNITIES (2004). The report showed, for example, that 15,500 Rhode Islanders had lost the right to vote; 86% (more than 13,000) of these were living in the community, serving either probation sentences or parole terms following incarceration; 20% of black men in the state were disenfranchised. *Id.* at 1–2.

⁴⁷³ See, e.g., *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 n. 20 (2008) (opinion of Stevens, J.).

a popular vote. The FLC then mobilized the mass support needed to pass the referendum.

Complementary Implementing Legislation and Voter Drives. Recognizing that granting ex-felons technical access to the ballot would not necessarily result in their actual voting, the Rhode Island organizers also drafted a comprehensive companion bill to implement the constitutional amendment. The FLC organizers used their experience and connections with newly released prisoners to figure out what specific procedures would be easiest for them, given their experiences with the Rhode Island courts and prison.⁴⁷⁴ For example, the bill, which was passed by the Legislature and became effective upon passage of the referendum,⁴⁷⁵ specifically classifies the Department of Corrections as “a voter registration agency.”⁴⁷⁶ In that role, it provides voter registration forms as part of the release process, and it even offers assistance in filling them out. The organizers also decided to couple their legislative efforts with a large voter registration initiative. For voter IDs, the post-*Crawford* effort might consist not only of mobilizing against voter ID laws, but alternatively of getting IDs for eligible voters and registering them to vote. One solution might utilize another government institution, for example Medicare agencies, to double as a photo ID issuer and registration center.⁴⁷⁷

A dissent from the Supreme Court could help in such an effort by opening up legal space in which to work and directing lawyers to the kinds of relationships they need for that work to be successful. The FLC organizers depended on the Brennan Center, the Sentencing Project, and the Right to Vote Campaign — three national groups — to outline the legal mechanics involved in changing relevant laws and how, as a procedural matter, they would have to be changed.⁴⁷⁸ The lawyers from these groups determined that a state constitutional amendment would be necessary, and also that they must first seek legislation authorizing the question to be placed on a ballot for a public referendum. As Alec Karakatsanis, a law student who studied the campaign, wrote: “The FLC organizers now knew their task.”⁴⁷⁹ A

⁴⁷⁴ Karakatsanis, *supra* note 471, at 13.

⁴⁷⁵ Brennan Ctr. for Justice, Voting Rights Restoration Efforts in Rhode Island, http://www.brennancenter.org/content/pages/voting_rights_restoration_efforts_in_rhode_island (last visited Oct. 5, 2008).

⁴⁷⁶ See R.I. GEN. LAWS § 17-9.2-3 (2008).

⁴⁷⁷ Cf. ADVANCEMENT PROJECT, IN PURSUIT OF AN AFFIRMATIVE RIGHT TO VOTE (2008), available at <http://www.advancementproject.org/pdfs/RTV-Report-Final-Printed-Version.pdf> (proposing strategies for pursuing an affirmative right to vote at the federal and state levels).

⁴⁷⁸ See Karakatsanis, *supra* note 471, at 5.

⁴⁷⁹ *Id.* at 6. Many legislators, for example, had no idea that most of those disenfranchised were nonwhite, poor, and nonviolent: using both data and the stories of community members, the FLC reframed the issue. The FLC used this information to gain the authoritative endorsements of in-

dissent from the Court could similarly offer a legal roadmap, capitalizing on the Justice's particular expertise or interest.⁴⁸⁰ At minimum, a demosprudential dissent could use the example as a parable to ready the ground for the next round of fights in the Court and the next round of responses in other domains.

(b) *The Post-Crawford Campaign Against Voter IDs in Missouri.* — One state has already mobilized against post-*Crawford* efforts to enact photo ID laws. In Missouri, a progressive coalition recently defeated an effort to enact a voter restriction law.⁴⁸¹ Indeed, “after a public outcry driven by a grass-roots coalition,” the proposal died.⁴⁸² In a victory for opponents of burdensome voter restrictions, Missouri lawmakers ended this year’s legislative session without a final vote on the legislation.⁴⁸³ A Republican lobbyist who campaigned for the measure reported that “[t]he bill failed to go to the Senate floor for a vote in part because of pressure by the secretary of state and grass-roots groups.”⁴⁸⁴ Another lobbyist reported of Republican lawmakers, “They may have decided it wasn’t worth another fight.”⁴⁸⁵ The grass-roots strategy in Missouri sharply contrasts with the failed legal challenge in *Crawford*, in which the lawsuit was filed before the law took effect, which meant there were no individual plaintiffs who suffered grievous harm.

The campaign against the voter ID laws in Missouri united a coalition of organizations including ACORN, labor unions, the League of Women Voters, and AARP.⁴⁸⁶ Secretary Carnahan credited the success

stitutional actors such as the Department of Corrections, the Chief of Police, and several legislators. *See id.* at 18–19.

⁴⁸⁰ Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 38–40; *see also supra* note 396.

⁴⁸¹ The Missouri legislature had already passed a photo ID law in 2006, but the Missouri Supreme Court held that it violated the state constitution. However, immediately following the *Crawford* decision, the Republican-dominated legislature sought to amend the Missouri Constitution. The proposed change would have altered Missouri’s Constitution to allow the state to require voters to possess a photo ID and to meet a strict standard for citizenship; this would have made Missouri one of the toughest states in the country for citizens to register to vote or to cast a ballot. At the time it was being considered, “[t]he Missouri secretary of state, Robin Carnahan, a Democrat who oppose[d] the measure, estimated that it could disenfranchise up to 240,000 registered voters who would be unable to prove their citizenship.” Ian Urbina, *Voter ID Battle Shifts to Proof of Citizenship*, N.Y. TIMES, May 12, 2008, at A1.

⁴⁸² Art Levine, *Lessons from Voting Rights Activists’ Big Win in Missouri*, ALTERNET, June 10, 2008, <http://www.alternet.org/democracy/87650/?page=entire>.

⁴⁸³ *See id.*

⁴⁸⁴ Urbina, *supra* note 465. “Michael Slater, deputy director of Project Vote, which campaigned against the measure, said the resistance to the measure was unprecedented: ‘Small-city papers like The Joplin Globe and The St. Joseph News-Press opined against the voter ID rules, along with The Kansas City Star and The St. Louis Post-Dispatch. . . . You rarely see pressure move this fast or this effectively.’” *Id.*

⁴⁸⁵ Levine, *supra* note 482.

⁴⁸⁶ *See id.* The advocacy groups relied on direct action:

of the coalition to an effective messaging strategy: “We told stories about real people who wouldn’t be eligible to vote. Putting a human face on the issue was more important than talking abstractly about the myth of voter fraud.”⁴⁸⁷ For example, organizers located “Lillie Lewis, a voter who lives in St. Louis . . . [and who had] had a difficult time trying to get a photo ID from the state, which asked her for a birth certificate . . . [because] officials of [her home state] sent her a letter stating that they had no record of her birth.”⁴⁸⁸ Speaking at a news conference, Lewis stated, “That’s downright wrong. . . . I have voted in almost all of the presidential races going back I can’t remember how long, but if they tell me I need a passport or birth certificate that’ll be the end of that.”⁴⁸⁹ At this same news conference, which received national coverage, several Missouri nuns also spoke about the fact that nuns in Indiana had been turned away from the polls, a story that illustrated the potential consequences of the proposed Missouri constitutional amendment.⁴⁹⁰ “Sister Sandy Schwartz of the Franciscan Sisters of St. Mary the Angel said that an informal survey indicated that 15 of the 35 voters in her convent did not have a valid government ID of the type required by this proposal.”⁴⁹¹

In Missouri, the fight has shifted from litigation to grassroots organization.⁴⁹² Activists there see coalition-building among various affected constituencies, combined with the use of effective individual

The AARP, with over 800,000 Missouri members, sent out an email alert to roughly 30,000 of its most active members the weekend before the final week of the legislative session, warning that the legislature was moving to disenfranchise voters. ACORN managed a sophisticated phone and door-to-door voter contact program in suburban and swing districts More than 8,000 voters called their legislators, . . . and Senate Republicans started to feel the heat.

Id.

⁴⁸⁷ *Id.*

⁴⁸⁸ Urbina, *supra* note 481.

⁴⁸⁹ *Id.* (internal quotation marks omitted).

⁴⁹⁰ AARP lobbyist Jay Hardenbrook was quoted as saying, “Once the nun thing was out there, it gave the issue a bigger, national spotlight.” Levine, *supra* note 482.

⁴⁹¹ Press Release, Missouri Secretary of State, Secretary Carnahan and Missouri Voters Discuss Costly Effects of Possible Voter Photo ID Law (May 8, 2008), *available at* <http://www.sos.mo.gov/news.asp?id=706>.

⁴⁹² Lawsuits against ID laws remain a plausible option where there is a factual record supporting the burden placed on specific groups of citizens like older voters, poor voters and students. Nevertheless, the burden on plaintiffs in these cases remains high. As a result, it will remain tough for voting rights groups to prevail in court even though the Court left open the possibility of an as-applied challenge. See Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, N.Y. TIMES, Apr. 29, 2008, at A1 (“The 6-to-3 ruling kept the door open to future lawsuits that provided more evidence. But this theoretical possibility was small comfort to the dissenters or to critics of voter ID laws, who predicted that a more likely outcome than successful lawsuits would be the spread of measures that would keep some legitimate would-be voters from the polls.”); Ian Urbina, *Decision Is Likely To Spur Voter ID Laws in More States*, N.Y. TIMES, Apr. 29, 2008, at A11.

narratives, as the key to voter success on the photo ID front. Imagine the spillover effect if the Missouri stories had made it out of the state and into a demosprudential dissent.

In sum, the goal of a demosprudential dissenter in *Crawford* might have been to give permission to norm entrepreneurs, like the League of Women Voters, the Family Life Center in Rhode Island, or Missouri Secretary Carnahan, as well as ordinary citizens, like Sister Sandy Schwartz or voter Lillie Lewis, to feel outrage and then act to generate constructive change in the public arena. Rather than relying on litigation alone as the primary vehicle to address the sense of exclusion or disrespect, the dissent would make visible the fact that there is not one single, common story. Instead the demosprudential dissent would foreground alternative narratives.

Toward these ends, the dissenter might employ an analogy to show that the problem of fraud is real, but it is a problem of insider corruption, not voter impersonation. And the dissenter might provide an analysis that affirmed the work of organizations such as the Brennan Center or Advancement Project, both of which also function as norm entrepreneurs, using litigation and organizing strategies to frame future conversations about the right to vote. These organizations publish extensive reports documenting the many barriers to voting, directed at media, legislators, and national elites.⁴⁹³ In addition, they seek to shape the discourse and influence agenda formation at the local level. They connect information and people, creating advocacy networks that translate complex ideas into local action. To that end, the dissent might have been drafted for the numerous amici who filed friend of the court briefs, so that they might download and circulate the dissent to educate and inspire their members, their constituents, and their students.⁴⁹⁴

Finally, a *Crawford* demosprudential dissent might have encouraged readers to pursue a specific fix to the current ID law, by outlining a number of solutions — such as those articulated by Justices Ginsburg and Souter during oral argument, mentioned by petitioners' counsel during oral argument, or proposed by amici — in a similar way to Justice Kennedy's list of still-permissible alternatives in his concurring opinion in *Parents Involved*. But the tone, moral vigor,

⁴⁹³ See, e.g., ADVANCEMENT PROJECT, *supra* note 477; JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD (2007), available at http://brennan.3cdn.net/e20e4210db075b482b_wcm6ibohl.pdf.

⁴⁹⁴ For a list and copies of amicus briefs filed in *Crawford* by membership organizations such as AARP, Project Vote, League of Women Voters of Indiana, S.E.I.U., Common Cause, and People for the American Way; litigating and advocacy groups such as the NAACP LDF and the Lawyers Committee for Civil Rights Under Law; and historians and social scientists, see Brennan Ctr. for Justice, *Crawford v. Marion County Election Board*, http://www.brennancenter.org/content/resource/crawford_v_marion_county_election_board/ (last visited Oct. 5, 2008).

and storytelling qualities of the dissent might matter as much as a detailed plan for reducing the burden. As is evident in the one person/one vote line of cases, the white primary cases, and elsewhere, outlining a specific solution to a structural problem may not resolve the underlying flaw because, without a more meaningful intervention from constituents, the state legislatures can (and often will) pass a new law that imposes the same burden in a different way.⁴⁹⁵ Ultimately, the most important goal is to keep a vibrant conversation going between popular constitutional culture and constitutional law.

Consider the following possible framing.⁴⁹⁶

Because there is no explicit federal guarantee of the right to vote, states have enormous power to enact arbitrary rules with vast consequences both for election outcomes and for individuals trying to cast ballots.⁴⁹⁷ The right to vote in federal elections is controlled by fifty states and 13,000 separate and unequally administered voting jurisdictions.⁴⁹⁸ Indiana, along with Georgia, has the most restrictive identification requirement in the country.⁴⁹⁹ Forty-eight other states manage to run their elections without this type of disenfranchisement. Residents of Indiana now have less of a right to vote for President than their neighbors in Illinois and Ohio.

Local control of elections, as in the voter ID law of Indiana, is often toxic because it can be easily manipulated by partisans who seek to shape the electorate to maintain their power. Partisan control of election administration threatens the core principle of our democracy —

⁴⁹⁵ Compare the reapportionment cases of *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Karcher v. Daggett*, 462 U.S. 725 (1983), with the equipopulation gerrymander in *Vieth v. Jubelirer*, 541 U.S. 267 (2004); see also the grandfather clause cases of *Guinn v. United States*, 238 U.S. 347 (1915), and *Lane v. Wilson*, 307 U.S. 268 (1939), as well as the Texas white primary cases of *Nixon v. Herndon*, 273 U.S. 536 (1927), and *Nixon v. Condon*, 286 U.S. 73 (1932). The law of unintended consequences, as Justice Stevens's opinion notes, suggests that federal statutes adopted to give greater uniformity to voter registration by states may have simultaneously pushed states to consider more rigorous anti-fraud schemes. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1617–18 (2008) (opinion of Stevens, J.) (describing two recently enacted federal laws that require states to reexamine their election procedures, both of which “contain provisions consistent with a State’s choice to use government-issued photo identification as a relevant source of information concerning a citizen’s eligibility to vote,” and one of which — the Help America Vote Act (HAVA) — introduced the idea of voter IDs).

⁴⁹⁶ For a hypothetical demosprudential dissent, see <http://www.law.harvard.edu/faculty/guinier/publications/foreword.pdf>.

⁴⁹⁷ The dissenter might want to reference the disturbing trend set in *Bush v. Gore*, 531 U.S. 98 (2000), in which the Court asserted that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States,” *id.* at 104. In other words, Florida’s state right to administer the election took precedence over counting every individual vote.

⁴⁹⁸ Advancement Project, *supra* note 466.

⁴⁹⁹ See BRENNAN CTR. FOR JUSTICE, ID REQUIREMENTS DISCOURAGE VOTERS (2008), available at <http://www.brennancenter.org/page/-/Democracy/2%20current%20ID%20provisions.pdf>.

that the right to vote is fundamental because it is preservative of all other rights.

In all its talk of burdens, interests, balancing, and numbers, the Court forgets the simple truth that the right of all citizens to elect their representatives should be a fundamental tenet of inclusion in society, and the most basic sign of our equal human dignity within a polity of which we are a part. Yet, the Court is right. There is no provision of the U.S. Constitution that affirmatively guarantees citizens the right to vote. We have staged wars abroad to guarantee non-Americans the right to cast a ballot, but voting is not a right that we guarantee our own people. Both the Afghan Constitution and the Interim Iraqi Constitution explicitly confer the right to vote — the U.S. Constitution does not.⁵⁰⁰

The IRS does not delegate to counties, municipalities, or school districts the unsupervised ability to enforce the federal tax code. Shouldn't Congress assert its authority over federal elections?⁵⁰¹ Currently, the federal government defers to fifty states and 13,000 locally administered jurisdictions the barely regulated responsibility to enforce the right to vote in national elections. Such deference is especially problematic when those local bodies are easy prey for partisans. Indeed it is local election administrators who have the motivation, the access, and the track record to engage in whatever election fraud exists. It is not the individual voter, in other words, who threatens the integrity of the process.⁵⁰²

Today it's the poor, the elderly, and minorities who are excluded. Who will be next? Voting should be a right guaranteed to all American citizens, not a privilege dispensed at the whim of politicians. If this is something our state governments and this Court cannot or will not protect without an explicit constitutional mandate, then perhaps we need one.

* * *

⁵⁰⁰ See Advancement Project, *supra* note 466.

⁵⁰¹ See U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*, except as to the Places of choosing Senators." (emphasis added)).

⁵⁰² Advancement Project, *supra* note 466; see also OVERTON, *supra* note 452, at 140–62 (collecting sources). Professor Overton argues that the United States should adopt universal voter registration, in which states affirmatively assume the responsibility for registering all eligible individuals to vote. *Id.* at 168. Overton's proposal addresses the *real* problems that come from outsourcing and privatizing voter registration, which are distinct from the *manufactured* problems of fraudulent in-person voting.

Ultimately, I draw three conclusions from this exercise of applying demosprudence to dissent. First, demosprudence is more than a philosophy; it is a practice that Justice Scalia has mastered. Scalia is more than an originalist; he is, to my surprise, also a demosprude. While he has said that the Framers tie his hands, his dissents reach out to the people. He speaks frankly, memorably, and with absolute certainty about the very meaning of our democracy. So Scalia meets the first element of a demosprudential approach by addressing conflicts at the core of democracy. He meets the second constitutive element by engaging his audience with accessible metaphors and memorable imagery. In his written dissent in *Boumediene*, Scalia roused emotions by declaring that terrorists threaten not only our country, but “our homeland.” By contrast, his written dissent in *Washington State Grange* evoked a chuckle. There he imagined Oscar the Grouch endorsing Campbell’s Soup against the company’s will and without their consent, an analogy he hoped would illustrate the injustice of the Court majority’s opinion.⁵⁰³

Justice Scalia has a knack for attracting and holding the attention of a nonlegal public, the third element. Because he understands that Court reversal through constitutional amendment is “well nigh impossible,”⁵⁰⁴ his dissents are deliberate exercises in advocacy. They chart new paths for changing the law. They maintain the Court’s position at the “center stage [of] significant legal *debate*.”⁵⁰⁵ And they provide “a necessary[] check upon the power of the Court.”⁵⁰⁶ As in *Lawrence*, Justice Scalia can be transparent about his premises, attentive to his role as a catalyst for a larger public conversation, and accountable, on some level, to inviting and involving a larger public (not just himself) in lawmaking.

In sum, the first conclusion is that the demosprude’s tools are not always used to build a twenty-first-century democracy. Justice Scalia is a demosprudential *practitioner* who lacks commitment to the demosprudential *philosophy* of deliberation and inclusion. His originalist orthodoxy impels him to understand democracy by looking back to the Framers rather than forward to a living Constitution. Scalia imagines that the constitutive community that forged the constitutional text picked the values that guide law for all time. As he does not reconsider our constitutional principles in light of an ever-

⁵⁰³ See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1201 (2008) (Scalia, J., dissenting).

⁵⁰⁴ Scalia, *supra* note 480, at 39.

⁵⁰⁵ *Id.* (“The Court itself is not just the central organ of legal *judgment*; it is center stage for significant legal *debate*.”); see also Slater, *supra* note 39 (Justice Scalia assenting to the description of dissent as advocacy).

⁵⁰⁶ Scalia, *supra* note 480, at 39.

expanding consent community, he does not ask what its new members would have required had they been present at the creation.⁵⁰⁷ A consent community that excluded blacks, women, and white men who did not own property defines his constitutive values. Although the Constitution was subsequently amended over time to include those originally excluded, none of those newly invited into the polity were given the opportunity to ratify or reject the original terms of the agreement. The structure of the amendment process does not give a previously excluded minority (in the case of ex-slaves) or a previously dependent majority (in the case of women) an opportunity to revisit the original terms of the document by which they were nevertheless bound. In addition, to the extent he is committed to expanding the range of “people” involved, he understands them to be adequately represented in the existing institutions of government.

At the same time that his fealty to the original text fossilizes a debate whose major premise was an exclusionary and minoritarian form of democracy,⁵⁰⁸ he often is inclined to impose his own views rather than create space for others to participate. His brand of originalism contradicts the commitment to “deliberative accountability” that animates the idea of demosprudence.⁵⁰⁹ In deliberative accountability, power is held to account through two-way interactions.⁵¹⁰ By providing greater transparency to the deliberative process internal to the Court, the demosprudential dissenter educates the public and ultimately helps legitimate the Court’s authority. Power is thus dispersed by appealing to the audience’s own experience and by drafting or inspiring them to *participate* in a form of collective problem solving. Thus, there is built into Justice Scalia’s approach and his vision of democracy a profound dissonance: the genre he chooses invites greater participation, but his view of democracy may ultimately limit it.

In expressing these reservations, I may be exposing demosprudence to the critique that it has a political or partisan bias.⁵¹¹ But the bias here is not partisan; it is a preference for deliberative democracy rather than democracy as a mere aggregated tally of votes reflecting fixed or

⁵⁰⁷ Cf. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1630 (2005) (book review) (“One version finds troubling the idea that a past generation can lay down rules constraining the will of the majority in the present and in future generations. On that version, *constitutionalism* is the culprit, not *Marbury* or *Cooper*.”).

⁵⁰⁸ See generally Ginsburg, Harvard Conversation, *supra* note 179.

⁵⁰⁹ See Jane Mansbridge, *The Fallacy of Tightening the Reins*, 34 ÖSTERREICHISCHE ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 233 (2005).

⁵¹⁰ See *id.*

⁵¹¹ I realize that it might be impossible to make the idea of the demosprudential dissenter completely separate from ideology: the different Justices weigh democratic values in different ways and so any definition of demosprudence that includes reference to those values will necessarily have some kind of partisan bias. Without some reference to these democratic values, however, there may not be any meat on the bones, so to speak.

momentary preferences. The process of democratic deliberation seems inconsistent with Justice Scalia's approach in the *Washington State Grange* case, for example. Rather than regarding his audience as partners in deliberation, he seemed inclined to draft them as cheerleaders for his view.⁵¹² He articulated his view of "democracy" using the authoritative rather than the pedagogical voice. To the extent that Justice Scalia is "happiest in the martyr's role of principled defeat,"⁵¹³ he appears unconcerned that democratic processes may not easily yield to his "top-down" approach to judging.⁵¹⁴ He enjoys the attention of public combat without necessarily wanting to share the stage with the people themselves.⁵¹⁵ At the same time, he sees dissents as teachable moments,⁵¹⁶ albeit with a kind of certainty and centralized control.

Nevertheless, demosprudential dissents are part of a genre of narrative exposition that need not be aligned with any particular ideology or wing of the Court. Even Justices with a more participatory or deliberative view of democracy could and *should* learn from Justice Scalia many relevant techniques (the added urgency is associated with the dead hand control problem described in Part IV). Justice Scalia's view of democracy is impoverished in my view, and yet he is helping to institutionalize new channels for democratic participation. Justice Scalia may incorporate an alternative substantive vision of democracy where the role of courts is tightly constricted and courts are insulated from public scrutiny. At the same time, his dissents encourage a social movement to fight on. He also invites the larger public to scrutinize the Court, both from the right and from the left (he often seems to egg liberals on, inviting critique as well as deliberation). His dissents help create space for a new conception of the judicial role within the repertoire of our democracy.

⁵¹² See *infra* pp. 83–84; see also Lithwick, *supra* note 210; Lithwick, *supra* note 109 (discussing how Justice Breyer had looked at his audience while Justice Scalia seemed to gaze into space, allowing his audience to eavesdrop on the fun he was having playing out his own thoughts).

⁵¹³ ROSEN, *supra* note 41, at 201.

⁵¹⁴ *Id.* at 220 (describing Scalia's "top-down" approach to judging, where he "start[s] with well-developed ideological commitments and impose[s] them on [the] case, regardless of the facts").

⁵¹⁵ See Lithwick, *supra* note 109. His willingness to command media attention may be a recent phenomenon. When Justice Scalia was still an appellate judge, he admonished judges to avoid becoming public figures. The high esteem in which people hold the courts, he argued in 1986, depends on the Justices' functioning outside of the public consciousness so that no one sees "that lo and behold, they're made up of frail human beings like every other governmental institution." ROSEN, *supra* note 41, at 197 (quoting Justice Scalia).

⁵¹⁶ In his own words, Scalia views the purpose of dissent as, at least in part:

[informing] the public in general, and the Bar in particular, about the state of the Court's collective mind. . . . [D]isclosure of the closeness of the vote provides useful information to the legal community, suggesting that the logic of the legal principle at issue has been stretched close to its utmost limit, and will not readily be extended further.

Scalia, *supra* note 480, at 37–38.

The second conclusion is that lawyers, too, have demosprudential responsibilities. Especially where a loss is likely, lawyers before the Court should weigh the demosprudential possibilities of their case. They should make every effort to use real people and rich narratives to vividly tell their clients' stories. In this way, lawyers can transform a decisional defeat into a democratic springboard. For even in the face of an adverse opinion, lawyers can successfully arm the dissenters with raw demosprudential material. Consider *Crawford*, whose lawyers might not have had any individual clients in Indiana, as they were bringing the case early. They might have rooted their argument in the stories of folks from other states like Georgia and Missouri. Lawyers ought not rely upon the *possibility* that a demosprudential dissenter will direct her law clerks to dig this material up on their own. Neither should they assume that amici will know to file the demosprudential equivalent of the "Brandeis brief."⁵¹⁷ Critically, demosprudence through dissent is not just a practice of judging. It is a democracy-enhancing jurisprudence in which lawyers participate.⁵¹⁸

The third conclusion is perhaps the most important. Demosprudential dissenters need to be clear that their potential audiences are external, not internal. Justice Scalia, in particular, has many audiences, but he admits that he does not write to persuade his colleagues on the Court.⁵¹⁹ In *Heller*, for example, he offered a one-word sentence as part of his response to Justice Stevens: "Grotesque."⁵²⁰ Stevens may be "the butt of his sarcasm," but Justice Scalia does not engage Justice Stevens "as a participant in a mutually respectful process of mutual justification, as everyone in the deliberative field would define deliberation."⁵²¹

Compare, for example, Justice Stevens in his *Heller* dissent, where he argued his case on the Court majority's turf and missed the opportunity to speak to and engage a political agenda and a mobilized constituency. Justice Stevens deploys jurisprudence primarily to challenge

⁵¹⁷ In *Crawford*, amici filed supporting analyses of the practical consequences as well as the historical antecedents to the Indiana photo ID law. See *supra* note 494.

⁵¹⁸ See *supra* notes 478–480, 494–500. I am indebted to Jane Mansbridge for urging me to include this aspect of demosprudence here. In the book that I am coauthoring with Professor Torres, the role of lawyers in demosprudence will be developed further.

⁵¹⁹ See Slater, *supra* note 39 ("I'm not going to persuade my colleagues and I'm not going to persuade most of the federal bench." (quoting Justice Scalia)).

⁵²⁰ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2794 (2008); see also Email from Jane Mansbridge to Lani Guinier (Sept. 21, 2008) (on file with the Harvard Law School Library) ("As I read that sentence, I thought, 'No one who wants to have a real deliberation with someone uses a word like that. That is a 'cut off conversation' — even a 'cut off relationship' — word. I have heard words, phrases, and sentences like this in faculty department meetings. The people at whom they are aimed remember them forever.").

⁵²¹ Mansbridge, *supra* note 520; see also Mansbridge, *supra* note 509 (describing the importance of deliberative accountability).

Justice Scalia's analysis, and thus speaks primarily to his colleague on the Court. Justice Scalia, on the other hand, speaks both to his colleagues and to his political friends simultaneously. He normalizes his insistence on the authority of the original text and authorizes the New Right gun lobby's position. In the process, he camouflages the law/politics distinction and creates his own exception to the law/politics divide. Justice Scalia uses his originalism jurisprudence as a language that a political movement can both understand and rally around. Justice Scalia's success in *Heller* stands as an example to all the Justices on the Court of the possibilities opened through demosprudential networks.

The 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. Although I have focused on Justice Scalia's words, his style must be interpreted to acknowledge that he is the Justice most closely connected with his social movement.⁵²² Indeed, as Jane Mansbridge observes, Justice Scalia "need not urge his followers to do x. He can just say x and know they will take it up. . . . [O]nce you have a relationship with a social movement you don't need specific urging."⁵²³ Similarly, Justice Ginsburg speaks in her clearest voice when she addresses the issue of gender equality as in *Ledbetter* or *Carhart*.

Thus, I am reassured that, despite legitimate concerns about feeding demagogic instincts among the judiciary or undermining confidence in the rule of law, demosprudential dissents are a wise use of judicial resources under the right circumstances. They reconstruct multiple meanings of the judicial role vis-à-vis the public. The judge can become a catalyst for democratic accountability by making the interpretation of law available to a larger public. The judge should not be an evangelist on a speaking tour, but the judge's prophetic voice in dissent can redefine the judge's role from simply declaring the tenets of the law to the faithful (or arguing with her colleagues) to serving as a coach or spark plug for democracy.⁵²⁴ In this account, the judge's role includes that of the "parish priest," not just the "bishop."

⁵²² See Siegel, *supra* note 313.

⁵²³ Mansbridge, *supra* note 520 (remembering that in President George W. Bush's 2003 State of the Union address, "he talked about 'wonder-working power[.]' Every fundamentalist knew that hymn. Others didn't. So there was a bit of 'esoteric writing' here. Scalia doesn't use esoteric writing; he wouldn't stoop to it. But he knows he has a social movement as an audience.")

⁵²⁴ See Scott & Sturm, *supra* note 268; Susan Sturm, *Law's Role in Addressing Complex Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 35, 35 (Laura Beth Nielson & Robert L. Nelson eds., 2005) (arguing that courts provide a place for "legally structured occasions for deliberating about the relationship between norms and practice" in the employment discrimination context).

Indeed, whether it is Justice Ginsburg's dissent from the bench in *Ledbetter*, Justice Stevens's concurrence in *Baze*, Justice Breyer's oral dissent in *Parents Involved*, or to a lesser extent the oral dissents this Term by Justice Scalia in *Boumediene* and Justice Stevens in *Heller*, there is a common theme. In different ways and from different perspectives, these dissenters are raising up the issue of democracy. They may seek affirmatively to reinvigorate the will of current lawmakers. They may, at the same time, stimulate discussion and critique of — or engagement with — the people's role in the process of lawmaking itself. But each 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." They are creating teachable moments through which to reach new potential lawmakers.

IV. IMPLICATIONS OF DEMOSPRUDENCE THROUGH DISSENT

*A dissenting opinion is to some extent an appeal by the minority — from the decision of the majority — to the people.*⁵²⁵

A. Democracy-Enhancing Potential of Deliberative Accountability

1. *Constitutional Authority.* — The Supreme Court *enhances* its authority by engaging the public through tempered, direct communication. The demosprudential dissenter invites the nonlegal public to consider, critique, and even take action in response to decisions with which they disagree. I argue that much of the authority for the Court as a constitutional institution lies in just such "deliberative accountability"; that is, transparent communication with, and responsiveness to, the people.⁵²⁶ In fact, the third prong of demosprudence through dissent calls ordinary people to deliberate collectively about conflicts at the core of democracy. Like Mark Tushnet's defense of popular constitutionalism, it is grounded in Lincoln's First Inaugural: "This country, with its institutions, belongs to the people who inhabit it."⁵²⁷ In Tushnet's words, "the Constitution belongs to all of us collectively, *as we act together.*"⁵²⁸

⁵²⁵ *Evils of Dissenting Opinions*, *supra* note 57, at 75.

⁵²⁶ See Mansbridge, *supra* note 509.

⁵²⁷ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 5, 10 (James D. Richardson ed., 1908).

⁵²⁸ TUSHNET, *supra* note 239, at 181 (emphasis added).

Of course acting together through the mechanism of dissent can take many forms. It may involve political discussion about the merits of a policy, as with the death penalty. It may take place during the heated back-and-forth of dueling political movements, as Reva Siegel describes in the case of the “de facto” ERA. Or it may depend on extraordinary norm entrepreneurs like Dr. Martin Luther King, Jr., a charismatic preacher who drew on the authority of *Brown v. Board of Education* to inspire 50,000 black people to spend more than 365 days boycotting segregated buses.⁵²⁹ The very day Rosa Parks was arraigned and convicted, Dr. King delivered a sermon before a mass meeting at Holt Street Baptist Church.⁵³⁰ He prepared his audience to take the bold step of continuing their one-day bus boycott indefinitely, by brilliantly fusing two great texts: the Supreme Court’s pronouncement a year earlier in *Brown*, and the Bible.⁵³¹

Dr. King was a visionary. He was a gifted orator who inspired a mass movement to join in protest against Jim and Jane Crow. But acting together to remake the Constitution may also depend on ordinary yet role-literate members of the lay public recalibrating the relationship between politics and law, as feminists did during the contentious public debate about the Equal Rights Amendment. Although the amendment was never adopted, the contestation influenced public norms as well as the Supreme Court’s view of the law.⁵³²

2. *Popular Will*. — In 1898, the *Albany Law Journal* suggested that laypeople cannot interpret or influence the development of constitutional law.⁵³³ The author questioned the role of dissenting opinions, a role squarely at odds with the then-reigning norm of acquiescence. Dissents were thought to undermine the people’s faith in “the” law; they were viewed as empty engines incapable of inspiring change. A dissenting opinion, the journal suggested:

is to some extent an appeal by the minority — from the decision of the majority — to the people. What can the people do? They can’t alter it; they can’t change it; right or wrong, they must respect and obey it. Why shake the faith of the people in the wisdom and infallibility of the judiciary?⁵³⁴

⁵²⁹ See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63*, at 138–42 (1988).

⁵³⁰ *Id.* at 135–38.

⁵³¹ “If we are wrong,” King declaimed, “the Supreme Court of this nation is wrong. If we are wrong — God Almighty is wrong!” *Id.* at 140. According to Taylor Branch, the crowd seemed to explode as King then shouted: “If we are wrong — Jesus of Nazareth was merely a utopian dreamer and never came down to earth! If we are wrong — justice is a lie.” *Id.* at 141.

⁵³² See Siegel, *supra* note 38.

⁵³³ *Evils of Dissenting Opinions*, *supra* note 57, at 74–75.

⁵³⁴ *Id.* at 75.

One hundred years later, Professor Robert Post offered a demoprudential answer, in which he inverted the logic of the question. Post suggested that a “crude distinction” between law and politics undergirded the Court’s insistence upon unanimity. But he argued that the distinction is difficult to sustain in a constitutional democracy, where the Court’s authority to pronounce law depends largely upon popular will and the popular will is forged through public discussion and deliberation.⁵³⁵ Thus public confidence in our democracy provides a stronger source of constitutional wisdom than public faith in any Justice’s infallibility.⁵³⁶

There is another answer to the *Albany Law Journal*’s question: Supreme Court dissenters can ratify and initiate constitutional change. Through colloquial forms of communication, public discourse, and popular engagement, they can shift from silent acquiescence to speech, from judge-made law to collective constitutional change.⁵³⁷

As Justice Scalia and Justice Ginsburg (and less frequently Justice Breyer) have shown, when members of the Court use their opinions to speak directly to a nonlegal public in language ordinary people can understand, a minority viewpoint can gain enduring traction. Witness the NRA and the shift in constitutional culture its mobilization helped effect. The culture shift preceded — rather than followed — *Heller*. Or consider the civil rights movement, fueled in part by *Brown*’s promise but also disappointed in its execution.⁵³⁸ Young student activists’ rising expectations, followed by deep frustration with the courts’ inability to follow through, prompted their refusal to leave

⁵³⁵ The prestige and reputation of the Court — “the influence and weight that it commands” — also depend on a capacity for transparency and engagement among members of the Court and between the Court and the public that is more substantial than the “illusion” of “absolute certainty and of judicial infallibility.” Post, *supra* note 57, at 1357 (quoting Fuld, *supra* note 67, at 928); see also *supra* pp. 65–66. I agree with former President of the Supreme Court of Israel Aharon Barak, that the two major tasks of a judge “are bridging the gap between law and society” and “protect[ing] the constitution and democracy.” Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 25–26 (2002). Where I part company is on the question of whether the safeguarding of formal democracy is, as he suggests, adequately “expressed in legislative supremacy” or whether it also requires expression in “basic values and human rights.” *Id.* at 26.

⁵³⁶ Since constitutional law is inexorably linked to constitutional culture, the suppression of dissent “can come to seem equivalent to the arbitrary foreclosure of public dialogue.” Post, *supra* note 57, at 1357.

⁵³⁷ See *id.* at 1323, 1327, 1330, 1366. But cf. Linda Greenhouse, *2,691 Decisions*, N.Y. TIMES, July 13, 2008, at A1 (“In fact, it is most often the Supreme Court that is the follower. It ratifies or consolidates change rather than propelling it”); Audio recording: Linda Wertheimer, Supreme Court Reporter Linda Greenhouse Retires (July 12, 2008), available at <http://www.npr.org/templates/story/story.php?storyid=92489115> (noting that the decision in *Roe v. Wade* reflected rather than changed social norms).

⁵³⁸ See GUINIER & TORRES, *supra* note 46; Tomiko Brown-Nagin, *The Courage to Dissent* (unpublished manuscript, on file with the author).

segregated lunch counters in North Carolina and Georgia in 1960. The energy of the youth, combined with the courage of the elders, brought new laws into being and changed the culture of our country and our Constitution, although no new constitutional amendments were ratified.⁵³⁹ To the extent that ordinary people understand and internalize the story of a judicial decision (including the legal and cultural process by which the court reached that decision), they are likely to have more confidence in the lawmaking institutions and in their own ability to influence those institutions, and thus a greater sense of agency. There is a relationship, in other words, between the more formal institutions of constitutional change and “informal pathways of communication through which constitutional culture channels social movement conflict so it guides officials in determining the Constitution’s meaning.”⁵⁴⁰

When those with an aroused consciousness of the stakes at hand — and a sense of being authorized to act on those stakes — mobilize, they help reshape Supreme Court jurisprudence. As one of the Court’s distinguished judicial conservatives said in dissenting from *Baker v. Carr*,⁵⁴¹ the case that opened the door to the “political thicket,”⁵⁴² it is a “civically militant” populace that ultimately makes the most democratically accountable and sustainable decisions.⁵⁴³ At the same time, demosprudential dissent can help to make the Court more democratically accountable by capitalizing on the fact that “major Supreme Court decisions are as likely to mobilize opponents as they are to educate prospective supporters.”⁵⁴⁴

⁵³⁹ See Brown-Nagin, *supra* note 538. Along the way, of course, there were many disappointments, such as *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and setbacks, such as *Milliken v. Bradley*, 418 U.S. 717 (1974), in the 1970s and *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), in the 2000s.

⁵⁴⁰ Siegel, *supra* note 38, at 1330.

⁵⁴¹ 369 U.S. 186 (1962).

⁵⁴² *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

⁵⁴³ See *Baker*, 369 U.S. at 269–70 (Frankfurter, J., dissenting) (“Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people’s representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.”).

⁵⁴⁴ Michael Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1138 (2001); see also Michael Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 459 (2005) (noting that Justice Scalia’s dissent in *Lawrence*, which argued that the decision would logically entail a constitutional right to gay marriage, was circulated among conservative Christian groups); Cass Sunstein, *Backlash’s Travels*, 42 HARV. C.R.-C.L. L. REV. 435, 444–45 (2007) (pointing to the Condorcet Jury Theorem to justify the argument that large populations can make constitutionally relevant judgments). Moreover, if we live in a world where we think that the court is equally likely to be right or wrong, then the Court should pay attention to the risk or existence of backlash because it “reflects the public’s judgments about basic social questions,” and such judgments deserve respect for democratic reasons. Sunstein, *supra*, at 446.

A demosprudential appeal to the people might also prompt the nonlegal public to think more critically about their own role in public discourse, not just that of the Court, in ways that extend beyond the narrow partisanship encouraged by our election machinery. After all, demosprudence through dissent is not a practice limited to one side or the other. But it is not yet clear to what extent the Justices on the left are willing and able to join the most famous, and one of the most conservative, Supreme Court Justices — Antonin Scalia — in using this public style of communicating.⁵⁴⁵ Across the political spectrum, people would benefit from an ability to participate in a more deliberative and public space where constitutional law could meet and exchange views with constitutional culture. If the Justices instead remain remote, without human voice or connection, they may weaken important sources of demosprudential exchange between constitutional law and constitutional culture.

3. *Public Education About Minority Views.* — Demosprudential dissents can be used to educate the public about views of the Court minority that not only deserve a hearing but that may not influence current or future judicial majorities without a more aroused popular consciousness of the issues at stake. To the extent that dissenters can help a lay audience understand the implications of the majority opinion in moral terms, they may be more successful at reaching a larger audience than if they rebut point-by-point the majority's legal analysis.⁵⁴⁶

Demosprudential dissents are an important antidote if judicial bloc voting proceeds along ideological lines among a group of mostly similarly-situated Justices with great intellectual powers but limited real world exposure. Those who find themselves in a more or less permanent judicial minority may need to look beyond their ability to persuade their colleagues. Addressing a nonlegal audience may help a locked-in judicial minority to avoid the deadening “conformity effects” and dead-end barriers that come from an entrenched yet small group of people making all the decisions over an extended period of time.⁵⁴⁷

⁵⁴⁵ Nor is it clear whether other Justices on the right are interested in the mechanism of demosprudence. For example, Justice Thomas, who limits his public interactions within the courtroom, has delivered only two dissents from the bench in the last ten years. Duffy & Lambert, *supra* note 44, at 9, 24.

⁵⁴⁶ See, e.g., *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 270–76 (1974) (Douglas, J., dissenting) (filing separate opinion in which he expressed the view that the critical issue in the case concerned invidious discrimination against the poor rather than the right to interstate travel; acknowledging at the same time that “the political processes rather than equal protection litigation are the ultimate solution of the present problem”; then appending to his opinion “Gourmand and Food — A Fable”, which was the foreword to an article, Judith R. Lave & Lester B. Lave, *Medical Care and Its Delivery: An Economic Appraisal*, 35 LAW & CONTEMP. PROBS. 252 (1970)).

⁵⁴⁷ See *infra* pp. 122–25, especially text accompanying notes 566–70.

Justices in the minority now have the means through the internet to speak to an audience that is broader than the Justice's colleagues or the litigants in the case at hand.⁵⁴⁸ There are multiple opportunities for a more robust and ongoing public awakening to minority views as a result of the technological revolution: a communications makeover that has resulted in wide-ranging public access to the work of government officials. In the fifteenth century, the printing press revolutionized access to the written word; in the twenty-first century, the internet is transforming access to the spoken word. Were oral dissents more widely circulated, for example, through cameras in the courtroom or an upload of the audio onto YouTube, they could create new interest in "an appeal by the minority — from the decision of the majority — to the people."

The new technology enables social movements to be even more effective translators — they can take the decisions being issued by Justices in dissent and turn them into stories or even soundbites that the average person will be exposed to and may be inspired by.⁵⁴⁹ Social movement activists and thought leaders can use blogs, video, and cell phone technology to unpack and disseminate what Gerald Torres calls the "ethical construction of law" that surrounds the majority's textualist, structuralist, or originalist analysis.⁵⁵⁰

Just as the Court's audience shifted and expanded following the Judiciary Act of 1925, the transformation of communications technology today may produce a similar upheaval in conventional wisdom. That new technology permits people from different classes and geographic locations to participate, at least vicariously, in public life. It is not beyond the reach of imagination to expect tomorrow's Court to begin to speak to a broader public in creative new ways.

4. *Democratic Accountability and the Law/Politics Divide.* — Demosprudence through dissent is a form of *democratic* judicial activism that opposes *decisional* judicial activism. Justices Breyer, Stevens and Ginsburg's oral dissents on the left and Justice Scalia's dissents on the right raise to public consciousness a deeply democratic issue: the

⁵⁴⁸ Indeed, one of my colleagues, former Harvard Law School Dean and current Professor Robert Clark, suggested at a recent faculty workshop that the Justices should consider blogging as a way to reach out to a broader audience. Apparently, Judge Richard Posner of the Seventh Circuit already does blog.

⁵⁴⁹ One potential problem with this theory is that the oral dissents just really aren't available. Media sources always note that there was a dissent from the bench, but they still quote the written opinion instead of the oral one. Social movements are unlikely to use the oral opinion, since they are unlikely to be in the Court on the day the opinion is read and thus will have to wait months for an audio recording to show up. The Court could circumvent this problem if it published the text of oral dissents at the same time as the written decisions, or if dissenters made their written opinions more like their oral ones.

⁵⁵⁰ See Gerald Torres, *Social Movements and the Ethical Construction of Law*, CAP. U. L. REV. (forthcoming 2008).

specter of judicial activism, which up until now has been presented as an inchoate form of partisan hypocrisy. The conservative movement that came to power with the election in 1980 of President Ronald Reagan loudly proclaimed that Presidents should only appoint judges who will issue “legal” rather than “political” judgments, who will enforce the law, not make it. But judges — conservative or liberal — do not find the answers to hard questions in legal precedent or legal logic alone.⁵⁵¹ As conservative Seventh Circuit Judge Richard Posner acknowledges, law is “shot through with politics,” and thus judges must rely on other sources of judgment, “including their own political opinions or policy judgments, even their idiosyncrasies.”⁵⁵²

Recall the Louisville and Seattle cases. It was not the liberal Justice Breyer but the conservative Chief Justice Roberts and his fellow Republican appointees in the majority who overruled the decision of the democratically elected school board in Seattle and the voters themselves in Louisville. Similarly in *Ledbetter*, it was the Court majority that narrowed the reach of a congressional majority. The oral dissents in these cases show how Justices in the majority, including those appointed under the banner of strict constructionism, often reinterpret well-established precedents or do not defer to legislative majorities.⁵⁵³ The dissents thus reinforce the ideal underlying the obligation to publish reasons for a decision.

At the same time, they sharpen that ideal by subjecting those reasons to greater public scrutiny. That scrutiny can then have salutary consequences for democracy. Demosprudential dissents — delivered in accessible, non-technical language — can go beyond exposing the political nature of the judge’s role. They can invite a fresh approach to the conventional and overly simplistic divide between political and legal judgments. They can help make democracy a practice, not just a theory.

Disagreements about the law can be negotiated (through expanded opportunities for participatory democracy) rather than asserted (by the majority in an electoral democracy). The question can become who gets to talk, not just who gets to vote. Demosprudential dissents remind us that law can in fact be made by ordinary people who push their legislators, making sure that opportunities are available to blacks

⁵⁵¹ This was the claim of the legal realists and of the critical legal studies movement. It has now been “mainstreamed” and in many ways is no longer controversial among legal academics. But in popular discourse, the idea of judicial activism retains its one-sided salience.

⁵⁵² POSNER, *supra* note 159, at 9.

⁵⁵³ See *id.* (arguing that “law” in a “judicial setting is simply the material, in the broadest sense, out of which judges fashion their decisions”). Judge Posner cites empirical studies showing that extralegal factors such as personal and professional experience as well as political preferences influence judicial decisions. *Id.* at 8.

and non-blacks, to women and men, to gays and straights.⁵⁵⁴ Indeed, to the extent that unanimity squelches legitimate differences of view, it undermines an important and less formal forum of deliberative accountability.

B. Challenges

1. *Axis of Homogeneity.* — The Court currently represents a thin slice of the population, with little experiential and background diversity. Despite Justice Roberts's efforts to impose a new norm of unanimity, the Court is defined both by biographical homogeneity and partisan asymmetry. Currently, all of its members first served as appellate court judges.⁵⁵⁵ None of its members has ever run for public office. (Compare this to the Taft Court, on which a former President and former cabinet officers served.) Five of its members are Catholic; eight of its members are men.⁵⁵⁶ There are no Latinos or Asians on the Court. Its partisanship can be full-throated, but without a full mix of views represented. There are several ideologically constant conservatives and the left side of the bench is led by a moderate Republican.⁵⁵⁷

⁵⁵⁴ See Siegel, *supra* note 38, at 1325 n.6 ("Cover placed at the center of law the communal groups that would seem peripheral if the government's own worldview were the starting point. In so doing, Cover set in motion three captivating arguments: (1) government should be understood as one among many contestants for generating and implementing norms; (2) communities ignored or despised by those running the state actually craft and sustain norms with at least as much effect and worth as those espoused by the state; and (3) imposition of the state's norms does violence to communities, a violence that may be justifiable but is not to be preferred a priori." (citing Martha Minow, *Introduction to NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 1, 2 (Martha Minow et al. eds., 1992))).

⁵⁵⁵ TOOBIN, *supra* note 20, at 14, 26, 44, 52, 70, 80–81, 264, 299.

⁵⁵⁶ See Greenhouse, *supra* note 129 ("While it appears to be politically incorrect and possibly even impolite to notice, we now have a Catholic majority on our Supreme Court for the first time in our history. Have you noticed whether the justices acknowledge this new majority in any way, or do they appear to studiously avoid it? Could it really be that the religious affiliation of the justices has no meaning or import? Have you observed any instances where it may have had any bearing on the decisions being made?").

⁵⁵⁷ Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 50 ("I don't think of myself as a liberal at all," [he said,] laughing and shaking his head. "I think as part of my general politics, I'm pretty darn conservative." Stevens said that his views haven't changed since 1975, when as a moderate Republican he was appointed by President Gerald Ford to the Supreme Court." (quoting interview with Justice Stevens)); see also Akhil Reed Amar, Heller, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008) (noting the impact on the Court's decisions of the fact that four current Justices served on the *Harvard Law Review*). In addition, both Chief Justice Roberts and Justice Alito served in the federal executive branch earlier in their careers. Professor Michael Dorf conducted a study, cited by Linda Greenhouse, examining justices appointed by Republican Presidents, beginning with Richard Nixon in 1969, and concluded that those without previous experience in the federal executive branch tend to become more liberal in their views, while those with such experience basically stay the same. See Michael Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices "Evolve" and Others Don't?*, 1 HARV. L. & POL'Y REV. 457 (2007).

This is not just a question of pure biography, although prior experience does seem to matter where litigators for a social movement ascend to the bench (as did Justices Marshall and Ginsburg), where Republican-appointed Justices have prior federal executive government service and thus seem more likely to remain loyal to the Administration that appointed them,⁵⁵⁸ or where Justices like Breyer or Stevens had fathers whose work (in Justice Breyer's case⁵⁵⁹) or life challenges (in Justice Stevens's⁵⁶⁰) influenced both their moral and professional compasses. Demosprudence through dissent becomes crucial when homogeneity on the bench limits the Court's capacity for accountability, as Justices are able to invite to the discussion voices not represented on the Court itself.

However, the current axis of homogeneity challenges the practice of demosprudence in two ways. One is that Justices without experience living, working with, or talking with ordinary people may lack the facility to speak colloquially. Their professional lives have been disciplined by the logic of a closed system that assesses competence by metrics that are foreign and alienating to the nonlegal public. After all, these are the elite of the elite. By contrast, Justices with a more eclectic background may find it easier to communicate to, and be understood by, a nonlegal public. Consider the divergent styles of Justice Black and Justice Frankfurter in light of their very different backgrounds. Frankfurter, a former law professor, was accused of writing long essays masquerading as opinions, whereas Black, a former politician, was recognized for writing so that other people, not just lawyers, might want to read his opinions.⁵⁶¹

The second is that the Court is isolated from sources of innovation. As Professor Scott Page writes in defense of the toolkit of diversity, groups that include people of similar backgrounds and skill sets are more likely to get stuck at the same problem-solving dead ends.⁵⁶² Judicial minimalism (or deciding cases on narrow grounds) may reduce petty squabbling but it does little to ensure that the Court will benefit

⁵⁵⁸ See Greenhouse, *supra* note 129 (citing Dorf, *supra* note 557). This would apply presumably to Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

⁵⁵⁹ Justice Breyer's father worked as a lawyer and legal counsel for the San Francisco Board of Education. Oyez, Stephen G. Breyer, U.S. Supreme Court Justice, http://www.oyez.org/justices/stephen_g_breyer/ (last visited Oct. 5, 2008).

⁵⁶⁰ See ROSEN, *supra* note 41 (describing Justice Stevens's reverence for his father, whose conviction for embezzling \$1.3 million was later overturned by the Illinois Supreme Court).

⁵⁶¹ NEWMAN, *supra* note 136, at 292.

⁵⁶² See SCOTT PAGE, *THE DIFFERENCE* (2007). Page, a professor of complex systems, argues that unless a team or decisionmaking body contains people with diverse backgrounds and cognitive strengths, that decisionmaking group will consistently get stuck at the same place. See *id.* at 361 (arguing that if two top scorers on a test get the same questions wrong, it makes sense to hire the next highest scorer who answered correctly the questions the top two got wrong so that the group has a greater chance of achieving collective success).

from the range of perspectives and information that promote innovative solutions.⁵⁶³ Without access to multiple and competing sources of insight, the Court is more likely to get mired in nineteenth- or twentieth-century approaches to twenty-first-century problems. It lacks the tools to address issues of quality public education, to prepare all our citizens to compete in the global marketplace, or to once and for all protect the fundamental right to vote by affirming the federal — not just the state — responsibility to ensure universal access to all qualified citizens, especially in national elections.

2. *Goal of Unanimity.* — One might argue, in response, that a focus on dissents understates the value of institutional consensus as a better solution to the partisan asymmetry. Polarization makes a court not only unpleasant but often dysfunctional. The striking decline in the number of oral dissents from the 2006 Term to the 2007 Term might suggest a consensus emerging in favor of narrow decisionmaking (judicial minimalism) that challenges the idea that demosprudential dissents offer important lessons.⁵⁶⁴ Chief Justice Roberts did his best to promote just such consensus: he was in the majority 90% of the time in the 2007 Term.⁵⁶⁵

The Court majority in the 2007 Term may have been cajoled by Chief Justice Roberts to listen more carefully to the raised voices of their colleagues in the minority. In the employment discrimination arena, the conservative and liberal ends of the spectrum appear willing to compromise in more narrowly crafted rulings that do not raise the ire of dissenting Justices. But “conformity effects” may also play a role.⁵⁶⁶ The Justices in the minority may go along to get along, under pressure from their colleagues to play ball under new rules.⁵⁶⁷ Although mainstream Court observers noted with pleasure the reduction in 5–4 decisions (and liberals appreciated the five-for-five sweep for workers this Term compared to the pro-business tilt in the 2006 Term),⁵⁶⁸ the absence of obvious controversy does not mean that the

⁵⁶³ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259 (1999).

⁵⁶⁴ It was not just the number of oral dissents that fell. The number of closely contested decisions also dropped precipitously. In the 2006 Term, one-third of the cases were 5–4 decisions, “the highest share in at least a decade.” Ginsburg, *supra* note 181, at 2. By contrast, in the 2007 Term, the Court decided eleven cases out of sixty-seven by one-vote margins. Linda Greenhouse, *On Court That Defied Labeling, Kennedy Left Boldest Mark*, N.Y. TIMES, June 29, 2008, at A1.

⁵⁶⁵ Greenhouse, *supra* note 564.

⁵⁶⁶ CASS SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003).

⁵⁶⁷ See, e.g., *id.* (describing cascading and conformity effects among appellate court judges).

⁵⁶⁸ Compare Ginsburg, *supra* note 181, with Linda Greenhouse, *Justices, in Bias Case, Rule for Older Workers*, N.Y. TIMES, June 20, 2008 (cases involving employees’ rights in workplace discrimination cases completed a five-for-five sweep “that was little short of astonishing, given how far the court had appeared to be tilting toward business under Chief Justice John G. Roberts Jr.”); see also Editorial, *The Court and Workers*, N.Y. TIMES, June 21, 2008, at A18 (comparing the

core conflicts at the heart of the ideological divide have been resolved. Nor does it mean that the significant challenges facing the country are being addressed either head-on or with the benefits of many minds.⁵⁶⁹ This is especially true when the Court majority fails to reflect the demographic, ideological, or experiential diversity of the country's population.⁵⁷⁰

Despite Chief Justice Roberts's efforts, moreover, there was in fact less unanimity: only 30% of the cases this Term were decided without dissent, compared with just over 40% in the Term before, and just over half in 2005–2006. Although the number of 5–4 cases declined from 2006–2007, that figure should be weighed in light of the fact that the Court decided fewer cases than in any Term since 1953–1954.⁵⁷¹ If there is an effort to avoid conflict, it does not seem to be working. The personnel of the current Court may simply not be positioned — on their own — to resolve the great ideological, political, and cultural debates of our time. What demosprudence through dissent (whether oral or written) may offer, therefore, is a more effective approach to conflict. When the Court creates public spaces for deliberating about these disagreements, it can provide innovative and nonlegislative forms of democratic accountability.

3. *Problem of Dead-Hand Control.* — Several scholars have raised the question of whether the Court is now less democratically accountable because its members serve for such an extended period of time because of increased life expectancy in the twenty-first century compared to the eighteenth or nineteenth centuries. “Life tenure” now means service averaging twenty-five years; for the first 200 years of the nation's history, Justices' tenure averaged only fourteen years.⁵⁷² Justices from one political era now serve well into periods where they may represent the dead-hand control of a former electoral majority. Arguably, we experienced this in *Bush v. Gore*, in which a Court, put in place by past electoral majorities, decided the presidential election

Court's narrow rulings in favor of workers' rights in the 2007 Term with its pro-business reputation in the 2006 Term).

⁵⁶⁹ The idea of “many minds” tracks Justice Brennan's view that the dissenting opinion “reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas.” WAYNE V. MCINTOSH & CYNTHIA L. CATES, *JUDICIAL ENTREPRENEURSHIP: THE ROLE OF JUDGES IN THE MARKETPLACE OF IDEAS* 10 (1997) (internal citation omitted). *But cf.* Vermeule, *supra* note 214.

⁵⁷⁰ See James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 776 (2004).

⁵⁷¹ Greenhouse, *supra* note 564.

⁵⁷² Steven Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 770–71 (2006).

rather than wait for a new electoral majority to be determined⁵⁷³ — what Professor Larry Kramer called the Court's power grab.⁵⁷⁴

In the early part of the twenty-first century, the Court is also less engaged in a conversation with the academy,⁵⁷⁵ except through the law clerk pipeline in which law clerks transmit former professors' favorite theories into footnotes in Supreme Court opinions.⁵⁷⁶ This combination of factors suggests that the Court does not satisfy Professor Page's diversity toolkit analysis.⁵⁷⁷ Consider as well the views on experiential diversity that Justice Ginsburg has expressed, writing before she became a Supreme Court Justice.⁵⁷⁸ All of these factors, particularly longer stays on the Court, contribute to the danger of dead-hand control by an electoral minority for an extended period.⁵⁷⁹

Nevertheless, skeptics, for whom law is exclusively or primarily about rule elaboration and enforcement, will worry that the Court will lose its authority and legitimacy if the response to *Bush v. Gore* were more direct appeals to a nonlegal public audience. For them, the danger is that the Court is already moving from the business of law to the stadium of politics. These concerns cause some, including the current Chief Justice, to stand firm on the importance of institutional norms of unanimity. For Chief Justice Roberts, the Court needs to act "as a Court" developing a "jurisprudence of the Court."⁵⁸⁰ And yet for small

⁵⁷³ See Kramer, *supra* note 239, at 15 ("And, of course, this shift in the Court's attitude toward the competence of other branches to address constitutional questions goes far toward explaining its extraordinarily aggressive actions in last Term's most notorious decision, *Bush v. Gore*."); *id.* at 152–158 (calling *Bush v. Gore* "the capstone of the Rehnquist Court's campaign to control all things constitutional" and anticipating that the consensus over time will only broaden to conclude that the Court's intervention from a legal standpoint was "utter[ly] implausib[le]"); that the majority simply "twisted the law"; and that something even "more insidious than vulgar partisanship was at work," that is, the Court's reluctance to allow other democratic institutions to resolve a constitutional dilemma); Greenhouse, *supra* note 129 ("I would certainly like to think that neutral principles and not partisanship dictated the result, but I cannot tell you that I am 100 percent sure of that. The 13th stroke of the clock — the anomaly in the opinion that has to be explained and that has not been explained — is why the majority declared that its decision was for this case only and was not to be relied on in future cases.").

⁵⁷⁴ Kramer, *supra* note 239, at 169.

⁵⁷⁵ See *infra* pp. 133–34. But cf. Amar, *supra* note 557.

⁵⁷⁶ See Alexander & Solum, *supra* note 507.

⁵⁷⁷ See *supra* note 562.

⁵⁷⁸ See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1202 (1992) (noting the difference that a female presence might have made on the Court in decisions before *Roe v. Wade*).

⁵⁷⁹ But see Alexander & Solum, *supra* note 507, at 1630 ("Larry Alexander has written elsewhere that he does not find this type of countermajoritarianism at all problematic, unlike, for example, such anticonstitutionalists as Jeremy Waldron. Indeed, on Alexander's view that law's essential function is to resolve moral controversy and its concomitant uncertainty through determinate rules, all law consists of the past binding the present.").

⁵⁸⁰ ROSEN, *supra* note 41, at 224–25. Chief Justice Marshall is Chief Justice Roberts's model: There weren't a lot of concurring opinions in the thirty years when Marshall was the chief justice. There weren't a lot of dissents. . . . [Y]ou take a look at some of our opin-

“d” democrats, these same questions present Supreme Court Justices with a set of democracy-enhancing opportunities and challenges.

In terms of opportunities, demosprudential dissents remain a potential corrective mechanism when the appointment process offers little hope of reviving the Court as a representative body. I do not mean representative in the identitarian sense. I do mean, as Justice Scalia suggests, that the Court should be responsive to, and representative of, the will of the people. In an essay defending the practice of dissent, Justice Scalia acknowledges that the appointment process is a legitimate, though perhaps overused, mechanism for “the people to achieve correction of what they deem to be erroneous constitutional decisions.”⁵⁸¹ But, he also suggests, consistent with the post-1925 Judiciary Act’s change in audience, that dissents help the Court reclaim from the academicians the role of stimulating and conducting discussion and thus keep “the Court in the forefront of the intellectual development of the law.”⁵⁸² For Justice Scalia, the Court itself is not just “the central organ of legal *judgment*; it is center stage for significant legal *debate*.”⁵⁸³

Demosprudence through dissent is also vital where the other branches of government consistently defy the Court.⁵⁸⁴ In these circumstances, demosprudence through dissent can be a powerful antidote to an electoral minority exercising indefinite control as a judicial majority.

Despite their skepticism, those in the judicial minority might consider experimenting with forms of opinion writing that resituate the Court in a democratically accountable relationship with the public, one that need not be reduced to partisan politics or entertainment. Given the concerns raised here — about the lack of experiential diversity on the present Court, the potential for dead-hand control over a much longer period than the Founders could have anticipated, the Chief Justice’s commitment to reinforcing a unanimity norm,⁵⁸⁵ and the potential that is now available given new technologies — it seems a propitious time to reconceptualize the role of dissent in our democracy.

ions [now] and you wonder if we’re reverting back to the English model where everybody has to have their say.

Id. In Chief Justice Roberts’s mind, the individual Justices should be less concerned “about the consistency and coherency” of their individual judicial record. *Id.*

⁵⁸¹ Scalia, *supra* note 480, at 39.

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ Greenhouse, *supra* note 129 (explaining that “[t]here are many ways for the political branches to show their displeasure with the Supreme Court”).

⁵⁸⁵ See ROSEN, *supra* note 41; see also Ginsburg, *supra* note 181 (describing Chief Justice Roberts’s admiration for “Chief Justice Marshall’s unparalleled ability to achieve consensus” such that “the Court spoke with one voice”).

C. Critiques

Nevertheless, there are dangers associated with a focus on dissent. As Justice Brennan writes, dissent has its limits. “[C]ollegiality *is* important; unanimity *does* have value; feelings *must* be respected.”⁵⁸⁶ Critics of dissent will roundly condemn the breach of judicial decorum involved in dramatic recitations of legal opinions at both a personal and professional level. The criticisms are twofold. First, at a personal level, the Justice’s freedom to interpret law is often compromised by other competing values. The Justice may prefer to protect her personal privacy by opting for institutional inscrutability. She does not want to be recognized in the supermarket. Second, at a professional level, the Justice may defer her pursuit of individual notions of morality and justice in favor of an institutional mission. An oral dissenter may share the conventional notion that the Court’s authority derives exclusively from each Justice’s individual anonymity and technical skills in service of a larger concept called “the” law. Moreover, the inclination to resolutely express one’s individual disagreement publicly may undermine collegiality.⁵⁸⁷

Critics may also claim that dissenting from the bench threatens the privileged status and crucial authority that the Court needs in order to promote the rule of law. The very transparency that demosprudential dissents provide arguably undermines the legitimacy of the judicial process by destroying confidence in “the” law as a principled position distinct from politics. The dissenter’s raised voice may be perceived as delegitimizing the authority by which the Court speaks.⁵⁸⁸

Another criticism identifies a concern arising from the possibility that demosprudential dissents provide a forum in which the people themselves get to participate. Critics may justifiably be alarmed if this format prompts a Justice to see herself as the voice of the “people.” The Justice may view herself as missionary or messenger in ways that preempt other voices rather than enable them. Furthermore, the Justice may lose credibility as a legal authority if she spends too much of her capital speaking to popular audiences rather than to the litigants in the case before the Court. She may be taken less seriously by academic audiences or by her peers.⁵⁸⁹ Even worse, the Court as an institution may lose some of its authority.

⁵⁸⁶ Brennan, *supra* note 198, at 429.

⁵⁸⁷ See Ginsburg, *supra* note 578.

⁵⁸⁸ Ginsburg, *supra* note 181 (“In civilian systems, the nameless, stylized judgment, and the disallowance of dissent, are thought to foster the public’s perception of the law as dependably stable and secure. Our tradition, on the other hand, safeguards the independence of the individual judge and prizes the transparency of the process of wielding judicial power.”).

⁵⁸⁹ At a professional level, the Justice may believe that her credibility among the legal public derives in large measure from her facility with the conventions and etiquette of legal reasoning.

Although a discussion of theories of law is beyond the scope of this Foreword, it is worth noting that the dramatic shift in the Court's audience from litigants to the legal public, including law professors, in the 1930s and 1940s was accompanied by a corresponding shift in the understanding of law's authority, at least for some of the Justices, such as Justice Brandeis. Professors Philippe Nonet and Philip Selznick have described this transition as one from "autonomous" law to "responsive law."⁵⁹⁰ For those members of the Court or the academy who think of "law" as "autonomous," rather than "responsive," demosprudence through dissent is alarming substantively, not just procedurally clumsy.

Finally, Professor Gerald Rosenberg suggests a critique of this Foreword's premise that the populace is engaged with the courts and aware of judicial opinions. Rosenberg criticizes those who conferred so much inspirational power on *Brown* on precisely the ground that the average person has little idea what courts are doing and is very rarely aware of any particular legal opinions.⁵⁹¹ Demosprudence through dissent may overestimate the power and authority of the Supreme Court. It may also underestimate the Court's comparative institutional disadvantages in formulating and advancing policies that rely in part on empirical and social science evidence. Or it may fail to calculate the chances that dissent is simply ineffectual. Too many dissents, too often, can undermine their democratic potential, especially if they descend into demagoguery or platitudes.⁵⁹² Moreover, as already

The "constitutional law mafia" would look askance at a Justice who displayed a familiarity with the rhythms and beats of spoken word. For example, *Brown*, according to Professor Bruce Hay, was criticized as "virtual burlesque of traditional legal reasoning." Hay, *supra* note 233, at 33. Following *Brown*, the Court issued a number of per curiam opinions that left academics clueless as to the legal principles at their core; yet the same per curiam opinions had great meaning for civil rights activists — economy of expression gave them the open space they needed to champion their cause knowing they had support from on high. Second, at a personal level, even the most technologically savvy Justice may find herself preaching only to the choir. Few people, outside of the litigants and the "legal" public, usually pay attention to the opinions of the Court. Fewer people still actually hear the oral dissents. Those who do may already be members of the "club."

⁵⁹⁰ See Post, *supra* note 57, at 1381–82. Post compares the autonomous view that stressed authority and obedience in the judiciary's obligation to be faithful to a system of clearly defined rules with the view that law is open and flexible and the authority of legal institutions lies in their ability to achieve the law's *purposes* beyond simply maintaining order. "Judicial legitimacy comes to depend upon 'a union of legal authority and political will.'" *Id.* at 1382 (quoting PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 86 (1978)).

⁵⁹¹ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); see also Brown-Nagin, *supra* note 240 (arguing that lawyers overestimate the utility of legal texts to ordinary people).

⁵⁹² Larsen, *supra* note 141, at 476. Professor Larsen likens perpetual dissents to acts of judicial civil disobedience. Larsen argues that, if used sparingly, perpetual dissents can signal the fragility of a particular precedent, inspire legislative action, or spark public debate on an issue without causing too much harm. Their positive potential, however, is undermined the more frequently

discussed, the oral dissent, in particular, may involve Justices speaking only to members of the “club,”⁵⁹³ although this perception also may encourage the Justices to speak forthrightly simply because they feel they are among friends.

Demosprudential dissents are admittedly a limited means of institutionalizing dissent within the democratic process, albeit with as yet untapped potential for enhancing our democratic system. But how do we even know when democracy is enhanced? How do we know when these interventions actually serve a democratic purpose?⁵⁹⁴ Or as Professor Martha Minow asks, is the audience involved simply to participate or to broaden the constitutional community to include those previously excluded? While a demosprudential dissenter is opening up space for a conversation with democratic actors, it is not always easy to determine when that conversational space is democracy-enhancing.

These are legitimate concerns. But in the appropriate context, a demosprudential dissent can play an essential role. It can raise the stakes where nontrivial claims are at issue. For those worried about backlash, a demosprudential dissent may generate a different type of reaction, in which backlash is seen as a predictable or at least unsur-

they appear. “The average protester (resisting the rule of law in a nonviolent way to encourage change) will only be taken seriously and can only be effective if he carefully selects his causes and picks his battles.” *Id.*

⁵⁹³ See *supra* note 28 and accompanying text (alluding to atmosphere of social intimacy among the Supreme Court reporters, the group of regular court watchers, and the members of the Court).

⁵⁹⁴ One approach is to do a content analysis along with a close textual read of the oral and written dissents. Or one might imagine quantitative measures of a successful demosprudential dissent in which we count, first, the contemporaneous treatment of the dissenting opinion by the media, including direct references and quotations from the opinion; second, the subsequent discussion of the opinion by academics (as measured by citations in law reviews), interest groups (as measured by references in blogs, web postings, and litigation strategy), and directly affected actors; third, the penetration of the opinion or its critique into the popular consciousness as evidenced by popular cultural references, grassroots activism that takes language from the opinion or key phrases and makes them slogans on placards or applause lines in speeches; and fourth, concrete actions taken by legislators and ordinary citizens in response to, or inspired by, the opinion’s critique. These metrics, however, are limited. They may be the best current measures we have, but they are imperfect because they reproduce a toolkit that fails to tell us all the places where the issues actually get raised. Or they may count media hits but ignore the degree to which the dissent actually reframes the conversation by focusing instead on journalistic shortcuts in which the wire services define and often distort the story, which is then reprinted in mass circulation papers without thought. Thus, tabulating media hits may overstate the degree to which the opinion speaks to a broader segment of the population in ways that are consistent with the constituting norms of the consent community. The alternative is to identify the defining qualities of the demosprudential dissent, such as expanding the audience with whom the Court is in conversation and generating principles or extending an explicit invitation to act in a way that makes law consistent with democratic values. It is a true Socratic exercise. The outcome is not a predetermined version of the truth; it is a deliberative process that includes a broader portion of the consent community than was involved in the litigation itself and — out of which process — some provisional version of the truth will emerge. Consider, for example, the work of John Dewey or Charles Sanders Peirce.

prising dynamic in the ongoing conversation between the Court and the people.⁵⁹⁵ Alternatively, to the extent that a dissent enables a popular audience to convert its anger into critique and constructive involvement, it can play an educative role, leading to a more informed and more engaged citizenry. I hypothesize three ways in which this can happen. First, demosprudential dissents may draw attention to the relationship between formal pronouncements and informal activity. Second, they may simultaneously broaden and limit the authoritative role that Justices play.⁵⁹⁶ Third, they make the formal process of law-making more transparent and thus more democratically accountable. Indeed, demosprudential dissenters have the potential to make the Court more democratically accountable without implicating the counter-majoritarian difficulty that critics claim lies at the heart of judicial review. By contrast, Chief Justice Roberts's call for more unanimity risks undermining a nascent democratic forum that is broader than legislative decisionmaking and potentially less divisive than exclusive reliance on electoral up/down voting.⁵⁹⁷

V. CONCLUSION

I have argued that demosprudential dissents, particularly in the form of dissents from the bench, are part of a democracy-enhancing jurisprudence. Demosprudential elements can feature prominently in oral dissents as well as in written ones, and, as we have seen in the October 2007 Term, there is such a thing as demosprudence through concurrence.

Demosprudential dissenters create channels for dissent within the democratic process.⁵⁹⁸ They can inspire a series of negotiations through which ordinary people become social critics, and legislators “overrule” the Court’s cramped reading by rewriting statutes. They raise questions about the legitimacy of legislative majorities, but not only when those majorities are the artificial constructs of electoral rules.⁵⁹⁹ A demosprudential dissent does not aim to enforce a rigid separation of law from politics; rather, it moves to strengthen the bridge between law and democracy. But even as they are *active*,

⁵⁹⁵ See, e.g., Post & Siegel, *supra* note 47, at 375 (noting that backlashes “reflect a deep logic of the American constitutional order”).

⁵⁹⁶ For example, the demosprudential dissenter can participate in a two-way conversation, seeking empirical and social science evidence that was not part of the judicial record but, because the dissent makes no law, can provide litigants strategic coaching to make the record in a future case. See, e.g., *supra* note 480 and accompanying text.

⁵⁹⁷ Guinier, *supra* note 213, at 2 (describing the liability of elections that overemphasize sacred moments of choice as the exclusive means of aggregating preferences).

⁵⁹⁸ See *supra* note 230 and accompanying text.

⁵⁹⁹ See *supra* note 401 and accompanying text (discussing *Crawford* and the partisan majority in the Indiana legislature).

demosprudes are not judicially *activist*. For rather than commanding the public, demosprudential dissenters call the public — through their representatives or their own marching feet — to act in the name of democracy.

The most demosprudential dissents are educative. Their pedagogical power lies not in their ability to persuade or instruct, but in their capacity to engage the public in critical dialogue. That discussion may include more questions than answers; indeed, there may be no “right answer.” But the deliberation is still valuable, for it includes new voices, and encourages them to recognize their power. From educating current legislative majorities on the need to act to change the law to identifying in plainspoken words an alternative view of law, demosprudential dissenters generate critical reflection and inspire a sense of agency among the people themselves. In some cases, today’s demosprudential dissenters will influence future judicial majorities; they will be vindicated by history. In other cases, they may use the dissenter’s platform to make way for public deliberation about the relationship between democracy and law-making. In still other cases, they may use what Professor Michael Walzer calls the “prophetic voice,” one that summons up shared morals and traditions, and that invites both critique and deliberation.⁶⁰⁰ At their best, these dissenters become “teachers in a vital national seminar.”⁶⁰¹

Demosprudential dissents use a symbolically important organ of the state to speak in an amplified forum. But they do not use the force of the state to impose a certain outcome. Because demosprudential dissenters speak through a central public institution, they must comport themselves in accordance with the responsibilities that the institution imposes. Justices’ demosprudential dissents are different than, but not in tension with, Court convention. But a hard look at the practice of demosprudence through dissent may push us to broaden our conception of a Justice’s role, and to include more explicitly the active participation of “we the people” in deliberations about law.

At the same time, demosprudential dissents can broaden the Court’s gaze beyond the repeat audience of academics and legal professionals. The recent resurgence of oral dissents would not be the first time the Court directed its opinions to a different group of people. As I discussed in Part I, the adoption of the 1925 Judiciary Act allowed the Supreme Court to move from being a court of last resort to a “ministry of justice.”⁶⁰²

⁶⁰⁰ WALZER, *supra* note 26, at 75.

⁶⁰¹ Eisgruber, *supra* note 227, at 962 (quoting Rostow, *supra* note 227, at 208).

⁶⁰² Post, *supra* note 57, at 1289.

This change in role was accompanied by a change in the Court's personnel, as well as an erosion of the prior norm in favor of unanimity. The Supreme Court in the 1930s and 40s also shifted its attention to a new audience as it began to speak more directly to and with legal academics. By the 1990s, however, legal academics had begun to engage in more theoretical and interdisciplinary scholarship, and by 2007 many law professors had ceased publishing articles of interest to legal professionals and judges.⁶⁰³ The *Cardozo Law Review* recently collected data on the number of federal court opinions that cited the *Harvard Law Review*: "In the 1970s, the law review [was cited] 4,410 times; in the 1990s, 1,956; and thus far this decade, 937."⁶⁰⁴ With the conversation between the Court and the academy atrophying, there is room — and a need — for a broader audience to serve the Court as a mechanism for transparency and accountability.⁶⁰⁵

Many academics are nonetheless very effective translators of the Court's opinions for the general public. But this skill set is not generally valued in the genre of academic writing. Academic articles are long, turgid, often inaccessible. They are, as this one is, heavily footnoted, and they are not widely read by nonacademics. Supreme Court opinions by Justices who themselves were former law professors, or who seek the praise of the "constitutional law mafia," may be written more to impress than to inform.

Nonetheless, on its own, the Court has shown great capacity to write for a lay audience. Consider the intentionally demosprudential opinion of the Warren Court in *Brown*.⁶⁰⁶ Guided by the experienced hand of a former politician, the Court wrote a short opinion that has

⁶⁰³ Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8. Articles in law reviews have become more obscure as law professors "take pride in the theoretical and in working in disciplines other than their own. They seem to think the analysis of actual statutes and court decisions — which is to say the practice of law — is beneath them." *Id.*

⁶⁰⁴ STAFF OF CARDOZO LAW REVIEW, TRENDS IN JUDICIAL CITATIONS AND LAW REVIEW ARTICLES (Mar. 8, 2007), available at http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (criticizing interdisciplinary legal scholarship as of little use to courts); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 660 (1998) (courts' citation to legal scholarship declined 47% over the previous two decades, with the most notable decline in the 1990s); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1324 (2002) (noting that "interdisciplinary legal scholarship is intended to be read by professors . . . rather than by practitioners (including judges)"); Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1009–10 (2000) (reporting drop in Supreme Court citation of legal scholarship).

⁶⁰⁵ This of course raises questions about the audience the professoriate is addressing. See Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362 (2002). But it also could spur a new generation of public law scholarship among legal academics.

⁶⁰⁶ 347 U.S. 483 (1954).

been acclaimed as the most important opinion of the twentieth century. Chief Justice Warren's goal was also transparent. He wanted a unanimous opinion to maintain the Court's institutional authority and galvanize its influence through "solidarity of conclusion."⁶⁰⁷ Although widely hailed today, the unanimous *Brown* opinion generated mixed reviews in the legal academic literature at the time.⁶⁰⁸ Some accused of it being nothing more than "a document of compromise to win over the doubting justices and such parts of the country willing to listen."⁶⁰⁹ Others went further, claiming that *Brown* was a travesty of judicial craft. It offered little by way of either legal reasoning or neutral principle, citing few cases or other conventional sources of constitutional law.

Recent academic scholarship argues provocatively that the *Brown* Court was in over its head. Its intervention splintered the South, provoking a backlash that the Court was unable to tamp down.⁶¹⁰ And scholars, such as Professor Derrick Bell, have argued that they would have dissented on substantive grounds had they been members of the 1954 Warren Court.⁶¹¹ Most significantly, however, the academic responses have generally veered a good distance from Chief Justice Warren's prescription: they are neither short nor readable by the lay public.⁶¹² They have failed to note the most promising demosprudential quality of the *Brown* opinion. Legal academics in the 1950s and 1960s criticized *Brown* for lacking well-developed legal reasoning, but

⁶⁰⁷ ABA Canons of Judicial Ethics, No. 19 (1924).

⁶⁰⁸ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–34 (1959) (discussing how the *Brown* opinion was motivated by political as opposed to "neutral" legal reasoning). But cf. Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) ("[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated 'equally,' I think we ought to exercise one of the sovereign prerogatives of philosophers — that of laughter."). Black was a Southerner who had grown up in Texas accepting Jim Crow and then subsequently experienced a change of heart.

⁶⁰⁹ Hay, *supra* note 233, at 32.

⁶¹⁰ See MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 385–442 (2004).

⁶¹¹ See Derrick A. Bell, *Bell, J., Dissenting, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185 (Jack M. Balkin ed., 2001). In Bell's view, integration would have followed the inability of most school districts to afford two equally funded systems. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 20–28 (2004).

⁶¹² I include in this category my own contribution on the subject. See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, J. AM. HIST., June 2004, at 92. There are, however, exceptions such as RICHARD KLUGER, *SIMPLE JUSTICE* (1976) and BRANCH, *supra* note 529. Although both books are long, they are quite readable.

Brown's accessibility and forcefulness were the inspiration for a social movement that gave the opinion its legs.⁶¹³

Justices, like Earl Warren then or Ruth Bader Ginsburg now, emboldened by their ability to draw on relevant biographical resources, can respond ingeniously and even dramatically to changing institutional environments and to evolving notions of law and judicial authority.⁶¹⁴ On a Court where, as I discuss in Part IV, the dead-hand control of an electoral minority looms, the dissenter's biography as well as her role assume greater significance. The celebration of dissents and of a particular expansion of democracy in the jurisprudential realm is thus a statement attuned to our time. Here I find myself once again in the company of Justice Scalia, who has suggested that dissenting opinions help the Court reclaim from academicians the role of stimulating and conducting discussion.⁶¹⁵

The time is ripe, in other words, for the Court to see beyond academics to the people themselves as a source of democratic authority and accountability. Consider that the 2008 Supreme Court Term catches the Court at a potentially pivotal time, where a new president will have the chance to replace one or more of the Court's members and thus change the balance of power on the Court. At this precise moment when the direction of the Court is in flux, demosprudential dissents on either side are signals to engage the public in the work of the Court, but even more, in the work of the democratic process.

Given the high stakes, the dissenter bears a great responsibility to help develop a richer constitutional culture and a better answer to the skeptics in the *Albany Law Journal*. Why dissent, they asked. And why direct dissent to a popular audience?

In this Foreword, I suggest an answer, borrowed from Justice Douglas: that democracy itself authorizes the practice of addressing dissents to the general, not merely the legal, public.⁶¹⁶ Dr. King an-

⁶¹³ Its message was heard in the hamlets of Georgia and in the churches of Alabama. In 1955, following *Brown I* and *Brown II*, Martin Luther King, Jr. roused a crowd in a Montgomery mass meeting with a spirited refrain: "If we are wrong — the Supreme Court of this nation is wrong." See *supra* note 530.

⁶¹⁴ Cf. Post, *supra* note 57, at 1289.

⁶¹⁵ See Scalia, *supra* note 480.

⁶¹⁶ The answer I propose is not novel. See, e.g., Post, *supra* note 57, at 1358. By the late 1940s, Justice Douglas was articulating a similar proposition — that the obligation to dissent by a Justice in the minority is fundamental to principles of democratic self-government:

When judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. It is the democratic way to express dissident views. Judges are to be honored rather than criticized for following that tradition, for proclaiming their articles of faith so that all may read.

William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 106 (1948); see also Brennan, *supra* note 198, at 435 (arguing that dissents contribute to the "marketplace of competing ideas").

chored his rousing sermon in a similarly demosprudential justification, when he addressed the thousands of black citizens of Montgomery on the day Rosa Parks was arraigned for refusing to give a white man her bus seat. After summoning the authority of the Supreme Court's opinion in *Brown* to assure the congregation that "we" are not "wrong," he said: "[D]emocracy transformed from thin paper to thick action is the greatest form of government on earth."⁶¹⁷ The Douglas/King justification is not merely a function of abstract democratic theory. It envisions both democratic legitimacy and democratic practice. It involves explanation and transparency to fulfill the expectation that the people themselves know the law. But it also anticipates that the people themselves can be, and should be, inspired to act collectively when the occasion warrants, such that they, too, have a say in helping to make constitutional meaning. Like the call and response in the black church that day in 1955, the demosprudential dissent can create a democratic space for resistance and subversion.

It is in this context, then, that I anchor the idea of demosprudence through dissent. It is here that the distinctive format of oral dissents becomes salient but not exclusive. The rhetorical style of the demosprudential dissent, whether oral or written, must be considered in light of changes in technology as well as changes within our "constitutional culture." As Justice Holmes suggested, in explaining his preference for concision, "an opinion should" not "be like an essay with footnotes." Instead, it should be guided by the qualities of "an oral utterance."⁶¹⁸

Whether it is through writing or speaking, however, merely getting the public's attention on issues at the core of our democracy is not enough. Here we might learn from Justice Ginsburg's down-to-earth approach, reflecting, it seems, the many years she spent in the trenches fighting on behalf of ordinary women. Whereas Justice Scalia often seeks to impose his own view of democracy on his attentive audience, Justice Ginsburg finds her voice by helping others find theirs.

Justice Ginsburg's oral dissent in *Ledbetter* not only spoke directly to women like Lilly Ledbetter; it gave them a public platform that helped transform Ledbetter into a committed activist. Justice Ginsburg also spoke to Congress, urging them to enact legislation guaranteeing equal pay for equal work. And although the initial legislative fix failed when the Senate did not act, by then Ledbetter was posi-

⁶¹⁷ "We are here also because of our love for democracy (*Yes*), because of our deep-seated belief that democracy transformed from thin paper to thick action (*Yes*) is the greatest form of government on earth (*That's right*)." Martin Luther King, Jr., Address to MIA Mass Meeting at Holt Street Baptist Church (Dec. 5, 1955), in 3 THE PAPERS OF MARTIN LUTHER KING, JR.: BIRTH OF A NEW AGE, DECEMBER 1955–DECEMBER 1956, at 71, 71 (Clayborne Carson ed., 1997).

⁶¹⁸ Post, *supra* note 57, at 1293–94 (quoting Holmes Letter, *supra* note 65).

tioned to create an even larger public audience for the view that women's lived experience matters.

Ledbetter's odyssey to the public stage was capped on August 26, 2008 when she was a featured speaker at the Democratic National Convention in Denver. Forty-four years after civil rights movement activist Fannie Lou Hamer testified at the Democratic National Convention in Atlantic City about the importance of blacks gaining the right to vote, Lilly Ledbetter told her story of women struggling for the right to equal pay for equal work. Speaking in a soft Southern lilt as a "grandmother from Alabama," Ledbetter specifically credited Justice Ginsburg's dissent as she invoked fundamental American principles:

I hoped the [favorable jury] verdict would make my company feel the sting, learn a lesson and never again treat women unfairly. But they appealed, all the way to the Supreme Court, and in a 5-to-4 decision our highest court sided with big business. They said I should have filed my complaint within six months of Goodyear's first decision to pay me less, even though I didn't know that's what they were doing.

In dissent, Justice Ruth Bader Ginsburg wrote that the ruling made no sense in the real world. She was right. The House of Representatives passed a bill that would make sure what was done to me couldn't happen again. But when it got to the Senate, enough Republicans opposed it to prevent a vote. . . . My case is over. I will never receive the pay I deserve. But there will be a far richer reward if we secure fair pay. For our children and grandchildren, so that no one will ever again experience the discrimination that I did. Equal pay for equal work is a fundamental American principle With all of us working together, we can have the change we need and the opportunity we all deserve.⁶¹⁹

Ledbetter's sojourn on center stage reflected a combination of factors, but it would be impossible not to include Justice Ginsburg's oral dissent among them. It was Justice Ginsburg's validation of Ledbetter's complaint that enabled other elites to hear the rich, radical, and concrete criticism embedded in Ledbetter's simple request for justice. At the same time, other struggling factory workers could also hear Ledbetter's complaint, not just as a singular grievance but as a prophetic voice that gained additional power because they recognized her as one of them.

To the extent that Justices from Ruth Bader Ginsburg to Antonin Scalia speak out in a demosprudential voice that is more prophetic than authoritative, that is more colloquial than technical, they are speaking to and empowering the people. They are inviting the public into the hallowed halls of the courtroom, transforming an elite stage into a democratic agora. In this tradition, Justices teach the public to

⁶¹⁹ Lilly Ledbetter, Address to the Democratic National Convention (Aug. 26, 2008), *available at* <http://www.demconvention.com/lily-ledbetter/>.

identify with the constitutional values at stake and invite them to speak back in a voice that is all their own. They channel the energy of “we the people” into a revitalized, robust democracy. They do this by speaking, not through the complex diction of authoritative experts, but directly to the people in a language they can understand.