
ROMANCING THE COURT

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INTRODUCTION

The potential role of the Supreme Court of the United States as an agent of progressive social change has inspired generations of legal academics.¹ From school desegregation² and civil rights more broadly³ to abortion⁴ and women’s rights⁵ to the death penalty⁶ to the rights of lesbians and gay men,⁷ the Court is seen by many as playing an important role in bringing about change.⁸

In her majestic foreword to the *Harvard Law Review*, Professor Lani Guinier proposes an additional mechanism by which the Court can affect progressive social change: the demosprudential oral dissent.⁹ Her essential claim is that dissents read orally from the bench can have an inspirational

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¹ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 21-28 (2d ed. 2008) (recounting academic support for the “Dynamic Court” view of the judiciary, which argues that the “political, institutional, and economic independence” of the courts makes them the most effective governmental agent for social change).

² See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.).

⁴ See *Roe v. Wade*, 410 U.S. 113, 164-66 (1973).

⁵ See *United States v. Virginia*, 518 U.S. 515, 534 (1996).

⁶ See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam).

⁷ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁸ See generally ROSENBERG, *supra* note 1 (discussing other leading cases in which scholars have credited the Supreme Court with producing progressive change).

⁹ Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 47 (2008) (defining demosprudence as “a lawmaking or legal practice that builds on the collective wisdom of the people” by tapping the “power of social movements or mobilized constituencies to make, interpret, and change law”).

power that written dissents lack.¹⁰ She uses Justice Breyer's oral dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*¹¹ as an example of such a demosprudential oral dissent.¹² Justice Breyer's dissent, Guinier writes, "appealed to shared and heartfelt values, not just compelling logic and clear reason."¹³ It "summoned memories, values, and practices that might . . . have resonated with a less educated audience . . . [who] had seen evidence in their own lives of what he described."¹⁴ For Guinier, a demosprudential oral dissent such as Justice Breyer's offers 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."¹⁵ In the age of the conservative Roberts Court, Guinier looks to demosprudential oral dissents to "educate, inspire, and mobilize citizens to serve the present as well as the future goals of our democracy."¹⁶

Guinier has written a fascinating, deeply rich and thoughtful article. It is also long, covering 135 pages and including 619 footnotes. This brief response cannot even begin to do it justice. What I can do, I hope, is to raise questions about the efficacy of demosprudential oral dissents. In the pages that follow, I make three main points. First, for decades social science researchers have repeatedly found that judicial opinions neither educate nor teach. Ordinary people do not know about them, are unlikely to find out about them, and are not interested. Second, elites 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. In other words, demosprudential dissents are neither necessary nor sufficient for democratic deliberation. Third, Guinier's analysis is too Court-centric. It overstates the contribution of the Court to fostering democratic deliberation. It is clear that democratic deliberation occurs without demosprudential dissent. If scholars want to understand the capacity of the Justices to influence democratic deliberation, they need to focus on that deliberation and on social movements, not on the Court. Focusing only on the Court will inevitably overstate its role. Finally, given these points, I will conclude by asking why, in the face of decades of social science research, legal academics continue their endless quest to find judicial influence, to romance the Court.

¹⁰ *Id.* at 17.

¹¹ 127 S. Ct. 2738, 2746 (2007).

¹² Guinier, *supra* note 9, at 8-13.

¹³ *Id.* at 11.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 14-15 (contending that Chief Justice Roberts's push for unanimity in the Court's opinions, intended to give the Court a more authoritative voice, magnifies the importance of oral dissents).

I. JUDICIAL OPINIONS NEITHER EDUCATE NOR TEACH

Guinier begins the foreword with an epigraph quoting Justice Anthony Kennedy's response to a question from a Harvard Law School student about the audience for dissenting opinions; at the end of his response, Justice Kennedy says, "[j]udges are teachers. By our opinions, we teach."¹⁷ The ability of oral dissents in particular to teach is key for Guinier's arguments.¹⁸ She expands on this claim, writing that "dissenting Justices may educate, inspire, and mobilize citizens."¹⁹ Indeed, she makes claims about teaching in nearly a dozen places throughout the article.²⁰ In two places she quotes Eugene Rostow's famous 1952 statement that the Justices are "teachers in a vital national seminar."²¹

The problem with this claim is that if Justices are teachers, then their classes are very poorly attended. And those who are there are not taking notes! Decades of social science research show that the American public is not persuaded by Court opinions.²² Reviewing the data in a 2008 compilation of the influence of Supreme Court decisions on the views of Americans in fourteen substantive areas including desegregation, rights of the accused, school prayer, abortion, gay rights, and the war on terror and civil liberties, Professors Nathan Persily, Jack Citrin, and Patrick Egan found few effects.²³ Writing in the introduction, Persily summarizes the findings: "In the vast majority of the cases reviewed here, Supreme Court decisions had no effect on the overall distribution of public opinion."²⁴

¹⁷ *Id.* at 7 (quoting Justice Kennedy).

¹⁸ *See id.* at 30-31.

¹⁹ *Id.*

²⁰ *Id.* at 14, 17, 31, 47, 50, 51, 58, 112, 115, 132, 137.

²¹ *Id.* at 51, 132 (quoting Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (declaring that "[t]he Supreme Court is, among other things, an educational body" and as such contributes to forming American public opinion and public policy)).

²² WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS 53 (1973) (reporting that in 1966, despite a recent spate of dramatic Supreme Court decisions, only forty-six percent of survey respondents "could recall anything at all that the Court had recently done"); Gerald N. Rosenberg, *The Irrelevant Court: The Supreme Court's Inability to Influence Popular Beliefs About Equality (or Anything Else)*, in REDEFINING EQUALITY 172, 187 (Neal Devins & Davison M. Douglas eds., 1998) (finding no evidence in polling data to support the claim that the Supreme Court influenced public opinion in favor of racial or gender equality). *See generally* NATHANIEL PERSILY, JACK CITRIN & PATRICK J. EGAN, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (2008) (examining the Supreme Court's effect on public opinion of constitutional controversies).

²³ *See generally* PERSILY, CITRIN & EGAN, *supra* note 22.

²⁴ Nathaniel Persily, *Introduction* to PERSILY, CITRIN & EGAN, *supra* note 22, at 8.

Part of the reason for this lack of efficacy is that most Americans are unaware the Court has acted, even on important issues.²⁵ I could devote a considerable number of pages to reviewing the literature that uniformly finds most Americans do not have a clue as to what the Court is doing or has done.²⁶ As an example, consider the Court's 1973 abortion decision, *Roe v. Wade*. Although *Roe v. Wade* is undoubtedly well-known among readers of this Essay, that is not the case for ordinary Americans.²⁷ In March of 1982, a CBS News/New York Times poll asked respondents in a national survey: "Does the U.S. Supreme Court permit or does it forbid a woman to have an abortion during the first three months of pregnancy, or haven't you been following this closely enough to say?"²⁸ Although this question was asked nearly a decade after *Roe v. Wade*, and two years into the Reagan Administration with its public and vociferous commitment to overturning *Roe v. Wade*,²⁹ nearly half of respondents (49%) had no idea.³⁰ Others had it wrong, with 10% of respondents saying that the Court had issued a decision forbidding abortion.³¹ In 1986, another national survey probed knowledge of the case name, asking: "*Roe vs. Wade* was a landmark Supreme Court case which dealt with: . . . ?"³² Only 30% of respondents knew that *Roe v. Wade* dealt with abortion.³³ Sixteen percent thought that it dealt with "the rights of a person accused of a crime" and 9% thought it dealt with "racial segregation in schools."³⁴ While by 1998 there was some modest improvement in these responses,³⁵ the reader may recall that in the 2008 presidential campaign Sarah Palin, the governor of Alaska and Republican Party candidate for Vice President of the United States, could not name even one Supreme Court case with which she disagreed other

²⁵ *See id.* at 9.

²⁶ *See generally* PERSILY, CITRIN & EGAN, *supra* note 22.

²⁷ CBS News/New York Times Poll (Mar. 1982), *available at* iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>.

²⁸ *Id.*

²⁹ *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT 72 (1991) ("The Reagan administration made *Roe v. Wade* the symbol of everything that had gone wrong in law, particularly in constitutional law.").

³⁰ CBS News/New York Times Poll, *supra* note 27.

³¹ *Id.*

³² Survey by Research & Forecasts, Inc., Knowledge of the U.S. Constitution (Oct.-Nov. 1986), *available at* iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>.

³³ *Id.*

³⁴ *Id.*

³⁵ A 1998 CBS News/New York Times Poll found 55% of respondents saying the Court permits abortions. CBS News/New York Times Poll (Jan. 1998), *available at* iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>. This means, of course, that 45% of respondents were unaware of what *Roe v. Wade* permitted or did not permit.

than *Roe v. Wade*.³⁶ This is striking given that Guinier discusses several of Justice Scalia's oral dissents that might have appealed to Governor Palin.³⁷ Toward the beginning of her article, Guinier writes: "The question is whether dissenting Justices can engage that [broader] public in a kind of deliberation that is rooted in the deeply democratic practices of constitutional governmental institutions."³⁸ We know the answer to that question and the answer is no.

If large portions of the American public are unaware even of major decisions like *Roe v. Wade*, it is fantasy to think ordinary Americans will know about oral dissents. To start, there are very few of them. Guinier reports, in a footnote, that since 1994 there have been "approximately" forty-seven oral dissents.³⁹ That works out to just about 3.4 oral dissents per year. To make matters even worse, as Guinier herself notes, "oral dissents just really aren't available."⁴⁰ They are not printed or made readily available by the Court.⁴¹ They are sometimes described in newspaper stories,⁴² but Guinier repeatedly stresses the importance of their being delivered orally.⁴³ The basic point is that very few people *hear* oral dissents.

Guinier suggests that technology may improve this situation.⁴⁴ Due to the heroic efforts of Professor Jerry Goldman, a political scientist at Northwestern University, The Oyez Project website posts audio files of oral dissents.⁴⁵ However, there can be a lengthy delay between the issuance of an oral dissent and the posting of the audio files.⁴⁶ For example, Guinier devotes a good deal of attention to Justice Breyer's oral dissent in *Parents Involved*.⁴⁷ Although the case was decided on June 28, 2007, Guinier comments that the audio file for the dissent would not be available until over a year later.⁴⁸ In addition,

³⁶ Katie Couric, *Palin, Biden Trade Views On Abortion*, CBS NEWS, Oct. 1, 2008, <http://www.cbsnews.com/stories/2008/10/01/eveningnews/main4493062.shtml>.

³⁷ Guinier writes that Justice Scalia has been "a perpetual oral dissenter, often using oral dissents to transform a case into a cause." Guinier, *supra* note 9, at 46 & n.206.

³⁸ *Id.* at 15.

³⁹ *Id.* at 23 n.94 (listing Justice Scalia as the most frequent oral dissenter, with eleven oral dissents in the period, followed by Justice Stevens with ten).

⁴⁰ *Id.* at 120 n.549.

⁴¹ *See id.* at 24.

⁴² *Id.* at 53 (observing that journalists present at an oral dissent are initially responsible for disseminating it using their verbatim notes).

⁴³ *See id.* at 10, 25-28.

⁴⁴ *See id.* at 54 (blaming the "Court's resistance to twenty-first-century technology" for the failure of oral dissents to "realize their demosprudential potential").

⁴⁵ *See* The Oyez Project, About Oyez, <http://us.oyez.org/about> (last visited Feb. 12, 2009).

⁴⁶ *See* Guinier, *supra* note 9, at 53-54 n.234 (reporting a "few months" delay in processing the Court's audio materials by the National Archives).

⁴⁷ *Id.* at 7-18.

⁴⁸ *Id.* at 17 n.50 (noting that the files should be available from Oyez "as of October 2008").

accessing an oral dissent at the Oyez site requires several steps. In order to find Justice Breyer's oral dissent in *Parents Involved*, for example, one must first find the Oyez site.⁴⁹ Then, one must find the case itself. But even once the case is found, there is no explicit indication anywhere on the page that there is an oral dissent. In order to access it one has to click on "Opinion Announcement" and start listening to the slightly more than forty-minute long audio file.⁵⁰

The small number of oral dissents, and the difficulty of learning that they exist and listening to them, means that very few people hear them. Most likely, the only people who are aware of them are people physically present in the Court and activists. But even most activists may not know about them, given that, as Guinier notes, "[s]ocial movements are unlikely to use the oral opinion, since they are unlikely to be in the Court on the day the opinion is read."⁵¹

Having admitted these challenges, Guinier then imagines what some alternatives might be for reaching the public with oral dissents. She writes that "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.'"⁵² Putting aside the issue of poor access to oral dissents, this confuses form with content by assuming that the larger public even cares about them. The public is not interested in legal debates, spoken or not. Imagine, for example, a cable television show, *The Supreme Court This Week*, with the announcer intoning, "lets have a warm welcome for this week's host, the effervescent David Souter!" I would hate to hazard a guess on ratings, even on C-SPAN.

Guinier goes further, suggesting that through the Internet, "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, [and] interested citizens."⁵³ But again this confuses form with substance. Undeterred, Guinier continues, suggesting that "[i]n the age of the internet, those stories could 'go viral' through YouTube or e-mail forwarded to like-minded friends."⁵⁴ She also proposes that "[w]ere 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."⁵⁵ Alas, although creative, these are flights of pure

⁴⁹ The Oyez Project, <http://us.oyez.org/> (last visited Feb. 12, 2009).

⁵⁰ The Oyez Project, *Parents Involved in Community Schools v. Seattle School District No. 1 – Opinion Announcement*, http://us.oyez.org/cases/2000-2009/2006/2006_05_908/opinion (last visited Feb. 1, 2009).

⁵¹ Guinier, *supra* note 9, at 120 n.549.

⁵² *Id.* at 28.

⁵³ *Id.* at 30 n.133.

⁵⁴ *Id.* at 29.

⁵⁵ *Id.* at 28.

fancy. While the younger generation may be wired, they are not listening to oral dissents. Is it anything but pure fantasy to expect “spoken word artists” to riff off of oral dissents in Supreme Court cases? And if there were such compositions, I doubt they would be played even at law school happy hours.

Social scientists have studied the mechanisms by which the public learns about Supreme Court opinions.⁵⁶ In general, the literature finds that most judicial decisions receive little sustained coverage.⁵⁷ “[E]ven controversial and unpopular decisions,” Charles Franklin and Liane Kosaki find, “are likely to vanish quickly from the media.”⁵⁸ However, they do emphasize that elite action can change this pattern.⁵⁹ When Supreme Court decisions provoke “sustained elite reaction,” the media covers those reactions.⁶⁰ Reviewing the influence of the Court on public opinion, Persily concurs.⁶¹ He notes that the “nature of court decisions’ effects on public opinion is usually a product of the way elites react to the decision.”⁶² This literature suggests that it is the reaction of political elites to Supreme Court opinions, and not the opinions themselves, that interests the public. Without that reaction, technology will not increase the audience for Supreme Court opinions, let alone oral dissents.

The point is that practically nobody cares about what a Justice might say in an oral dissent. Guinier may be correct that oral dissents “represent a novel space that combines the theatrical and subversive traditions of performance art with the dialogic and democratizing traditions of law.”⁶³ And I suspect she is right that vivid, clear, down-to-earth narratives are effective ways of communicating, especially compared with turgid legal writing.⁶⁴ But all this means is that oral dissents are great subjects to study as literary forms, not as causal agents of deliberative democracy. Guinier’s argument takes insufficient account of the structures, knowledge and culture that limit judicial penetration of everyday consciousness.

⁵⁶ See, e.g., Kevin M. Scott & Kyle L. Saunders, *Supreme Court Influence and the Awareness of Court Decisions 2* (Aug. 31, 2006) (unpublished manuscript, available at http://www.allacademic.com/meta/p152007_index.html) (arguing that “the institution of the Court itself, the media, and other group cleavages all play a varying role in how individuals find out about issues before the Court and the decisions that the Court makes”).

⁵⁷ See *id.* at 6-7 (concluding that “media coverage of the Supreme Court . . . is sporadic, inconsistent, and non-reflective of the diversity of the Supreme Court’s docket”).

⁵⁸ Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in *CONTEMPLATING COURTS* 352, 360 (Lee Epstein ed., 1995).

⁵⁹ See *id.* (observing an increase in media coverage that occurs when political elites react to a Supreme Court decision, even a week after the opinion is announced).

⁶⁰ *Id.*

⁶¹ Persily, *supra* note 24, at 9.

⁶² *Id.*

⁶³ Guinier, *supra* note 9, at 24.

⁶⁴ *Id.* at 25-28.

II. ORAL DISSENTS ARE UNLIKELY TO EITHER MOTIVATE OR INSPIRE ELITES

Guinier is aware that oral dissents are difficult to find.⁶⁵ She suggests, however, that an oral dissent's "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 the existence and content of the dissent."⁶⁶ She suggests this can happen in two ways. First, in an oral dissent a "Justice can reach out to inchoate social movements, helping to remind them of the source of their systemic exclusion."⁶⁷ Second, activists battling issues that are litigated in the Supreme Court may be inspired to act by an oral dissent.⁶⁸ Guinier writes at length about Pat Todd, an educational administrator in Louisville, Kentucky, and a local activist for school desegregation. Referring to Justice Breyer's oral dissent in *Parents Involved*, Guinier writes that although "few people may actually have heard his oral dissent, it is the Todds of the world whose participation jump starts the process of democratic accountability."⁶⁹ Thus, Guinier argues that oral dissents can spark and inspire social activists.

To the extent Guinier is arguing that the content of judicial opinions structures the activists' approaches she is, of course, correct. She notes that "Todd used Justice Breyer's strongly worded dissent . . . to come up with an alternative assignment plan that might still be lawful."⁷⁰ There is nothing unusual about this. If Supreme Court decisions are the law of the land, and will be applied by the lower federal courts, then Todd and her colleagues need to take them into account when crafting a desegregation plan that will survive court challenge. It is not at all clear how oral dissents add much to this calculation, however. It is difficult to imagine that Todd or any other activist would have acted any differently in the absence of an oral dissent. And, since it appears Todd was not present in the Supreme Court when Justice Breyer gave his oral dissent, it is not clear how she would have heard and been inspired by it.⁷¹

Guinier goes further than this. She claims that Todd also used Justice Breyer's written dissent to "rally the troops" and that she and "her team of

⁶⁵ *Id.* at 53-54.

⁶⁶ *Id.* at 49-50.

⁶⁷ *Id.* at 52.

⁶⁸ *See id.* at 55.

⁶⁹ *Id.* at 13.

⁷⁰ *Id.* at 39.

⁷¹ The *Daily Independent* of Ashland, Kentucky, ran a picture showing "Pat Todd, Jefferson County Public School's Executive Director for Student Assignment, speak[ing] Thursday, June 28, 2007 during a press conference at the Van Hoose Education Center in Louisville, Ky." Mark Sherman, *Court Rejects Louisville Schools' Diversity Plans*, DAILY INDEPENDENT (Ashland, Ky.), June 28, 2007, http://www.dailyindependent.com/schools/local_story_179110650.html. This was the same day the opinion was read.

administrators and researchers initially used Breyer's dissent as a clarion call."⁷² Indeed, Guinier gets a bit carried away, writing that "Todd armed herself with Justice Breyer's dissent, which she read aloud at the beginning of all of her community forums."⁷³ Given that the written dissent was "seventy-seven heavily footnoted pages,"⁷⁴ this is improbable. In fact, Emily Bazelon, the source for Guinier's claim, writes merely that "Todd would start her presentation with quotes from Justice Kennedy and from Justice Breyer's dissent."⁷⁵ More importantly, Bazelon makes it clear that Todd was using the words of the Justices to show her frustration with the Court's opinion, not to rally her supporters.⁷⁶ Once she discovered through polls that the citizens in Louisville supported the desegregation plan, she stopped using Justice Breyer's dissent in her presentations.⁷⁷ Todd told Bazelon that "she had dropped Breyer's dissent in *Meredith* from her presentation; she was no longer feeling frustrated with the court."⁷⁸ If Todd were using the words of Justice Breyer's dissent as a rallying cry, it seems likely she would have kept quoting them.

Guinier's key claim is that oral dissents can mobilize social movements.⁷⁹ There is a social science literature that explores the relationship of Supreme Court opinions to social movements. A classic study is Michael McCann's *Rights at Work*, which examines the impact of judicial opinions on the struggle for pay equity.⁸⁰ Traveling around the country interviewing women involved in the pay equity struggle, McCann concludes that judicial opinions can help mobilize and inspire what Guinier calls "democratic accountability" only when "[1] [i]ncreasingly favorable political opportunities . . . converge with [2] preexisting organizational resources to provide [3] potential activists a propitious context for effective collective action. Legal actions then *can* spark actual insurgency . . . of [4] identified movement constituents."⁸¹

In other words, for judicial opinions to foster democratic accountability there must be public and elite support, pre-existing groups and resources committed to the issue, a committed leadership, and a predisposed target

⁷² Guinier, *supra* note 9, at 39.

⁷³ *Id.* at 12, 39.

⁷⁴ *Id.* at 9.

⁷⁵ Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES MAG., July 20, 2008, at 38, 43.

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *Id.* *Meredith v. Jefferson County Board of Education*, 127 S. Ct. 2738 (2007), a case involving the student assignment plan in Louisville, Kentucky, was a companion case to *Parents Involved*.

⁷⁹ *See* Guinier, *supra* note 9, at 52.

⁸⁰ *See generally* MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

⁸¹ *Id.* at 136-37 (emphasis added) (enumerating necessary conditions for "movement building").

audience. When all these conditions are present, law *can*, but not necessarily will, make a difference. McCann puts it this way: “Even under the most propitious circumstances . . . the contributions of legal maneuvers to catalyzing defiant collective action will be partial, conditional, and volatile over time.”⁸²

McCann’s analysis suggests that demosprudential dissents are neither necessary nor sufficient for mobilizing social movements. They are not necessary because if there is an active social movement in place then no judicial help is needed. They are also not sufficient because without a preexisting movement and the other factors McCann identifies, such dissents will accomplish nothing. Indeed, Guinier provides two examples of successful mobilization without demosprudential dissents. She describes an extremely well-organized and successful movement to restore voting rights to ex-felons in Rhode Island.⁸³ She postulates that, “[a] dissent from the Supreme Court could help in such an effort,”⁸⁴ but activists in Rhode Island did not need it. Similarly, she tells the story of how social movements in Missouri defeated an attempt to enact a very strict voter identification bill,⁸⁵ also without the help of demosprudential opinions.

But Guinier may be on to something when she echoes McCann: “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.”⁸⁶ McCann’s work suggests that this might be right, but this is a claim very different from the one Guinier makes throughout her article. Guinier needs more of this kind of qualification to construct a persuasive argument.

When all is said and done, social activists care about the substantive holding of Court opinions, not the existence and language of oral dissents. The most well-known examples of mobilization arguably in response to Court decisions come in cases where there were no oral dissents. These include cases like *Brown v. Board of Education*,⁸⁷ which mobilized segregation groups, *Roe v. Wade*,⁸⁸ which mobilized anti-abortion groups, and *Goodridge v. Department of Public Health*,⁸⁹ which mobilized opponents of same-sex marriage.⁹⁰ Elites are seldom if ever motivated or inspired by the language of judicial dissents to

⁸² *Id.* at 137. “[E]ffective legal mobilization,” McCann adds, “depends on a *rare* combination of favorable opportunities and resources often in *short* supply among subordinate groups.” *Id.* at 305 (emphasis added).

⁸³ Guinier, *supra* note 9, at 103-04.

⁸⁴ *Id.* at 104.

⁸⁵ *Id.* at 105.

⁸⁶ *Id.* at 114.

⁸⁷ 347 U.S. 483 (1954).

⁸⁸ 410 U.S. 113 (1973).

⁸⁹ 798 N.E.2d 941 (Mass. 2003).

⁹⁰ See ROSENBERG, *supra* note 1, at 355.

act. When elites are favorably situated, as McCann finds, they may make use of opinions, but the opinions alone are unlikely to matter much.

III. A COURT-CENTRIC APPROACH OVERSTATES THE IMPORTANCE OF DEMOSPRUDENTIAL JUDICIAL OPINIONS

Guinier's analysis is too Court-centric. In arguing for the influence of demosprudential oral dissents in fostering democratic deliberation, Guinier overstates the contribution of the Court. In describing the role of demosprudential dissents, Guinier uses the word "authorize" and its several forms multiple times.⁹¹ For example, she writes that "Justice Breyer's dissent [in *Parents Involved*] did 'authorize' and inspire Pat Todd and others to explore new ways to accomplish their shared goals."⁹² She makes a similar claim for the effect of Justice Ginsburg's oral dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*⁹³ In *Ledbetter*, the Court held that Lilly Ledbetter was barred from recovering back pay withheld from her on the basis of her sex because she did not file her legal complaint when the discrimination first started, even though at that time she was unaware of it.⁹⁴ Justice Ginsburg's oral dissent, Guinier claims, "helped authorize women to push back."⁹⁵

This view is much too Court-centric. Why does Guinier believe that Pat Todd and Lilly Ledbetter needed Court authorization and permission to fight for what they believed in? What evidence does she have that they would not have acted in the ways they did without urging by concurring and dissenting Justices? Given the commitment of these two women to their respective causes, it seems almost insulting to suggest they were ultimately dependent on the Court. Now it is possible, even likely, that the oral dissents from Justices Breyer and Ginsburg helped Todd and Ledbetter to feel better about their causes, but that has nothing to do with granting them permission to act. Similarly, Guinier imagines a demosprudential dissent in *Crawford v. Marion County Election Board*,⁹⁶ the Indiana voter identification case that would "give permission . . . to feel outrage and then act to generate constructive change."⁹⁷ But again, people do not need permission from Supreme Court Justices to feel outrage or generate change, constructive or otherwise. By focusing on the

⁹¹ Guinier, *supra* note 9, at 32, 39, 42, 58, 90, 114, 118 (asserting that Court opinions "authorize" individuals and groups to act).

⁹² *Id.* at 39.

⁹³ 127 S. Ct. 2162 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; Guinier, *supra* note 9, at 42 (asserting that Lilly Ledbetter took on "the role of social critic, . . . inspired, in part, by Justice Ginsburg's forceful dissent").

⁹⁴ *See Ledbetter*, 127 S. Ct. at 2169.

⁹⁵ Guinier, *supra* note 9, at 42.

⁹⁶ 128 S. Ct. 1610 (2008) (upholding an Indiana statute requiring voters to present government-issued photo identification).

⁹⁷ Guinier, *supra* note 9, at 107.

Court rather than social activists, Guinier overstates the Court's influence and under-appreciates the determination and dedication of social activists.

A good example of this flawed approach to understanding the role of the Court involves the death penalty. Guinier points to Justice Stevens's concurrence in *Baze v. Rees*,⁹⁸ dealing with a constitutional challenge to the use of a three-chemical injection as a method of execution.⁹⁹ Guinier describes the concurrence as "profoundly demosprudential," an opinion that aims to "generate debate about the merits of capital punishment."¹⁰⁰ But Americans have been debating the death penalty and pollsters have been measuring its popular support for decades.¹⁰¹ For almost all of this time majorities have supported the death penalty, with support climbing as high as eighty percent in September 1994.¹⁰² This occurred despite numerous powerful dissents from Justices Brennan and Marshall.¹⁰³ When in the 1970s the Court intervened by invalidating the death penalty as then practiced,¹⁰⁴ there was a backlash that increased public support for it.¹⁰⁵ As of November 2008, Gallup finds that nearly two-thirds of Americans support the death penalty while less than one-third oppose it.¹⁰⁶ In addition, "nearly half (48%) believe it is not imposed often enough. Only 21% of Americans say it is imposed too often."¹⁰⁷ Finally, over half of Americans believe the death penalty is applied fairly.¹⁰⁸ Given the decades-long debate about the death penalty, and the enduring support

⁹⁸ 128 S. Ct. 1520 (2008) (holding that Kentucky's lethal injection procedure does not violate the Eighth Amendment's prohibition of cruel and unusual punishment).

⁹⁹ See *id.* at 1525-27, 1538.

¹⁰⁰ Guinier, *supra* note 9, at 65.

¹⁰¹ Lydia Saad, *Americans Hold Firm to Support for Death Penalty*, GALLUP, Nov. 17, 2008, <http://www.gallup.com/poll/111931/Americans-Hold-Firm-Support-Death-Penalty.aspx> (revealing that in 1937, fifty-nine percent of Americans favored the death penalty for convicted murderers).

¹⁰² *Id.*

¹⁰³ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting). Starting in 1976, Justices Marshall and Brennan dissented from every decision upholding a sentence of death. MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* 4 (1996). Mello also notes that from 1976 to 1991 Marshall and Brennan dissented in more than 2500 capital cases denying certiorari. *Id.*

¹⁰⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁰⁵ Saad, *supra* note 101 ("[I]t appears that Supreme Court rulings on the death penalty in the 1970s may have sparked increased public support for the punishment, starting around 1976.").

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Breaking down respondents by party identification, Republicans support it by better than four to one, independents by better than two to one, and Democrats by more than half (fifty-two percent to forty-four percent). *Id.*

¹⁰⁸ *Id.*

Americans express for it, it is fantastical to expect a concurring opinion, however demosprudential, to generate a debate that does not already exist.

Guinier's analysis may be too Court-centric because her understanding of the role of the Court is romanticized. For instance, she described Justice Breyer's oral dissent in *Parents Involved* as a step toward "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."¹⁰⁹ This is a claim only a law professor could love. What "awe-inspired reverence"? While it is often the case, as Robert McCloskey pointed out decades ago, that Court winners ascribe great wisdom to the Court, McCloskey also noted that they quickly change their beliefs when they lose.¹¹⁰ Furthermore, public opinion surveys do not support Guinier's claim. In June 2008, Gallup reported that fewer than half of respondents approved of the way the Supreme Court was handling its job.¹¹¹ When the responses are analyzed by party identification, McCloskey's shrewd observation seems accurate; only forty percent or so of Democrats and Independents approve of the way the Supreme Court is handling its job, compared to approximately sixty percent of Republicans.¹¹² "Awe-inspired reverence" hardly seems an apt description of an institution that garners support from less than half of the American public.

It is interesting to note that those judicial opinions that seem most effective in mobilizing citizens are those that anger and outrage segments of the population who mobilize to prevent their implementation and overturn them.¹¹³ *Brown*, *Roe v. Wade*, and *Goodridge* generated outrage and energized social movements, albeit not for change that either Guinier or I would call constructive. This occurred not because there were demosprudential oral dissents that gave permission to opponents, but because opponents disagreed with the substantive outcomes.

The key problem with this part of Guinier's analysis is that she uncritically puts the Court at the center of social movements. If scholars want to understand the capacity of the Justices to influence democratic deliberation, they need to focus on that deliberation and on social movements, not on the Court. Guinier's focus on the Court inevitably overstates the Court's role. For example, Guinier credits Justice Ginsburg's *Ledbetter* oral dissent in inspiring Lilly Ledbetter to participate in the political process,¹¹⁴ but does not take into

¹⁰⁹ Guinier, *supra* note 9, at 12.

¹¹⁰ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 244 (4th ed. 2005).

¹¹¹ Jeffrey M. Jones, *Bush, Congress, Supreme Court Near Historical Low Approval*, GALLUP, June 16, 2008, <http://www.gallup.com/poll/108010/Bush-Congress-Supreme-Court-Near-Historical-Low-Approval.aspx> (reporting a forty-eight percent approval rating for the Court).

¹¹² *Id.*

¹¹³ Persily, *supra* note 24, at 12.

¹¹⁴ Guinier, *supra* note 9, at 40-41 (explaining how Justice Ginsburg's oral dissent helped spark a "legislative crusade" over gender discrimination in employee wages).

account the broader political context. At the end of her article, Guinier makes the remarkable claim that “[i]t 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.”¹¹⁵ However, the political environment was such that both Ledbetter and Congress probably would have acted anyway. Ledbetter’s willingness to bring a case in the first place and appeal her loss in the Eleventh Circuit suggests that she was dedicated to her cause. In addition, Congress was acting in full awareness of the upcoming election where a woman was a leading candidate for the Democratic Party’s presidential nomination and women’s votes were seen as a key target by the Democratic Party. Under these circumstances, it is likely that the Democratic-controlled House would have passed a bill overturning the *Ledbetter* decision regardless of whether Justice Ginsburg offered a demosprudential dissent. Similarly, it made good political sense for the Democratic Party to invite Lilly Ledbetter to speak at the Democratic National Convention, also independent of anything Justice Ginsburg said.¹¹⁶ While it is of course possible that Justice Ginsburg’s oral dissent contributed and supported both Ledbetter’s and Congress’s actions,¹¹⁷ the broader context suggests it played, at best, a minor role.

The pre-2008 congressional attempt to overturn *Ledbetter* raises an interesting question about the conditions under which Congress acts to overturn the Court’s decisions. It is hard to imagine that congressional action overturning Court decisions is normally the product of demosprudential oral dissents. At the very least, the literature examining congressional overrides does not identify oral dissents as important. Instead, the literature highlights electoral considerations and perceived threats to congressional power as key factors leading to congressional overrides.¹¹⁸ Consider, for example, the enactment of the Pregnancy Discrimination Act of 1978, overturning *General Electric Co. v. Gilbert*.¹¹⁹ If there was a demosprudential oral dissent in that

¹¹⁵ *Id.* at 137.

¹¹⁶ Lilly Ledbetter, Address at the Democratic National Convention (Aug. 26, 2008), <http://www.demconvention.com/lily-ledbetter/>.

¹¹⁷ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

¹¹⁸ See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (“Congressional overrides are most likely when a Supreme Court interpretation reveals an ideologically fragmented Court, relies on the text’s plain meaning and ignores legislative signals, and/or rejects positions taken by federal, state, or local governments.”); Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353, 353 (1994) (finding that “electoral considerations of public opinion and interest group pressure are likely to lead to a congressional response”); James Meernik & Joseph Ignagni, *Congressional Attacks on Supreme Court Rulings Involving Unconstitutional State Laws*, 48 POL. RES. Q. 43, 43 (1995).

¹¹⁹ 429 U.S. 125 (1976) (holding that an employer’s disability benefits plan that did not cover disabilities related to pregnancy did not violate Title VII of the Civil Rights Act of

case, it is not well known. Similarly, the Civil Rights Act of 1991 overturned *Wards Cove Packing Co. v. Atonio*,¹²⁰ plus several other cases,¹²¹ apparently without the aid of a well-known demosprudential oral dissent. In focusing on oral dissents and the Court, Guinier overstates their importance.

In sum, Guinier's emphasis on the importance of judicial language is too Court-centric and apolitical. It suggests that without demosprudential judicial opinions, political leaders will lack the vision or the ability to act. Furthermore, Guinier assumes that the use of the language of demosprudential dissents indicates their causal influence.¹²² Perhaps she is right, but that is a hypothesis to be tested, not a self-evident truth.

IV. ROMANCING THE COURT: THE ENDLESS QUEST TO FIND JUDICIAL INFLUENCE

Ultimately, Guinier has produced another, albeit creative, law review article in a long line of seemingly endless attempts to portray the Court as an effective and powerful agent of change and defender of minorities. But this analysis cannot be reconciled with decades of social science research that questions and qualifies claims of judicial efficacy. Ignoring social science data is nothing new in legal scholarship. For example, it took decades for the attitudinal model of Supreme Court jurisprudence to gain a beachhead among legal academics.¹²³ While important work on the attitudinal model appeared in the 1980s¹²⁴ and 1990s,¹²⁵ it was not until 2004 that a major legal academic

1964), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000).

¹²⁰ 490 U.S. 642 (1989) (holding that to make a prima facie showing of illegal disparate racial impact, employees must "demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

¹²¹ *See, e.g.*, *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹²² *See* Guinier, *supra* note 9, at 121.

¹²³ The attitudinal model "holds that justices make decisions by considering the facts of the case in light of their ideological attitudes and values." *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 73 (1993).

¹²⁴ Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561 (1989) (supporting the attitudinal model with a correlation between Justices' votes and independent measurements of their ideological values).

¹²⁵ SEGAL & SPAETH, *supra* note 123, at 69 (suggesting that the Supreme Court decides cases based on ideological preferences because of a lack of electoral accountability and the power to control its docket).

adopted and refined the model.¹²⁶ The legal academy seems even more reluctant to come to terms with decades of data that speak to the issues Guinier raises, such as the Court's effect on public opinion and social movements. Until it does, legal scholarship will be more about rhetoric and romance than reality.

This lack of engagement with social science research is particularly striking for those who purport to be on the political left. In privileging the role of the Court, they reveal an elitist, top-down vision of change that sells short the initiative and dedication of social reform activists whose causes they support. Guinier's argument celebrates the ability of ordinary people to deliberate constitutional values – the “wisdom of the people”¹²⁷ – yet she suggests they will not do so without authorization and permission from the Court.¹²⁸ This ignores the fact that the great movements for social change in America, from abolition to suffrage to economic justice, have not depended on judicial authorization.¹²⁹ In looking to the Court, those on the political left also have forgotten the historic role of the judiciary as a defender of the status quo and unequal distributions of power, wealth, and privilege.¹³⁰ Perhaps most importantly, by focusing on the Court the left tacitly assumes that rights trump politics and that litigating legal cases is as effective as building and sustaining political movements. Neither history nor data provide support for that assumption.

It is unclear why legal academics have, for the most part, been so unwilling to confront social science research.¹³¹ Some of this reticence is perhaps due to lack of training in empirical methods. But it is more plausible that the reticence derives from the insularity of the legal academy and a concern with a sense of status.¹³² If legal academics no longer have a monopoly on legal scholarship, and if courts are less important in producing social change than

¹²⁶ Cass R. Sunstein, David Schkade, & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004).

¹²⁷ Guinier, *supra* note 9, at 16, 47.

¹²⁸ *See id.* at 40, 107.

¹²⁹ *See* ROSENBERG, *supra* note 1, at 156, 265 (arguing that empirical evidence shows that courts did not play a significant role in producing the civil rights and women's rights movements).

¹³⁰ *See* Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 796 (2006).

¹³¹ There is, however, a movement within the legal academy to bring the tools of social science into legal research. The movement includes the creation of the Empirical Legal Studies Blog (www.elsblog.org), the *Journal of Empirical Legal Studies*, and the annual Conference on Empirical Legal Studies, first held in 2006.

¹³² For a polemical attack on the insularity of legal scholarship, see Gerald N. Rosenberg, *Across the Great Divide (Between Law and Political Science)*, 3 GREEN BAG 2D 267, 272 (2000) (arguing that legal academics are intellectually isolated from the political science field to their detriment).

legal academics have been taught to believe, then the deference to which they have grown accustomed is misplaced.

At the same time, claims about the importance of demosprudential dissents say more about the strengths and weaknesses of the best modern legal scholarship than they say about the ability of the Court to contribute to democratic deliberation. As long as the most interesting, thoughtful and creative legal academics romance the Court, their scholarship, and our learning, will suffer.