
BEYOND LEGISLATURES: SOCIAL MOVEMENTS, SOCIAL CHANGE, AND THE POSSIBILITIES OF DEMOSPRUDENCE

COURTING THE PEOPLE: DEMOSPRUDENCE AND THE LAW/POLITICS DIVIDE

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America's first black President signed his first major piece of legislation on January 29, 2009: the Lilly Ledbetter Fair Pay Act.¹ Since the Act carried Lilly Ledbetter's name, she fittingly stood beaming by President Obama's side during the signing ceremony.² For nineteen years, however, this seventy-year-old grandmother had less reason to be joyful, working in supervisory blue-collar jobs in a Goodyear Tire and Rubber Plant in Gadsden, Alabama earning fifteen to forty percent less than her male counterparts. This pay gap, which resulted from receiving smaller raises than the men, "added up and multiplied" over the years.³ But Ledbetter did not discover the disparity until she was nearing retirement and "only started to get hard evidence of discrimination when someone anonymously left a piece of paper" in her mailbox listing the salaries of the men who held the same job.⁴ Ledbetter sued and a federal jury awarded her \$223,776 in back pay and more than \$3 million in punitive

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¹ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

² See Richard Leiby, *A Signature with the First Lady's Hand in It*, WASH. POST, Jan. 29, 2009, at C1 ("It seemed to be all about Lilly Ledbetter at the White House yesterday – her name was enshrined in history, affixed to the first piece of legislation signed by President Obama.").

³ *Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 10 (2007) [hereinafter *Hearing*] (statement of Lilly Ledbetter); see also Lilly Ledbetter, Address to the Democratic National Convention (Aug. 26, 2008) [hereinafter *Ledbetter, Address*], <http://www.demconvention.com/lily-ledbetter/>.

⁴ *Hearing*, *supra* note 3, at 10. Ledbetter's salary was \$3,727 a month. The salary of the lowest paid man, with far less seniority, was \$4,286. *Id.* at 12.

damages, finding that it was “more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex.”⁵ The Supreme Court nullified that verdict. The five-Justice majority held that Ledbetter waived her right to sue by failing to file her complaint within 180 days of the first act of discrimination.⁶ In Ledbetter’s words, the 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.”⁷ By contrast, the Lilly Ledbetter Fair Pay Act sided with ordinary, working women across the nation.

Justice Ruth Bader Ginsburg, on behalf of herself and three colleagues, dissented from the Court’s May 2007 decision.⁸ A leading litigator and advocate for women’s equality before taking her seat on the Court,⁹ Justice Ginsburg read her dissent aloud from the bench – an act that, in her own words, reflects “more than ordinary disagreement.”¹⁰ Her oral dissent, which made the front page of the *Washington Post*,¹¹ signaled that something had gone “egregiously wrong.”¹² In a stinging rebuke to the Court majority, she used the personal pronoun, speaking not to her colleagues but directly to the other “you’s” in her audience – women who, despite suspecting something

⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2178 (2007) (Ginsburg, J., dissenting) (quoting record from below), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub L. No. 111-2, 123 Stat. 5.

⁶ *Id.* at 2165 (majority opinion).

⁷ *Ledbetter*, Address, *supra* note 3; *see also Hearing, supra* note 3, at 10.

⁸ *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).

⁹ In an interview with the ACLU, Ginsburg’s co-counsel described the first case Ginsburg argued before the Court: “I’ve never heard an oral argument as unbelievably cogent as hers. . . . Not a single Justice asked a single question; I think they were mesmerized by her.” *Tribute: The Legacy of Ruth Bader Ginsburg & WRP Staff*, AM. CIVIL LIBERTIES UNION, Mar. 7, 2006, <http://www.aclu.org/womensrights/gen/24412pub20060307.html>.

¹⁰ Justice Ruth Bader Ginsburg, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007) [hereinafter Ginsburg, Eizenstat Lecture], http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html.

¹¹ Robert Barnes, *Over Ginsburg’s Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1 (“Speaking for the three other dissenting justices, Ginsburg’s voice was as precise and emotionless as if she were reading a banking decision, but the words were stinging.”). Barnes noted that Justice Ginsburg’s oral dissent was a “usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women’s rights.” *Id.*

¹² Ruth Bader Ginsburg, Celebration Fifty-Five: A Public Conversation Between Dean Elena Kagan ’86 and Justice Ruth Bader Ginsburg ’56-’58 at the Harvard Law School Women’s Leadership Summit (Sept. 20, 2008) (from notes taken by and on file with author) [hereinafter Ginsburg, Leadership Summit]; *see also* Ginsburg, Eizenstat Lecture, *supra* note 10 (“A dissent presented orally . . . garners immediate attention. It signals that, in the dissenters’ view, the Court’s opinion is not just wrong, but importantly and grievously misguided.”).

askew in their own jobs, were reluctant to rock the boat as the only women in all-male positions:

Indeed initially you may not know the 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 threshold for suing too late.¹³

Justice Ginsburg's dissent reflected an acute sense, missing from the majority's opinion, of the circumstances surrounding women in male-dominated workplaces. In a job previously filled only by men, women "understandably may be anxious to avoid making waves."¹⁴

Justice Ginsburg was *courting* the people.¹⁵ Her oral dissent and subsequent remarks hinted at a democratizing form of judicial speech that, were it heard, could be easily understood by those outside the courtroom.¹⁶ By speaking colloquially – using the personal pronoun "you" to address her audience – Justice Ginsburg signaled to ordinary women that the majority should not have the last word on the meaning of pay discrimination. Her goal was to engage an external audience in a conversation about our country's commitment to equal pay for equal work.¹⁷

While Justice Ginsburg spoke frankly to and about the Lilly Ledbetters of the world, her real target was the legislature. Appalled by the Court's "cramped interpretation" of a congressional statute to justify its decision nullifying the favorable jury verdict, Justice Ginsburg explicitly stated that the "ball again lies in Congress's court."¹⁸ During a public conversation in September 2008, then-Harvard Law School Dean Elena Kagan asked Justice Ginsburg to describe her intended audience in *Ledbetter*. Ginsburg replied:

¹³ Oral Dissent 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; see also Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40-41 (2008).

¹⁴ Oral Dissent of Justice Ginsburg, *supra* note 13, at 8:30-8:37; see also Guinier, *supra* note 13, at 41.

¹⁵ By "courting" I mean enlisting or inspiring rather than wooing or currying favor with.

¹⁶ Guinier, *supra* note 13, at 40.

¹⁷ Cf. Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 92 MINN. L. REV. (forthcoming 2009) (manuscript at 14, available at <http://black.wustl.edu/webfiles/announcements/johnson-black-ringsmuth-2009.pdf>) (finding that Supreme Court Justices use their oral dissents strategically to signal strong disagreement as well as the need for action by third parties to change the majority decision). As was her practice, Justice Ginsburg handed out her bench announcement right after the delivery of her oral dissent. Her press-release-style opening paragraphs in her opinions are intended to help reporters under tight deadlines get it right.

¹⁸ Oral Dissent of Justice Ginsburg, *supra* note 13, at 10:17-10:58; see also Guinier, *supra* note 13, at 41 n.179.

“[I]t was Congress. Speaking to Congress, I said, ‘you did not mean what the Court said. So fix it.’”¹⁹

Democrats in Congress responded quickly. Initially called the Fair Pay Restoration Act, the House-passed bill would have eliminated the Court-sanctioned time limit.²⁰ That bill, however, died in the Senate, where Republicans – including John McCain – publicly denounced it as anti-business.²¹

As the initial Fair Pay Restoration Act languished in Congress, Lilly Ledbetter emerged as a real presence in the 2008 election campaign.²² Despite her initial misgivings about partisan campaigning, she was infuriated by John McCain’s refusal to support a congressional fix. She cut an ad²³ for Barack Obama that had a “stratospheric effect” when poll-tested by Fox News’s political consultant Frank Luntz.²⁴ In August 2008, Ledbetter was a featured speaker at the Democratic National Convention in Denver.²⁵ There, as well as in her testimony before Congress, she acknowledged the significance of Justice Ginsburg’s dissent both in affirming her concerns and directing attention to a legislative remedy.²⁶

In her testimony before Congress, for example, Ledbetter echoed Justice Ginsburg’s emphasis on the isolation many women feel when they first integrate the workplace.²⁷ Both Ledbetter and Justice Ginsburg used the pronoun “you” to speak directly to other women. At the same time that Ledbetter’s story animated Justice Ginsburg’s dissent, Justice Ginsburg’s dissent amplified Ledbetter’s own voice. Suitably emboldened, this Alabama

¹⁹ Ginsburg, Leadership Summit, *supra* note 12.

²⁰ H.R. 2831, 110th Cong. (2007).

²¹ The initial bill passed the House in July 2007, but never came up for a vote in the Senate. GovTrack, H.R. 2831: Lilly Ledbetter Fair Pay Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831> (last visited Mar. 17, 2009); *see also* Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

²² *Morning Edition: Fair Pay Law Strikes a Blow for Equal Pay* at 4:12 (National Public Radio broadcast Jan. 29, 2009), <http://www.npr.org/templates/player/mediaPlayer.html?action=1&t=1&islist=false&id=99995431&m=99995549> (describing Ledbetter’s prominent role and reporting that Ledbetter’s husband, a retired National Guard Sergeant Major, voted for a Democratic President for the first time in fifty years when he cast his ballot for Barack Obama).

²³ In the ad, Ledbetter says, “John McCain opposed a law to give women equal pay for equal work. And he dismissed the wage gap, saying women just need education and training. I had the same skills as the men at my plant. My family needed that money.” *Id.* at 2:35-2:58.

²⁴ *Id.* at 3:07-3:18.

²⁵ Ledbetter, Address, *supra* note 3.

²⁶ *Hearing*, *supra* note 3, at 10.

²⁷ *Id.* at 11.

grandmother went before Congress to speak directly to women about their shared fears of making waves in a male dominated environment:

Justice Ginsburg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. You can't expect people to go around asking their coworkers how much they are making. Plus, even if you know some people are getting paid a little more than you, that is no reason to suspect discrimination right away. Especially when you work at a place like I did, where you are the only woman in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along.²⁸

Justice Ginsburg also continued to engage in a more public discourse about the *Ledbetter* case and her role as an oral dissenter. In an October 2007 speech posted on the Supreme Court website, she parodied the majority's reasoning: "'Sue early on,' the majority counseled, when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience, and when you may not know that men are receiving more for the same work. (Of course, you will likely lose such a less-than-fully baked case.)"²⁹ As reframed by Justice Ginsburg, *Ledbetter's* story was not about a negligent plaintiff who waited an unconscionably long time to sue; it was about an ordinary woman struggling to comprehend and eventually document the pay disparities in her all-male work environment. Justice Ginsburg frankly acknowledged the zigzag trajectory of change, especially given the real world employment challenges such a woman faces. In "propel[ling] change," her oral dissent had to "sound an alarm" that would be heard by members of Congress, Lilly *Ledbetter* and women's rights advocates more generally.³⁰ Her dissent had "to attract immediate public attention."³¹

Eventually social activists, legal advocacy groups, media translators, legislators and "role-literate participants" (in Reva Siegel's terminology)³² not only heard but acted upon the alarm bells Ginsburg sounded. Marcia Greenberger of the National Women's Law Center was one of those "role-literate participants" who helped carry Justice Ginsburg's message forward. Greenberger characterized Ginsburg's oral dissent as a "clarion call" to the

²⁸ *Id.* at 10; see also YouTube, *Ledbetter v. Goodyear Equal Pay Hearing: Lilly Ledbetter*, <http://www.youtube.com/watch?v=jRpYoUu5XH0> (last visited Mar. 10, 2009).

²⁹ Ginsburg, Eizenstat Lecture, *supra* note 10.

³⁰ See *id.* Justice Ginsburg's willingness to participate in a more expansive conversation is not entirely unexpected, given her view that conversation should run both ways. "If we don't listen we won't be listened to." Ginsburg, Leadership Summit, *supra* note 12.

³¹ Ginsburg, Eizenstat Lecture, *supra* note 10; see also Johnson, Black & Ringsmuth, *supra* note 17 (manuscript at 7-8).

³² Guinier, *supra* note 13, at 51; see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323, 1339-48 (2006) [hereinafter Siegel, *Constitutional Culture*].

American people “that the Court is headed in the wrong direction.”³³ Lilly Ledbetter became another such participant as her story, with Justice Ginsburg’s assistance, helped ground and frame the discourse.³⁴ And for the first time in more than a decade, Congress pushed back against the Supreme Court. In January 2009, Lilly Ledbetter’s name was enshrined in history when Congress passed and President Barack Obama signed the Lilly Ledbetter Fair Pay Act.³⁵

In her *Ledbetter* dissent and subsequent remarks, Justice Ginsburg was courting the people to reverse the decision of a Supreme Court majority and thereby limit its effect. In Robert Cover’s “jurisgenerative” sense,³⁶ she claimed a space for citizens to advance alternative interpretations of the law. Her oral dissent and public remarks represented a set of *demosprudential* practices for instantiating and reinforcing the relationship between public engagement and institutional legitimacy.

In Justice Ginsburg’s oral dissent we see the possibilities of a more democratically-oriented jurisprudence, or what Gerald Torres and I term

³³ Mother Jones, Ginsburg’s Famous White Gloves Finally Come Off, http://www.motherjones.com/mojoblog/archives/2007/05/4556_ginsburgs_famou.html (May 31, 2007, 22:19 PST) (quoting Marcia Greenberger).

³⁴ Justice Ginsburg’s dissent and Lilly Ledbetter’s public statements converge on a common explanation for Ledbetter’s delay in filing her lawsuit, an explanation that influenced both the media coverage and the Obama campaign’s framing of the case. See Adam Liptak, *Justices Hear Bias Case on Maternity, Pensions, and Timing*, N.Y. TIMES, Dec. 11, 2008, at B7; Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?hp>. Their mutually reinforcing explanation for Ledbetter’s delay in filing her lawsuit, their joint outreach to Congress and their success in sparking favorable media coverage of the new legislation became key talking points on conservative blogs. See, e.g., Posting of Hans Bader to OpenMarket.org, <http://www.openmarket.org/2009/03/04/distorting-the-news-to-obamas-advantage/> (Mar. 4, 2009, 15:29); Posting of Orin Kerr to Volokh Conspiracy, <http://volokh.com/posts/1236629897.shtml> (Mar. 9, 2009, 16:18); Posting of Ed Whelan to Bench Memos, National Review Online, <http://bench.nationalreview.com/post/?q=YzA0Zjk1MzViMWUwMWNIYWUwZTkYyYmY3MzAxYWE> (Mar. 9, 2009, 13:51). Indeed, Lilly Ledbetter soon came to symbolize a populist message. Ledbetter not only was present at the signing ceremony for the bill named in her honor, but sat with First Lady Michelle Obama during President Obama’s first address to a joint session of Congress. Michael Falcone, *Guests of the First Lady, Reflecting Main Themes of the Speech*, N.Y. TIMES, Feb. 25, 2009, at A16.

³⁵ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-3, 123 Stat. 5. The Act passed the Senate with “Yea” votes from every present Democrat and all four female Republicans. U.S. Senate Roll Call Votes 111th Congress – 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00014 (last visited Mar. 17, 2009).

³⁶ See generally Robert M. Cover, *The Supreme Court, 1981 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (conceptualizing the law as normative in nature).

demosprudence.³⁷ Demosprudence builds on the idea that lawmaking is a collaborative enterprise between formal elites – whether judges, legislators or lawyers – and ordinary people. The foundational hypothesis of demosprudence is that the wisdom of the people should inform the lawmaking enterprise in a democracy. From a demosprudential perspective, the Court gains a new source of democratic authority when its members engage ordinary people in a productive dialogue about the potential role of “We the People” in lawmaking.³⁸

Demosprudence is a term Professor Torres and I initially coined to describe the process of making and interpreting law from an external – not just internal – perspective. That perspective emphasizes the role of informal democratic mobilizations and wide-ranging social movements that serve to make formal institutions, including those that regulate legal culture, more democratic.³⁹ Demosprudence focuses on the ways that “the demos” (especially through social movements) can contribute to the meaning of law.

Justice Ginsburg acted demosprudentially when she invited a wider audience into the conversation about one of the core conflicts at the heart of our democracy.⁴⁰ She grounded her oral dissent and her public remarks in a set of demosprudential practices that linked public engagement with institutional legitimacy. Those practices are part of a larger demosprudential claim: that the Constitution belongs to the people, not just to the Supreme Court.

The dissenting opinions, especially the oral dissents, of Justice Ginsburg and other members of the Court are the subject of my 2008 Supreme Court

³⁷ See Lani Guinier & Gerald Torres, *Linked Fate: Toward a Jurisprudence of Social Movements 1* (Sept. 17, 2006) (unpublished manuscript, on file with author).

³⁸ Guinier, *supra* note 13, at 48 (“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.’”).

³⁹ See, e.g., LANI GUINIER & GERALD TORRES, *CHANGING THE WIND: THE DEMOSPRUDENCE OF LAW AND SOCIAL MOVEMENTS* (forthcoming 2010) (draft manuscript at 1, on file with author).

We coin the term demosprudence . . . as a critique of lawmaking that is historically preoccupied with moments of social change as if they occur primarily within an elite enterprise. Demosprudence is a philosophy, a methodology and a practice that views lawmaking from the perspective of informal democratic mobilizations and disruptive social movements that serve to make formal institutions, including those that regulate legal culture, more democratic. Although democratic accountability as a normative matter includes citizen mobilizations organized to influence a single election, a discrete piece of legislation, or a judicial victory, we focus here on democratic responsiveness to popular, purposive mobilizations that seek significant, sustainable social, economic and/or political change. In this lecture, therefore, we discuss demosprudence primarily as the jurisprudence of social movements.

Id.

⁴⁰ See *id.* (manuscript at 14).

foreword, *Demosprudence Through Dissent*.⁴¹ The foreword was addressed to judges, especially those speaking out in dissent, urging them to “engage dialogically with nonjudicial actors and to encourage them to act democratically.”⁴² The foreword focuses on oral dissents because of the special power of the spoken word, but Justices can issue demosprudential concurrences and even majority opinions, written as well as spoken.⁴³ Moreover, true to its origins, demosprudence is not limited to reconceptualizing the judicial role. Lawyers and nonlawyers alike can be demosprudential, a claim that I foreshadow in the foreword and which Torres and I are developing in other work on law and social movements.⁴⁴

Supreme Court Justices can play a democracy-enhancing role by expanding the audience for their opinions to include those unlearned in the law. Of the current Justices, Justice Antonin Scalia has a particular knack for attracting and holding the attention of a nonlegal audience. His dissents are “deliberate exercises in advocacy” that “chart new paths for changing the law.”⁴⁵ Just as Justice Ginsburg welcomed women’s rights activists into the public sphere in response to the Court majority’s decision in *Ledbetter*, Justice Scalia’s dissents are often in conversation with a conservative constituency of accountability.⁴⁶ By writing dissents like these, both Justices have acknowledged that their audience is not just their colleagues or the litigants in the cases before them. Both exemplify the potential power of demosprudential dissents when the dissenter is aligned with a social movement or constituency that “mobilizes to change the meaning of the Constitution over time.”⁴⁷ Thus, Justice Ginsburg speaks in her “clearest voice” when she addresses issues of gender equality.⁴⁸ Similarly, Justice Scalia effectively uses his originalist jurisprudence as “a language that a political movement can both understand and rally around.”⁴⁹

⁴¹ Guinier, *supra* note 13.

⁴² *Id.* at 50; *see also id.* at 10 (describing Justice Breyer’s passionate oral dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), where he “hinted at a new genre of judicial speech” that could resonate with a less educated audience were his oral dissent more widely distributed). Demosprudential dissents are those that 1) probe or question a particular understanding of democracy, 2) using an accessible narrative style to 3) reach out to an external audience – beyond the other Justices or litigants in the case. *Id.* at 51, 90-92, 95-96.

⁴³ *Id.* at 52-56.

⁴⁴ *Id.* at 102-07, 113 & nn.517-18.

⁴⁵ *Id.* at 110.

⁴⁶ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

⁴⁷ Guinier, *supra* note 13, at 114.

⁴⁸ *Id.*

⁴⁹ *Id.*; *see also* Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) [hereinafter Siegel, *Dead or Alive*].

Both Justices Ginsburg and Scalia are at their best as demosprudential dissenters when they encourage a “social movement to fight on.”⁵⁰

Robert Post, writing in this symposium, reads my argument exactly right: “[C]ourts do not end democratic debate about the meaning of rights and the law; they are participants within that debate.”⁵¹ As Post explains, I argue that the “meaning of constitutional principles are forged within the cauldron of political debate,” a debate in which judges are often important, though not necessarily central, actors.⁵² Law and politics are in continuous dialogue, and the goal of a demosprudential dissenter is to ensure that the views of a judicial majority do not preempt political dialogue. When Justice Ginsburg spoke in a voice more conversational than technical, she did more than declare her disagreement with the majority’s holding. By vigorously speaking out during the opinion announcement, she also appealed to citizens in terms that laypersons could understand and to Congress directly.⁵³ This is demosprudence.

Robert Post eloquently summarizes and contextualizes the argument I make about demosprudence. He also corrects the misunderstanding of the law/politics divide that beats at the heart of Gerald Rosenberg’s criticisms of that argument.⁵⁴ Post neatly restates my premise: “Law inspires and provokes the claims of politically engaged agents, as it simultaneously emerges from these claims.”⁵⁵

In his companion essay, Professor Rosenberg polices the law/politics distinction to create a false binary. Rosenberg dismisses the possibility of an ongoing and recursive conversation between law and politics that *may* produce changes in the law and eventually in our “constitutional culture,” meaning changes in the popular as well as elite understanding of what the law means. Constitutional culture is the fish tank in which the beliefs and actions of judicial as well as nonjudicial participants swim. It is the “dynamic sociopolitical environment” in which ideas about legal meanings circulate, ferment, compete and ultimately surface in formal venues such as legal

⁵⁰ Guinier, *supra* note 13, at 112; *see also* Ginsburg, Eizenstat Lecture, *supra* note 10; *cf.* Siegel, *Dead or Alive*, *supra* note 49, at 196, 237-38.

⁵¹ *See* Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 582 (2009).

⁵² *Id.*

⁵³ My claim in the foreword that Justices, not just Justice Ginsburg, use their oral dissents strategically to appeal to third parties is consistent with the findings of a recent study by several political scientists. *See* Johnson, Black & Ringsmuth, *supra* note 17 (manuscript at 30-31).

⁵⁴ *See* Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564 (2009).

⁵⁵ *See* Post, *supra* note 51, at 581.

advocacy or legislative actions.⁵⁶ As political scientist Daniel HoSang explains, the goal of demosprudence is “to open up analytic and political possibility to build and sustain more dynamic and politically potent relationships between [legal elites] and aggrieved communities.”⁵⁷

Professor Rosenberg’s critique of demosprudence rests on several misunderstandings of my work and that of other legal scholars.⁵⁸ First, Professor Rosenberg wrongly assumes that my claims are descriptive rather than aspirational.⁵⁹ Second, Professor Rosenberg’s concern about my “Court-centric” analysis overlooks the occasion for my argument;⁶⁰ that is, the traditions associated with the Supreme Court foreword published every year in the November issue of the *Harvard Law Review*. Third, he orients his entire critique around polling data and other social science research to trivialize the relationship of narrative to culture, to exaggerate the predictive capacity of a data-driven approach to quantify causation and to preempt other useful analytic approaches.⁶¹

First, my foreword posits that judges *can* play a demosprudential role and that oral dissents are one *potential* vehicle for allowing them to do so.⁶² While it is true that oral dissents *currently* face obstacles to their demosprudential efficacy, those obstacles need not be insurmountable. Moreover, Rosenberg’s critique arguably makes my point. He is saying “people don’t pay attention,”⁶³ while I am saying “yes, they can!” Indeed, they might pay more attention if Justices took the time to talk to them.⁶⁴ He characterizes the past; I aim to sketch out the contours of a different future. Rosenberg is absolutely right that one next step might be to deploy the tools of social science to explore the extent to which this claim has been realized.⁶⁵ But the foreword is suggestive, not predictive. Justices of the Supreme Court can be demosprudential when they use their opinions to engage nonlegal actors in the process of making and interpreting law over time. They have democratically-based reasons to seek to

⁵⁶ See Guinier, *supra* note 13, at 59 (“That there is a healthy dialectic between an oppositional constitutional culture and the ‘legal constitution’ is the organizing idea behind demosprudence through dissent.”).

⁵⁷ Daniel HoSang, Assistant Professor of Ethnic Studies and Political Science, University of Oregon, Remarks on Lani Guinier and Gerald Torres’s “Demosprudence” Paper, University of Oregon School of Law (Oct. 24, 2008).

⁵⁸ See generally Post, *supra* note 51.

⁵⁹ See Rosenberg, *supra* note 54, at 565.

⁶⁰ See *id.* at 573-77.

⁶¹ *Id.* at 577-79.

⁶² See Guinier, *supra* note 13, at 4.

⁶³ See Rosenberg, *supra* note 54, at 566 (stating that “most Americans do not have a clue as to what the Court is doing or has done”).

⁶⁴ I thank my faculty assistant, Janet Moran, for highlighting this formulation of my argument. See Guinier, *supra* note 13, at 24-25 & 29 n.126 (discussing debate over cameras in the courtroom); *infra* notes 110-111 and accompanying text.

⁶⁵ See Rosenberg, *supra* note 54, at 564, 577-79.

inspire a mobilized constituency; it is not that they invariably *will* cause a social movement to emerge.

Similarly, the idea that Court opinions do not invariably inspire social movements does not mean they cannot have this effect. Nor do I argue that oral dissents are the only, or even the single most important, communication tool at the Court's disposal. When the Supreme Court announced *Brown v. Board of Education*⁶⁶ in 1954, there were no dissents. Moreover, the orality of the opinion announcement was not a central feature of the event. No one heard the voice of Earl Warren reading his decision on the radio. Nevertheless, the decision had a powerful effect, in part because it was purposely drafted to speak to "the people."⁶⁷ Justice Warren consciously intended that the *Brown* opinion should be short and readable by the lay public.⁶⁸ In his work, Professor Rosenberg focuses on the white backlash the *Brown* decision inspired.⁶⁹ But a demosprudential analysis also focuses on the frontlash, the way that *Brown* helped inspire the civil rights movement. *Brown's* accessibility and forcefulness helped inspire a social movement that in turn gave the opinion its legs.⁷⁰

In 1955, Rosa Parks refused to give up her seat on a bus in Montgomery. She was arrested. Four days later, when she was formally arraigned and convicted, a one-day bus boycott by the black citizens of Montgomery was unexpectedly, amazingly, successful.⁷¹ Dr. Martin Luther King, Jr. delivered a sermon that evening before a mass meeting of 5000 people gathered at and around Holt Street Baptist Church.⁷² He prepared his audience to take the bold step of continuing the boycott indefinitely. He did so by brilliantly fusing two great texts: the Supreme Court's pronouncement a year earlier in *Brown* and the Bible.⁷³ Dr. King roused the crowd at that first mass meeting in Montgomery with a spirited refrain: "If we are wrong – the Supreme Court of this nation is wrong. If we are wrong God Almighty was wrong."⁷⁴

⁶⁶ 347 U.S. 483 (1954).

⁶⁷ See Guinier, *supra* note 13, at 52.

⁶⁸ *Id.* at 52 & n.233.

⁶⁹ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 74 (2d ed. 2008).

⁷⁰ See Guinier, *supra* note 13, at 134-35 & n.613 ("Its message was heard in the hamlets of Georgia and in the churches of Alabama.").

⁷¹ TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 131-32 (1988). The Women's Political Council, led by women like Jo Ann Robinson, undertook the "mammoth task" of printing letters "asking every Negro to stay off the buses on Monday in protest of [Rosa Parks's] . . . arrest and trial." *Id.* The effort required "stealth, because . . . [i]f white people ever learned that state-employed teachers had used taxpayer-owned facilities to plot a revolt against segregation laws, heads would roll." *Id.*

⁷² See Guinier, *supra* note 13, at 116 (citing BRANCH, *supra* note 71, at 138-42).

⁷³ *Id.* at 116 n.531.

⁷⁴ *Id.* (quoting Dr. King).

In the foreword, I argue that Dr. King was a classic example of a “role-literate participant.”⁷⁵ His theological and strategic acumen enabled him to invoke *Brown* as “authorization” and “legitimation” to sustain the actions that 50,000 blacks in Montgomery, Alabama would take for over thirteen months when they refused to ride the city’s buses.⁷⁶ But as Robert Post rightly points out, the word “authorize” meant something more like embolden or encourage.⁷⁷

My point is that *Brown* shows judicial actors can inspire or provoke “mass conversation.” It is when the legal constitution is narrated through the experience of ordinary people in conversation with each other that legal interpretation becomes sustainable as a culture shift.⁷⁸ And if a majority opinion can rouse, so too can a dissenting one. Thus, demosprudence through dissent emphasizes the use of narrative techniques and a clear appeal to shared values that make the legal claims transparent and accessible.

Although demosprudence through dissent is prescriptive rather than descriptive, it was never my intent to suggest that the Court *should be* central to any social movement. Like Justice Ginsburg, I am not a proponent of juridification (the substitution of law for politics).⁷⁹ In Justice Ginsburg’s words, “[t]he Constitution does not belong to the Supreme Court.”⁸⁰ At the same time, I recognize that the Court has been deeply influential, albeit unintentionally at times, in some very important social movements. Studying the 1960s student movement in Atlanta, Tomiko Brown-Nagin argues that the lunch counter sit-ins were, in fact, a reaction to the Supreme Court’s decision – not because of what the Supreme Court said, but because of what it did not say.⁸¹ The Court initially raised, then dashed expectations. It was the disappointment with “all deliberate speed” – the legal system’s failure to live up to the promise of the Court’s initial ruling – that inspired students to take to the streets and initiate some of the bold protest demonstrations at lunch

⁷⁵ *Id.* at 116; *see also supra* note 32 and accompanying text.

⁷⁶ Dr. King specifically referred to *Brown* as *authorizing* what the black residents of Montgomery were contemplating doing, meaning that they were fighting for a right the Supreme Court of the United States had determined to exist. Guinier, *supra* note 13, at 116 n.531, 135 n.613.

⁷⁷ *See Post, supra* note 51, at 585-86.

⁷⁸ *See* Thomas B. Stoddard, Essay, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 972-73 (1997) (describing the difference between the law’s “rule-shifting” and “culture-shifting” capacities).

⁷⁹ *See* Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1206 (1992). *See generally* GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009) (discussing the interaction between legal and political institutions).

⁸⁰ *A Conversation with Justice Ruth Bader Ginsburg* (Public Radio Exchange broadcast Sept. 2, 2004), <http://www.prx.org/piece/2952>.

⁸¹ *See generally* TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: COURTS AND COMMUNITIES IN THE CIVIL RIGHTS MOVEMENT* (forthcoming 2009).

counters and in streets in the 1960s.⁸² Brown-Nagin emphasizes the multiple ways in which courts, lawyers and social movement actors are engaged in a dialogic and recursive discourse.⁸³

Rosenberg's second misunderstanding deserves both a concession and a clarification. Rosenberg's criticism that my argument is too Court-centric is fair as far as it goes.⁸⁴ I appreciate (and to a great extent share) Rosenberg's skepticism regarding courts as the primary actors in forging the path of social change. Gerald Torres and I argue that social change involves denaturalizing prior assumptions, a process that must be continuously monitored under the watchful eye of engaged political and social actors.⁸⁵ Moreover, social change is only sustainable if it succeeds in changing cultural norms, is institutionalized through policy decisions and the oversight of administrative actors, and develops an internal and external constituency of accountability. I concede that courts are not necessarily central to social movement activism.

Why then do I focus on the dialogic relationship between the Supreme Court and other essential social change actors in the foreword? The foreword is designed to be, and has always been, *about the Court's Term*.⁸⁶ In this venue, I developed the idea of demosprudence *in application* to this particular organ of government. The inherent structural limitation of this particular art form was challenging but ultimately, in my view, productive. It pushed me to explore the ways that judicial actors, in conjunction with mobilized constituencies, can redefine their roles consistently with ideas of democratic accountability. Indeed, because the format of the foreword encouraged me to approach demosprudence from this angle, I discovered something important about demosprudence: judges, not just lawyers or legislators, speak to constituencies of accountability in a democratically accountable and democracy-inspired legal system.

I argued that oral dissents (like Justice Ginsburg's in *Ledbetter*) reveal the existence of an alternative, and relatively unnoticed, source of judicial authority.⁸⁷ The Court's legitimacy in a democracy need not depend on the Court speaking with an "institutional voice" (that is, unanimously). Here I am influenced by Jane Mansbridge's idea that democratic power can be held to account through two-way interactions, a source of authority rooted in

⁸² *See id.*

⁸³ *See id.* Also, Reva Siegel, alone and with Robert Post, has produced several excellent articles on just this point. *See generally* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Siegel, *Constitutional Culture*, *supra* note 32.

⁸⁴ *See* Rosenberg, *supra* note 54, at 573-77.

⁸⁵ *See generally* Guinier & Torres, *supra* note 37.

⁸⁶ Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 463-64 (1995).

⁸⁷ *See* Guinier, *supra* note 13, at 4.

“deliberative accountability.”⁸⁸ The demosprudential dissenter ideally provides greater transparency to the Court’s internal deliberative process.⁸⁹ At the same time, the dissenter may disperse power “by appealing to the audience’s own experience and by drafting or inspiring them to *participate* in a form of collective problem solving.”⁹⁰ Thus, the Court gains constitutional authority when dissenters speak in a “democratic voice,” potentially expanding their audience beyond legal elites. In Mark Tushnet’s words, “the Constitution belongs to all of us collectively, *as we act together*.”⁹¹

Third, Rosenberg’s argument that oral dissents are ineffectual, are unlikely to ever be effectual, and should not be considered relevant, reflects his disciplinary allegiances.⁹² His perspective depends on empirical evidence of causation. It has a substantive, a methodological and a technological dimension.

Rosenberg’s substantive argument seems to rest on the assumption that law almost never influences politics or vice versa. His skeptical certitude reduces to insignificance the recursive interactions between the courts and the activists in the 1950s and ’60s over civil rights, in the 1970s over the meaning of gender equality, in the 1990s over affirmative action, and in the 2000s over the meaning of marriage. In addition, Professor Rosenberg’s certitude goes well beyond the evidence he cites. He believes demosprudential dissents “are not necessary because if there is an active social movement in place then no judicial help is needed.”⁹³ At the same time, he quotes McCann approvingly despite the fact that McCann concludes law can in fact make a difference under the right circumstances.⁹⁴

⁸⁸ *Id.* at 111 n.509 (citing Jane Mansbridge, *The Fallacy of Tightening the Reins*, 34 ÖSTERREICHISCHE ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 233 (2005)).

⁸⁹ *See, e.g.*, James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Towards the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 364 (2003) (finding that increased awareness of the Court’s activities may increase the public’s confidence and the Court’s institutional legitimacy).

⁹⁰ *See* Guinier, *supra* note 13, at 111.

⁹¹ *See id.* at 115 n.528 (quoting MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181 (1999)).

⁹² *See* Rosenberg, *supra* note 54, at 570-73.

⁹³ *Id.* at 572.

⁹⁴ *Id.* at 571-72 nn.80-82 (quoting MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 136-37, 305 (1994)). In challenging Rosenberg’s “zero-sum account of law and social change,” for example, Professor Tomiko Brown-Nagin cites multiple studies, including one by Michael McCann, that show how “law provides normative and strategic resources for social movements.” Tomiko Brown-Nagin, “*One of These Things Does Not Belong*”: *Intellectual Property and Collective Action Across Boundaries*, 117 YALE L.J. POCKET PART 280, 281 (2008) (citing MCCANN, *supra*; Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117 (Keith O. Boyum & Lynn Mather eds., 1983)), <http://thepocketpart.org/2008/06/01/brown-nagin.htm>. In addition, Rosenberg’s certitude may also be based on evidence-gathering

There is more than a friendly misunderstanding at work. Within Professor Rosenberg's critique of demosprudence lurks a deep disciplinary tension about the nature of causation and the primacy of uniform metrics of measurement, as well as the meaning of political participation and influence.⁹⁵ What I value about political engagement cannot simply be reduced to what can be measured. When judges participate openly in public discussion, whether through book tours or oral dissents, their words or ideas may have traction without causing measureable changes in public opinion.

As Robert Post notes, I am of the school that values "the texture and substance of dialogue."⁹⁶ I do not define politics, more generally, primarily by election outcomes or polling data. As I write elsewhere, opportunities for participation enhance democratic legitimacy in part because "democracy involves justice-based commitments to voice, not just votes: participation cannot be reduced to a single moment of choice."⁹⁷ Opportunities for formal and informal deliberation are important because of "the texture and meaning of the relationships among political actors, as well as the texture and substance of the values that emerge from public discussion."⁹⁸

The methodological aspect of Rosenberg's critique involves his taste for numbers and other metrics of certainty.⁹⁹ Rosenberg would prefer that I treat the format of a dissent as something to be studied by literary critics but as irrelevant to political or public relationships.¹⁰⁰ The notion that storytelling is not the stuff of politics ignores the important work of social psychologists and linguists who write at length about the processes by which the brain hears and evaluates information. For example, what people say they believe is not necessarily predictive of what they do.¹⁰¹ Indeed, attitudes are not recalled like USB memory sticks, but are reconstructed in relationship to the environment.¹⁰²

techniques that are less accurate than he assumes. See James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, J. POL. (forthcoming) (manuscript at 8-13, on file with author).

⁹⁵ See SILVERSTEIN, *supra* note 79, at 283-84.

⁹⁶ Post, *supra* note 51, at 585.

⁹⁷ Lani Guinier, *Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger*, 71 MOD. L. REV. 1, 22 (2008). Demosprudence, in other words, is not a philosophy of unmediated preference gathering (like the populist initiative process or the market). Rather, it represents a philosophical commitment to the lawmaking force of meaningful participatory democracy.

⁹⁸ See Post, *supra* note 51, at 585.

⁹⁹ See *id.*

¹⁰⁰ See Rosenberg, *supra* note 54, at 569.

¹⁰¹ And people can and do change their minds, especially as a result of deliberating with others. See generally BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (2004) (maintaining that robust debate and deliberation is good for democracy).

¹⁰² See Gregory M. Walton & Mahzarin R. Banaji, *Being What You Say: The Effect of Essentialist Linguistic Labels on Preferences*, 22 SOC. COGNITION 193, 205 (2004). See

My argument assumes that the river of social change has many tributaries, from the strategic mobilization of diverse resources that Marshall Ganz identifies to the narratives of resistance that Fred Harris explores.¹⁰³ No single institution of government, acting alone, successfully controls or enables these mighty currents. For example, the Supreme Court, when it wields law to establish relationships of power and control, primarily legitimates rather than destabilizes existing relationships of power and control.¹⁰⁴ Thus I agree with Rosenberg that the Court rarely functions as the central power source for fundamental structural change.

Nevertheless, I argue that members of the Court can catalyze change when they help craft or expand the narrative space in which mobilized constituencies navigate the currents of democracy. That role may be hard to measure, especially when demosprudential politics do not use the same language or framing devices as ordinary politics.¹⁰⁵ That role may also be inaccurately interpreted if the evaluation tool is survey data that asks open-ended questions or miscodes respondents' answers.¹⁰⁶ For example, after recalibrating the measurement tools on which conventional wisdom relies, Professors Gibson and Caldeira conclude that the American people may not be as woefully ignorant about the Court as has been consistently reported.¹⁰⁷ In addition, when members of the Court direct their dissents to social movement actors and other role-literate participants, the recursive nature of that discourse would be difficult to capture in national survey instruments.¹⁰⁸

generally Norbert Schwarz, *Self Reports: How the Questions Shape the Answers*, AM. PSYCHOLOGIST, Feb. 1999 (discussing the cognitive mechanisms that underlie the question-and-answer dynamic).

¹⁰³ See generally MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT (forthcoming 2009); Fredrick C. Harris, *Specifying the Mechanism Linking Dissent to Action*, 89 B.U. L. REV. 605, 605-07 (2009). Both Ganz and Harris find that disappointment can be channeled into collective action through narratives of injustice, agency and identity.

¹⁰⁴ See, e.g., Robin West, *The Supreme Court, 1989 Term – Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 50 (1990).

¹⁰⁵ Fred Harris cites work on the role played by framing abstract concepts through narratives. See Harris, *supra* note 103, at 605 n.3 (citing David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in FRONTIERS IN SOCIAL MOVEMENT THEORY 133, 136 (Aldon D. Morris & Carol McClurg Mueller eds., 1992)).

¹⁰⁶ See Gibson & Caldeira, *supra* note 94 (manuscript at 11-13) (arguing that open-ended questions underestimate the public's knowledge of the Supreme Court).

¹⁰⁷ *Id.* (manuscript at 27-29).

¹⁰⁸ Professor Rosenberg states that “[e]lites are seldom if ever motivated or inspired to act by the language of judicial opinions. Rather, they are motivated by the substantive holdings of cases.” Rosenberg, *supra* note 54, at 564. Professor Post, in response, thoroughly dispatches this motivational claim that a demosprudential act is useless if it does not directly yield movement in the Gallup polls or produce some other immediately (and causally) quantifiable result. Post, *supra* note 51, at 585.

Rosenberg's technical claim dismisses the form of oral dissents because they are not readily available.¹⁰⁹ Yet the technology that presently limits the reach of dissenting opinions does not tell us what the future holds regarding wider dissemination of the ideas and values of Justices who dissent.¹¹⁰ Justice Ginsburg already makes copies of her oral dissents available to the press, and Justice Scalia is a recognizable face on television and in the media. Fueled by video or simultaneous audio transmission, more people might actually read or hear the opinions, especially the oral dissents,¹¹¹ which are usually quite short. The technology of dissemination, like the technological framing of the story, is certainly relevant to who hears the story and who understands it. The inherent limitations on the current forms of outreach of demosprudential dissents, as well as the lack of public awareness of the majority's holdings, is incontrovertible. That oral dissents are not widely disseminated, however, does not establish their uselessness were more people to hear them.¹¹²

Consider two approaches to Justice Ginsburg's role in the passage of the Lilly Ledbetter Fair Pay Act. One way of viewing the Lilly Ledbetter Fair Pay Act is to discount almost entirely the role played by judicial elites (Ginsburg and her fellow dissenters). After all, it was legislative elites (the United States Congress) who passed a bill that was signed into law by an executive elite elected on a change agenda. Viewed this way, the Supreme Court dissenters were peripheral actors in a policy development orchestrated by executive and legislative change agents. The dissent and subsequent Act affected ordinary women, but the process of enacting the law did not include them. Few Americans in 2008 could name Ruth Bader Ginsburg as a Supreme Court Justice,¹¹³ and it is difficult to imagine that figure would be any higher for

¹⁰⁹ See Rosenberg, *supra* note 54, at 567-68.

¹¹⁰ See Guinier, *supra* note 13, at 120 (suggesting that videos of oral dissents may eventually reach a wider audience through YouTube); *supra* note 64 and accompanying text.

¹¹¹ Guinier, *supra* note 13, at 37 n.161; *cf. id.* at 24-25 (discussing the "humanizing approach" of having the Justices appear on screen, delivering opinions, in the film RECOUNT: THE STORY OF THE 2000 PRESIDENTIAL ELECTION (HBO Films 2008)).

¹¹² And it arguably suggests the opposite – a need for greater attention to the narrative style and accessibility of the opinions. See *id.* at 90-107 (evaluating various stylistic elements and the effectiveness of some recent Supreme Court dissents). I well understand how hard it is for these oral dissents to make a big impact; for example, I had difficulty obtaining the written transcripts of the oral dissents from the 2007-08 Term. Professor Rosenberg, however, misstates the lag time. I was able to listen to the oral dissents of the 2006-07 Term, including Justice Breyer's oral dissent in *Parents Involved* as well as Justice Ginsburg's oral dissent in *Ledbetter*. It was the audio of the oral dissents delivered in June 2008 that were not yet available at the time of my writing the foreword in the summer of 2008.

¹¹³ Findlaw.com, FindLaw's US Supreme Court Awareness Survey, <http://public.findlaw.com/ussc/122005survey.html> (last visited Feb. 20, 2009) (finding that

those who could name Lilly Ledbetter. Without linear data identifying the precise trajectory of the bill's passage, we can assume that the Court played a unidirectional role that distracted attention from, undermined the importance of, and had little direct influence on the behavior of the other role-literate actors in this series of dramatic events.¹¹⁴ This story suggests that Justice Ginsburg's dissent was mostly irrelevant because the political changes in the executive and the legislative branches, alone, could account for the Lilly Ledbetter Fair Pay Act. The framing effects of Justice Ginsburg's dissent were so small as to be insignificant.

Now consider an alternative. In this scenario, members of a judicial elite (Ginsburg and her fellow dissenters) sounded the alarm to get the immediate attention of "role-literate participants" who knew how to make themselves known among a watchful public. That alarm was heard by a middle elite of women's and civil rights advocates who helped organize a campaign to change the law. That campaign capitalized on, but also contributed to, the momentum of a historic presidential election campaign and emboldened a seventy-year-old grandmother from Alabama to jump onto the public stage. Not to be left out of the arc of change was the culture-changing effect of Hillary Clinton's "eighteen million cracks" in the glass ceiling during the Democratic primaries of 2008.¹¹⁵ In this alternative, Lilly Ledbetter's willingness – after consulting with her husband – to step into the national stage reflected a complex process of which at least one element was Justice Ginsburg's forceful oral dissent. Justice Ginsburg's dissent did not *cause* Congress to pass the Lilly Ledbetter Fair Pay Act, but did play a role. It articulated, in widely accessible terms, a storyline that was picked up in the mobilization that ultimately led to a new President signing a law enshrining Lilly Ledbetter's name in history.¹¹⁶

I subscribe to this more complex view in which a forceful dissent sounded the alarms as first responder. Indeed, the language of that dissent was audible to those outside the legal elite. The process that followed not only affected ordinary people. It included them.

just twelve percent of Americans could name Ruth Bader Ginsburg as a Supreme Court Justice).

¹¹⁴ See Michael W. McCann, *Reform Litigation on Trial*, 17 LAW. & SOC. INQUIRY 715, 731-32 (1992) (identifying and critiquing this analysis).

¹¹⁵ See Dana Milbank, *A Thank-You for 18 Million Cracks in the Glass Ceiling*, WASH. POST, June 8, 2008, at A1.

¹¹⁶ That storyline "authorized" Ledbetter's delay in filing suit, a delay that the Court majority had used to justify its decision to overturn the favorable damage award below. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2168-70 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Although Lilly Ledbetter received no money as a result of the Ledbetter Bill she did get "personal satisfaction." See Times Topics: People, Lilly M. Ledbetter, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/l/lilly_m_ledbetter/index.html (last visited Mar. 11, 2009).

Those who believe it is possible to calculate with precision the inputs and outputs of social change might find the first hypothesis more plausible. The first approach has the virtue of certainty and clarity. It views members of the Supreme Court as members of a weak and dependent branch of our government who are dependent upon support from other branches. By themselves, they are not credible agents of progressive change.¹¹⁷ Thus, we can dismiss demoprudential dissenters as “neither necessary nor sufficient for democratic deliberation.”¹¹⁸

However, those whose reality is closer to the second alternative imagine social change along a multifaceted trajectory that consists of competing yet interdependent stories, resources and means of exercising power. Although this narrative of change is concededly imprecise, it is not per se irrelevant. As Michael McCann writes: “[J]udicial decisions express a whole range of norms, logics, and signals that cannot be reduced to clear commands and rules”¹¹⁹ Instead, their power comes from generating information and knowledge that reshape the tactical judgments of social change actors and “refin[e] the language of politics.”¹²⁰ Through their opinions, judges send messages to social change activists as to what is possible. They “reshap[e] perceptions of when and how particular values are realistically actionable as claims of legal right.”¹²¹

I defend the second hypothesis on the grounds that an important dialogic relationship exists between law and politics. Law does not substitute for politics. But politics is informed by and can inform law. Here, McCann is again on point when he says that court actions can play an important, though partial, role in “fashioning the different ‘opportunity structures’ and discursive frameworks within which citizens act.”¹²² Thus, in courting the people, Justice Ginsburg’s *Ledbetter* dissent opened up an analytic space for productive dialogue and what Daniel HoSang terms “politically potent action” by the people themselves.¹²³

Politically potent action, however, is not limited to casting a ballot or engineering policy outcomes that can be quickly aggregated and counted. Nor is it always precisely what the judicial dissenter imagines. As Martha Minow writes, “[l]egal language, like a song, can be hummed by someone who did not

¹¹⁷ *But see* McCann, *supra* note 114, at 727-28 (critiquing Rosenberg’s zero-sum perspective and noting that discrete institutions are almost never “solitary organs of change”).

¹¹⁸ Rosenberg, *supra* note 54, at 564.

¹¹⁹ McCann, *supra* note 114, at 732.

¹²⁰ *Id.* (quoting JOHN BRIGHAM, *THE CULT OF THE COURT* 196 (1991)).

¹²¹ *Id.* at 732.

¹²² *Id.* at 733.

¹²³ *See* HoSang, *supra* note 57.

write it and changed by those for whom it was not intended.”¹²⁴ Or, as I note in the foreword, the demosprudential dissenter’s real power “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.”¹²⁵

We have often seen this dynamic on the right, where Justice Scalia is perhaps the most demosprudential of the Justices.¹²⁶ Were more dissenters on the left, not just the right, to participate self-consciously in a larger demosprudential project, a more dynamic set of “politically” potent relationships might emerge between legal elites and aggrieved community actors. In other words, judges (and other legal professionals) could play a more active and self-conscious role in creating “analytic” space for citizens to advance alternative interpretations of their own lived experience and ultimately help change the law. Law and politics are not the same, but they constitute and shape each other over time through mass conversation as well as mass mobilization.

At the same time, I readily concede that the challenges of *courting* the people are neither captured by, nor limited to, what Justices say aloud and in dissent. Justices operate under multiple constraints that Professor Rosenberg painstakingly documents.¹²⁷ To the extent Supreme Court Justices appear to politicize their own internal decision-making process, they may lose legitimacy in the eyes of the public.¹²⁸

How, then, might President Obama proceed were a vacancy to arise on the Court during his term? Consider these facts. Republicans, although now out of power in Congress and the White House, still enjoy a supermajority on the Supreme Court.¹²⁹ The age and the health of the Justices make it likely that

¹²⁴ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 310 (1990).

¹²⁵ Guinier, *supra* note 13, at 114.

¹²⁶ Looking at the decisions over the past year, I concluded, along with a talented group of research assistants, that Justice Scalia was probably the Court’s most demosprudential dissenter. In the same way Justice Ginsburg has a recursive relationship with women’s rights advocates, Justice Scalia’s dissents engage and mobilize advocates with a conservative viewpoint. He has an obvious constituency of accountability – and they listen. Within a few days of having published his dissent in *Lawrence*, right-wing activists were making, mimeographing and circulating copies of it. See Guinier, *supra* note 13, at 118 n.544. It is a phenomenon one rarely observes on the left. In fact, Justice Ginsburg notwithstanding, one might argue that Scalia has no liberal counterpart.

¹²⁷ See Rosenberg, *supra* note 54, at 574-75.

¹²⁸ Gibson, Caldeira & Spence, *supra* note 89, at 365.

¹²⁹ An electoral minority, in other words, is exercising dead-hand control. This dead-hand control of an electoral minority is more acute in the twenty-first century because Justices now live longer and thus serve for longer periods of time. In the eighteenth and nineteenth centuries, the average tenure for a Supreme Court Justice was fourteen years. Steven Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure*

President Obama, should a vacancy arise, will only get to replace one moderately liberal dissenter with another.¹³⁰ Even if President Obama gets to name two or three new Justices, his nominees will likely reflect their judicial philosophies primarily in dissent.

As President Obama considers candidates for a future Court vacancy, he may therefore find himself thinking demosprudentially, especially if his nominees reflect his commitment to engaging “We the People” in deliberation about the meaning of our democracy. Thinking demosprudentially has both a mobilizing and mirroring dimension. It is a call to understand the ongoing dialogue between constitutional law and constitutional culture. It invites public debate about the meaning of constitutional principles. At the same time it is reflective. It raises to public consciousness the aspirational merits of deliberative accountability. It summons social movement actors to meditate on what it means for the Constitution to belong to the people and not just to the Supreme Court. Thinking demosprudentially is a reminder that the people themselves have a role to play in the conversation about the conflicts at the core of our democracy.

Thinking demosprudentially is not a project of the left or the right. It is a project of democratic accountability. To the extent Justices root their disagreement about the meaning and interpretation of constitutional law in a more democratically accountable soil, they may spark a deliberative process that enhances public confidence in the legitimacy of the judicial process itself.

Considerations of demosprudence, however, are not invitations for judicial activism. There is a difference between a self-effacing judicial philosophy powered by democratic empathy, on the one hand, and a self-aggrandizing philosophy of judicial lawmaking that pre-empts the legislative or popular will. The former links the Court’s authority to its democratic accountability; the latter is a form of juridification.

Reconsidered, 29 HARV. J.L. & PUB. POL’Y 769, 770-71 (2006). Since 1970, the average tenure of a Supreme Court justice is over twenty-five years. *Id.*

¹³⁰ Justice Stevens, often the most liberal justice and a frequent dissenter, views himself as a moderate Republican. *See, e.g.*, Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 7, 2007, at 50. Like six of his eight colleagues, he was appointed by a Republican President. Of his more conservative colleagues, five are Catholic. Only one member of the current Court is female. All of the Justices came to the Court from the federal courts of appeals. The current judicial career ladder, in some ways, acculturates them to think in narrow terms about what constitutional interpretation means. Life experience, as President Obama’s advisors acknowledge, can matter. *See infra* notes 131-134 and accompanying text. Although most cases are decided based on precedents, “a handful of decisions can reflect judges’ own life experiences.” Patrick Healy, *Seeking to Shift Attention to Judicial Nominees*, N.Y. TIMES, Oct. 6, 2008, at A15.

President Obama, as well as his advisors, recognize this distinction.¹³¹ Indeed, when the bugaboo of judicial activism was leveled during the campaign,¹³² Obama's advisors acted quickly to disaggregate a philosophy based on competence, empathy and democratic accountability from one based on judicial presumption.¹³³ They summoned *Ledbetter* as an example of the role that judicial biography and temperament already play in judicial pre-emption on the right, not the left.¹³⁴

Demosprudential dissenters actually have an even stronger defense to charges of judicial activism. They will "avoid the problem of judicial activism . . . 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."¹³⁵ Having a constituency of accountability to whom a Justice speaks in dissent is quite different than over-reaching, backed by the coercive power of the state, to overrule established precedent as a member of the Court majority. As dissenters on a conservative Court, liberal Justices will not, by themselves, make law. Nor will they, by themselves, make politics.

Instead, demosprudential dissenters invite the people, not their judicial colleagues, to become activists in service of democracy. They attempt to provide an important check on the power of the Court majority, by inviting the people themselves to play a more active role in the interpretation of the law. A demosprudential dissenter can also bring greater transparency to the lawmaking process, providing openness that heightens public regard for the legal process and the Court as an institution. By themselves, demosprudential

¹³¹ David G. Savage, *Two Visions of the Supreme Court*, L.A. TIMES, May 19, 2008, at A8 (contrasting Senator McCain's criticism of "judicial activism" with then-Senator Obama's concern that the judiciary does not look out for "ordinary Americans").

¹³² Conservative court watchers have already denounced President Obama for comments made during the presidential campaign as someone who would simply appoint "liberal activist judges." See, e.g., Steven G. Calabresi, *Obama's 'Redistribution' Constitution*, WALL ST. J., Oct. 28, 2008, at A17; S.A. Miller, *Voting Record Clouds Obama's Judge Picks*, WASH. TIMES, Nov. 17, 2008, at A1 (reporting that "conservatives balk at Mr. Obama's pledge to fill the federal courts with judges in the mold of Justice Ruth Bader Ginsburg . . . [one of] the most liberal judges in the court's history").

¹³³ When President Obama was campaigning for the Democratic Party nomination, he spoke harshly about some of the decisions made by the conservative majority on the Supreme Court. At a Planned Parenthood Conference in Washington, D.C. on July 17, 2007, he suggested that judicial philosophy was a relevant consideration in evaluating nominees to the Court: "We need somebody who's got the heart . . . to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges." Carrie Dann, *Obama on Judges, Supreme Court*, MSNBC.COM, July 17, 2007, <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx>.

¹³⁴ See Healy, *supra* note 130.

¹³⁵ Guinier, *supra* note 13, at 58 (citing Cover, *supra* note 36, at 4, 9, 11, 40).

dissents are neither necessary nor sufficient to propel social change. But, as with Justice Ginsburg's oral dissent in *Ledbetter*, their voices in dissent can help frame a culturally resonant and democratically potent narrative of change.¹³⁶

I would never argue that a single Justice in dissent could issue a poetic and inspired commentary that by itself could initiate action and be historically relevant in the same way as Martin Luther King's speech at Holt Street Baptist Church in Montgomery in 1955 or on the Washington Mall in 1963. I am not suggesting that Supreme Court Justices must or should recast themselves as orators, oracles or poets. I do suggest that at this historical moment Justices on the left, and not just the right, would do well to consider their demosprudential power as dissenters. Should they succeed, it is because "We the People" become the real democratic activists.

¹³⁶ See, e.g., Posting of Dahlia Lithwick to The XX Factor (Feb. 10, 2009 16:39), <http://www.slate.com/blogs/blogs/xxfactor/archive/2009/02/10/ledbetter-and-ginsburg-and-a-cheer-for-the-feisty-gals.aspx> ("[W]ithout Ginsburg's lifelong commitment to women's equality and her passionate (and very personal) dissent in the *Ledbetter* case, the issue of pay parity would not have blossomed into the national *Ledbetter* tsunami that helped sweep Obama into office in November.").