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**EXTENDING THE SHADOW OF THE LAW: USING HYBRID  
MECHANISMS TO DEVELOP CONSTITUTIONAL NORMS IN  
SOCIOECONOMIC RIGHTS CASES**

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***Abstract***

*This Article disputes the general perception that dispute resolution processes are inappropriate to resolving constitutional issues. Focusing on a recent South African Constitutional Court case in which the Court interpreted the right to housing in the South African Constitution to require that municipalities develop processes for “engaging” with citizens affected by redevelopment plans that may involve eviction, this Article considers how the engagement remedy could be developed into a hybrid dispute resolution mechanism that incorporates the flexibility of ADR processes with the public-norm creating capacity of traditional adjudication.*

**Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop  
Constitutional Norms in Socioeconomic Rights Cases**

Brian Ray \*

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## I. INTRODUCTION

One distinctive feature of constitutions developed in the twentieth-century is the almost uniform inclusion of socioeconomic rights provisions—rights to basic human needs such as food, water, shelter, health care and education.<sup>1</sup> Despite their relative ubiquity, however, judicial enforcement of these rights remains relatively controversial in theory and problematic in practice.<sup>2</sup>

While concerns over judicial review arguably are heightened in the socioeconomic rights context, the arguments over enforcement of these rights largely mirror the debate over judicial enforcement of constitutional rights more generally. In particular, both debates focus on the undemocratic nature of judicial review and consequently are concerned with defining (and confining) the judicial role in ways that maximize its legitimacy.<sup>3</sup>

Defenses of judicial review are connected to those of adjudication more generally and often locate their legitimacy in a set of procedural characteristics, including judicial independence, structured participation and reasoned decisions that promote objective results and serve the public interest. Lon Fuller in his famous essay *The Forms and Limits of Adjudication* defines “the distinguishing characteristic of adjudication” as “the fact that it confers on affected parties a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”<sup>4</sup> In a related vein, Owen Fiss argues that judicial review is rooted in a “conception of the judicial function [that] sees the judge as trying to give meaning to our constitutional values” and a “process through which that meaning is revealed or elaborated.”<sup>5</sup>

The more flexible, person-centered processes associated with alternative dispute resolution or “ADR” are often contrasted with adjudication. Both critics and proponents of alternative dispute resolution often assume that, unlike adjudication, these processes are inherently limited to solving particular disputes and thus are unable to establish precedents applicable beyond a single dispute.<sup>6</sup> This severely limits the capacity of ADR

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<sup>1</sup> See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 220 (2008) (“Constitutions drafted after World War II almost universally included social welfare provisions.”)

<sup>2</sup> See, e.g., *id.* at 231-37 (2008) (describing the conventional argument against judicial enforcement of socioeconomic rights); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Justification*, 1 INT’L J. CONST. LAW 13 (2003) (discussing theoretical objections to constitutionalization of social and economic rights).

<sup>3</sup> See Michelman, *supra* note 2, at 16 (“it is clear that the debate [over socioeconomic rights] throughout has been centered on a concern about the place and work of the judiciary in the democratic political order. We seem to think the problem with constitutionalizing social rights comes down mainly, if not solely, to a matter of the separation of powers.”)

<sup>4</sup> 92 HARV. L. REV. 353, 368 (1978) (hereinafter “Fuller, *Adjudication*”).

<sup>5</sup> *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12-13 (1979) (hereinafter “Fiss, *Foreword*”).

<sup>6</sup> See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-77 (1986) (“However, if ADR is extended to resolve difficult issues of constitutional or public law-making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern.”); Owen M. Fiss, *Against*

to generate public values and perform the norm-creation function usually associated with adjudication generally and constitutional adjudication in particular.

This Article challenges the general perception that alternative dispute resolution processes cannot develop public-law norms. A recent trend in ADR literature has sought to define a public norm-creation role for ADR in part by connecting these processes to other alternative legal and political problem-solving methods. Thus, Carrie Menkel-Meadow has argued that there are strong connections between deliberative democracy theory and the ADR movement including a shared appreciation for “constitutional experimentalism . . . in which there are feedback mechanisms for sharing and coordinating local outcomes with the broader polity.”<sup>7</sup> Similarly, Susan Sturm and Howard Gadlin have argued that ADR processes are capable of generating public-law norms “when relevant institutional actors develop values or remedies through an accountable process of principled or participatory decision making, and then adapt those values and remedies to broader groups or situations.”<sup>8</sup> Focusing on a recent South African Constitutional Court case in which the Court interpreted the right to housing in the South African Constitution<sup>9</sup> to require that municipalities develop processes for negotiating—or, in the Court’s language “engaging”—with citizens affected by redevelopment plans that may involve eviction, this Article considers how these claims about the norm-creation potential of ADR processes could be developed in the context of constitutional adjudication of socioeconomic rights.

The heightened legitimacy and separation-of-powers concerns associated with socioeconomic rights<sup>10</sup> means that they have been a rich source of examples for examining how alternative enforcement approaches. The South African Constitutional

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*Settlement*, 93 Yale L. J. 1073, 1085 (1984) (The role of adjudication “is not to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality in accord with them. This duty is not discharged when parties settle.”) (hereinafter “Fiss, *Settlement*”). See generally, Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. Disp. Res. 1 (2007) (discussing arguments that “ADR does not and cannot generate values or solutions that can apply beyond the scope of the particular dispute. In this sense, it is assumed that informal conflict resolution is necessarily non-normative, and that it cannot yield general public values or solutions to problems affecting more than the individual disputants.”).

<sup>7</sup> Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution*, 12 DISP. RESOL. MAG. 18, 19 (2006). See also Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L. J. 347, 348 (2004) (exploring “the use of alternative, legal, political and social problem solving institutions that draw on conflict resolution theory and practice.”); see also Amy J. Cohen, *Negotiation Meet New Governance: Interests, Skills, Selves*, 32 LAW & SOC. INQ. \_\_ (2008) (examining connections between negotiation literature and new governance literature).

<sup>8</sup> Sturm & Gadlin, *supra* note 6, at 3.

<sup>9</sup> S. AFR. CONST. 1996, § 26.

<sup>10</sup> See, e.g., Dennis M. Davis, *Socioeconomic rights: Do they deliver the goods?*, 6 INT’L J. CONST. L. 687 (2008) (discussing objections to inclusions of socioeconomic rights in the South African constitution). See generally *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253, para. 77 (rejecting the argument that the socioeconomic rights included in the new constitution are inconsistent with the separation of powers established by the Constitution because they “would result in the courts dictating to the government how the budget should be allocated.”).

Court is one of the most active courts in this area, and its decisions are cited as models both by other jurisdictions and in the academic literature.<sup>11</sup>

The Court's most recent housing-rights decision, *Occupiers of 51 Olivia Road v City of Johannesburg*,<sup>12</sup> portends a potentially important development in its approach to enforcement. The Court adopted the term "engagement" to describe a unique remedy it developed—in essence, a permanent negotiation/mediation requirement in housing-rights cases that may involve eviction. Properly implemented, the engagement remedy can be developed into a hybrid dispute resolution model that integrates ADR processes with formal adjudication in a manner that enhances the legitimacy of the resolution and creates the possibility for the extra-judicial interpretation and enforcement of socioeconomic rights. This hybrid process is particularly well-suited to enforcing socioeconomic rights because it is at once both more democratic than formal adjudication and also more flexible and responsive to the practical concerns that socioeconomic rights raise.

Part II of this Article outlines two classic but competing accounts of the procedural justifications for adjudication and related assessments of the limitations of ADR processes by Fuller and Fiss.<sup>13</sup> Part III analyzes two related articles by Sturm and Gadlin that develop this argument. Sturm first identifies four key characteristics that Fuller's and Fiss' accounts share and argues that these characteristics can be advanced through the use of mediation in the remedial phase of public-law litigation.<sup>14</sup> Sturm and

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<sup>11</sup> See, e.g., Tushnet, *supra* note 1, at xii (summarizing Chapters 7 and 8 of the text, which draw "on South Africa's developing jurisprudence of social welfare rights [to] show that the 'capacity' objection to judicial enforcement of social and economic rights rests on the assumption that such enforcement must take a strong form . . ."); Michelman, *supra* note 2, at 15 & n.8 (2003) (citing *Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721 (CC), as "supporting evidence" that judges "can find both properly adjudicative standards for testing claims of social-rights violations and worthwhile, properly judicial remedies for violations when found."); CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 236 (2001) (arguing that the Constitutional Court's enforcement approach "suggests, for the first time, the possibility of providing protection [for socioeconomic rights] in a way that is respectful of democratic prerogatives and the simple fact of limited budgets."); Katherine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *YALE J. INT'L LAW* 113, 158 (2008) ("South African constitutional law, a vanguard in many areas of constitutional rights, has inspired much commentary on the way that the minimum core concept might resolve the justiciability challenges of economic and social rights."); Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 *TEX. INT'L L.J.* 763, 766-67 (2003) ("The South African experience in the constitutional adjudication of social rights has profound implications for the international community at large").

<sup>12</sup> (2008) ZACC 1 (hereinafter "*City of Johannesburg Const. Ct.*").

<sup>13</sup> See Fuller, *Adjudication*, *supra* note 4; Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 *S. CAL. L. REV.* 305 (1971) (hereinafter "*Fuller, Mediation*"); Fiss, *Foreword*, *supra* note 5; Fiss, *Settlement*, *supra* note 6. As one commentator notes, "Fuller has become the paradigm of dispute resolution, just as Fiss is the paradigm of public law litigation." See Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Adjudication*, 75 *B. U. L. REV.* 1273, 1280 (1995). Bone cites a range of sources to support this characterization. *Id.* at n.19 (citing William N. Eskridge, Jr., *Metaprocedure*, 98 *YALE L.J.* 945, 955-56, 962-64 (1989); Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 *U. MICH. J.L. REF.* 647, 684-85, 687 (1988); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 *HARV. L. REV.* 427, 431 n.8 (1991)).

<sup>14</sup> Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 *GEO. L. J.* 1355 (1991).

Gadlin in more recent article propose an ADR model that promotes those same values and therefore can be used to develop public norms outside of adjudication.<sup>15</sup>

Part IV summarizes the debate over socioeconomic rights generally and the specific debate over the South African Constitutional Court's enforcement approach and identifies important ways in which the arguments there track the debate over the relative roles and legitimacy of adjudication and ADR. It then describes the Constitutional Court's most recent decision and argues that the engagement remedy the Court adopted can be developed into a hybrid process that incorporates aspects of both adjudication and mediation/negotiation in a way that retains the flexibility and responsiveness Fuller prizes in ADR while still protecting the legitimacy norms both Fuller and Fiss associate with adjudication.

## II. THE DEBATE OVER ADJUDICATION AND ALTERNATIVE DISPUTE RESOLUTION

Beginning in the mid-1970's the idea of "conflict resolution" or "dispute resolution" outside of formal adjudication began to gain increased attention among courts, lawyers and the general public.<sup>16</sup> Proponents of alternative dispute resolution, or "ADR," methods claim that they address many systemic problems with litigation and offer several benefits not available through traditional litigation. First, ADR could relieve congested court-dockets and at the same time offer expedited resolution to parties.<sup>17</sup> Second, ADR techniques could give parties to disputes more control over the resolution process.<sup>18</sup> The flexibility of ADR also creates opportunities for creative remedies that could more appropriately address the underlying concerns in a particular dispute than traditional remedies.<sup>19</sup> By offering the opportunity for consensus-based resolution, ADR also is arguably better suited than litigation to preserving long-term relationships and solving community-based disputes.<sup>20</sup>

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<sup>15</sup> Sturm & Gadlin, *supra* note 6.

<sup>16</sup> See COLE, MCEWEN & ROGERS, *MEDIATION LAW* § 5.2 (2d ed. 2007); MICHAEL FREEMAN, *Introduction to ALTERNATIVE DISPUTE RESOLUTION* xi (Michael Freeman ed., 1995).

<sup>17</sup> Carrie Menkel-Meadow, *What Will We do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 *UCLA L. REV.* 1613, 1616 (1997) (noting "the duality of purposes associated with ADR—efficiency and docket-clearing potential, as well as a claim for a better quality of justice with designated processes providing more tailor-made solutions to legal problems.")

<sup>18</sup> See, e.g., *id.*; Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 *U. MIAMI L. REV.* 873, 879 (2002) ("Proponents of alternative . . . dispute resolution often argue its chief value is disputant control over the process.")

<sup>19</sup> See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *GEO. L.J.* 2663, 2689-90 (1995) (noting "[p]arties (with the expert advice of lawyers) can decide how much 'public discourse' or confidentiality they need to resolve their dispute, how much direct confrontation or conversation they want with the other side, and how much flexibility they want to work out possible solutions that a court would not be authorized to award.")

<sup>20</sup> See, e.g., Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 *PENN ST. L. REV.* 165, 171 (2003) (suggesting "[t]he adoption of mediation by community justice centers may have reflected a belief that mediation--often characterized by its supporters as antithetical to adversarial dispute resolution processes--was more likely to nurture positive relationships within the community.")

One prominent metaphor that captures the distinction between ADR and traditional adjudication is the notion of the “shadow of the law” developed by Robert Mnookin and Lewis Kornhauser in the divorce context.<sup>21</sup> Under this view the law acts “not as imposing order from above, but rather as a providing a framework within which [parties] can themselves determine their . . . rights and responsibilities.”<sup>22</sup>

A. *Fuller’s Forms, Functions and Limits*

Lon Fuller’s essay, *Mediation—Its Forms and Functions*,<sup>23</sup> was one of the first attempts to theorize alternative dispute resolution processes.<sup>24</sup> For Fuller “the central quality of mediation” is “its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship . . . .”<sup>25</sup> In dispute resolution processes like mediation the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them “to free themselves from the encumbrances of rules” and to accept “a relationship of mutual respect, trust, and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.”<sup>26</sup>

Fuller contrasts the mediative function with what he calls “the standard procedures of law” central to which “is the concept of rules.”<sup>27</sup> Drawing a sharp distinction between “acts” and “persons,” Fuller defines rules as “requiring, prohibiting or attaching specific consequences to acts” and places them in the realm of adjudication.<sup>28</sup> By contrast, mediation is concerned principally with persons and relationships and deals with “precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite ‘role expectations.’”<sup>29</sup> In Fuller’s conception, mediation has no role to play in the interpretation and enforcement of laws, that is the role of courts and the function of adjudication: “[O]nce a law has been duly enacted its interpretation is for the courts; courts have been instituted, not to mediate disputes, but to decide them.”<sup>30</sup>

Thus, Fuller establishes a sharp dichotomy between the “rule of law” and alternative dispute resolution processes. Central to this dichotomy is his notion that rules “attribut[e] legal or social consequences to overt *and specifically defined acts*.”<sup>31</sup> Rules

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<sup>21</sup> Robert H. Mnookin and Lewis Kornhauser argued that “[i]ndividuals in a wide variety of contexts bargain in the shadow of the law.” *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 YALE L. J. 950, 997 (1979).

<sup>22</sup> *Id.* at 950.

<sup>23</sup> Fuller, *Mediation*, *supra* note 13.

<sup>24</sup> See Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RES. 1, 13 (2000) (“In many ways, Lon Fuller remains the only legal philosopher to take theorizing about dispute resolution processes seriously.”).

<sup>25</sup> Fuller, *Mediation*, *supra* note 13, at 325.

<sup>26</sup> *Id.* at 325-26.

<sup>27</sup> *Id.* at 327-28.

<sup>28</sup> *Id.* at 329.

<sup>29</sup> *Id.* at 329.

<sup>30</sup> *Id.* at 328.

<sup>31</sup> *Id.* at 329.

(and laws) are established in advance and must be sufficiently precise both in terms of defining the conduct to which they apply and the consequences that they will entail. By contrast, dispute resolution processes, in their focus on people and relationships, do not require “impersonal, act-prescribing rules” and therefore are particularly well-suited for dealing with the kinds of “shifting contingencies” inherent in ongoing and complex relationships.<sup>32</sup>

Fuller goes on to suggest that modern society creates an increasing number of people-dependent problems that are suitable for “meditative” approaches. He lists public welfare systems and public hospitals as prime examples in which the responsibility for distributing public goods “certainly needs to be at least ‘mediative’ (that is, as open-mindedly consultative) [as other mediated disputes].”<sup>33</sup>

Fuller’s essay *The Forms and Limits of Adjudication* analyzes the contrasting process of adjudication.<sup>34</sup> For Fuller a particular mode of participation defines adjudication: “the distinguishing characteristic of adjudication lies in the fact that it confers on affected parties a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”<sup>35</sup> The legitimacy of adjudication is dependent on the degree to which it maximizes this form of participation. This is because adjudication is “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.”<sup>36</sup>

This rationality principle not only provides the justification for adjudication’s authority, it also limits the kinds of disputes appropriate for adjudication: “Wherever successful association depends upon spontaneous and informal collaboration, shifting its forms with the task at hand, there adjudication is out of place, except as it may declare certain ground rules applicable to a wide variety of activities.”<sup>37</sup> Fuller describes these kinds of disputes as “polycentric,” meaning that they involve complex and intersecting sets of relationships.<sup>38</sup> Adjudication “cannot encompass and take into account the complex repercussions” that result from resolution of a polycentric dispute.<sup>39</sup> More importantly, in such disputes “it is simply impossible to afford each affected party a meaningful participation through proofs and arguments.”<sup>40</sup>

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<sup>32</sup> *Id.* at 330.

<sup>33</sup> *Id.* at 336-37.

<sup>34</sup> Fuller, *Adjudication*, *supra* note 4.

<sup>35</sup> *Id.* at 368.

<sup>36</sup> *Id.* at 366.

<sup>37</sup> *Id.* at 371.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 394.

<sup>40</sup> *Id.* at 394-95

Socioeconomic rights present a paradigmatic example of polycentricity.<sup>41</sup> Although he does not use the term “polycentric,” Frank Michelman’s description of the “raging indeterminacy” of socioeconomic rights captures their intense polycentric nature.<sup>42</sup> Using a hypothetical right to “effective social citizenship” as an example, Michelman points out that determining whether such a right has been violated requires ascertaining the net effect of a range of government policies with uncertain and potentially conflicting effects.<sup>43</sup>

Thus for Fuller, polycentric disputes, like those socioeconomic rights create, pose a real dilemma. The interrelated nature of the issues in such disputes are more susceptible to the give-and-take of alternative dispute resolution processes like mediation than to the application of rules characteristic of adjudication. But modern society increasingly requires resolution of public disputes that are polycentric, and Fuller’s sharp distinction between the rule of law and alternative dispute resolution means that relegating such disputes to the realm of ADR comes at the cost of diminishing, if not eliminating, the ability of the resolution to establish any broader norm applicable across disputes.

Fuller never offers a solution to this apparent dilemma. Nor does he identify any process that is ideal for resolving polycentric disputes. But a close reading of *Mediation* and *Adjudication* together suggests that Fuller was, in fact, open to the possibility of using hybrid forms of dispute resolution to deal with polycentric disputes.

In *Adjudication* Fuller acknowledges that adjudication’s ability to deal with polycentricity depends primarily on the degree to which decisions have precedential force: “If judicial precedents are liberally interpreted and are subject to reformulation and clarification as problems not originally foreseen arise, the judicial process as a whole is enabled to absorb these covert polycentric elements.”<sup>44</sup> Thus more flexible forms of adjudication (in other words adjudication that looks more like mediation) has greater capacity to deal with polycentricity.

Here, recall Fuller’s account of mediation and its characteristic ability to deal with shifting contingencies.<sup>45</sup> Although he does not directly cite mediation as a mechanism for addressing polycentricity, the complex issues he describes as suitable for “mediative”

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<sup>41</sup> See, e.g., Kate O’Regan, *Introduction to Socio-Economic Rights*, 1 ESR REV. VOL. 4 (1999) (“Two main arguments are raised in relation to the institutional competence of courts to enforce socio-economic rights. The first is Lon Fuller’s argument that certain types of decisions are ‘polycentric’ and therefore unsuitable for adjudication.”); *Bel Porto School Governing Body v Premier Western Cape*, 2002 CC (9) BCLR 891, para. 175 (discussing “polycentric” argument by respondents and citing Fuller, *Adjudication*, *supra* note 4); Craig Scott and Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 22 (1992) (“The resistance to constitutionally entrenched social rights on the grounds of institutional competence is often summarized in the view that social rights are said to be positive rights and therefore requiring time to realize; vague in terms of the obligations they mandate and involving complex polycentric, and diffuse interests in collective goods.”)

<sup>42</sup> See Michelman, *supra* note 2, at 30-31.

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

<sup>44</sup> Fuller, *Adjudication*, *supra* note 4, at 394-95.

<sup>45</sup> Fuller, *Mediation*, *supra* note 13, at 325-26.

approaches in his *Mediation* essay are plainly polycentric.<sup>46</sup> And Fuller's description of the interrelated issues typically present in a mediation echo his polycentric examples.<sup>47</sup>

B. *Fiss and the Public-Function Critique*

The emphasis on participant control over ADR processes that is central to their claimed benefits also forms the basis of the principal criticism leveled at their widespread use, i.e. that private resolution eliminates the public norm-creation function of adjudication. Owen Fiss, in one of the earliest and most influential criticisms of the ADR movement, argues that adjudication is not merely a tool for resolving private disputes but also "an institutional arrangement for using state power to bring reality closer to our chosen ideals."<sup>48</sup> In other words, adjudication serves important public purposes that extend beyond the boundaries of a particular dispute and the interests of the parties to that dispute.

Fiss' critique of ADR processes is rooted in his view that adjudication is a primarily public function that derives its legitimacy from a particular process. For Fiss the court's power to resolve cases is rooted in a "conception of the judicial function [that] sees the judge as trying to give meaning to our constitutional values" and a view that "adjudication is the process through which that meaning is revealed or elaborated."<sup>49</sup>

Fiss develops his theory of adjudication in the context of a defense of court resolution of complex institutional-reform litigation, or what he calls "structural reform" litigation.<sup>50</sup> As Fiss describes it, "[s]tructural reform . . . is one type of adjudication, distinguished by the constitutional character of the public values, and even more importantly by the fact that it involves an encounter between the judiciary and the state bureaucracies. The judge tries to give meaning to our constitutional values in the operation of these organizations."<sup>51</sup> These cases also implicate the same complex, interrelated issues that Fuller identifies as characteristic of polycentric disputes.

Fiss argues that two aspects of courts and the adjudicative process legitimize their resolution of public disputes: "one is the judge's obligation to participate in a dialogue, and the second is his independence."<sup>52</sup> By "dialogue," Fiss means the adversary process: judges do not pick their cases; they must listen to all parties; and they must issue decisions and articulate reasons for those decisions.<sup>53</sup> Independence requires that the judge not identify with any of the parties and her decision must be impartial.<sup>54</sup>

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<sup>46</sup> *Id.* at 336 (describing distribution of "scarce public welfare funds" and "the problem of the crowded public hospital" as problems suitable for meditative approaches).

<sup>47</sup> *Id.* at 317-18.

<sup>48</sup> Fiss, *Against Settlement*, *supra* note 6, at 1089.

<sup>49</sup> Fiss, *Foreword*, *supra* note 5, at 12-13.

<sup>50</sup> *Id.* at 2.

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

<sup>52</sup> *Id.* at 13.

<sup>53</sup> *Id.* at 13.

<sup>54</sup> *Id.* at 14.

Fiss rejects the argument that courts lack the institutional competence to deal with complex public disputes as both empirically unsupported and inconsistent with this understanding of the judicial role. He argues that there is no convincing evidence that administrative agencies possess superior expertise in dealing with the problems raised in structural-reform cases.<sup>55</sup> But, even accepting that courts have no claim to superior practical expertise, Fiss argues “[t]heir special competency lies elsewhere, in the domain of constitutional values, a special kind of substantive rationality, and that expertise is derived from the special quality of the judicial process – dialogue and independence.”<sup>56</sup> Administrative agencies are too tied to the political process and therefore lack the necessary independence “that is so essential for giving expression to our constitutional values.”<sup>57</sup>

Fiss takes issue with what he views as Fuller’s cribbed conception of adjudication, focusing on Fuller’s “participation axiom,” i.e., that adjudication is both defined through and limited by the right of individual parties to participate in the process.<sup>58</sup> Fiss notes that structural-reform litigation would be impossible if adjudication were limited to cases in which individuals fully participated in the process, and he argues that such a requirement would eliminate adjudication’s ability to create public norms and, consequently, a huge swath of constitutional and common law cases.<sup>59</sup>

When it comes to remedies, however, Fiss implicitly acknowledges the limits of adjudication in terms strikingly similar to Fuller’s polycentricity concern. Fiss concedes that “[t]here is no likely connection between the core processes of adjudication, those that give the judge the special claim to competence, and the instrumental judgments necessarily entailed in fashioning the remedy.”<sup>60</sup> In other words, the individual terms of the remedy cannot be justified by reasoned arguments—the same reason Fuller argues prevents adjudication from resolving polycentric disputes.<sup>61</sup>

But Fiss argues that there is a “tight connection between meaning and remedy.”<sup>62</sup> And this connection “requires that the decision about remedy be vested in the judge, the agency assigned to the task of giving meaning to the value through declaration.” Delegating the remedial function to some other body “necessarily creates the risk that the

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<sup>55</sup> *Id.* at 33-34.

<sup>56</sup> *Id.* at 34.

<sup>57</sup> *Id.* at 35.

<sup>58</sup> *Id.* at 42.

<sup>59</sup> *Id.* at 43.

<sup>60</sup> *Id.* at 52.

<sup>61</sup> Fuller summarizes the “relative incapacity of adjudication to solve ‘polycentric’ disputes” as rooted in “the incapacity of a given area of human activity to endure a pervasive delimitation of rights and wrongs [which] is also the measure of its incapacity to respond to a *too exigent rationality that demands an immediate and explicit reason for every step taken.*” Fuller, *Adjudication*, *supra* note 4, at 371 (emphasis added). He goes on to explain that “[b]lack of both these incapacities lies the fundamental truth that certain kinds of human relations are not appropriate for a process of decision that is institutionally committed to acting on the basis of reasoned argument.” *Id.*

<sup>62</sup> Fiss, *Foreword*, *supra* note 5 at 52.

remedy might distort the right, and leave us with something less than the true meaning of the constitutional value.”<sup>63</sup>

While making the judge responsible for the remedy in complex cases creates a clear risk that she will lose some of the distance from the dispute that is central to independence, Fiss views that as a necessary compromise: “Independence is a critical element in the process that legitimates the judicial function, for having us believe that judges can articulate and elaborate the meaning of our constitutional values, and, yet, to fully discharge that function . . . judges are forced to surrender some of their independence.”

### C. *Reconciling Fuller and Fiss*

By focusing on Fuller’s participation emphasis, Fiss is able to ignore the strong similarities in their views of adjudication. Both see the process as distinctive in its reason-giving capacity. To be sure, Fuller emphasizes the role of the individual in that distinct process, but it is not participation for its own sake that gives adjudication its special character and legitimacy, rather, it is “participation through proofs and arguments.”<sup>64</sup> In other words, the ability of individual participation in the structured setting process of adjudication to produce a reasoned result is the basis of its legitimacy.<sup>65</sup>

Thus Fuller’s concern about polycentricity is “not merely a question of the huge number of possibly affected parties,” but, instead, relates to the lack of a “clear issue to which either side [of a polycentric dispute] could direct its proofs and contentions.”<sup>66</sup> In addition, Fuller locates the fundamental problem with polycentric disputes in the fact that such disputes implicate “the incapacity of a given area of human activity to endure a pervasive delimitation of rights and wrongs [which] is also the measure of its incapacity to respond to *a too exigent rationality that demands an immediate and explicit reason for every step taken.*”<sup>67</sup> This is the same concern that Fiss raises regarding the court’s remedial function in a structural-reform case: the specifics of the remedy are not susceptible to reasoned justification.<sup>68</sup>

In the end, then, Fiss’ and Fuller’s views of adjudication and its limits have significant similarities. Adjudication’s legitimacy is tied to its capacity to produce reasoned decisions through a structured process that emphasizes a particular mode of party participation and requires an independent adjudicator. Adjudication begins to lose

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<sup>63</sup> *Id.* at 53.

<sup>64</sup> Fuller, *Adjudication*, *supra* note 4, at 43.

<sup>65</sup> Fuller answers “not necessarily” to the hypothetical question whether a judge’s decision must be accompanied by reasons.” *Id.* at 388. But he goes on to state that “[b]y and large it seems clear to me that the fairness and effectiveness of adjudication are promoted by reasoned opinions. Without such opinions the parties have to take it on faith that their participation in the decision has been real, *that the arbiter has in fact understood and taken into account their proofs and arguments.*” *Id.* (emphasis added).

<sup>66</sup> *Id.* at 394-95.

<sup>67</sup> *Id.* at 371.

<sup>68</sup> Fiss, *Foreword*, *supra* note 5, at 52,

legitimacy to the extent that its results cannot be justified by reasoned arguments and when the processes involved depart from the adversary model. Complex disputes test the limits of that legitimacy because the remedies they entail cannot be justified solely by reason, the role of the parties is more complicated, and the judge's independence is compromised by the practical need to assume a more direct role at the remedial phase.

The principal difference in their approaches is that Fiss states he is willing to live with the compromise of permitting courts to fashion remedies in such cases because he believes that the norm-creation capacity of adjudication requires courts to make remedial decisions. As a consequence, Fiss is critical of alternative dispute resolution processes out of concern that they will undermine the public-values in adjudication.

While Fuller appears to have a much stronger sense even than Fiss of the limits of the ideal form of adjudication, he hints at a willingness to accept alternative forms of adjudication that fail to fully maximize individual participation. As noted above, Fuller recognizes that a liberal interpretation of precedent permits a more flexible view of adjudication “as a collaborative [process] projected through time” in which “an accommodation of legal doctrine to the complex aspects of a problem can be made as these aspects reveal themselves in successive cases.”<sup>69</sup>

Fuller also cautions that his analysis of the “pure” form of adjudication that maximizes individual participation and judge neutrality should not be taken as condemnation of every “mixed or ‘impure’ form of adjudication.”<sup>70</sup> Fuller explains that he uses the term “parasitic” to describe such mixed forms in the neutral sense of a botanist, to imply that they draw “moral sustenance from another form of order.”<sup>71</sup> In other words, Fuller recognizes that the real world often requires use of forms of adjudication that do not meet the ideal that he describes. Thus, even for polycentric disputes, Fuller acknowledged that adjudication can set “ground rules” for a resolution that would better come from some other, more flexible form.<sup>72</sup>

By contrast Fiss rejects negotiated settlements and other forms of private dispute resolution because they lack the independence and reasoned decision-making procedures that legitimate adjudication. The central problem with settlement is that it is a purely private bargain with no necessary connection to the public values inherent in the laws that originally gave rise to the dispute. Judicial approval of a settlement thus fails “to explicate and give force to the values embodied in authoritative texts such as the

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<sup>69</sup> Fuller, *Adjudication*, *supra* note 4, at 48.

<sup>70</sup> *Id.* at 405.

<sup>71</sup> *Id.* at 406.

<sup>72</sup> Fuller, *Adjudication*, *supra* note 4, at 371 (“Wherever successful human association depends upon spontaneous and informal collaboration, shifting its forms with the tasks at hand, there adjudication is out of place except as it may declare certain ground rules applicable to a wide variety of activities.”). *See also*, Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 34 (1963) (“I am not here asserting that an agency called a ‘court’ should never under any circumstances undertake to solve a “polycentric” problem . . . . All I am urging is that this sort of problem cannot be solved within the procedural restraints normally surrounding judicial office.”).

Constitution and statutes: to interpret those statutes and give force to the values embodied in them.”<sup>73</sup>

### III. PROMOTING LEGITIMACY THROUGH ADR PROCESSES

#### A. *Sturm’s Deliberative Model*

Susan Sturm addresses the Fuller-Fiss debate,<sup>74</sup> focusing specifically on the legitimacy concerns raised in the remedial phase of structural-reform litigation.<sup>75</sup> Sturm describes Fuller and Fiss as representative of two competing models of what she calls the process critique of adjudication.<sup>76</sup>

Sturm largely agrees with Fiss’ criticisms of the limitations of Fuller’s model.<sup>77</sup> But Sturm also finds fault with Fiss’ own attachment to the adversary process, noting that Fiss’ unease with the remedial stage of structural-reform litigation illustrates that Fiss and Fuller “share many of the same concerns about the dangers of the court’s departure from the adversary model of adjudication.”<sup>78</sup> She identifies “[t]hree shared norms of judicial legitimacy [that] underlie” both Fiss’ and Fuller’s models (1) participation; (2) judicial independence and impartiality; and (3) reasoned decision-making.<sup>79</sup>

Sturm rejects Fiss’ claim that judges must fashion remedies themselves to preserve the legitimacy of adjudication.<sup>80</sup> While she agrees with both Fuller and Fiss that participation plays an important role in legitimating the judicial function, Sturm argues that participation can be implemented in the remedial phase in a manner that departs from the traditional adversary model and also enhances the legitimacy of that process. Rather than relying on indirect representation through legal professionals, Sturm advocates for maximizing the involvement of parties and other affected actors and empowering those individuals and groups to come up with their own remedial plan.<sup>81</sup> While this enhances the participation so valued by Fuller, it requires abandoning his ideal of the two-party dispute and the identification of clear-cut issues to which those parties can address their

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<sup>73</sup> Fiss, *Settlement*, *supra* note 6, at 1085.

<sup>74</sup> Others have analyzed the tension (and similarities) between these two classic approaches to adjudication, but Sturm was the first to develop the possibility of importing ADR techniques into the adjudicative process while still protecting the legitimating characteristics both Fuller and Fiss identify with adjudication. *See, e.g.*, Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Adjudication*, 75 B. U. L. REV. 1273, 1310 (1995) (describing Fuller’s theory of adjudication and Fiss’ criticisms and arguing that “once one gets beyond the caricature of [Fuller’s] model, it is apparent, for example, that Professor Fiss’ definition of the purpose of adjudication—giving concrete meaning to public values—is quite similar to Fuller’s.”).

<sup>75</sup> Sturm, *supra* note 14.

<sup>76</sup> *Id.* at 1387.

<sup>77</sup> *Id.* (arguing Fiss’ “structural reform model offers a powerful critique of the dispute resolution model and offers a normative theory intended to address and give legitimacy to the court’s role in public law litigation.”).

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

<sup>79</sup> *Id.* at 1390.

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

<sup>81</sup> *Id.* at 1391-97.

arguments. Similarly, while Sturm's proposal embraces Fiss' understanding that adjudication is norm-creating, it rejects his insistence that the judge must both determine liability and develop the remedy.

Sturm describes her approach as a "deliberative model of remedial decisionmaking."<sup>82</sup> The deliberative model is essentially a proposal to use mediation to develop the remedy in a structural-reform case with an enhanced role for the court. After determining liability, the court sets up a structured mediation process. The court first defines the parameters of the process, including a definition of "the liability norms that have been violated."<sup>83</sup> At the prenegotiation stage, the judge assists in identifying stakeholders and appointing a mediator. The court also identifies characteristics of an effective consultation process, informs the participants of the standards it will use to evaluate the result and sets deadlines.<sup>84</sup> This gives court greater control over the process and requires specific attention to the underlying substantive norms.

Following the negotiations, the parties are required to present the court with a written agreement and explanation that has been approved by the stakeholder groups. The court then holds a public hearing and evaluates the remedy on three levels: (1) the adequacy of the process; (2) the responsiveness of the remedy to the concerns raised in the process; and (3) its capacity to address the underlying substantive norms.<sup>85</sup> This ensures that the process is fully participatory and that the result reflects reasoned decisionmaking tied to the legal norms at stake. While the court is more directly involved than under stand-alone mediation, its impartiality and independence is preserved by limiting that role to structuring and evaluating, but not participating in, the remedial process.

For Sturm, then, adjudication's legitimacy can be protected by using alternative dispute resolution processes at the remedial stage in a tightly controlled and judicially supervised setting. Like Fuller, she sees the flexibility, informality and person-centered aspects of mediation as distinctly appropriate to addressing the complex remedial issues that arise in complex public-disputes. But she shares Fiss's concern that using such processes risks compromise or elimination of the underlying norms that adjudication is intended to promote. The answer is to enhance judicial control of the otherwise private process of mediation and specifically emphasize the norms at stake throughout the process.

Sturm is careful to emphasize that her argument is limited to the remedial context and that extending the deliberative model to liability determinations would require careful consideration of the differences between the liability-determination and remedial tasks of the court.<sup>86</sup> Nonetheless, she notes that the model could serve a similar legitimating function in the consent-decree context. If the negotiations leading to a

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<sup>82</sup> *Id.* at 1428.

<sup>83</sup> *Id.* at 1428-29.

<sup>84</sup> *Id.* at 1429-30.

<sup>85</sup> *Id.* at 1430-31.

<sup>86</sup> *Id.* at 1445.

consent decree were structured along the lines of the deliberative model, then judicial approval of that result could derive the same legitimating benefits despite the lack of a direct court role at the liability phase.<sup>87</sup>

B. *A Norm-Creating ADR Process Independent from Litigation*

In a more recent article, Sturm, writing with Howard Gadlin, directly addresses the potential for ADR processes to serve a public-norm creation function completely independent of adjudication. Echoing Sturm's description of the deliberative model, Sturm and Gadlin contend that public norms emerge not only from formal adjudication but also "when relevant institutional actors develop values or remedies through an accountable process of principled and participatory decision making and then adapt these values and remedies to broader groups or situations."<sup>88</sup>

ADR processes have this norm-creation potential provided that they are structured in a way that links "individual and systemic conflict resolution."<sup>89</sup> Sturm and Gadlin advocate "a combination of root cause analysis and multi-level remediation" to allow ADR to achieve this.<sup>90</sup> Root-cause analysis makes implicit organizational norms explicit as part of the resolution of individual conflicts and in turn creates the opportunity for evaluating whether to reject or accept those norms.<sup>91</sup> Multi-level remediation requires considering when and whether to apply the results of an individual resolution to others within an organization.<sup>92</sup> As systemic problems are identified over time and solutions are applied system-wide, individual interventions "generate deliberations that produce an overarching governance structure built around principles, values and lessons" from individual resolutions.<sup>93</sup> Formal law serves both to set the outer bounds of possible resolutions and, at the same time, to define abstractly the values that the individual resolutions must serve.<sup>94</sup>

It is evident from Sturm and Gadlin's description of this process that they believe it can incorporate the same legitimacy characteristics as the deliberative remedial model. But, rather than requiring direct and specific court involvement to protect public values, these informal processes are completely free of any court involvement, whether at the liability or remedial stage, and yet address all three legitimacy characteristics Sturm identifies with the deliberative model.

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<sup>87</sup> *Id.* at 1446.

<sup>88</sup> Sturm & Gadlin, *supra* note 6, at 3.

<sup>89</sup> *Id.* at 4.

<sup>90</sup> *Id.* at 53.

<sup>91</sup> *Id.* at 53. *See also id.* at 4 ("The linchpin of our approach is a form of root cause analysis, which enables intermediaries to identify and, where possible, address underlying problems as part of individual case work.").

<sup>92</sup> *Id.* at 53 ("Problems revealed through conflict resolution sometimes give rise to changes in policy, which apply to everyone similarly situated within the relevant domain.").

<sup>93</sup> *Id.* at 55.

<sup>94</sup> *Id.*

Thus, they note that “when linked to systemic change, non-adjudicative conflict resolution can foster articulation of implicit norms [and] ‘reasoned elaboration and visible expression of public values,’ . . . .”<sup>95</sup> And also that “[c]onflict resolution thus institutionalizes principled decision making that can be generalized within the community practice in which it operates.”<sup>96</sup>

Participation is protected through root-cause analysis, which “incorporates the participation of those affected by, responsible for and knowledgeable about, the problems at issue,” and because remedies “must emerge from this collective deliberation,” in the same manner as the deliberative model.<sup>97</sup>

Independence and impartiality take on a more complex form. Rather than requiring the “‘detached neutrality’” that is characteristic of adjudication, Sturm and Gadlin argue that “‘multi-partiality’—critically analyzing a conflict from multiple vantage points” can serve the same function.<sup>98</sup> This in turn further reinforces both participation and reasoned decision-making because it requires “an institutional design that builds in participatory accountability-ongoing examination and justification to participants and a community of practitioners.”<sup>99</sup>

Sturm and Gadlin acknowledge that there are limits to the norm-creation ability of stand-alone ADR processes, but argue that these limits “focus attention on the interdependence of informal and formal conflict resolution systems.” The nature of the process and, more importantly, the identity of communities involved in that process, will dictate the relative legitimacy and applicability of the norms developed through it.

Recognizing the complex relationship between formal and informal dispute resolution processes moves the debate over the relative capacities of ADR and formal adjudication beyond the sharp dichotomies reflected in the arguments of Fiss and Fuller, while recognizing the concerns of both. As noted above, Fuller’s apparent receptivity to hybrid forms of adjudication hints at a similar understanding that a combination of formal and informal processes can be the most effective at addressing complex public-law issues. But Fuller was plainly concerned that this effectiveness would come at the cost of a loss of legitimacy. In the same way, Fiss recognizes the potential, at least at the remedial level, for other processes to displace adjudication, but is deeply concerned about compromising the legitimacy of the result.

Sturm’s deliberative model offers an initial step beyond the stark choices presented by Fiss and Fuller but one that still emphasizes the need for direct oversight and significant court involvement. Sturm’s and Gadlin’s description of individual ADR processes conscious of and linked to systemic problem-solving de-links norm-creation

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<sup>95</sup> *Id.*

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

<sup>97</sup> *Id.* at 56

<sup>98</sup> *Id.* at 4.

<sup>99</sup> *Id.*

from formal adjudication completely, while still recognizing the relationship between formal and informal norm-creation processes.

The next Part uses a recent South African Constitutional Court case in which the Court interpreted the right to housing in the South African Constitution to require that municipalities develop processes for “engaging” with citizens affected by redevelopment plans that may involve eviction, to consider how Sturm’s and Gadlin’s claims about ADR’s potential to create public norms could be extended further. Properly implemented, engagement can be developed into a hybrid dispute resolution model that integrates ADR processes with formal adjudication in a manner that enhances the legitimacy characteristics identified by Sturm and creates the possibility for the non-judicial development of public norms for socioeconomic rights.

#### IV. DEVELOPING A HYBRID MODEL THROUGH “ENGAGEMENT”

##### A. *The Socioeconomic Rights Debate*

Judicial enforcement of socioeconomic rights raises strong objections on institutional-competence and separation-of-powers grounds. Critics of judicial enforcement argue that courts are simply not equipped to deal with the complex, interrelated issues these rights raise.<sup>100</sup> Because enforcement has substantial and specific effects on the state budget, critics also argue that judicial enforcement raises insurmountable separation-of-powers concerns and creates significant practical problems by restricting the ability of the political branches to set budget priorities.<sup>101</sup> Notably, Fuller’s argument against adjudication of “polycentric” disputes features prominently in the literature as a reason for not constitutionalizing socioeconomic rights and for limiting judicial enforcement when they are included.<sup>102</sup>

These same objections, somewhat paradoxically, also emerge in the literature surrounding structural-reform litigation. Fiss’ contention that adjudication is central to the elaboration of public norms and absent from ADR processes suggest that structural-reform litigation is a genre of disputes where adjudication is particularly important. Yet, judicial resolution of these disputes has instead prompted widespread criticism of the legitimacy and institutional capacity of courts to deal with the complex issues they raise.<sup>103</sup> These are precisely the same objections to judicial enforcement of socioeconomic rights.<sup>104</sup>

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<sup>100</sup> See, e.g., Michelman, *supra* note 2, at 13 (discussing theoretical objections to constitutionalization of social and economic rights).

<sup>101</sup> See, e.g., Tushnet, *supra* note 2, at 231-33 (discussing the “conventional argument against judicial enforcement of social and economic rights.”)

<sup>102</sup> See, e.g., Kate O’Regan, *Introduction to Socio-Economic Rights*, 1 ESR REV. VOL. 4 (1999) (“Two main arguments are raised in relation to the institutional competence of courts to enforce socio-economic rights. The first is Lon Fuller’s argument that certain types of decisions are ‘polycentric’ and therefore unsuitable for adjudication.”); *Bel Porto School Governing Body v Premier Western Cape*, 2002 CC (9) BCLR 891, para. 175 (discussing “polycentric” argument by respondents and citing Fuller, *Adjudication*, *supra* note 4).

<sup>103</sup> See Sturm, *supra* note 82, at 1378. Sturm notes that “[t]he court’s dynamic and activist role in formulating public law remedies has triggered a heated debate among academics judges, and politicians

Recognizing the force of these objections in the socioeconomic rights context, the South African Constitutional Court has taken a leading role in developing innovative approaches to enforcement that attempt to mitigate institutional-competence and separation-of-powers concerns. The most celebrated example of this innovation is the Court's first housing-rights case, *Government of Republic of South Africa v Grootboom*.<sup>105</sup>

The plaintiffs in *Grootboom* were desperately poor members of an informal community who had established makeshift housing on a public sports field following their eviction from nearby private land. They brought suit against the City of Cape Town claiming that the City's failure to provide housing violated the right to access to adequate housing under section 26(2) of the Constitution, and the rights of the children in the community to shelter under section 28(1)(c).<sup>106</sup>

The Constitutional Court held that the City violated the general right to housing in section 26 because, although it, together with other levels of government, had developed constitutionally adequate housing programs addressing medium- and long-term needs, those plans lacked any provision for short-term, emergency needs like those of the *Grootboom* community.<sup>107</sup> The Court, however, limited its relief to a declaration that the state housing program in the Cape municipal region was unconstitutional in that it "failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations."<sup>108</sup> The Court refused to issue any more specific requirements and dissolved an injunction requiring the City to report back to court on its progress implementing a new housing plan.<sup>109</sup> The City thus was left to

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concerning the proper role of the court." She identifies four major criticisms: "1. The court's public remedial activities fail to conform to standards of legitimate judicial decisionmaking; 2. The courts violate principles of federalism and separation of powers . . . ; 3. The courts are not competent to perform the role of public remedial formulation; and 4. The court's are abusing their power and acting unfairly in the execution of their public remedial function." *Id.*

<sup>104</sup> Compare Sturm, *supra* note 82, at 1378 (listing the four objections just described) with Tushnet, *supra* note 1, at 231-33 (quoting Frank R. Cross' summary of the arguments against socioeconomic rights in *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001), which include that "their enforcement raises the spectre of 'the courts running everything—raising taxes and deciding how the money should be spent'" and that "[j]udges are ill-suited for the evaluation and making of the trade-offs implied by many positive rights.") and Michelman, *supra* note 2, at 15 ("[I]t is clear that the debate [over socioeconomic rights] throughout has been centered on a concern about the place and work of the judiciary in the democratic political order. We seem to think that the problem with constitutionalizing social rights comes down mainly, if not solely to a matter of separation of powers.").

<sup>105</sup> 2000 (11) BCLR 1169 (CC). See, e.g. Dennis M. Davis, *Socioeconomic rights: Do they deliver the goods?*, 7 INT'L J. CONST. L. \_\_ (2008) (noting that the result in *Grootboom* has been "welcomed"); Mark V. Tushnet, *Marbury v. Madison Around the World*, 71 Tenn. L. Rev. 251, 270-71 (2004) (discussing *Grootboom*); Sunstein, *supra* note \_\_, at 233-36 (analyzing *Grootboom* and concluding the Court "adopt[ed] a novel and highly promising approach to judicial protection of socio-economic rights.").

<sup>106</sup> *Grootboom*, *supra* note 122, at paras. 13-16.

<sup>107</sup> *Id.* at paras. 95-96.

<sup>108</sup> *Id.* at para. 99.

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

determine for itself how best to cure the constitutional defect with no direct oversight by the Court.

Due in large part to the Court's limited remedy, *Grootboom* has been described variously as a "dialogic,"<sup>110</sup> or a "weak-form"<sup>111</sup> or an "administrative-law"<sup>112</sup> approach. These labels all highlight the fact that the Court's use of a general declaration significantly limited the Court's role and largely left policy development to the political branches. For those same reasons, however, critics of the Court's approach in *Grootboom* have charged it with proceduralizing these rights by refusing to give them any substantive content.<sup>113</sup>

These critics focus on an important interpretive move made by the Court in *Grootboom* and other cases. Most of the socio-economic rights in the South African Constitution contain what is called an "internal limitations" provision. The right itself is stated in the first clause. For example, section 26 provides: "1. Everyone has the right to have access to adequate housing."<sup>114</sup> That right is then qualified in the second clause (the "internal limitation"), which states: "2. The state must take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right."<sup>115</sup> The Court has consistently held that these two provisions must be read together.<sup>116</sup>

Critics argue that the Court should interpret the right itself independent of the limitation. This would require a two-step process in which the Court first declares what the right to housing requires in the abstract, but then considers cost-based justifications for any particular program that falls short of this ideal. As one critic describes it, this approach "view[s] resource scarcity not as qualifying the ambit [of the right] but rather as limiting the extent to which its implied benefits may be demanded at a given time."<sup>117</sup>

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<sup>110</sup> Rosalind Dixon, *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*, 5 INT'L CONST. L. J. 391, 417 (2007) (arguing that the Court should adopt a "dialogic model," which is "fully consistent with the approach the Court in *TAC* suggested might be appropriate in future cases . . .").

<sup>111</sup> Tushnet, *supra* note 1, at 231-37 (2008).

<sup>112</sup> Sunstein, *supra* note 9, at 234 ("What the South African Constitutional Court has basically done is to adopt an *administrative law model of socioeconomic rights*.").

<sup>113</sup> See, e.g., Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 S AFR. J. HUM. RTS. 473, 474 (2006) ("[T]he Court's rejection of what can be called a 'minimum core approach' to the enforcement of ss26(1) and 27(1) of the Constitution in favour of an administrative law-like 'reasonableness approach' . . . has been much lamented."); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S AFR. J. HUM. RTS. 1, 8-10 (2003); Danie Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What Are Socio-Economic Rights For?'*, at 41 in HENK BOTHA, et al, eds RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION (2003) (describing the Court's approach as "limited") (hereafter "*Brand, Proceduralisation*").

<sup>114</sup> S. AFR. CONST. 1996, §26.

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

<sup>116</sup> See, e.g., *Grootboom*, *supra* note 122, at para. 34.

<sup>117</sup> Pieterse, *Coming to Terms*, *supra* note 130, at 480.

In addition to limiting the substantive scope of these rights, critics charge that the Court's refusal to interpret the right separate from the limitation fails to give adequate guidance to the political branches and potential claimants. They claim that "there is a need for the Court to clarify the State's obligations imposed by socio-economic rights."<sup>118</sup> Without such guidance, "the state is left with an amorphous standard by which to judge its own conduct" and is unable "to assess its conduct against clear benchmarks."<sup>119</sup>

Critics also argue that the Court's failure to give substantive content to these rights renders its decisions arbitrary and illegitimate. As one commentator puts it, the reasonableness standard adopted by the Court "seems to stand for whatever the Court regards as desirable features of state policy. The problem with this approach is that it lacks a principled policy basis upon which to found decisions in socio-economic rights cases."<sup>120</sup>

These criticisms of the Court's enforcement approach reflect Fiss' focus on the public function of adjudication and the unique role of courts in that process. In effect, the Court's critics are saying, like Fiss, that only the Court has the power and responsibility to interpret these rights and establish constitutional values. Without an authoritative court interpretation the government cannot determine its constitutional responsibilities and citizens cannot challenge government programs and actions that fall short. Likewise Fiss' related concern that the legitimacy of adjudication is threatened when the court does not dictate the remedy because we might be left "with something less than the true meaning of the constitutional value"<sup>121</sup> is reflected in the criticism of *Grootboom's* limited remedy and the Court's broader refusal to define the meaning of the right and the remedy separately in each case.

Finally, the charge that the Court's refusal to declare the content of the right makes it impossible to test its decisions in each case against any objective standard reflects Fiss' emphasis that the legitimacy of adjudication rests principally on the fact that a judicial decision is the result of reasoned argument (dialogue) and "justif[ied] . . . in terms of the norms of the constitutional system."<sup>122</sup>

But Fiss' own recognition that the court's legitimacy is diminished when it fashions the details of a remedy because those details represent a choice among competing options for implementing the constitutional norm<sup>123</sup> points towards a flaw in the criticisms of the Court's approach as well. Fiss acknowledges that "[t]he task of discovering the meaning of constitutional values such as equality, due process, or

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<sup>118</sup> Bilchitz, *Towards a Reasonable Approach*, *supra* note 130, at 10

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

<sup>120</sup> *Id.*

<sup>121</sup> Fiss, *Foreword*, *supra* note 5, at 53.

<sup>122</sup> *Id.* at 45.

<sup>123</sup> *Id.* at 49 ("The judge must search for the 'best' remedy, but since his judgment must incorporate such open-ended considerations as effectiveness and fairness, and since the threat and constitutional value that occasions intervention can never be defined with great precision, *the particular choice of remedy can never be defended with any certitude.*" (emphasis added)).

property, is . . . quite different from choosing or fashioning the most effective strategy for actualizing those values.” This is because “there is no likely connection between the core processes of adjudication, those that give the judge the special claim of competence, and the instrumental judgments necessarily entailed in fashioning the remedy.”<sup>124</sup>

This gap between the abstract right and the practical remedy is collapsed when it comes to socioeconomic rights in way that makes it almost impossible to disentangle the two. Take the right to health care. In contrast to the equality example used by Fiss, where the right itself could be interpreted to mean “racial equality,” which would then require choosing among a range of policy choices to implement that interpretation,<sup>125</sup> it is impossible to define the right to “health care” without reference to specific policies.

This is illustrated by criticisms of the Constitutional Court’s interpretation of the right to health care in *Treatment Action Campaign*.<sup>126</sup> Tracking the interpretive debate just described, critics argue the Court should have defined the right to health care independent of the limitation.<sup>127</sup> This would mean deciding, for example, “[w]hat are the services to which one is entitled to claim access? Do these services involve preventative medicine, such as immunizations, or treatment for existing diseases or both? Does the right entitle one to primary, secondary, or tertiary health care services, or all of these?”<sup>128</sup> In other words, defining the right necessarily entails prescribing particular policies.<sup>129</sup>

Furthermore, as Fiss also emphasizes, courts are in no better position (and likely a worse one) than the political branches to make the instrumental assessments necessary to determine whether a particular health-care policy is more or less likely to be effective. Like the decisions over allocation of public goods that Fuller cites, interpreting the right to health care necessarily requires courts to make contingent policy decisions that will almost certainly have to shift over time and demand intimate, real-time understanding of the specific conditions on the ground to be effective.<sup>130</sup>

On the one hand, the “raging indeterminacy” of socioeconomic rights lends support to the Court’s decision to interpret the right and the limitation together.<sup>131</sup> This is because defining the right in the abstract requires articulating substantive policies in light of specific conditions in particular contexts. More importantly, however, it heightens the legitimacy deficit Fiss acknowledges the remedial function creates for adjudication in complex disputes like these due to the loss of judicial independence and the lack of a necessary connection between the constitutional value and the specifics of the remedy. Thus, accepting Fiss’ view of adjudication’s legitimacy, there is at least no more of a

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<sup>124</sup> *Id.* at 52.

<sup>125</sup> *Id.* at 52-53.

<sup>126</sup> 2002 (5) SA 721 (CC).

<sup>127</sup> Bilchitz, *supra* note 130, at 6.

<sup>128</sup> *Id.*

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

<sup>130</sup> Others have recognized these same institutional-competence problems with judicial enforcement. See, e.g., CASS SUNSTEIN & STEVEN HOLMES, *THE COST OF RIGHTS* 126-27 (1999) (Noting that judges “lack the fact-finding capacity . . . that would justify their making particular allocative decisions.”).

<sup>131</sup> Michelman, *supra* note 2, at 30-31.

legitimacy problem in the Court's current approach than there would be if the Court were to attempt to interpret the right before considering whether the limitations clause justified a departure from that ideal. Any declaration of the meaning of the right to housing would be a policy proposal, i.e. a remedy, and thus would entail the kind of instrumental judgments that diminish the legitimacy of the result.

Sturm's proposal that mediation can be used in the remedial phase in a manner that still protects the essential legitimating features of adjudication, and Sturm's and Gadlin's extension of that argument to ADR processes independent of adjudication suggests a way out of the legitimacy dilemma posed by socioeconomic rights. At the same time, using ADR processes offers a possible solution to the institutional-competence concerns they raise.

The Constitutional Court's most recent housing-rights decision involved an interim order requiring a form of negotiation/mediation, which the Court calls "engagement." The Court constitutionalized the engagement requirement in all future housing-rights cases. After a brief description of that decision and the litigation that led to it, the following sub-sections consider how this requirement might satisfy the characteristics for a norm-creating ADR process described by Sturm and Gadlin and thereby enhance the legitimacy of the Court's role in enforcing these rights. The hybrid dispute resolution process that engagement could become is fully consistent with the legitimacy norms Sturm and Gadlin identify and reflects the kind of hybrid process Fuller implies is most suitable for resolving polycentric disputes of this kind.

#### B. *City of Johannesburg and the Engagement Remedy*

*City of Johannesburg* began as a series of emergency applications in the Witwatersrand High Court by the City of Johannesburg to evict over 300 people from six properties in inner-city Johannesburg.<sup>132</sup> The City sought these evictions as part of a broader regeneration strategy, one aspect of which was the identification, clearance and ultimate redevelopment of over 200 "bad" buildings with some 67K occupants in the inner-city district.<sup>133</sup>

The buildings targeted plainly created unsafe and unsanitary living conditions.<sup>134</sup> Notwithstanding the legitimate concern over the health and safety hazards these buildings presented, however, the City's eviction program by most accounts was outrageous. The City implemented these evictions by filing form applications with very little notice to actual occupants and in most cases gaining summary eviction with no hearing.<sup>135</sup> The City would then send in teams of workers dressed in red, known as "red ants", to forcibly

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<sup>132</sup> *City of Johannesburg and Rand Properties (Pty) Ltd.*, Case No. 04/10330, at para. 2 ("City of Johannesburg High Ct.").

<sup>133</sup> See Centre on Housing Rights and Evictions, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (March 8, 2005), at 41-46, 60-64 (describing the regeneration plan and the practice of forced evictions) ("Any Room?").

<sup>134</sup> *City of Johannesburg v Rand Properties (Pty) Ltd.*, 2007 SCA 25 (RSA), at para. 8 (hereinafter "SCA judgment").

<sup>135</sup> *Any Room?*, *supra* note 140, at 60-64 (describing in detail the city's typical eviction procedures).

evict. The Geneva-based Center on Housing Rights and Evictions (COHRE) published an extensive report describing these abuses and outlining legal and policy arguments against that program.<sup>136</sup>

The residents of six targeted buildings were organized by several organizations to oppose the applications in their cases. COHRE had partnered with the Centre for Applied Legal Studies (CALs) in drafting the initial report criticizing the eviction program.<sup>137</sup> CALs then coordinated the litigation strategy in these cases.<sup>138</sup> Other groups were also active in this effort, including the Community Law Centre, a public-interest research and advocacy group based at the University of the Western Cape. Several of these groups filed amicus curiae briefs in support of the residents.<sup>139</sup>

The high court (the trial-level court in the South African system) was extremely sympathetic to the residents' arguments. The court rejected the City's eviction application and issued a broad order holding that the City had violated section 26 by pursuing these evictions without a plan to house the evicted residents, as required by *Grootboom* and related legislation.<sup>140</sup> The court also enjoined the City from seeking to evict the residents and ordered it to develop a plan for housing these and other residents. Notably the order specifically required the City to relocate residents within the inner-city district.<sup>141</sup>

The City appealed to the Supreme Court of Appeal (SCA). The SCA reversed the High Court, finding that the evictions were constitutionally permissible but triggered a much more limited responsibility by the City to relocate the displaced residents.<sup>142</sup>

The residents appealed the SCA's order to the Constitutional Court, which accepted the application in May 2007.<sup>143</sup> The Court heard oral argument on August 28, 2007 and two days later issued a remarkable interim order that required the parties to "engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the

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

<sup>137</sup> See *id.* at 5, n. 1. See also Press Release, COHRE/CALS, *Jo-Burg City Housing Policy Goes to Bloemfontein* (Feb. 20, 2007) ("The plight of [the residents] was first brought to public attention in a May 2005 report co-authored by researchers from the Centre for Applied Legal Studies (CALs) and COHRE . . ."), available at <http://www.law.wits.ac.za/cals/>.

<sup>138</sup> See <http://www.law.wits.ac.za/cals/Rand%20Properties/Randindex.html> (summarizing the litigation and providing links to the briefs by all parties at the SCA and Constitutional Court levels).

<sup>139</sup> See Press Release, COHRE/CALS, *Jo-Burg City Housing Policy Goes to Bloemfontein*, *supra* note 216 ("The Centre for Housing Rights and Evictions and the Community Law Centre (CLC) have been permitted to make submissions [to the SCA] as friends of the court.").

<sup>140</sup> *City of Johannesburg High Ct.*, *supra* note 148.

<sup>141</sup> *Id.* Order paras. 3-4.

<sup>142</sup> *SCA Judgment*, *supra* note 150.

<sup>143</sup> See Constitutional Court interim order 30 August 2007 in *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg*, CCT 24/07, available at <http://www.constitutionalcourt.org.za>.

citizens concerned.”<sup>144</sup> The Court also ordered the parties to file affidavits reporting the results of the negotiations with the Court approximately one-month later, on October 3, 2007.<sup>145</sup>

After requesting several extensions of the Court’s deadline, the parties eventually reached a partial settlement that included the following provisions. In the short-term, the City agreed to cease its eviction attempts and to take specific measures to make the existing buildings safer and more habitable by cleaning the buildings, providing sanitation services, access to water and functioning toilets.<sup>146</sup> Before relocating the residents from the buildings designated for redevelopment, the City agreed to refurbish several other buildings in inner-city Johannesburg to at least provide “security against eviction; access to sanitation; access to potable water; access to electricity for heating, lighting and cooking”<sup>147</sup> and to limit any rental fees to no more than 25% of the occupants’ monthly income.<sup>148</sup> Finally, the City agreed to consult with the residents on the “provision of suitable permanent housing solutions . . . having regard to applicable national, provincial and municipal housing policies.”<sup>149</sup>

Despite agreeing to these remarkable terms, both sides pressed the Court to decide the broader issue whether the City was in compliance with section 26 and *Grootboom*’s mandate to develop a plan that addresses the emergency needs of individuals like the residents in this case. The City submitted a “Draft Inner City Housing Plan” along with its affidavit reporting the results of the negotiation and requested that the Court find that this plan satisfied its constitutional obligations under section 26.<sup>150</sup> The residents filed a supplementary affidavit objecting to the City’s submission of this new plan in the context of an affidavit that was intended only to be a report of the parties’ negotiated settlement.<sup>151</sup> Nonetheless, the residents continued to urge the Court to determine whether the City was in compliance with section 26 and asked for additional time to respond to the City’s new plan.

The Constitutional Court issued its final opinion and order on February 19, 2008. The Court specifically refused to deal with the residents’ broader claim that the City still lacked a comprehensive housing plan as required by *Grootboom*. Citing the City’s commitment in the settlement agreement to develop a long-term housing plan in consultation with the residents, the Court found that “[t]here is every reason to believe that negotiations will continue in good faith.”<sup>152</sup> The Court noted that the City’s position

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<sup>144</sup> *Id.* at para. 1.

<sup>145</sup> *Id.* at para. 3.

<sup>146</sup> Settlement agreement between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg dated 29 October 2007 at paras. 2-4. (copy on file with the author).

<sup>147</sup> *Id.* at para. 6.

<sup>148</sup> *Id.* at para. 7.

<sup>149</sup> *Id.* at para. 18.

<sup>150</sup> Karen Brit October 2007 Affidavit, available at [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za) (search “cases for” 24/07 and select “First Respondent’s Supplementary Affidavit” from “Pleadings and Documents”).

<sup>151</sup> Moray Hathorn October 2007 Affidavit, available at [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za) (search “cases for” 24/07 and select “Applicant’s Supplementary Affidavit” from “Pleadings and Documents”).

<sup>152</sup> City of Johannesburg Const. Ct., *supra* note 12, at para. 34.

had evolved considerably as demonstrated by the City's "willingness to engage" and it expressed optimism that "[t]here is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result."<sup>153</sup> The Court also emphasized that, court intervention remains an enforcement option "if this course becomes necessary."<sup>154</sup>

The Court then formalized the negotiation/mediation requirement, calling it "engagement." The Court noted that it had called for versions of engagement in earlier cases.<sup>155</sup> In particular in another eviction case, *Port Elizabeth Municipality v Various Occupiers* the Court stated:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.<sup>156</sup>

The Court found that a range of constitutional provisions, including the state's obligation to "encourage the involvement of communities and community organizations in local government," as well as the rights to human dignity<sup>157</sup> and life<sup>158</sup> broadly require engagement with citizens affected by its policies.<sup>159</sup> The Court then described in more specific terms what engagement should entail.

First, following *Grootboom*, the Court emphasized that "section 26(2) mandates that the response of any municipality to potentially homeless people with whom it engages must also be reasonable."<sup>160</sup> Reasonableness is context-specific and permits a range of substantive outcomes: "It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless."<sup>161</sup>

Second, in most cases, and in particular where a large-scale program is involved, engagement must be more than a merely "ad hoc" process.<sup>162</sup> Emphasizing that "[i]t must have been apparent [from the outset of the City's regeneration strategy planning]

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at paras. 10-12.

<sup>156</sup> (2004) ZACC 7, at para. 39.

<sup>157</sup> South Afr. Const. § 10 (1996).

<sup>158</sup> South Afr. Const. § 11 (1996).

<sup>159</sup> *Id.* at para. 16.

<sup>160</sup> *Id.* at para. 18.

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

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

that the eviction of a large number of people was inevitable,” the Court noted that “[i]f structures had been put in place with competent sensitive council workers skilled in engagement, the process could have begun when the strategy was adopted.”<sup>163</sup> Thus, engagement must be incorporated at the outset of any long-term planning process and must involve a trained cadre of government employees.

Third, the Court recognized that “[p]eople about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process.”<sup>164</sup> These vulnerable groups “must not be regarded as a disempowered mass.”<sup>165</sup> Instead the state must make every effort to engage and these groups may require assistance from civil society groups. For this reason the Court specifically recognized that “[c]ivil society organizations that support the peoples’ claims should preferably facilitate the engagement process in every possible way.”<sup>166</sup>

Finally, the Court established what amounts to a public reporting requirement for the government following any engagement process. Emphasizing that “secrecy is counter-productive to the process of engagement,” the Court stated that “the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality with that process would ordinarily be essential.”<sup>167</sup> Courts are then required to consider “[w]hether there had been meaningful engagement between a city and the resident about to be rendered homeless,” when considering a challenge under section 26.<sup>168</sup>

### C. *Engagement as a Hybrid Mechanism for Developing Constitutional Norms*

On the one hand the Court’s description of the engagement process looks a lot like Sturm’s and Gadlin’s model of a norm-creating ADR process. It pushes the responsibility for developing the substantive content of section 26 into the political sphere and adopts a largely private, party-directed mechanism for doing so. But unlike their model, which operates completely separate from the judicial system, engagement remains tied to the courts in ways that make it more of a hybrid between the pure ADR process they describe and pure adjudication. The hybrid nature of engagement enhances both its legitimacy and its norm-creation capacity in several ways.

The structure created by the Constitutional Court is really an expanded version of Sturm’s deliberative model, but one that operates without a court liability determination. Therefore, it tracks Sturm’s suggestion that the model might be extended to consent decrees.<sup>169</sup> Rather than setting specific guidelines in each case, as under Sturm’s model, the Court instead sets more general guidelines for the engagement process, as it did in

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<sup>163</sup> *Id.* at para 19.

<sup>164</sup> *Id.* at para. 15.

<sup>165</sup> *Id.* at para. 19.

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

<sup>167</sup> *Id.* at para. 21.

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

<sup>169</sup> Sturm, *supra* note 82, at 1446 (suggesting that “[c]onsent decrees reached through processes that conform to the deliberative model may satisfy basic requirements of legitimate judicial intervention.”)

*City of Johannesburg*. These guidelines will, presumably, be refined and expanded in future cases that come before the Court where engagement was tried and failed. This gives courts the power to structure the engagement process in ways that ensure attention to the values these rights protect as Sturm and Fiss emphasize. While this structuring role operates over a longer period of time and across multiple cases rather than within a single one, it is nonetheless similar to the structuring role Sturm assigns to the court in the deliberative model and thus allows the courts to refine the process to ensure attention to public values.

The engagement remedy also circumscribes the courts' initial role in most cases and gives it the kind of baseline-setting role to which Fuller argues courts should limit themselves when dealing with highly polycentric issues. Rather than setting direct policy through substantive interpretation of section 26, the courts instead establish the ground rules for a procedure by which the parties themselves, assisted by civil society, can develop the specific policies required to provide access to adequate housing.<sup>170</sup>

The public-reporting requirement plays several important roles. First by requiring the state to develop a complete record that will be the basis for potential judicial review, it ensures that, in failed engagements, courts will have the information necessary to develop the process itself in ways that protect public values.

Second, because the parties know that they must develop a record that a court may ultimately review for compliance with procedural and substantive obligations the public-reporting requirement creates a strong incentive for engagements to incorporate these public values throughout the process. Both sides will be looking towards a potential end-game that involves representations to a court and will want to be able to demonstrate that their actions and proposals serve the broader values of the right.

This requirement also emphasizes the role of reasoned arguments in the process that is a central legitimating characteristic for both Fuller and Fiss. Fuller asserts that adjudication gives institutional expression to reason because "a decision which is the product of reasoned argument must be prepared itself to meet the test of reason."<sup>171</sup> As a result, "issues tried before an adjudicator tend to become claims of right or accusations of fault."<sup>172</sup> The public-reporting requirement gives the parties incentive to make reasoned arguments and claims of rights because they know those arguments may be assessed by the courts and will certainly be subject to analysis and critique by the public at the end of the process.

This aspect of the engagement process comes with the cost of eliminating the confidentiality that many argue is an important feature of ADR processes to avoid

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<sup>170</sup> See Bone, *supra* note 13, at 1318 (arguing that in a case challenging the constitutionality of the conditions at a special-needs school "Fuller would have had little difficulty with ordering new procedures [for provision of new facilities and personnel], but he certainly would have worried about the judge deciding on the facilities and personnel,").

<sup>171</sup> Fuller, *Adjudication*, *supra* note 4, at 366-67.

<sup>172</sup> *Id.* at 369.

position-based bargaining and to enhance the possibility of genuine negotiations.<sup>173</sup> The potential for position-based bargaining is real, but disclosure of the engagement process is critical to protecting the legitimacy norms associated with litigation and confidentiality may be less important in this setting than in others.

First, one of the principal benefits of confidentiality in private disputes is the opportunity to avoid public disclosure of the terms of the settlement itself. But the policies that result from a successful engagement will be public in any event, thus eliminating this potential concern.

Second, the need for potential court oversight is crucial to ensuring that municipalities engage seriously and also to provide the opportunity for public critique of the results. Others have argued for limited disclosure in court-connected mediation to protect against potential abuse of ADR processes.<sup>174</sup> In the engagement context, those concerns are heightened. The potential for bargaining disparity between the parties is much greater. Moreover, a public process and the potential for judicial review of that process are necessary to make the remedy both effective and responsive to the public values at stake.

In the end, the hybridity of engagement—the oscillation between a party-controlled process and court direction—permits the process to operate across both public and private spheres in a way that combines the flexibility of ADR methods that Fuller emphasizes and, at the same time, draws on the legitimating characteristics of adjudication.<sup>175</sup> Rather than creating a parallel process, as Sturm and Gadlin describe, engagement remains tied to the courts and permits periodic court intervention across multiple cases.

Successful engagements will never reach the courts, but many engagements certainly will. Those cases will allow the Court to provide guidance on both how the engagement process should be structured and what substantive outcomes are constitutionally permissible. These cases will then serve as guidelines for future engagements thus creating a multi-level remediation process that Sturm and Gadlin emphasize is necessary for individual resolutions to become precedents in other cases. Rather than operating independent of courts, however, engagement ties the process back

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<sup>173</sup> See, e.g., Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy and Confidentiality*, 76 Ind. L. J. 591, 633 (2001) (“Confidentiality in ADR is popularly viewed as crucial to the effectiveness of ADR and to participants’ willingness to use such procedures.”)

<sup>174</sup> See *Weston*, *supra*

<sup>175</sup> Melvin Eisenberg in an essay published as a commentary on (and in the same issue as) *The Forms and Limits of Adjudication*, suggests that a hybrid combination of “good-faith negotiation based on relevant legal principles” and connected to the possibility for court review may be “an optimum form of ordering” in public-law cases with polycentric dimensions. 92 Harv. L. Rev. 410, 430 (1978). While Eisenberg argues that the need for such a hybrid approach risks undermining the moral force of adjudication as defined by Fuller, I think that the hybridity can instead preserve the legitimacy of adjudication by relying on ADR processes to deal with the polycentric dimensions of the dispute.

to courts and creates the opportunity to address the results of failed engagements and tweak the process to deal with the problems they raise.

### 1. *Successful Engagements*

But what happens with successful engagements? Cases where the process works and the settlement never reaches a court directly implicate Fiss' concern that private interests may trump public values because there is no independent review of the result. As an initial matter, the Court recognized Fiss' concern and emphasized that "[i]t will not always be appropriate for a court to approve all agreements entered into consequent upon engagement."<sup>176</sup> The Court has thus signaled to parties in all future engagements that their efforts must be attentive to the public values at stake or risk rejection if the dispute comes to court. Each engagement will take place in the "shadow" of the possibility of litigation and court involvement thus building in an incentive to incorporate these values at the start.

More importantly, several features of the process the Constitutional Court described in *City of Johannesburg* track the requirements Sturm identified as central to a legitimate outcome for Fuller and Fiss<sup>177</sup> and allow for incorporation of the features of the public-norm creating ADR process Sturm and Gadlin describe.<sup>178</sup> To begin with, the Court's demand that the state involve civil society organizations in the engagement process protects the participation principle Sturm identified.<sup>179</sup> Civil society organizations active on housing issues will have broader perspectives and will understand how the results of these individual negotiations may affect the broader policy landscape. Thus these groups can negotiate for policy changes that extend beyond the individuals involved in the specific engagement.<sup>180</sup> At the same time, these groups can help alleviate the disparity in bargaining capacity between the municipality and vulnerable populations.

The public-reporting requirement, even absent direct review by a court, also increases participation at a broader level by permitting any interested group or individual to assess (and criticize) the result of an individual engagement and even the process that lead to it. While this form of public assessment is unlikely to affect the outcome of what would be at that point a complete engagement, it can serve the same refining function as court review in the longer term by offering suggestions for improving the process and/or reasons why the next engagement should be more protective of the values of the specific right. In this way, the public report generated in a successful engagement serves some of the same functions as the reasoned decision of a court: announcing the terms of the

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<sup>176</sup> *City of Johannesburg Const. Ct.*, *supra* note 10, at para. 30.

<sup>177</sup> *See infra* at notes 72-81 and accompanying text. Sturm identifies three shared characteristics:

"participation, impartiality and reasoned decision-making . . . ." Sturm, *supra* note 14, at 1402.

<sup>178</sup> *See infra* notes 103-12 and accompanying text.

<sup>179</sup> Sturm, *supra* note 14, at 1410.

<sup>180</sup> Sturm and Gadlin suggest that an additional benefit to including repeat players like civil society organizations in the negotiation process is increased legitimacy: "[P]anelists of independent physicians and community advocates operating as third-party intermediaries carry substantial weight and bring legitimacy to the process of conflict resolution and systems intervention." Sturm & Gadlin, *supra* note 6, at 47-48

agreement and stating how those terms are consistent with the requirements of the right involved.

The broad participation engagement entails—both by bringing outside groups into the process and permitting review and critique by the general public after the fact—creates the “multi-partiality” that Sturm and Gadlin argue can substitute for judicial independence in the ADR context.<sup>181</sup> Rather than a single, independent judge assessing the outcome for consistency with public values, the incorporation of multiple, experienced actors in the engagement itself and the opportunity that the public report creates for critique of the process and the result from a range of perspectives encourages a principled result that protects those values.

More importantly, the public-reporting requirement combined with another, up-until now under-utilized, constitutional provision creates a powerful tool for using individual engagements to establish broad norms across individual engagements. In combination these features create incentives for both the municipality and the affected residents to pay consistent attention to the public norms these rights enforce during the negotiation process. They also can be used to make the results of single engagements repeatable, where appropriate, in other similar situations in the same way that Sturm and Gadlin argue individual conflict resolutions should be adapted to establish broader policies within an organization.<sup>182</sup>

Each of the socioeconomic rights, including section 26, require “progressive realization” of the right over time.<sup>183</sup> Progressive realisation requires, at a minimum, that the state cannot decrease the level of benefit provided without substantial reason.<sup>184</sup> The public-reporting requirement means that municipalities must document their engagement efforts and also the result of any engagement. Citizens in a subsequent dispute will have access to that result and can argue that it establishes a minimum level of benefit from which any municipality cannot depart without substantial justification.

The reasonableness and resources limitations in section 26 give the government flexibility to argue either that a different level of benefit or modified program is more appropriate to address the particular circumstances in that dispute, but it must support those claims in the engagement process. During engagement, residents and civil society groups will have the opportunity to argue for alternatives not considered by the government that may adequately address the basis for that modified program or diminished benefit.

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<sup>181</sup> Sturm & Gadlin, *supra* note 6, at 56.

<sup>182</sup> *Id.* at 54.

<sup>183</sup> South Africa Const. § 26 (1996).

<sup>184</sup> See *Grootboom*, *supra* note 105, at para 45. The Court adopted the interpretation of “progressive realisation” put forth in paragraph 9 of the general comment to Article 2.1 of the International Covenant on Economic, Social and Cultural Rights: “Moreover, any deliberately retrogressive measures . . . would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.” *Id.*

The City of Johannesburg's inner-city regeneration project provides a simple example of this effect. Continuation of this project will require a significant number of additional evictions. Following the Court's decision, the City must develop a plan for engaging in a systematic way with the residents of the buildings targeted for redevelopment. Those residents can now point to the settlement agreement the City reached as a benchmark for their cases. The City will have to justify offering any lesser accommodation to these other residents not only as matter of good negotiation practice, but also because it knows that the engagement process is subject to court review if it breaks down.

Up until this point, the Court's controversial decision to link the substantive right to the internal limitations clause when interpreting socioeconomic rights has been largely criticized as diminishing its force.<sup>185</sup> But through engagement, the progressive-realisation qualifier has the potential to act as a powerful tool for giving section 26 substantive content. Content, however, that is developed by the state itself through negotiation with affected citizens and civil society groups rather than mandated by courts.

For this structured approach to engagement to work effectively, it must include not only a process for documenting the individual engagements, which the Court recognized, but also a publicly accessible repository of those reports. This will give municipalities the longitudinal information they will require to make engagement more than a merely ad hoc process. More importantly, access to the results of engagements is necessary for individual engagements to serve as potential precedents for future engagements and also to allow for public assessment of the results.

Civil society can play a key role here as well. Groups that are consistently involved in engagements can help develop appropriate record-keeping guidelines for each engagement. Those same groups can then press the government to make those records publicly available and, in turn, use those same records as the basis for negotiations in subsequent engagements.

Over time, then, engagement can establish a generalizable, but still flexible, set of both process norms and substantive requirements for section 26 that can be applied and modified in later cases. The public-reporting requirement permits broad access to these norms. The involvement of civil society helps ensure that the government does not depart from these norms in later cases and that modifications are justified by the particular circumstances in each case. The continuing obligation to engage in socioeconomic rights cases creates an incentive for the government to incorporate these norms into social policy development more generally and also to consult with civil society groups when developing those policies.

Equally important, the potential replication of individual engagements is largely controlled by the political branches themselves, thus enhancing the democratic legitimacy

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<sup>185</sup> See, e.g., Bilchitz, *supra* note 1113, at 9 (arguing in the context of the section 27 right to health care that the Court's approach "is guilty of failing to integrate ss 27(2) and (1): it focuses the whole inquiry on s 27(2) without providing a role for s 27(1).).

of the process. Following *City of Johannesburg*, municipalities must develop structured, long-term approaches to engagement and build plans for engagement from the start of any redevelopment process. This forces those municipalities to pay consistent attention to the requirements of section 26 because they must consider its implications from a longer-term perspective in any development plan. It also gives those same municipalities control over when to engage and under what circumstances.

Going back to the Johannesburg example, if the City takes seriously the obligations the Court has described, it should now develop something like an “engagement department”—or at least a structured engagement review process—that will consider what aspects of its redevelopment plans might require engagement under section 26. The City can then decide whether a particular building or set of buildings require redevelopment and assess the potential cost of engaging with the residents in light of the result in the *City of Johannesburg* case. Rather than responding in an ad hoc way to individual law suits over section 26, then, the City can now take control over what interventions to make in light of its overall budget and policy priorities.

## 2. *Bad-Faith Engagements*

There is, of course, always the possibility that a municipality will decide to engage in bad faith. This could happen in one of several ways. First the city could simply refuse to engage. Second, it could go through the motions of engagement without offering any serious concessions to residents and without seriously justifying that refusal beyond simply saying it lacks the resources. A more subtle alternative is if the city goes through the motions of engagement using facially reasonable excuses for refusing to provide additional benefits, such as increased demands from other sectors or legitimate differences in the situations between one set of residents and another that are in fact pretextual.

Those cases will likely end up in court and the question will be how a court should deal with this kind of recalcitrance once identified. In the first two scenarios—outright refusal or obvious bad faith—it makes sense for the court, at least initially, to order further engagement with additional court control. Exercising this option would create a process that tracks Sturm’s deliberative model even more directly.<sup>186</sup> The court could find the municipality liable for violating section 26, not for the substantive reason that it failed to provide sufficient benefits, but on the procedural ground that it failed to engage in good faith. Because of the public reporting requirement, the Court will have the benefit of a record from which it can assess the process itself and order the parties to return to the bargaining table with specific modifications. These could include a broad range of things, including appointing a specific civil society group (or some other person) to act essentially as a mediator or, less dramatically, ordering more inclusive consultations with groups that were either excluded or not sufficiently included.

The option to modify the specific process also gives the Court an opportunity, without directly interpreting section 26, to signal the parties in general terms through

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<sup>186</sup> See *infra* notes 72-81 and accompanying text.

informal discussions or formal statements on the record what it thinks section 26 might require in this situation and in light of previous engagements. Just as in Sturm's deliberative model, this would give the court an additional opportunity to reinforce the public values at stake.<sup>187</sup> The parties would then return to the bargaining table but with a more specific, court-directed procedure and substantive guidelines.

There is good reason to think that this kind of repeated engagement under specific court pressure will in fact work, even where a municipality initially ignores its obligations. This is precisely what happened in *City of Johannesburg*: the very specific pressure Constitutional Court exerted worked to force the City to engage more seriously. In a left-handed compliment, the Court deliberately "commended [the City] for the fact that its position became more humane as the case proceeded through the different courts, and for its ultimate reasonable response to the engagement order."<sup>188</sup> Later in the judgment, the Court itself highlighted the fact that direct court pressure to engage and report back was "the deciding factor" that moved the City to make concessions: "The deciding factor in this case in my view was that engagement was ordered by this Court, and the parties had been asked to report back on the process while the proceedings were pending before it."<sup>189</sup> But the Court went on to emphasize its preference that "engagement take place before litigation commences unless it is not possible to do so because of urgency or some other compelling reason."<sup>190</sup>

What happens in the most extreme cases where the process breaks down completely, or the municipality persists in refusing to offer a reasonable program? As an initial matter, the Court has structured the engagement process to try and avoid this result. In particular, the possibility for more direct court control over a renewed engagement process just described will at least ensure that complete breakdown is only possible if the municipality takes an extremely hard line over time.

Nonetheless, when faced with repeated refusals to engage seriously (or simply a good-faith impasse) the Court may ultimately have to substantively interpret section 26 and order the municipality to take specific action. On the one hand, this looks like the failed result that Sturm argues forces the Court to choose among the less legitimate

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<sup>187</sup> *Sturm*, *supra* note 14, at 1429-30 (describing the court's role prior to negotiation as "outling[ing] for the participants the characteristics of the process" and "inform[ing] the participants as to the standards by which it will assess the adequacy of the proposed remedy.").

<sup>188</sup> *City of Johannesburg Const. Ct.*, *supra* note 10, at para. 28. This quote echoes the Court's rhetorical move in *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC), a health-care rights case, where, faced with public calls for defiance of any court order by senior government officials, it noted in the judgment that the government had always complied with court orders in the past and there was no reason to expect a different result in that case. *TAC*, 2002 (5) SA 721, at para. 129. As in *TAC*, the Court here appears to be trying more to coax the government into taking seriously its constitutional responsibilities in the future than truly commending it for having done so in the past. See generally, Brian Ray, *Policentrism, Political Mobilization and the Promise of Socioeconomic Rights*, \_\_\_ STANFORD J. INT. LAW \_\_\_ (2008) (arguing that the Court's general approach in socioeconomic rights cases is targeted at accustoming the political branches to take seriously its obligations under these rights).

<sup>189</sup> *City of Johannesburg Const. Ct.*, *supra* note 10, at para 30.

<sup>190</sup> *Id.*

alternatives in the structural-reform litigation context.<sup>191</sup> But the key characteristics of engagement—its extended nature, the public reporting requirement, and the political control it creates—leaves the Court in a much better position to direct specific policy changes for several reasons.

First, the Court now has a substantial record before it of proposals and counter-proposals, including detailed justifications by the municipality. This enhances the informational base from which it is making the substantive interpretation and thereby reduces the institutional competence concerns.<sup>192</sup> In addition, once this process has developed over time, the Court will also have the benefit of records of other engagements and can consider the similarities and differences of this particular situation.

Second, as pointed out above, the city will have decided in advance to engage with this particular set of residents. Presumably this choice will have taken into account the larger context of the city's other responsibilities and priorities, and therefore ordering expenditures will not be as potentially disruptive as it would if the case were brought directly by residents. In other words, the political control engagement creates should give the Court more flexibility to order some substantive benefit where warranted because it was a political decision to target these groups. For the same reason, any court-ordered relief to a specific set of residents will avoid the queue-jumping problem that the Court has been concerned with and used as a reason to avoid ordering individual relief in other cases.<sup>193</sup> In this way, engagement opens the door to making section 26 individually enforceable, but only after the political process, not the court, has determined that some benefits should be given to a particular group.<sup>194</sup>

## V. CONCLUSION

As a hybrid process that operates somewhere in between pure ADR and pure adjudication—and, indeed oscillates between those two extremes—engagement offers a novel and potentially important tool for enforcing socioeconomic rights. That tool falls somewhat short of the Courts' critics call for full-fledged judicial interpretation and

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<sup>191</sup> Sturm contemplates the possibility of breakdown of the deliberative model and notes that “although a court-imposed remedy may undermine norms of remedial legitimacy, the court’s adoption of this role derives support from the parties’ failure to reach agreement.” Sturm, *supra* note 14, at 1439.

<sup>192</sup> See *id.* (noting that, in the case of a court-imposed remedy following deliberation “[t]he court’s remedial decision will be informed by the data, diversity of perspective and reasoning produced by the deliberations.”).

<sup>193</sup> See, e.g., *Grootboom*, *supra* note 105, at para. 92 (“This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis.”); *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd*, (2004) (6) SA 40 (SCA), para. 23 (discussing the “queue-jumping” problem identified in *Grootboom*).

<sup>194</sup> See generally, Brian Ray, *Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through ‘Engagement’*, 8 HUM. RTS. L. REV. 703 (2008) (discussing the political control created by the engagement remedy).

enforcement, but those same features that make engagement something less than strong court enforcement also enhance the legitimacy of this tool.

Michelman's description of the effects of a hypothetical "constitutionally declared right of everyone to the enjoyment of social citizenship" illustrate this point.<sup>195</sup> Michelman points out that such an ambiguous right "would leave just about every major issue of public policy still to be decided."<sup>196</sup> But, he argues, such a right could still have important effects on the democratic decision-making process:

Its maximum (but maybe not trivial) effect on democratic decisionmaking (the courts being kept away) would be a certain pressure on the frame of mind in which citizens and their elected representatives would approach the sundry questions of public policy always waiting to be decided. In Rawlsian language, the point of naming social citizenship a constitutional right would be to give a certain inflection to political public reason. Across a very broad swathe of public issues, such a naming would amount to a demand that those issues be approached as occasions for exercises of judgment--which choice will be conducive to the social citizenship of everyone, on fair terms?—rather than as invitations to press and to vote one's own naked interests and preferences.<sup>197</sup>

Engagement operates in a similar, but somewhat more coercive, fashion to force the political branches to pay consistent attention to section 26 (and possibly other socioeconomic rights in the future) whenever they develop social policy. Rather than removing the courts (as in Michelman's description), engagement gives them a specific, but, at least initially, limited role, that incorporates the legitimacy norms emphasized by Fiss and Fuller while leaving substantive policy-making largely in the political realm.

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<sup>195</sup> See Michelman, *supra* note 2, at 34.

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

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