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

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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 their almost uniform inclusion of socioeconomic rights provisions—rights to basic human needs such as food, water, shelter, health care, and education.† Despite the

* © 2009 Brian Ray, Assistant Professor of Law, Cleveland-Marshall College of Law. I would like to thank Lolita Buckner Inniss, Joan Flynn, Richard Goldstone, and participants in the South Africa Reading Group for their helpful comments and suggestions on earlier versions of this work. Angela Barstow and the staff of the Cleveland-Marshall Library, especially Jessica Mathewson, provided invaluable research assistance. The Cleveland-Marshall Fund provided generous research support. It was a pleasure working with the staff of the Utah Law Review in the editing and publication process.

† 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.").
relative ubiquity of these rights, however, judicial enforcement of them remains relatively controversial in theory and problematic in practice.\(^2\)

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.\(^3\)

Defenses of judicial review are connected to those of adjudication more generally. They often locate their legitimacy in a set of procedural characteristics—such as 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 the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."\(^4\) 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."\(^5\)

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.\(^6\)

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\(^3\) See Michelman, supra note 2, at 16 ("[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 the problem with constitutionalizing social rights comes down mainly, if not solely, to a matter of the separation of powers.").

\(^4\) Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 368 (1978) [hereinafter Fuller, *Forms and Limits*].


\(^6\) 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 Settlement*, 93 YALE L.J. 1073, 1085 (1984) [hereinafter Fiss, *Against Settlement*] (The role of adjudication "is not to maximize the ends of private parties, nor 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 severely limits the capacity of ADR 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 ADR processes cannot
develop public law norms. It follows a recent trend in ADR literature that seeks to
define a public norm creation role for ADR in part by connecting these processes
to other alternative legal and political problem-solving methods. This Article
focuses on a recent South African Constitutional Court case, *Occupiers of 51
Olivia Road v City of Johannesburg*, in which the court interpreted the right to
housing in the South African Constitution. The court held that municipalities must
develop processes for negotiating—or, in the court’s language “engaging”—with
citizens affected by redevelopment plans, to analyze how 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 mean that they have been a rich source for examining the
use of alternative enforcement approaches. The South African Constitutional Court

This duty is not discharged when parties settle.”). *See generally* Susan Sturm & Howard
discussing arguments that “ADR does not and cannot generate values or solutions that can
apply beyond the scope of the particular dispute” and “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”).

*See, e.g.*, Carrie Menkel-Meadow, *Deliberative Democracy and Conflict
Resolution*, 12 NO. 2 DISP. RESOL. MAG. 18, 19 (2006) (arguing 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”); *see also*
and new governance literature); Carrie Menkel-Meadow, *The Lawyer’s Role(s) in
legal, political and social problem solving institutions that draw on conflict resolution
theory and practice”); Sturm & Gadlin, *supra* note 6, at 3 (arguing 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”).
is one of the most active courts in this area; other jurisdictions and academic literature cite its decisions as models for developing alternative approaches.\textsuperscript{11}

*Occupiers of 51 Olivia Road v City of Johannesburg*\textsuperscript{12} 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.\textsuperscript{13} Properly implemented, the engagement remedy can be developed into a hybrid dispute resolution model. This model integrates ADR processes with formal adjudication in a manner that enhances the legitimacy of the resolution and makes possible extra-judicial interpretation and enforcement of socioeconomic rights. This hybrid process is particularly well-suited to enforcing socioeconomic rights because it is 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.\textsuperscript{14} Despite their differences, the characteristics


\textsuperscript{12} 2008 (5) BCLR 475 (CC) (S. Afr.).

\textsuperscript{13} See id. at para. 5.

\textsuperscript{14} See generally Fiss, Foreword, *supra* note 5; Fiss, *Against Settlement, supra* note 6; Fuller, *Forms and Limits, supra* note 4; Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971) [hereinafter Fuller, *Mediation*]. One commentator notes, “Fuller has become the paradigm of dispute resolution, just as Fiss is the paradigm of public law litigation.” Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. Rev. 1273, 1279–80 (1995). Bone cites a range of sources to support this
Fuller and Fiss identify as legitimizing adjudication share important similarities that Susan Sturm has argued ADR processes can promote and protect. 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’s accounts share and argues that these characteristics can be advanced through mediation in the remedial phase of public law litigation. Sturm and Gadlin, in a more recent article, propose an ADR model that promotes those same values and therefore can be used to develop public norms outside of adjudication.

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 the legitimacy of adjudication and ADR. It then describes the Constitutional Court’s decision in City of Johannesburg and argues that the court’s engagement remedy can be developed into a hybrid process incorporating aspects of adjudication and mediation/negotiation. It argues that this can be done 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-1970s, the idea of “conflict resolution” or “dispute resolution” outside of formal adjudication gained increased attention among courts, lawyers, and the general public. Proponents of ADR claim that its methods address many systemic problems in litigation and offer several benefits not available through traditional litigation. First, ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques could give parties to disputes more control over the resolution characterization. Id. at 1279 n.19 (citing William N. Eskridge, Jr., Metaprocedure, 98 Yale L.J. 945, 955–56, 962–64 (1989) (book review); Richard L. Marcus, Public Law Litigation and Legal Scholarship, 21 U. Mich. J.L. Reform. 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)).

16 Id.
17 See Sturm & Gadlin, supra note 6.
process.\textsuperscript{20} The flexibility of ADR also creates opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies.\textsuperscript{21} 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.\textsuperscript{22}

One prominent metaphor that captures the distinction between ADR and traditional adjudication is the "shadow of the law" notion developed by Robert Mnookin and Lewis Kornhauser in the context of divorce.\textsuperscript{23} 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."\textsuperscript{24}

\textbf{A. Fuller's Forms, Functions, and Limits}

Lon Fuller's essay, \textit{Mediation—Its Forms and Functions},\textsuperscript{25} was one of the first attempts to theorize ADR processes.\textsuperscript{26} 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."\textsuperscript{27} In dispute resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their

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\textsuperscript{20} See, e.g., id.; Lisa B. Bingham, \textit{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.").

\textsuperscript{21} See, e.g., Carrie Menkel-Meadow, \textit{Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)}, 83 GEO. L.J. 2663, 2689–90 (1995) ("[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.").

\textsuperscript{22} See, e.g., Deborah R. Hensler, \textit{Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System}, 108 PENN ST. L. REV. 165, 171 (2003) ("The 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.").


\textsuperscript{24} Id. at 950.

\textsuperscript{25} Fuller, \textit{Mediation}, supra note 14.

\textsuperscript{26} See Carrie Menkel-Meadow, \textit{Mothers and Fathers of Invention: The Intellectual Founders of ADR}, 16 OHIO ST. J. DISP. RESOL. 1, 13 (2000) ("[I]n many ways, Lon Fuller remains the only legal philosopher to take theorizing about dispute resolution processes seriously.").

\textsuperscript{27} Fuller, \textit{Mediation}, supra note 14, at 325.
relationship, but to help them “to free themselves from the encumbrance 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.”

Fuller contrasts the mediative function with what he calls “the standard procedures of law,” central to which “is the concept of rules.” 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. By contrast, mediation is concerned principally with persons and relationships, and it deals with “precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite ‘role expectations.’”

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 and enforcement is for the courts; courts have been instituted, not to mediate disputes, but to decide them.”

Thus, Fuller establishes a sharp dichotomy between the “rule of law” and ADR processes. Central to this dichotomy is his notion that rules “attribut[e] legal or social consequences to overt and specifically defined acts.” Rules (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 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.

Fuller further suggests that modern society creates an increasing number of people-dependent problems suitable for “mediative” 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.

Fuller’s essay *The Forms and Limits of Adjudication* analyzes the contrasting process of adjudication. For Fuller, a particular mode of participation defines adjudication: “the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of

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28 Id. at 325–26.
29 Id. at 327–28.
30 Id. at 329.
31 Id.
32 Id. at 328.
33 Id. at 329 (emphasis added).
34 Id. at 330–31.
35 Id. at 336–37.
36 Id.
37 Fuller, *Forms and Limits*, supra note 4.
presenting proofs and reasoned arguments for a decision in his favor.” 38 The legitimacy of adjudication is dependent on the degree to which it maximizes this form of participation because adjudication is “a device which gives formal and institutional expression to the influence of reasoned argument in human affairs.” 39

This rationality principle not only provides the justification for adjudication’s authority, but also limits the kinds of disputes appropriate for adjudication: “Wherever successful human 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.” 40 Fuller describes these kinds of disputes as “polycentric,” meaning that they involve complex and intersecting sets of relationships. 41 Adjudication “cannot encompass and take into account the complex repercussions” that result from resolution of a polycentric dispute. 42 More importantly, in such disputes “it is simply impossible to afford each affected party a meaningful participation through proofs and arguments.” 43

Socioeconomic rights present a paradigmatic example of polycentricity. 44 Although he does not use the term “polycentric,” Frank Michelman’s description of the “raging indeterminacy” of socioeconomic rights captures their intense polycentric nature. 45 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. 46

Thus for Fuller, polycentric disputes, such as those socioeconomic rights create, pose a real dilemma. The interrelated nature of the disputes’ issues is more susceptible to the give-and-take of ADR processes like mediation than to the

38 Id. at 368.
39 Id. at 366.
40 Id. at 371.
41 Id. at 395.
42 Id. at 394.
43 Id. at 394–95.
44 See, e.g., Bel Porto Sch. Governing Body v Premier of W. Cape Province 2002 (9) BCLR 891 (CC) at para. 51 (S. Afr.) (discussing the “polycentric” argument by respondents and citing Fuller, Adjudication, supra note 4); Kate O’Regan, Introduction to Socio-Economic Rights, 1 ESR Rev. No. 4 (1999), available at http://www.chr.up.ac.za/centre_projects/socio/esrvol1no4.html#2 (“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.”); Craig Scott & Patrick Macklem, Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution, 141 U. Pa. L. Rev. 1, 24 (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 . . . vague in terms of the obligations they mandate; and involving complex, polycentric, and diffuse interests in collective goods.”).
46 Id.
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 ADR 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 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." Thus, more flexible forms of adjudication (in other words, adjudication that looks more like mediation) have greater capacity to deal with polycentricity.

Here, recall Fuller's account of mediation and its characteristic ability to deal with shifting contingencies. Although he does not directly cite mediation as a mechanism for addressing polycentricity, the complex issues he describes as suitable for "mediative" approaches in his Mediation essay are plainly polycentric. And Fuller's description of the interrelated issues typically present in mediation echoes his polycentric examples.

B. Fiss and the Public Function Critique

The emphasis on participant control over ADR processes, which is central to their claimed benefits, also forms the basis of one of the principal criticisms of ADR processes, 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 it is also "an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals." 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's 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

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47 See generally Fuller, Forms and Limits, supra note 4.
48 Id.
49 Id. at 398.
50 Fuller, Mediation, supra note 14, at 325–26.
51 Id. at 336 (describing distribution of "scarce public welfare funds" and "the problem of the crowded public hospital" as problems suitable for meditative approaches).
52 Id. at 317–18.
53 Fiss, Against Settlement, supra note 6, at 1089.
Fiss, a court’s power to resolve cases is based on 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.”

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. As Fiss describes it,

[structural 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.]  

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.” By “dialogue,” Fiss means the adversary process: judges do not pick their cases; they must listen to all parties, issue decisions, and articulate reasons for those decisions.

Independence requires that the judge not identify with any of the parties; the judge’s decision must be impartial.

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. But, Fiss argues, even accepting that courts have no claim to superior practical expertise, “[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.” 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.”

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54 Fiss, Foreword, supra note 5, at 12–13.
55 Id. at 2.
56 Id.
57 See supra note 42 and accompanying text.
58 Fiss, Foreword, supra note 5, at 13.
59 Id. at 13.
60 Id. at 14.
61 Id. at 32.
62 Id. at 33–34.
63 Id. at 34.
64 Id. at 35.
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 parties to participate in the process. 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, its ability to resolve a huge swath of constitutional and common law cases.

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 “[i]t 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.” 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.

But Fiss argues that there is a “tight connection between meaning and remedy.” 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 remedy might distort the right, and leave us with something less than the true meaning of the constitutional value.”

While making the judge responsible for the remedy in complex cases creates a 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.”

65 Id. at 42.
66 Id. at 43.
67 See id. at 52.
68 Id.
69 Fuller summarizes the “relative incapacity of adjudication to solve ‘polycentric’ problems” as rooted in “the incapacity of a given area of human activity to endure a pervasive delimitation of rights and wrongs [that] is also the measure of its incapacity to respond to a too exigent rationality, a rationality that demands an immediate and explicit reason for every step taken.” Fuller, Forms and Limits, supra note 4, at 371 (emphasis added). He goes on to explain that behind “both these incapacities lies the fundamental truth that certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument.” Id.
70 Fiss, Foreword, supra note 5, at 52.
71 Id. at 52–53.
72 Id. at 53.
73 Id. at 57.
C. Reconciling Fuller and Fiss

By focusing on Fuller's participation emphasis, Fiss ignores 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." In other words, the ability of individual participation in the structured setting of adjudication to produce a reasoned result is the basis of its legitimacy.

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." 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 [that] is also a measure of its incapacity to respond to a too exigent rationality, a rationality that demands an immediate and explicit reason for every step taken." 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.

In the end, then, Fiss' and Fuller's views of adjudication and its limits have significant similarities. Both agree that 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. In addition, Fiss and Fuller both believe that adjudication begins to lose legitimacy to the extent that its results cannot be justified by reasoned arguments and when the processes involved depart from the adversary model. They also acknowledge that complex disputes test the limits of that legitimacy because the remedies they entail cannot be justified solely by reason; the role of

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74 Fuller, Forms and Limits, supra note 4, at 364.
75 Fuller answers "not necessarily" to the hypothetical question of whether a judge's decision must be accompanied by reasons. Id. at 387. But he goes on to state that "[b]y and large it seems clear 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. at 388 (emphasis added).
76 Id. at 394–95.
77 Id. at 371.
78 Fiss, Foreword, supra note 5, at 52.
79 Compare id. at 12–14, with Fuller, Forms and Limits, supra note 4, at 365–69.
80 Compare Fiss, Foreword, supra note 5, at 42, with Fuller, Forms and Limits, supra note 4, at 368–69.
81 Compare Fiss, Foreword, supra note 5, at 29–30, with Fuller, Forms and Limits, supra note 4, at 386–88.
the parties is more complicated. And finally, both authors conclude that the practical need for a judge to assume a more direct role at the remedial phase compromises the judge's independence.

The principal difference between the two approaches is that Fiss 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 ADR processes out of concern that they will undermine the public values in adjudication.

Although Fuller appears to have a much stronger sense 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.”

Fuller also cautions that his analysis of the “pure” form of adjudication that maximizes individual participation and judge neutrality should not be taken as a condemnation of every “mixed or ‘impure’ form of adjudication.” 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.” In other words, Fuller recognizes that the real world often requires forms of adjudication that do not meet his described ideal. Thus, even for polycentric disputes, Fuller acknowledges that adjudication can set “ground rules” for a resolution that would better come from some other, more flexible form.

By contrast, Fiss rejects negotiated settlements, and other forms of private dispute resolution in public law cases because they lack the independence and reasoned decision-making procedures that legitimate adjudication. The central

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82 Compare Fiss, Foreword, supra note 5, at 45-46, with Fuller, Forms and Limits supra note 4, at 393-95.
83 Compare Fiss, Foreword, supra note 5, at 46, with Fuller, Forms and Limits, supra note 4, at 394-98.
84 See id. at 52-53.
85 See id. at 57-58.
86 See Fuller, Forms and Limits, supra note 4, at 371.
87 Id. at 398.
88 Id. at 405.
89 Id. at 406.
90 See Fuller, Forms and Limits supra note 4, at 371 (“Wherever successful human 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.”); see also Lon L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wis. L. Rev. 3, 34 (“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.”).
91 Fiss, Against Settlement, supra note 6, at 1085.
problem with settlement is that it is a purely private bargain with no necessary connection to the public values inherent in the laws at issue in the dispute. Judicial approval of a settlement thus fails "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statues: to interpret those statutes and give force to the values embodied in them."92

III. PROMOTING LEGITIMACY THROUGH ADR PROCESSES

A. Sturm's Deliberative Model

Susan Sturm addresses the Fuller-Fiss debate,93 focusing specifically on the legitimacy concerns raised in the remedial phase of structural reform litigation.94 Sturm describes Fuller and Fiss as representative of two competing models of what she calls the process critique of adjudication.95 Sturm largely agrees with Fiss's criticisms of the limitations of Fuller's model.96 But Sturm also finds fault with Fiss’s own attachment to the adversary process, noting that Fiss’s 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.97 She identifies “[t]hree shared norms of judicial legitimacy [that] underlie” Fiss’s and Fuller’s models: (1) participation, (2) judicial independence and impartiality, and (3) reasoned decision making.98

Sturm rejects Fiss’s claim that judges must fashion remedies themselves to preserve the legitimacy of adjudication.99 While she agrees with 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 the process.100 Rather than relying on indirect representation through

92 Id.
93 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 Fuller and Fiss identify with adjudication. See, e.g., Bone, supra note 14, at 1310 (describing Fuller’s theory of adjudication and Fiss’s criticisms and arguing that “once one gets beyond the caricature of [Fuller’s] model, it is apparent, for example, that Professor Fiss’s definition of the purpose of adjudication—giving concrete meaning to public values—is quite similar to Fuller’s”).
95 Id. at 1387.
96 Id. (arguing Fiss’s “structural reform model offers a powerful critique of the dispute resolution model and presents a normative theory intended to address and give legitimacy to the court’s role in public law litigation”).
97 Id.
98 Id. at 1390.
99 Id.
100 Id. at 1391–96.
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. Although 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 arguments. Similarly, while Sturm’s proposal embraces Fiss’s 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.” 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, determined by “the liability norms that have been violated.” 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. This gives the court greater control over the process and requires specific attention to the underlying substantive norms.

After negotiations, the parties are required to present the court with a written agreement and explanation that the stakeholder groups have approved. 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. This ensures that the process is fully participatory and that the result reflects reasoned decision making 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 ADR processes at the remedial stage in a tightly controlled, judicially supervised setting. Like Fuller, she sees the flexibility, informality, and person-centered aspects of mediation as distinctly appropriate to addressing the remedial issues in complex public disputes. But she shares Fiss’s concern that using ADR processes risks compromise or elimination of the 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.

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101 Id.
102 See id. at 1431–32.
103 See id. at 1428.
104 Id. at 1428–29.
105 Id. at 1429–30.
106 Id. at 1431.
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. Nonetheless, she notes that the model could serve a similar legitimating function in the consent decree context. If the negotiations leading to a 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.

B. A Norm-Creating ADR Process Independent of 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 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.”

ADR processes have this norm-creation potential, provided that they are structured in a way that links “individual and systemic conflict resolution.” Sturm and Gadlin advocate a “combination of root cause analysis and multi-level remediation” to allow ADR to achieve this potential. 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. Multi-level remediation requires considering when and whether to apply the results of an individual resolution to others within an organization. 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. Formal law sets the outer bounds of possible

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107 Id. at 1445.
108 Id. at 1446.
109 Id.
110 Id. at 4.
111 Id. at 4.
112 Id. at 53.
113 Id.; 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.”).
114 Id. at 54 (“Problems revealed through conflict resolution sometimes give rise to changes in policy, which apply to everyone similarly situated within the relevant domain.”).
115 Id.
resolutions and, at the same time, defines abstractly the values that individual resolutions must serve.\textsuperscript{116}

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 court involvement, whether at the liability or remedial stage, and yet they address all three legitimacy characteristics Sturm identifies with the deliberative model.

Thus, the authors note, "when linked to systemic change, non-adjudicative conflict resolution can foster the articulation of implicit norms [and] 'reasoned elaboration and visible expression of public values.'"\textsuperscript{117} Also, "[c]onflict resolution thus institutionalizes principled decision making that can be generalized within the community of practice in which it operates."\textsuperscript{118} 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.\textsuperscript{119}

Independence and impartiality take on a more complex form. Rather than requiring the "'detached neutrality'" characteristic of adjudication, Sturm and Gadlin argue that "'multi-partiality'—critically analyzing a conflict from multiple vantage points"—can serve the same function.\textsuperscript{120} This, in turn, reinforces 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."\textsuperscript{121}

Sturm and Gadlin acknowledge limits to the norm-creation ability of stand-alone ADR processes, but they argue that the limits "focus attention on the interdependence of informal and formal conflict resolution systems."\textsuperscript{122} The nature of the process and, more important, the identity of communities involved in the 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\textsuperscript{123} 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

\begin{footnotes}
\footnote{116}{Id. at 54–55.}
\footnote{117}{Id. at 55.}
\footnote{118}{Id.}
\footnote{119}{Id. at 56.}
\footnote{120}{See id. at 4.}
\footnote{121}{Id.}
\footnote{122}{Id. at 56.}
\footnote{123}{See id.; supra notes 50–52 and accompanying text.}
\end{footnotes}
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 and Gadlin's description of individual ADR processes, conscious of and linked to systemic problem solving, de-links norm creation from formal adjudication completely while still recognizing the relationship between formal and informal norm-creation processes.

Part IV analyzes 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. The case is used to consider how Sturm 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 integrating ADR processes with formal adjudication in a manner that enhances the legitimacy characteristics identified by Sturm, while facilitating 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.\textsuperscript{124} 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.\textsuperscript{125} Notably, Fuller's argument against adjudication of "polycentric" disputes features prominently in the literature as an argument against

\textsuperscript{124} See, e.g., Michelman, supra note 2, at 15 (discussing theoretical objections to the constitutionalization of social and economic rights); see generally Kim Lane Schepele, Social Rights in Constitutional Courts: Strategies of Articulation and Strategies of Enforcement, 4–6 (Oct. 2008) (unpublished draft, copy on file with the author) (summarizing major criticisms of judicial enforcement of social rights).

\textsuperscript{125} See, e.g., Tushnet, supra note 1, at 231–33 (discussing the "conventional argument against judicial enforcement of social and economic rights"); Schepele, supra note 124, at 4–5 ("Many commentators believe that courts should not commit large segments of the state's budget to particular purposes because that is a proper role for a democratically elected legislature, not for court judgment.").
constitutionalizing socioeconomic rights and for limiting judicial enforcement when they are included.126

These same objections, somewhat paradoxically, also emerge in the literature surrounding structural reform litigation. Fiss’s contention that adjudication is central to the elaboration of public norms127 suggests 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.128 These are precisely the same objections to judicial enforcement of socioeconomic rights.129

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 the Republic of South Africa v Grootboom.130

1. The courts’ public remedial activities fail to conform to the 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 courts are abusing their power and acting unfairly in the execution of their public remedial function.

126 See, e.g., supra note 44 and accompanying text.
127 See Fiss, Foreword, supra note 5, at 12–13.
128 See Sturm, supra note 15, at 1379. 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 concerning the proper role of the court.” Id. She identifies four major criticisms:

129 Compare id. (listing the four objections described in the immediately preceding footnote), with Tushnet, supra note 1, at 231–33 (quoting Frank R. Cross’s summary of the arguments against socioeconomic rights in The Error of Positive Rights, 48 UCLA L. REV. 857, 887 (2001), which includes the arguments that enforcement of socioeconomic rights “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” (internal quotations omitted)), 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.”).
130 2000 (11) BCLR 1169 (CC) (S. Afr.); see also Sunstein, supra note 11, at 233–36 (analyzing Grootboom and praising the court’s “adoption of a novel and highly promising approach to judicial protection of socio-economic rights”); Davis, supra note 10,
The plaintiffs in *Grootboom* were desperately poor members of an informal community who had established makeshift housing on a public sports field after 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 their right to access to adequate housing under section 26(2) of the constitution, as well as the rights of the children in the community to shelter under section 28(1)(c).

The court held that the city violated the general right to housing in section 26 because, although it had developed constitutionally adequate housing programs addressing medium- and long-term needs, the city’s plans lacked any provision for short-term, emergency needs like those of the Grootboom community. 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.” The court refused to issue more specific requirements and dissolved an injunction requiring the city to report back to court on its progress implementing a new housing plan. The city was thus left to determine for itself how best to cure the constitutional defect with no direct court oversight.

In large part due to the court’s limited remedy, *Grootboom* has been described variously as a “dialogic,” “weak form,” or “administrative law” 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.

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131 *Grootboom* (11) BCLR 1169 at para. 12.
132 Id. at paras. 95–96.
133 Id. at para. 99.
134 Id.
135 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 “dialogue model,” which is “fully consistent with the approach the Court in *TAC* suggested might be appropriate in future cases”).
136 TUSHNET, supra note 1, at 242–43.
137 SUNSTEIN, supra note 11, at 234 (“What the South African Constitutional Court has basically done is to adopt an administrative law model of socioeconomic rights.”).
These critics focus on an important interpretive move made by the court in *Grootboom* and other cases. Most of the socioeconomic 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."\(^{139}\) 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."\(^{140}\) The court has consistently held that these two provisions must be read together.\(^{141}\)

Critics argue that the court should interpret the right itself independent of the limitation.\(^{142}\) This would require a two-step process in which the court first declares what the right to housing requires in the abstract, and 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."\(^{143}\)

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 "there is a need for the Court to clarify the State's obligations imposed by socioeconomic rights."\(^{144}\) 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."\(^{145}\)

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 basis upon which to found decisions in socio-economic rights cases."\(^{146}\)

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\(^{140}\) Id.

\(^{141}\) See, e.g., *Gov't of the Republic of S. Afr. v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 33 (S. Afr.).

\(^{142}\) See, e.g., Pieterse, *supra* note 138, at 481.

\(^{143}\) Id. at 480.

\(^{144}\) Bilchitz, *supra* note 138, at 10.

\(^{145}\) Id.

\(^{146}\) Id.
These criticisms of the court’s enforcement approach reflect Fiss’s focus on the public function of adjudication and the unique role of courts in that process. In effect, the court’s critics are saying, as does 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’s related concern about the threatened legitimacy of adjudication when the court does not dictate the remedy—because we might be left “with something less than the true meaning of the constitutional value”\(^\text{147}\)—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’s emphasis that the legitimacy of adjudication rests principally on the fact that a judicial decision is the result of reasoned argument (dialogue) and is “justified . . . in terms of the norms of the constitutional system.”\(^\text{148}\)

But Fiss’s recognition that a 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\(^\text{149}\) points toward a flaw in the criticisms of the Constitutional Court’s approach as well. Fiss acknowledges that “[t]he task of discovering the meaning of constitutional values such as equality, due process, or property, is . . . quite different from choosing or fashioning the most effective strategy for actualizing those values.”\(^\text{150}\) 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.”\(^\text{151}\)

This gap between the abstract right and the practical remedy collapses when it comes to socioeconomic rights in a way that makes it almost impossible to disentangle the two. For example, 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

\(^{147}\) Fiss, Foreword, supra note 5, at 53.

\(^{148}\) Id. at 45.

\(^{149}\) 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)).

\(^{150}\) Id. at 51.

\(^{151}\) Id. at 52.
choices to implement that interpretation,\textsuperscript{152} it is impossible to define the right to "health care" without reference to specific policies.\textsuperscript{153}

This is illustrated by criticisms of the Constitutional Court's interpretation of the right to health care in \textit{Treatment Action Campaign.}\textsuperscript{154} Tracking the interpretive debate just described, critics argue the court should have defined the right to health care independent of the limitation.\textsuperscript{155} This would mean deciding, for example, "[w]hat are the services to which one is entitled to claim access? Do these services involve preventative [sic] 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?"\textsuperscript{156} In other words, defining the right necessarily entails prescribing particular policies.\textsuperscript{157}

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 shift over time and demand an intimate, real-time understanding of the specific conditions on the ground to be effective.\textsuperscript{158}

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.\textsuperscript{159} Defining the right in the abstract requires articulating substantive policies in light of specific conditions in particular contexts. More important, however, the indeterminacy heightens the legitimacy deficit that 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.\textsuperscript{160} Thus, accepting Fiss's view of adjudication's legitimacy, there is at least no greater legitimacy problem in the

\textsuperscript{152} \textit{Id.} at 52–53.

\textsuperscript{153} Sandra Liebenberg makes a similar point when she observes that the Constitutional Court's enforcement approach implies "that there is no bright-line boundary between law and policy, and that substantive evaluative choices will have to be made regarding when and how the courts should intervene in policy choices which impact on people's socio-economic welfare." Sandra Liebenberg, \textit{Socioeconomic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Constitutional Conversations} 303, 308 (Stu Woolman & Michael Bishop eds., 2008).

\textsuperscript{154} 2002 (10) BCLR 1033 (CC) (S. Afr.).

\textsuperscript{155} Bilchitz, \textit{supra} note 138, at 6.

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} Others have recognized these same institutional-competence problems with judicial enforcement. \textit{See}, e.g., CASS SUNSTEIN & STEVEN HOLMES, \textit{The Cost of Rights} 126–27 (1999) (noting that judges "lack the fact-finding capacity . . . that would justify their making particular allocative decisions").

\textsuperscript{159} \textit{See} Michelman, \textit{supra} note 2, at 30–31.

\textsuperscript{160} \textit{See} Fiss, \textit{Foreword, supra} note 5, at 46.
court’s current approach than if the court were 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 and Gadlin’s extension of that argument to ADR processes independent of adjudication, suggest 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 in *Occupiers of 51 Olivia Road v City of Johannesburg* 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 subsections 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 it 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. The city sought these evictions as part of a broader regeneration strategy, one aspect of which was the identification, clearance, and ultimate redevelopment of more than 200 “bad” buildings with some 67,000 occupants in the inner-city district.

The targeted buildings clearly created unsafe and unsanitary living conditions. Notwithstanding the legitimate concerns over the health and safety hazards the buildings presented, the city’s eviction program was outrageous. The city implemented the evictions by filing form applications with very little notice to

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160 [2008 (5) BCLR 475 (CC) at para. 5 (S. Afr.).]
161 *City of Johannesburg v Rand Props. (Pty) Ltd.* 2006 (6) BCLR 728 (W) at para. 2 (S. Afr.).
162 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) [hereinafter *Any Room*?].
actual occupants and in most cases gaining summary eviction with no hearing.\textsuperscript{165} The city would then send in teams of workers dressed in red, known as “red ants,” to forcibly evict residents. The Geneva-based Center on Housing Rights and Evictions (COHRE) published an extensive report describing the abuses and outlining legal and policy arguments against the program.\textsuperscript{166}

Several groups organized the residents of six targeted buildings to oppose the applications in their cases.\textsuperscript{167} COHRE had partnered with the Centre for Applied Legal Studies (CALS) in drafting the initial report criticizing the eviction program.\textsuperscript{168} CALS then coordinated the litigation strategy.\textsuperscript{169} Other groups were also active in the effort, including the Community Law Centre,\textsuperscript{170} 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.\textsuperscript{171}

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 \textit{Grootboom} and related legislation.\textsuperscript{172} The court also enjoined the city from seeking to evict the residents, and it ordered the city 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.\textsuperscript{173}

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.\textsuperscript{174}

\textsuperscript{165} \textit{Any Room?}, supra note 163, at 60–64 (describing in detail the city’s typical eviction procedures).

\textsuperscript{166} Id.

\textsuperscript{167} City of Johannesburg v Rand Props. (Pty) Ltd. 2007 (6) BCLR 643 (SCA) at para. 13 (S. Afr.).

\textsuperscript{168} See \textit{Any Room?}, supra note 163, 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/.


\textsuperscript{171} Id.

\textsuperscript{172} See City of Johannesburg v Rand Props. (Pty) Ltd. 2006 (6) BCLR 728 (W) at para. 65 (S. Afr.).

\textsuperscript{173} Id. at 67.

\textsuperscript{174} City of Johannesburg v Rand Props. (Pty) Ltd. 2007 (6) BCLR 643 (SCA) at para. 5 (S. Afr.).
The residents appealed the SCA’s order to the Constitutional Court, which accepted the application in May 2007. The court heard oral argument on August 28, 2007, and two days later it issued a remarkable interim order requiring the parties to “engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.” 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.

After requesting several deadline extensions, 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 and providing sanitation services, access to water, and functioning toilets. 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;” and to limit any rental fees to no more than 25 percent of the occupants’ monthly income. 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.”

Despite agreeing to these remarkable terms, both sides pressed the court to decide the broader issue of 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 it requested that the court find that the plan satisfied constitutional obligations under section 26. The residents filed a supplementary affidavit objecting to the city’s submission of the new plan in the context of an affidavit that was intended to

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175 See Occupiers of 51 Olivia Road, Berea Twp. and 197 Main Street Johannesburg v City of Johannesburg Interim Order Dated 30 August 2007, available at http://www.constitutionalcourt.org.za/Archimages/10731.PDF.
176 Id. at para. 1.
177 Id. at para. 3.
178 Settlement Agreement Between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg (Oct 29, 2007) at paras. 2-4 (copy on file with the author).
179 Id. at para. 6.
180 Id. at para. 7.
181 Id. at para. 18.
182 Id. at paras. 3, 10.
be only a report of the parties’ negotiated settlement. 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.” The court noted that the city’s position had evolved considerably as demonstrated by its “willingness to engage,” and the court was optimistic that “[t]here is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result.” The court also emphasized that court intervention remains an enforcement option “if this course becomes necessary.”

The court then formalized the negotiation/mediation requirement, calling it “engagement.” It noted that it had called for versions of engagement in earlier cases. 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.

The court found that a range of constitutional provisions, including the state’s obligation to “encourage the involvement of communities and community

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185 Occupiers of 51 Olivia Road v City of Johannesburg 2008 (5) BCLR 475 (CC) at paras. 31–34 (S. Afr.).
186 Id. at para. 34.
187 Id.
188 Id.
189 Id. at paras. 9–23.
190 Id. at paras. 10–12.
191 Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) at para. 39 (S. Afr.).
organizations in local government,” as well as the rights to human dignity and life broadly require engagement with citizens affected by state policies. The court then described in more specific terms what engagement should entail.

First, in accordance with 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.” 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.”

Second, in most cases, and in particular where a large-scale program is involved, engagement must be more than a merely “ad hoc” process. Emphasizing that “[i]t must have been apparent [from the outset of the city’s regeneration strategy planning] that the eviction of a large number of people was inevitable,” the court also 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.” 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.” These vulnerable groups “must not be regarded as a disempowered mass.” 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 organisations that support the peoples’ claims should preferably facilitate the engagement process in every possible way.”

Finally, the court established what amounts to a public reporting requirement for the government after any engagement process. Emphasizing that “secrecy is counter-productive to the process of engagement,” the court stated, “[T]he 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.” Courts are then required to consider “[w]hether there

192 Occupiers of 51 Olivia Road 2008 (5) BCLR 475 at para. 16.
193 S. AFR. CONST. 1996 § 10.
194 Id. § 11.
195 Occupiers of 51 Olivia Road 2008 (5) BCLR 475 at para. 16.
196 Id. at para. 18.
197 Id.
198 Id.
199 Id. at para. 18.
200 Id. at para. 19.
201 Id. at para. 15.
202 Id.
203 Id. at para. 21.
had been meaningful engagement between a city and the resident about to be rendered homeless" when considering a challenge under section 26. 204

C. Engagement as a Hybrid Mechanism for Developing Constitutional Norms

On the one hand, the court's description of the engagement process looks much like Sturm 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. 205 Unlike their model, which operates separate from the judicial system, 206 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 its legitimacy and its norm-creation capacity in several ways.

The Constitutional Court created a structure that 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. 207 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 City of Johannesburg. 208 The guidelines will, presumably, be refined and expanded in 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. Although this structuring role operates over a longer period 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 courts' initial role in most cases and provides the baseline-setting role to which Fuller argues courts should limit themselves when dealing with highly polycentric issues. 209 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. 210

204 Id.
205 Compare supra Part IV.B, with supra Part III.B.
206 Sturm and Gadlin, supra note 6, at 6.
207 See Sturm, supra note 15, at 1446 (suggesting that "[c]onsent decrees reached through processes that conform to the deliberative model may satisfy basic requirements of legitimate judicial intervention").
208 Occupiers of 51 Olivia Road v City of Johannesburg (5) BCLR 475 (CC) at para. 10 (S. Afr.).
209 See Fuller, Forms and Limits, supra note 4, at 398.
210 See Bone, supra note 14, at 1318 (arguing that in a case challenging the constitutionality of the conditions at a special-needs school, "Fuller would have had little
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 toward a potential endgame 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.” As a result, “issues tried before an adjudicator tend to become claims of right or accusations of fault.” 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 certainly will 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 and is necessary to avoid position-based bargaining. The potential for position-based bargaining is real, but disclosure of the engagement process is critical to protecting the legitimacy norms associated with litigation. Confidentiality also 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 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 providing the opportunity for public critique of the results. Others have argued for limited disclosure in court-connected

difficulty with ordering new procedures [for the provision of new facilities and personnel], but he certainly would have worried about the judge deciding on the facilities and personnel . . .”).

211 Fuller, Forms and Limits, supra note 4, at 366–67.
212 Id. at 369.
213 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.”).
mediation to protect against potential abuse of ADR processes.\textsuperscript{214} 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 hybrid nature of engagement—the oscillation between a party-controlled process and court direction—permits the process to operate across 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.\textsuperscript{215} 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 courts to provide guidance on how the engagement process should be structured and what substantive outcomes are constitutionally permissible. These decisions 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 independently of courts, however, engagement ties the process back to courts and creates the opportunity to address the results of failed engagements and tweak the process to deal with 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’s concern that private interests may trump public values, because there is no independent review of the result. As an initial matter, in \textit{City of Johannesburg} the court recognized Fiss’s concern and emphasized that “[i]t will not always be appropriate for a court to approve all agreements entered into consequent upon engagement.”\textsuperscript{216} The court 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

\textsuperscript{214} See id. at 594.

\textsuperscript{215} See Melvin Eisenberg, \textit{Participation, Responsiveness, and the Consultative Process}, 92 HARV. L. REV. 410, 430 (1978). In this essay, published as a commentary on (and in the same issue as) \textit{The Forms and Limits of Adjudication}, Melvin Eisenberg 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. \textit{Id.} Although Eisenberg argues that the need for this hybrid approach risks undermining the moral force of adjudication as defined by Fuller, it can be argued that the hybridity can instead preserve the legitimacy of adjudication by relying on ADR processes to deal with the polycentric dimensions of the dispute.

\textsuperscript{216} \textit{Occupiers of 51 Olivia Road v City of Johannesburg} (5) BCLR 475 (CC) at para. 30 (S. Afr.).
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 important, several features of the process the Constitutional Court described track the requirements Sturm identifies as central to a legitimate outcome for Fuller and Fiss\(^{217}\) and allow for incorporation of the features of the public norm creating ADR process Sturm and Gadlin describe.\(^{218}\) To begin with, the court's demand that the state involve civil society organizations in the engagement process protects the participation principle Sturm identified.\(^{219}\) Civil society organizations active on housing issues will have broader perspectives and will understand how the results of 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.\(^{220}\) 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 led to it. Although 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 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 agreement and stating how those terms are consistent with the requirements of the right involved.

The broad participation that engagement entails—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.\(^{221}\) Rather than a single, independent judge assessing the outcome for consistency with public values, engagement encourages a principled result protecting those values through the incorporation of multiple, experienced actors, as well as the integration of a range of perspectives and a critique of the process through public reporting.

\(^{217}\) See discussion supra Part III.A. Sturm identifies three shared characteristics: "participation, impartiality, and reasoned decisionmaking." Sturm, supra note 15, at 1382–83.

\(^{218}\) See discussion supra Part III.B.

\(^{219}\) See Sturm, supra note 15, at 1410.

\(^{220}\) Sturm and Gadlin suggest that an additional benefit to including repeat players like civil society organizations in the negotiation process is increased legitimacy: "[P]anels 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 48.

\(^{221}\) See id. at 56.
More important, the public reporting requirement, combined with another, previously underutilized constitutional provision, creates a powerful tool for using individual engagements to establish broad norms across engagements. In combination, these features create incentives for the municipality and the affected residents to pay consistent attention during the negotiation process to the public norms these rights enforce. They also can be used to make the results of single engagements repeatable, where appropriate, in the same way that Sturm and Gadlin argue individual conflict resolutions should be adapted to establish broader policies within an organization.\textsuperscript{222}

Each of the socioeconomic rights, including section 26, requires “progressive realisation” of the right over time.\textsuperscript{223} Progressive realization requires, at a minimum, that the state cannot decrease the level of benefit provided without substantial reason.\textsuperscript{224} The public reporting requirement means municipalities must document their engagement efforts and results.

The reasonableness and resources limitations in section 26\textsuperscript{225} give the government flexibility to argue that a different level of benefit or modified program is more appropriate to address the circumstances in a 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.

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 lesser accommodation to these other residents as a matter of good negotiation practice and because the city 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

\textsuperscript{222} See id. at 54.
\textsuperscript{224} See Gov’t of the Republic of S. Afr. v Grootboom 2000 (11) BCLR 1169 (CC) at para. 45 (S. Afr.). 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.
\textsuperscript{225} Id. at paras. 19, 21.
been largely criticized as diminishing its force. But through engagement, the progressive realization 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 the reports. This will give municipalities the longitudinal information they will require to make engagement more than a merely ad hoc process. More important, 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 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 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 engagements is largely controlled by the political branches themselves, thus enhancing the democratic legitimacy of the process. After 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 municipalities to pay consistent attention to the requirements of section 26 because they must consider its implications from a long-term perspective in any development plan. It also gives municipalities control over the timing and circumstances of engagement.

Going back to the Johannesburg example, if the city takes seriously the obligations the court has described, it should 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

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226 See, e.g., Bilchitz, supra note 138, at 9 (arguing in the context of section 27’s 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)”).
building or set of buildings requires redevelopment, and it can assess the potential
cost of engaging with residents in light of the result in City of Johannesburg.
Rather than responding in an ad hoc way to individual lawsuits over section 26, the
city can choose which 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 for the city to go through the motions of engagement using facially
reasonable excuses for refusing to provide additional benefits, such as increased
demands from other sectors or legitimate—but pretextual—differences in the
situations between one set of residents and another.

Those cases likely will end up in court. The question then will be how a court
should deal with this kind of recalcitrance once it is 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. 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 options, including
appointing a specific civil society group (or some other person) to act essentially as
a mediator. Or, less dramatically, the court could order 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 informal discussions or formal statements on the record what it thinks
section 26 might require in a particular 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. The parties would
then return to the bargaining table but with a more specific, court-directed
procedure and substantive guidelines.

227 See discussion supra Part III.A.
228 Sturm, supra note 15, at 1429–30 (describing the court’s role prior to negotiation
as “outlining[ing] for the participants the characteristics of the process” and “inform[ing] the
participants as to the standards it will use to assess the adequacy of the proposed remedy”).

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There is good reason to think that this kind of repeated engagement under specific court pressure will work, even where a municipality initially ignores its obligations. This is precisely what happened in City of Johannesburg: the specific pressure the 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.” 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.” But the court went on to emphasize its preference that engagement “take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason.”

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 avoid this result. In particular, the possibility for more direct court control over the renewed engagement process just described will ensure that a 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 alternatives in the structural reform litigation context. But the key

229 Occupiers of 51 Olivia Road v City of Johannesburg 2008 (5) BCLR 475 (CC) at para. 28 (S. Afr.). This quote echoes the court’s rhetorical move in Minster of Health v. Treatment Action Campaign 2002 (1) BCLR 1022 (CC) at para. 129 (S. Afr.), a health care rights case where, faced with public calls for defiance of any court order by senior government officials, the court 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. As in Treatment Action Campaign, the court in City of Johannesburg appears to be trying to coax the government into taking seriously its constitutional responsibilities in the future rather than truly commending it for having done so in the past. See generally Brian Ray, Policentrism, Political Mobilization and the Promise of Socioeconomic Rights, 45 Stan. J. Int. Law 151 (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).

230 Occupiers of 51 Olivia Road v City of Johannesburg 2008 (5) BCLR 475 (CC) at para. 30 (S. Afr.).

231 Id.

232 Sturm, supra note 15, at 1439. Sturm contemplates the possibility of breakdown of the deliberative model and notes that “[a]lthough 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.” Id.
characteristics of engagement—its extended nature, the public reporting requirement, and the political control it creates—leave the court in a much better position to direct specific policy changes for several reasons.

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

Second, as discussed earlier, 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 that 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 has used as a reason to avoid ordering individual relief in other cases. In this way, engagement opens the door to making section 26 individually

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233 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").

234 These kinds of failed engagements also will give the court the opportunity to develop broad substantive guidelines for these rights to guide future engagements. Sandra Liebenberg has argued that the Constitutional Court's reasonableness review could evolve to incorporate more substantive interpretation without abandoning the context-sensitivity and flexibility that are its key advantages. See Liebenberg, supra note 153, at 325, 328. The engagement remedy would permit periodic interventions of the kind Liebenberg advocates while still putting the emphasis on the development of standards through the political process. Engagement gives the court the opportunity to review those standards over time and, where it finds policy choices either sufficient or deficient, to articulate the constitutional values that either support the chosen policy or require change. In this way, the court retains the public value-creation role the Fiss argues it must play, Fiss, Foreword, supra note 5, at 29, while still relying on civil society and the political branches to come up with the policies to enforce those values.

235 See, e.g., Gov't of the Republic of S. Afr. v Grootboom 2000 (11) BCLR 1169 (CC) at para. 92 (S. Afr.) ("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."); Modder E. Squatters v. Modderkloof Boerdery 2004 (8) BCLR 821 (SCA) at para. 23 (S. Afr.) (discussing the "queue-jumping" problem identified in Grootboom).
enforceable, but only after the political process, not the court, has determined that some benefits should be given to a particular group.236

D. Establishing and Extending Engagement

The success of engagement as a hybrid remedy for implementing socioeconomic rights depends on the willingness of the court and municipalities to apply it consistently over time and across different cases. Consistent application of engagement combined with refinement of the procedure is necessary for several reasons. First, as this Article argues, a critical mass of successful engagements is required to establish the precedents that create the potential for norm development outside of court decisions. Second, success of the process depends to a large degree on the development of structured mechanisms for engagement by government, civil society groups, and citizens. These mechanisms will develop only if the court remains committed to ordering engagement.

There are early indications that the Constitutional Court will continue to use engagement as a remedy, and also that it might extend it beyond eviction cases, even to rights other than housing. A few cases provide encouraging evidence that the court is willing to press for development of the remedy along the lines just described, and thus establish it as an important enforcement mechanism. But the prospect of extension also raises questions over the precise mechanisms necessary to make engagement effective and also the limitations of the remedy.

1. Engagement in Eviction Cases

The first case, Residents of Joe Slovo Community Western Cape v Thubelisha Homes, which the Constitutional Court decided237 as this Article goes to press, looks much like City of Johannesburg. Joe Slovo involved attempts by the City of Cape Town to evict and relocate thousands of residents of an informal community north of Cape Town along the N2 Highway, the major north-south corridor leading into Cape Town.238 The city targeted the residents for eviction and relocation as part of a broad redevelopment plan involving development of new housing to replace the existing informal settlements.239 Large numbers of residents protested the plan by demonstrating in and around the community and by opposing the plan in court.240

238 Id. at para. 25.
239 Id. at paras. 25–26.
240 Id. at para. 34.
The high court issued a decision permitting the relocations to proceed and denying the residents relief shortly after the Constitutional Court issued its opinion in *City of Johannesburg*.\textsuperscript{241} The judge made passing reference to the engagement requirement and, in a parenthetical aside, found that the numerous meetings the City Council held with residents, "along with multiple averments in the court papers of meetings and/or consultations that were held with the residents of Joe Slovo indicate[d] that there was a sufficient amount of engagements . . . regarding this matter."\textsuperscript{242}

The residents appealed directly to the Constitutional Court, which, in a somewhat surprising move, accepted the direct application rather than requiring the residents to first go through the Supreme Court of Appeal.\textsuperscript{243} Several of the same groups that were active in organizing the residents in *City of Johannesburg* submitted amicus curiae briefs to the Constitutional Court, arguing specifically that the City of Cape Town failed to adequately engage with the residents.\textsuperscript{244} The court granted those groups permission to present this issue at oral argument.\textsuperscript{245} During the hearing, Deputy Chief Justice Dikgang Moseneke, in a move reminiscent of *City of Johannesburg's* interim order, suggested the amici were correct by "interven[ing] to suggest that the parties talk to each other and advise the court on a 'just and equitable' solution."\textsuperscript{246}

That attempt to use engagement in a similar fashion as the court had done in *City of Johannesburg*—to resolve the substantive issues without direct court involvement—failed. The court issued its decision on June 10, 2009.\textsuperscript{247} The decision consists of five different decisions and spans 221 pages. All five opinions agree that neither section 26 nor the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act") protects the residents from eviction.\textsuperscript{248} And all five also concur in the final order that directs how the evictions are to take place.\textsuperscript{249} Early reaction has been generally critical of the court's refusal to find in favor of the residents. Sandra Liebenberg describes the

\textsuperscript{241} Thubelisha Homes v Various Occupants Case No. 13189/07, at para. 85 (S. Afr.), available at http://www.constitutionalcourt.org.za/Archimages/12328.PDF.
\textsuperscript{242} Id. at para. 24.
\textsuperscript{243} See Pearlie Joubert, 'It's Our Duty Not to Be Silent,' MAIL & GUARDIAN ONLINE, Aug. 24, 2008, http://www.mg.co.za/article/2008-08-24-its-our-duty-not-to-be-silent ("In a surprise move, the Constitutional Court gave the community permission to challenge the ruling and approach it without going through the Supreme Court of Appeal.").
\textsuperscript{244} See id. (noting that "[t]he community law centre of the University of the Western Cape and the Centre on Housing Rights for Evictions were admitted as friends of the court, in support of the resident's [sic] right to be properly consulted before being evicted").
\textsuperscript{245} See Further Directions by the Chief Justice 15 August 2008, available at http://www.constitutionalcourt.org.za/Archimages/12788.PDF.
\textsuperscript{246} Joubert, supra note 243, at 252.
\textsuperscript{248} Id. at para. 4.
\textsuperscript{249} Id. at para. 5.
result as "the largest judicially sanctioned eviction of a community in South Africa’s post-apartheid period." Pierre de Vos, while acknowledging that “the judgment shows a genuine concern for the plight of the Joe Slovo residents,” criticizes the substantive holdings as failing to expect "the state to act in an honest manner and to cater also for the most vulnerable and poor members of a well-established community whose area is to be upgraded."

It is beyond the scope of this article to deal with the full implications of the court’s latest decision, but several preliminary observations are possible. First, it is evident that the court is committed to using engagement. While it was unsuccessful in convincing the parties to engage before judgment, the court incorporated engagement into the order itself. The unanimous order requires the parties to “engage meaningfully with each other” on the date for relocation of the residents, the timetable for that relocation and “any other relevant matter.” On the one hand, this confirms that the court meant what it said in City of Johannesburg: that engagement truly is a constitutional requirement.

More important, the court has begun to establish more specific guidelines in this case that will begin the broader project of defining the engagement procedure and developing specific precedents that might be applied in future eviction cases. Three points are of particular note. First, the court’s use of engagement as part of a remedial order after a substantive judgment is notable in itself as an extension of engagement to a new procedural situation. Pierre de Vos observes that this, combined with the court’s retention of supervisory jurisdiction in the case, may in fact be the court’s way of forcing the government to engage with the residents over a revised plan and could be a backdoor mechanism for creating the pre-move engagement that never occurred.

Second, in the engagement order, the court assumed much more control over the negotiation agenda than it did in City of Johannesburg or in the Mamba decision discussed below. Among other things, the court ordered the parties to determine “[t]he exact time, manner and conditions” of each relocation and also “the precise temporary residential accommodation” for each resident. This is the kind of ratcheting up of court control that takes advantage of the engagement’s iterative potential and can help make the remedy more effective over time.

Finally, the court has retained supervisory jurisdiction and ordered the parties to report back on the results of engagement on each issue. Like the more specific agenda, this also represents a potentially important innovation in the engagement

252 Joe Slovo CCT 22/08, at para. 7.
253 See Occupiers of 51 Olivia Road v City of Johannesburg 2008 (5) BCLR 475 (CC) at para. 15-16 (S. Afr.).
254 See de Vos, supra note 251.
255 Joe Slovo CCT 22/08 at para. 7.
256 Id.
process by demonstrating to lower courts the possibilities for enhancing court control while still giving parties the power to determine the substantive result.

Despite these procedural innovations, the ultimate result in Joe Slovo, like the Mamba decision discussed next, illustrates that engagement has real limits. It also highlights the risk in relying exclusively on this kind of indirect remedy without ever developing the substantive requirements of section 26 directly. Mark Tushnet (citing Cass Sunstein’s discussion of constitutional development in post-Soviet countries) argues that “[c]oupling strong rights with weak remedies, particularly when those remedies are rarely deployed . . . may be a formula for producing cynicism about the constitution.”257 Both City of Johannesburg and Joe Slovo can be viewed as important opportunities for the court to develop the relatively modest enforcement of section 26 that it began in Grootboom into something more substantial. The success of engagement in City of Johannesburg deflected criticism about the court’s refusal to deal with the substance of section 26. But the critical reaction to the court’s approval of the evictions in Joe Slovo shows that the court must occasionally back up remedies such as engagement with more direct enforcement for those remedies to remain effective.

2. The Limits of Engagement

The second case, Mamba v Minister of Social Development, provides an example of the Constitutional Court extending engagement to a new context, specifically closure of refugee camps by the Gauteng government.258 The court’s actions in the case provide additional evidence of its commitment to this remedy and also illustrate a creative extension of engagement along the lines I have suggested. But the final result—complete refusal by the provincial government to meaningfully engage—demonstrates the limits of the remedy.

The wave of violent xenophobic protests that began in Johannesburg and extended to Durban and Cape Town in May 2008 displaced tens of thousands of people in South Africa.259 The Gauteng provincial government formally declared a state of emergency and used disaster relief funds to establish several temporary camps to provide security and shelter for victims of the violence.260 A range of national and international organizations provided logistical and financial support to the relief effort, and they began working with Gauteng and other provincial and local governments on medium- and long-term solutions for the camp residents.261

257 See TUSHNET, supra note 1, at 252.
258 Mamba v Minister of Soc. Dev. CCT 65/08 (S. Afr.), available at http://www.constitutionalcourt.org.za/Archimages/12830.PDF.
260 See id.
261 See id.
These efforts included repatriation of foreign nationals, asylum in another country, and reintegration in South Africa. 262

The Gauteng government initially set a deadline of July 31, 2008, for closure of the temporary camps, later extending that deadline to August 15, 2008. 263 The Consortium for Refugees and Migrants in South Africa (CoRMSA), an umbrella organization that includes several of the organizations active in the relief efforts, pressed the government to delay the closures until it developed and published a reintegration plan. 264 When the government ignored their request and publicly announced plans to move forward with the closures, CoRMSA and the Wits Law Clinic—housed at the University of Witwatersrand—sued in the Pretoria High Court seeking an injunction to prevent the closures and to require the government to develop and “communicate” a “comprehensive reintegration strategy that adequately protects the rights of all.” 265

On August 12, 2008, the High Court rejected the refugees’ arguments in a two-page order, finding that the government had not violated any rights and had no obligation to continue to provide accommodation. 266 Two days later, the refugees sought direct access to the Constitutional Court, even though the court was in recess. 267 Despite the recess, the court held an emergency hearing on the application the following Monday, August 18, and issued an interim order on August 21.

The order temporarily prohibited complete closure of the camps, subject to certain limitations, including the right to consolidate shelters and to deport illegal immigrants. But it also required, in language nearly identical to the City of Johannesburg engagement order, that the parties, engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in the application in the light of the values of the

264 Press Release, CoRMSA, CoRMSA Calls, supra note 263.
265 Press Release, CoRMSA, Wits Law, supra note 263.
Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters.268

Paragraph 5 of the order specified that the engagement should include not only the refugees but also the United Nations High Commissioner for Refugees, the Jesuit Refugee Services (groups active in supporting the camps), and "[o]ther role players."269 The order also required the refugees, the Gauteng government and the City of Johannesburg to report the results of the engagement by September 12 and set a hearing on the engagement for September 16.270

In spite of pressure from the National Parliament and facilitation offers by the South African Human Rights Commission,271 the Gauteng government adopted a narrow reading of the order and refused to negotiate a reintegration plan with CoRMSA and others. Instead, the provincial government read the August 21 order as requiring merely that it keep the refugees and the groups listed in the order apprised of its continued plans for closing the camps.272

After the September 16 hearing, the Constitutional Court postponed a hearing on the full application until November, but issued another interim order requiring the government to maintain the camps and ordering continued engagement under the guidelines of the August 21 order.273 CoRMSA hailed the court’s decision as an “opportunity for government, together with civil society and the broader humanitarian assistance community” to address the reintegration problem.274

This optimism proved unwarranted. The Gauteng government persisted in its narrow view of the court’s orders and began closing the camps without consulting

269 Id. at para. 5(a)(i)-(v).
270 Id. at paras. 3, 9.
271 See Parliament Wants Camps Open, IOL ONLINE, Aug. 13, 2008, http://www.iol.co.za (enter title of article in the article search box); Mamba, Applicants’ Sept. 2008 Supplementary Affidavit (The Gauteng government “has also been unwilling to become involved in any of the other attempts, including those of Parliament and the South African Human Rights Commission, to facilitate dialogue on the issues contemplated in the court order.”).
272 Mamba, Applicants’ Sept. 2008 Supplementary Affidavit at para. 10 (“The mode of engagement consists of informing the applicants and other stakeholders of what the [local government] and provincial government are entitled to do in terms of the court order as the government authority responsible for the management of the disaster declared in the wake of the xenophobic violence.”).
on a reintegration plan.\textsuperscript{275} On October 16, recognizing that the case was effectively moot, CoRMSA withdrew the application and dismissed the case.\textsuperscript{276}

What does the failed engagement in \textit{Mamba} suggest for the prospects of this remedy more generally? As an initial matter, it highlights the political nature of engagement and its dependence on the willingness of the political branches to take the process seriously. Put differently, the flexibility and enhanced legitimacy offered by engagement's hybridity carries with it the cost of losing the direct court control and specificity of traditional remedies.

The history of more direct court interventions in the United States suggests that this cost may not be as great in practice as it appears in theory, because governments often find ways to resist even very specific court orders. But the ambiguity inherent in engagement arguably provides more opportunity for resistance, and potentially allows it to come at a lesser political cost. The Gauteng government's narrow reading of what engagement required exemplifies this weakness.

By the same token, this "failed" engagement suggests that the remedy must be developed in ways that both encourage the political branches to take it seriously, and also permit stronger court intervention where appropriate. One potentially critical difference between \textit{City of Johannesburg} and \textit{Mamba} was the High Court's initial injunction in \textit{City of Johannesburg}, which forced the city to stop its eviction program. It was much easier for the Constitutional Court to order the parties to negotiate without the threat of imminent eviction, and the city had greater incentive to take the negotiations seriously, having already stopped the program. By contrast, the High Court in \textit{Mamba} permitted the government to proceed with the closures,\textsuperscript{277} and, although the Constitutional Court's August 21 order arguably required the government to maintain the camps, it was sufficiently qualified that the government could adopt the narrow reading that it did, thus eliminating any incentive to engage meaningfully.

These disparate results suggest two things. First, when ordering engagement in the context of an ongoing dispute, courts—at least in the short term—should be more willing to enjoin the challenged activity. Second, if, in the face of failed engagements, courts demonstrate a willingness to order substantive remedies, over

\textsuperscript{275} \textit{See} South African Press Association, \textit{Refugees Turfed out of Their Tents}, IOL ONLINE, October 7, 2008, http://www.int.iol.co.za (enter the title of the article in the article search box). In a sadly ironic parallel, the government used the same "red ant" security groups to evict the refugees as the City of Johannesburg had used in the \textit{City of Johannesburg} evictions. \textit{Id.} ("They didn't tell us they [the red ants] were going to do it," said Jane Senga, originally from Angola.").


\textsuperscript{277} \textit{Mamba} v \textit{Minister of Soc. Dev.} No. 36573/08-rm, at 2 (S. Afr.), available at http://www.constitutionalcourt.org.za/Archimages/12791.PDF.
time that will create an additional incentive for the government to engage seriously or risk losing the political control the remedy creates.

More broadly, the Mamba result reinforces the need to develop engagement as a structured, long-term process, rather than relying on it solely as an ad hoc remedy during an ongoing case. As the court emphasized in City of Johannesburg, engagement will work best where it is built into the policy development process from the start.278

Pushing engagement back into the policy development process raises difficult questions, i.e., at what level and at what point in the process does it make sense to engage? It is relatively easy to imagine extending engagement to other cases, like Mamba or Joe Slovo. And the court’s willingness to order engagement in Mamba demonstrates that engagement is now an integral part of its enforcement arsenal. But Mamba arguably failed because the engagement came too late and with too little direct court involvement.

Assuming that the Mamba order can be read together with City of Johannesburg as requiring provincial governments to build engagement into broader immigration and refugee policy, what would that look like? This is an extremely complicated question to answer in the abstract with the camps now closed and the refugees dispersed. Is the Gauteng government required now to “engage” with the same NGO’s on emergency plans for responses to potential future crises? Must it engage with the refugees who remain in South Africa? Must the reports of those engagements be made public? All of these questions suggest difficult lines must be drawn for engagement to develop into an effective remedy.

It is beyond the scope of this Article to precisely describe where those lines should be drawn. But it is apparent that engagement should be viewed not as a single event limited to a particular point in time, but instead as a process that should be incorporated on several levels. To use the Mamba example, the Gauteng government should build engagement into whatever steps it takes to develop policies both to prevent the xenophobic violence that led to the Mamba camps and to respond to similar situations in the future. Doing so not only makes good policy sense, but also provides the government with a record to which it can point if the policies it ultimately adopts are challenged in the future.

This by itself suggests one (fairly weak) incentive for the government to engage outside of a pending or threatened lawsuit: the ability to create a record to which it can point if and when a challenge arises. But engagement should not be limited to broad consultation in the policy development process, or else it will become nothing more than the kind of good governance standard that the Constitutional Court's critics argue diminishes the force of socioeconomic rights. If similar protests occur in the future, then the government should consider specific engagements when developing its disaster-relief plan and during the windup process that was at issue in Mamba.

278 See Occupiers of 51 Olivia Road v City of Johannesburg 2008 (5) BCLR 475 (CC) at paras. 14–15 (S. Afr.).
There are, of course, limits to how often and to what extent individual governments can incorporate engagement either into the policy development process or at the implementation phase. At some point, the government can legitimately decide that the process is complete—regardless of whether all parties are happy with the result. As discussed above, where there is disagreement, parties are free to seek court relief, and further engagement, if warranted, should be an option for the courts. But it is also conceivable that the court will simply determine that no further engagement is required and, based on the public record, that the policy adopted by the government is a reasonable one. The precise scope of the government's responsibility to engage will never be completely clear, but some clarity in the form of general guidelines and precedents will develop over time. It is less important to establish clear guidelines for when and at what points to engage, than it is to emphasize the need for consistent engagement over time.

V. CONCLUSION

As a hybrid process that operates somewhere between pure ADR and pure adjudication—and, indeed oscillates between those extremes—engagement offers a novel and potentially important tool for enforcing socioeconomic rights. That tool falls somewhat short of the call by the Constitutional Courts' critics for full-fledged judicial interpretation and enforcement, but the same features that make engagement something less than strong court enforcement also enhance its legitimacy.

Michelman's description of the effects of a hypothetical "constitutionally declared right of everyone to the enjoyment of social citizenship" illustrates this point.\(^\text{279}\) Michelman points out that such an ambiguous right "would leave just about every major issue of public policy still to be decided.\(^\text{280}\) But, he argues, such a right could still have important effects on democratic decision making:

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.\(^\text{281}\)

\(^{279}\) See Michelman, supra note 2, at 34.
\(^{280}\) Id.
\(^{281}\) Id.
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.