

'I am large': Sachs, Whitman and democracy

*Stu Woolman**

Do I contradict myself? Very well.
I am large. I contain multitudes.
Walt Whitman *Leaves of grass* (1881-1882)

The nights are very unclear here.
But if the moon is full we know it.
We feel one thing one minute,
something else the next.
Raymond Carver *Romanticism* (1991)

Introduction

July 2007. Cape Town

A man with one arm said:

I am constitutionally incapable of disagreeing with anyone.

Had the man been just any man, the observation, if noticed at all, would have gone unremarked upon.

But the man in this instance was Albie Sachs. The setting: Cape Town, during a conference in honour of Justice Sachs' long-time colleague, Justice Emeritus Laurie Ackermann. The audience: many of Sachs J's brethren on the bench and a house packed with domestic academics and internationally renowned scholars:

I am constitutionally incapable of disagreeing with anyone.

It must go down as one of the most extraordinary self-observations of any jurist anywhere. But why is that? And, more importantly, why would the *aperçu* have passed unnoticed, just one more piece of the flotsam and jetsam of

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academic gatherings? First, it is rare – though not unprecedented – for sitting justices to comment on single cases, let alone a psychological pre-disposition as to how he or she would determine cases generally. Second, whether Justice Sachs meant to amuse his audience is hard to say, for there was nothing droll in his delivery. But everyone in the audience understood immediately that aspect of Justice Sachs's jurisprudence to which he referred: no one on the Constitutional Court has penned as many concurring dissents, concurring concurrences (that agree with the majority and the minority opinions alike), or extended observations about the human condition.¹ About the only forms of written reflection that Justice Sachs *qua* Justice Sachs has not employed would be iambic pentameter, free verse or song. Third, the majority of the audience would have 'read' that remark as affirmation of what they already *supposedly* knew: that Justice Sachs's oeuvre lacked discipline and that he was often off on a frolic of his own.

This article offers an alternative reading. This reading does not deny, entirely, the conventional wisdom – but rather amplifies our current understanding and reverses its spin. That alternative reading identifies Justice Sachs as a poet-democrat in the tradition of Walt Whitman. Here we have a justice who could conceivably write, as Whitman did: 'I speak the pass-word primeval, I give the sign of democracy'. Or: 'Every atom belonging to me as good belongs to you'.

Again: My strong misprision of Sachs's opinions is not meant to recast his judgments so as to give them some kind of Dworkinian coherence that they simply do not possess.² What I hope to achieve instead is a twofold appreciation for (a) Justice Sachs as an 'outspoken democrat on the bench' relatively unmoved by the injunction that judges should not be engaged in the hurly-burly of politics; and (b) Justice Sachs as a writer, who possesses a 'voice' that rises above the quotidian and, consequently, has a vote – even if it be but one of eleven – that demands to be heard.

¹According to the annual statistics kept by the *South African Journal on Human Rights (SAJHR)*, over the Constitutional Court's first 15 years, Sachs J had the lowest agreement rate.

²As a poet-democrat, Justice Sachs himself says that he has little patience for grand theorising that attempts to pull together any given area of the Court's jurisprudence. At the same 'Dignity and the Jurisprudence of Justice Laurie Ackermann' Conference at which he revealed his Whitmanian sensibility, he cavalierly remarked that while he enjoyed the avuncular style of fellow panelist Judge Dennis Davis, he had little time or patience for the analytically-nuanced and rigorous approach taken by fellow panelist and legal philosopher Patrick Lenta. Professor Lenta had, just prior to Sachs's rather rude dismissal, offered an extremely careful point-by-point dissection of the theoretical arguments offered by the Court as justifications for declaring the death penalty unconstitutional in *Makwanyane*. Although the point of this paper is to demonstrate that Justice Sachs has developed a coherent line of thought over his 15 years on the Court, such remarks do reveal an unfortunate disdain for the well-worked-out good faith reconstructions (and critiques) raised by academics. His particularly cutting comment runs counter to the generous spirit of Justice Sachs's regular invocation of the words of 'one of [his] favorite US Supreme Court Judges ... Robert Jackson who famously, and quite *self-ironically*, said: 'We at the Supreme Court don't have the last word because we are infallible. We are infallible because we have the last word'. Sachs 'Concluding remarks on the panel discussion' (2005) 8/1 *Economic and Social Rights Review* 17 at 17.

The antinomies of democracy: individualism, pluralism and solidarity

In the pages that follow, this article traces Sachs's and Whitman's respective efforts to hold the antinomies of democracy – 'individualism', 'pluralism', and 'solidarity' – together. However, my analysis can only be compelling if the manner in which I deploy 'individualism', 'pluralism', and 'solidarity' retains at least a patina of plausibility. This article employs definitions from relatively neutral, but well-established secondary sources, in order to avert the charge that I have defined the terms in order to ensure that my analysis appears unassailable.

Individualism (and classically liberal democracy)

Individualism and the political form that protects individualism – a classically liberal state – can be characterised in a number of different, but roughly similar ways. Immanuel Kant writes in *Critique of Pure Reason*, that '[a classical liberal] constitution ... achieves the greatest possible freedom (for individuals) by framing the laws in such a way that the freedom of each can co-exist with the freedom of all'.³ Individualism, in this 19th century account, is both '[a] moral stance (and) political philosophy ... that stresses (the need for) ... self-reliance (in a *democratic* society). Individualists promote the exercise of one's goals and desires, while opposing most external interference with one's choices, whether by the state, society, groups, institutions or other individuals. In political philosophy, the individualist theory of (*democratic*) government holds that the state should protect the liberty of individuals to act as they wish as long as they do not infringe upon the liberties of others'.⁴

Individualism and classical liberalism remain essential features of modern constitutional democratic thought. Nancy Rosenblum and Robert Post place the following gloss on classical liberalism and its commitment to individual freedom: '[A]t the heart of classical liberalism is a brief set of formal prescriptions and a small number of strong limitations on the exercise of democratic power'.⁵ These prescriptions and brakes on state power, in short, '[n]urture voluntary associations. Limit the size, and more importantly, the scope of government. So long as the state provides a basic rule of law that steers people away from destructive or parasitic ways of life and in the direction of productive ways of life, society runs itself. If you want people to flourish, let them run their own lives'.⁶

Friedrich Hayek, classical liberalism's strongest champion in the 20th century, writes that the 'basic clause of ... a (classically liberal) constitution would have to state that in normal times, and apart from certain clearly defined emergency

³Kant *Critique of Pure Reason* II, i. 1.

⁴http://www.answers.com/topic/individualism#Political_individualism (accessed 2009-09-25).

⁵Rosenblum and Post *Civil society and government* (2001) 26.

⁶*Ibid.*

situations, men could be restrained from doing what they wished, or coerced to do particular things, *only* in accordance with the recognised rules of just conduct designed to define and protect the individual domain of each'.⁷ Michael Sandel, no fan of classical liberalism and its notion that individuals 'own themselves' sets out in crisp fashion classical liberalism's three basic tenets: '1 No paternalism. ... The state has no right to dictate what risks [individuals] may take with their bodies and lives. 2 No morals legislation. ... (Classical liberals) oppose using the coercive force of law to promote notions of virtue or to express the moral convictions of the majority. ... Majorities in some (democracies) may disapprove of homosexuality, but that does not justify laws that deprive gay men and lesbians of the right to choose their sexual partners for themselves. 3 No redistribution of income or wealth. (Although classical liberal democracies require taxation for the provision of common goods such as personal security for members of the commonweal, courts that ensure civil and criminal justice, national defense and such shared institutions as legislatures, the executive and bureaucratic offices of state, in its strictest form it does not) require some people to help others. ... [and the] state has no more right to force affluent taxpayers to support social programmes for the poor than a benevolent thief has the right to steal money from a rich person and give it to the homeless.'⁸ Despite their general resistance to redistribution, classical liberals recognise that the welfare of all individuals – rich and poor alike - requires a stable and secure society and thus rests on the entitlement to a 'minimum core' of goods required for any individual to flourish.⁹ Without such stability, individuals will not be able to pursue their own (unique) conception of the good.

Pluralism (and constitutional welfare state democracy)

Democratic pluralism can be defined as follows: 'The political theory of pluralism holds that political power in a (*democratic*) society does not lie with the electorate, nor with a small concentrated elite',¹⁰ but assumes that such power is and ought to be distributed amongst a wide array of associations, bonding networks, bridging networks and social formations. These associations or social formations may be identified by ascriptive characteristics – race, sex, birth, disability – that cannot be chosen, or descriptive characteristics that reflect the nature of ostensibly 'voluntary' associations:

Nuclear families, extended families, friends, acquaintances, burial societies, fellow workers, neighbours, citizens, civics, lovers, sexual partners, religions, sects, book clubs, dinner guests, bowling clubs, fraternities, political parties, political action groups, stokvels, political lobbies, trade unions, corporations, non-governmental organizations, charities, guilds, professional regulatory bodies, schools, universities,

⁷ Hayek *Law, legislation and liberty: The political order of a free people* (1979) 109.

⁸ Sandel *Justice: What is the right thing to do?* (2009) 59-61. Sandel somewhat over-eggs the pudding.

⁹ Hayek *The constitution of liberty* (1961); Nozick *Anarchy, state and utopia* (1974).

¹⁰ <http://www.answers.com/topic/pluralism-political-theory> (accessed 2009-09-25).

committees, museums, park boards, economic trade associations, parent-teacher associations, school boards, tenant associations, co-op boards, landless peoples movements, co-operatives, internet forums, foundations, trusts.¹¹

Two features of pluralism in a modern welfare state and a constitutional democracy require emphasis because they take us – and poet democrats such as Justice Sachs – beyond the stifling confines of the ‘political’ found in classical liberalism. First, the modern welfare state does not adhere to individualism’s thin conception of the right and the just. As Arthur Schlesinger Jr writes, the modern welfare state’s commitment to political pluralism requires ‘increasing government intervention in order to assure more equal opportunities’.¹² In this renewed liberal tradition, faithful to the goal rather than to the dogma, modern liberal democrats altered their view of the state so that our notion of the just required a government that had the express obligation ‘to maintain high levels of employment in the economy, to supervise standards of life and labor, to regulate the methods of business competition, and to establish comprehensive patterns of social security’.¹³ Second, this thicker conception of the right is married to the recognition that most constitutional democracies contain and sustain multiple, or heterogeneous, conceptions of the good and that it is these multiple conceptions of the good that give meaning to the lives of individuals and groups. As Michael Walzer convincingly argues, there is a ‘radical givenness to our associational life’.¹⁴ What he means, in short, is that most of the associations that make up our associational life are involuntary associations. We don’t choose our family. We generally don’t choose our race or religion or ethnicity or nationality or class or citizenship. Moreover, even when we appear to have the space to exercise choice, we rarely create the associations available to us. The vast majority of our associations are already there, culturally determined entities that pre-date our existence or, at the very least, our recognition of the need for them. Finally, even when we overcome inertia and do create some new association (and let me not be understood to underestimate the value of such overcoming), the very structure and style of the association is almost invariably based upon an existing rubric. Pluralists such as Walzer remind us of our tendency (a) to overemphasise dramatically the actual space for individual autonomy; and (b) to ignore the patently obvious contingency of our ‘individual’ conceptions of the good upon widely shared, non-reflective, social endowments.

Solidarity (or strong egalitarian democracy)

The solidarity-based democratic state possesses two important dimensions: political and economic. However, the two dimensions are linked, notes Jean-Louis

¹¹See Woolman ‘Freedom of association’ in Woolman and Bishop (eds) *Constitutional law of South Africa* (2003) (2nd ed) ch 44.

¹²Schlesinger Jr ‘Liberalism in America: A note for Europeans’ in *The politics of hope* (1962).

¹³*Ibid.*

¹⁴Walzer ‘On involuntary association’ in Gutmann (ed) *Freedom of association* (1998) 64, 67.

Laville, by a set of activities that contribute to the democratisation of the economy on the basis of civic commitments.¹⁵ Laville writes:

The economic dimension first insists on the prevalence of the reciprocal impulse in the emergence of these practices. The latter are not based on a contractual agreement motivated by profit; they rather aim at an inter-subjective experience. Their consolidation is then [sought] through mixing resources, with redistributive public resources and market resources relaying reciprocal resources. The challenge consists in mixing resources in a way that preserves the rationale behind the project, without transforming it into a mere tool.

The political dimension is rooted in this reciprocity and the construction of public spaces allowing a debate among the stakeholders on the goals pursued and the means implemented hereto. The challenge, in this case, lies in maintaining the possibility for the existence of autonomous public spaces, distinct from institutionalised public spaces regulated by authorities.

The two dimensions are intertwined insofar as the mobilisation of the forms of reciprocity used in a voluntary way by free and equal citizens allows them to gain access to the public space by constructing the conditions for their economic independence. But the capacity to generate social changes depends on the link established between, on the one hand, exercising this positive freedom of association and co-operation and, on the other hand, a public action which is the only one able to promulgate the rights and to define the norms of an inequality-reducing redistribution. The effects of the solidarity-based economy are thus linked to the combination of two dimensions of democratic solidarity, namely egalitarian reciprocity and public redistribution.¹⁶

Benjamin Barber articulates a similarly strong conception of democratic politics, but, as an American, is able to locate that solidarity in over two centuries of largely uninterrupted, democratic commitment to a constitutional order.¹⁷ Such a move – the ability of a constitutional order to accommodate solidarity and strong democracy – is essential if we are to make sense of Justice Sachs's desire to

¹⁵See also Laville *Action Publique et Economie Solidaire* (2005), available at <http://www.emes.net/index.php?id=236> (accessed 2009-09-25).

¹⁶*Ibid.*

¹⁷I would note that the genuine constitutional crises in the United States – the first, in the 1780s, when the Confederation failed and gave way to the polity reflected in the US Constitution of 1789; the second, when the US Supreme Court itself was suspended, briefly in the late 1790s; the third, when the South attempted (and failed) to secede from the Union in the 1860s through the Civil War; the fourth, when the great depression required seismic shifts in the politics of the country and the constitutional doctrine of the United States Supreme Court – actually provided opportunities for the democratic constituency of the country to rethink or to reaffirm existing commitments. This observation is not new. See, eg, Ackermann *We, the people* (1991). However, I am pressing the extent to which crises or conventions create new opportunities for democratic solidarity to reveal itself in the basic law of a nation. As I note above, South Africa has had only two such moments – the peace negotiations that led to a new majoritarian democracy and the interim Constitution in 1993/1994 and the deliberations of the Constitutional Assembly from 1994 to 1996 that led to the final Constitution in 1997.

locate strong democracy and solidarity in the very specific terms of the South African Constitution. Barber writes, in a voice that echoes Walzer and extends the latter's insights on pluralism into democratic theory, that:

Democracy understood as self-government in a social setting is not a terminus for individually held rights and values; it is their starting place. Autonomy is not the condition of democracy, democracy is the condition of autonomy. Without participating in the common life that denies them and in the decision-making that shapes their social habitat, women and men cannot become individuals. Freedom, justice, equality and autonomy are all products of common thinking and common living; democracy creates them.¹⁸

And as for any difficulties that might face the framing of constitutional rights in terms of democratic solidarity, Barber responds with equal vigour: 'The rights we often affect to hurl impudently into the face of [our democratic] government are rights we enjoy only by virtue of government. The private sphere we guard so jealously from the encroachments of the public sector exists entirely by dint of law, which is the public sector's most significant creation.'¹⁹ Barber turns the ostensible 'individualistic, liberal, atomistic' bases for constitutional democracy on its head. Instead, the Constitution we praise so highly – in South Africa – exists only because virtually all South Africans (or at least their representatives) gave the interim Constitution their imprimatur of approval. If 87% of the freely-elected Constitutional Assembly endorsed the final Constitution – and all the members of that assembly (100%) subsequently participated in the institutions it created – then it seems fair to say, as Barber argues, that all of our constitutional rights flow from a democratically-determined social compact endorsed by (most) South Africans and that they retain their force only by virtue of the democracy – and the solidarity of a citizenry – that supports them.²⁰

Whitman and Sachs on democracy: Individualism, pluralism and solidarity

If a biographer wanted to do so, she could trace the similarities between Whitman and Sachs: their modest origins, their early vision and embrace of something greater than themselves, their resistance to tyranny (Whitman as an abolitionist, Sachs as a freedom fighter), their use of the pen – not the sword – to speak basic

¹⁸Barber *Strong democracy: Participatory politics for a new age* (1984) xv.

¹⁹*Ibid.*

²⁰Whether, as an empirical matter, all (or even a majority of) South Africans would endorse every provision of the final Constitution is another matter. It seems fair to say that they would not. However, the point about democratic solidarity being prior to constitutional supremacy does not rest on majority support for every provision. The priority of democratic solidarity simply points to the priority of the formal democratic agreement between political parties (and their members) about the substantive content of the constitution itself.

truths about the human condition and their embrace of a complex form of democracy that holds the anti themselves.

Beyond contradiction: Whitman and democracy

It is, however, my task to convince you that the commonplace readings of Whitman and Sachs as 'hopelessly confused writers' are readings born of laziness and an approach to literary and constitutional criticism that should be assiduously avoided.²¹ Steven Mack recognises Whitman's complex – manifold – conceptions of democracy as the leitmotif for *Leaves of Grass* in its many, and continually revised, iterations.²² Mack writes:

One of the consequences of this shift [away from a superficial reading] is that when Whitman's early and late works are viewed together, the word 'democracy' winds up naming a number of different and even contradictory ideas. It is all material and at the same time all spiritual. Democracy is the warrant nature gives for human freedom as well as the protocol it establishes for disciplined living. It both describes the universe as it actually is and prescribes the process that can make it so. Democracy is the very way we imagine our relations to one another and to the material and spiritual world in which we live. It is not a single aspect of a larger organic vision: it is the organism itself and the quality of relations that binds it together. But in a sense, the two lines of argumentation converge on this point, for in the final analysis, the substance of Whitman's vision and the processes by which it develops are inextricable. I argue that the vision that finally crystallizes by the time he writes *Democratic Vistas* (1871) is more complex and dynamic than its original counterpart because it is grounded in a necessity to reconcile the tensions it incorporates. If on one level democracy implies antithetical ideas (say, an individual's complete freedom to think and decide for oneself and the right of the community to bind that individual to majoritarian will), then on a deeper level democracy must mean the process by which its many contradictions are adjudicated.²³

²¹Here I gladly follow the path of aggressive learning reflected in the work of Frank Michelman and articulated as a method of legal/textual interpretation in Michelman 'The uses of interpretive charity' (2009) 1 *Constitutional Court Review* 1.

²²Whitman published six iterations of *Leaves of grass* from 1855 to 1891. Each iteration builds upon the last and demonstrates a development in his thought about democracy along the lines suggested here. It is for that reason that I use the penultimate version of Whitman's *Leaves of grass* (1882). For those readers doubtful of the contention that Whitman – as a poet – should be taken seriously as a theoriser of American democracy, noble laureate and poet Czeslow Milosz (quoted as this article went to print) wrote: 'Whitmanizing is not only a matter of liberating us from meter and rhyme, it is also a rapturous movement toward happiness, a *democratic pledge of breaking down class divisions*, expressed in poetry'. Bantry 'The real critter: Walt Whitman' (2010) 152/11 *The New York Review of Books* (June 14-July 14) 18.

²³Mack *The pragmatic Whitman: Reimagining American democracy* (2002), available at <http://www.stephenmack.com>, or <http://www.books.google.co.za> (accessed 2009-09-25). Elsewhere Mack writes: 'The history of hostile responses to Whitman tracks, in many ways, the history of our own moral, political, and cultural failures – failure to take full advantage of a new and liberating literary language, failure to give an honest accounting of our own sexuality, failure to recognize the humanity of gay and lesbian people or to appreciate the moral significance of that humanity. Likewise, the history of critical rereadings

And so we hear the following in one of Whitman's earliest contributions to *Leaves of grass*, 'One's-Self I Sing'

ONE'S-SELF I sing, a simple separate person,
 Yet utter the word Democratic, the word En-Masse.
 Of physiology from top to toe I sing,
 Not physiognomy alone nor brain alone is worthy for the Muse, I say
 the Form complete is worthier far,
 The Female equally with the Male I sing.
 Of Life immense in passion, pulse, and power,
 Cheerful, for freest action form'd under the laws divine,
 The Modern Man I sing.²⁴

Democracy that sounds of Thoreau and Emerson, millions of individual experiments in life – democracy being the political form in which men and women alike can pursue a life of 'passion, pulse and power'. Indeed, a similarly Thoreauian view of the individual citizen's obligation in a democracy – to herself or himself, and thus to others – can be found in 'To the States':

To the States or any one of them, or any city of the States,
 Resist much, obey little,
 Once unquestioning obedience, once fully enslaved,
 Once fully enslaved, no nation, state, city of this earth, ever
 afterward resumes its liberty.²⁵

of Whitman is in part the history of our own moral maturation. ... In his sensitive reading of Whitman's depiction of democratic individualism, for example, the political philosopher George Kateb makes a point of distancing himself – and even Whitman – from the poet's nationalism: 'For me', he writes, 'Whitman's greatness does not lie in his pursuit of an image of democratic nationality Nationhood is too close to a conception of group identity: a shared pride in tribal attributes rather than in adherence to a distinctive and principled human self-conceptualization that may one day be available to persons everywhere in the world', Kateb 'Walt Whitman and the culture of democracy' (1990) 18 *Political Theory* 545 at 547. Richard Rorty also argues for Whitman's form of nationalism in *Achieving our country: Leftist thought in twentieth-century America* (1998). Rorty acknowledges that excessive and uncritical patriotism may lead to 'bellicosity' or, more dangerous, a taste for 'imperialism'; nevertheless, he asserts that national pride plays the same role that self-respect plays for individuals. 'It is', Rorty writes, 'a necessary condition for self-improvement ... Emotional involvement with one's country – feelings of intense shame or of glowing pride aroused by various parts of its history, and by various present-day national policies – is necessary if political deliberation is to be imaginative and productive' *Achieving our country* (14). For Rorty, notes Mack, 'American patriotism means identifying oneself emotionally and intellectually with classic American democratic values and ideals. Loyalty to America, in this sense, is loyalty to a utopian democratic creed – a "civic religion", as writers such as William James, Herbert Croly, John Dewey, and, of course, Walt Whitman viewed it. In practice, such patriotism means permitting oneself genuine pride in those moments in history when Americans were able to translate their ideals into successful public policy. But even more important, it means laying legitimate claim to those democratic values and ideals – both as a resource for imagining new policy goals and as a powerful rhetorical tool to aid in achieving them' (n 23).

²⁴Whitman *Leaves of grass* (1881-1882) 9.

²⁵*Id* 15.

But Whitman's radical and somewhat romantic individualism yields ultimately to pluralism and a basic, visceral connection to his peers and the polity. In one of his most famous 'sonnets', 'Song of Myself', he draws individuals together, both in terms of the narratives that frame their individual lives and in the very basic stuff that forms us all:

I CELEBRATE myself, and sing myself,
And what I assume you shall assume,
For every atom belonging to me as good as belongs to you.²⁶

No self-abnegation for Whitman: indeed, the equality that roots his vision of democracy is borne of a set of passions we all share, and all desire: it is visceral, unapologetically sexual, so sexual that Whitman's craving for contact is for men and women alike. His heterosexual, homosexual, bisexual yearning is remarkably on full display in one of his most famous poems, 'I Sing the Body Electric':

I SING the body electric,
The armies of those I love engirth me and I engirth them,
They will not let me off till I go with them, respond to them,
And disconcert them, and charge them full with the charge of the soul
The love of the body of man or woman balks account, the body itself balks account,
That of the male is perfect, and that of the female is perfect.
The expression of the face balks account,
But the expression of a well-made man appears not only in his face,
It is in his limbs and joints also, it is curiously in the joints of his hips and wrists,
It is in his walk, the carriage of his neck, the flex of his waist and knees, dress does not hide him,
The strong sweet quality he has strikes through the cotton and broadcloth,
To see him pass conveys as much as the best poem, perhaps more,
You linger to see his back, and the back of his neck and shoulder-side.²⁷

At a time when homosexuality was a love that dare not speak its name, Whitman spoke it of all the time. It is truly 'the end' of sexuality when it comes with fetters. Whitman will have none of it. Here he is, in 'To a Common Prostitute', talking frankly about sex in a manner far ahead of even our own Constitutional Court:²⁸

²⁶*Id* 29.

²⁷*Id* 81.

²⁸As I have argued at length elsewhere, *S v Jordan* 2002 6 SA 642 (CC) remains one of the Court's handful of poorly reasoned judgments with suboptimal outcomes. See Woolman 'Freedom of association' in Woolman and Bishop (eds) *Constitutional law of South Africa* (2006) (2nd ed) ch 36; Woolman 'Dignity' in Woolman and Bishop (eds) *Constitutional law of South Africa* (2006) (2nd ed) ch 3. It must be noted here that Justices Sachs and O'Regan do author a game, if still metaphysically and politically *outré*, dissent. Understandably even these justices cannot speak of a 'slow rude muscle' – though one wishes that they might speak – as honestly – about the human condition, as Whitman does in 'A woman waits for me' (*Leaves of grass* (n 24) 88):

BE composed – be at ease with me – I am Walt Whitman, liberal and lusty as Nature,
 Not till the sun excludes you do I exclude you,
 My girl I appoint with you an appointment, and I charge you that you
 make preparation to be worthy to meet me,
 And I charge you that you be patient and perfect till I come.²⁹

'Kosmos' marks Whitman's ability to connect his sensual/sexual individualism to political pluralism. What he does, in a Walzer or Sen-like fashion, is to link the variety of social (and natural) endowments that 'make us' (and give our lives meaning) with the recognition that not only is every polity heterogeneous, but that the very individual citizens who make up any given polity are made up of conflicting 'constitutive attachments'. Indeed, Whitman directly challenges those readers who might be inclined toward a comprehensive vision of the 'good' that suppresses difference within a community and that rejects difference beyond a community's boundaries:

WHO includes diversity and is Nature,
 Who is the amplitude of the earth, and the coarseness and sexuality
 of the earth, and the great charity of the earth, and the equilibrium also,
 ... Who contains believers and disbelievers, who is the most majestic lover,
 Who holds duly his or her triune proportion of realism, spiritualism, and of the
 aesthetic or intellectual,
 Who having consider'd the body finds all its organs and parts good,
 Who, out of the theory of the earth and of his or her body understands by subtle
 analogies all other theories,
 The theory of a city, a poem, and of the large politics of these States; ...
 Who, constructing the house of himself or herself, not for a day but for all time,
 sees races, eras, dates, generations,
 The past, the future, dwelling there, like space, inseparable together.³⁰

The complex account of the self above, this radical heterogeneity of person and polity, the recognition in the last lines, about how time (human time, lived experience) folds back on itself is again, far ahead of its time.

Sex, song and work: in all their various forms come together in an ode to America's solidarity – a solidarity rooted in everyone's equal desire to do, to be,

A WOMAN waits for me, she contains all, nothing is lacking ...
 Without shame the woman I like knows and avows hers.
 I pour the stuff to start sons and daughters fit for these States, I
 press with slow rude muscle,
 I brace myself effectually, I listen to no entreaties,
 I dare not withdraw till I deposit what has so long accumulated within me.
 ... I shall demand perfect men and women out of my love-spending,
 I shall expect them to interpenetrate with others, as I and you
 inter-penetrate now,
 I shall count on the fruits of the gushing showers of them, as I
 count on the fruits of the gushing showers I give now,
 I shall look for loving crops from the birth, life, death,
 immortality, I plant so lovingly now.

²⁹(N 24) 299.

³⁰*Id* 303.

'to sing the body electric'. And so, again a century before Drucilla Cornell can talk about political freedom and political solidarity in terms of sexuate difference,³¹ Whitman again pips our most radical critical contemporary thinkers to the post in 'I Hear America singing':

I HEAR America singing,
... each singing what belongs to him or her and to none else,
the day what belongs to the day,
at night the party of young fellows, robust, friendly,
*singing with open mouths their strong melodious songs.*³²

Space and time neither permit further extended exposition on Whitman nor commentary on his commitment to radical individualism, pluralism and solidarity. But for those amongst you who might think that his politics and his poetry have nothing to say to jurists or legal academics, in South Africa or elsewhere, consider this late poem, 'Thought,' in one of the last iterations of *Leaves of grass*:

OF JUSTICE – as If could be anything but the same ample law,
expounded by natural judges and saviors,
As if it might be this thing or that thing, according to decisions.³³

The 'ample law' reflects his commitment to radical individualism, pluralism and solidarity. His commitment is most assuredly not to 'natural law' as it is generally understood. The conservative underpinnings of natural law jurisprudence share little with the crude, rude muscles that animate Whitman's democratic theory. Recognition of the '*natural*' and '*ample law*', and not arid 'decisions' handed down by a judge – or 11 of our best and brightest – are what justice requires.

Has the case been made for Whitman's radical democracy and his commitment to individualism, pluralism and solidarity? Only the reader's own extended engagement with *Leaves of grass* could convince her of this proposition. In any event, the primary purpose of this explication of Whitman's work is to show that a similar set of commitments are apparent in the work of another poet-democrat, Justice Albie Sachs.

Beyond contradiction: Sachs and democracy

Can one read Albie Sachs's entire oeuvre and not come away thinking that he would have loved, as a judge, to speak in this Whitmanian vernacular: to put the obvious so plainly, and without the constraints of his office (however much holding such office might please him.) Indeed, his impatience with the arid strictures of the law and its analytical demands may be at the root of his regular concurring dissents that, being

³¹Cornell *The imaginary domain* (1995); Cornell *At the heart of freedom* (1998); Cornell *Justice cause: Freedom, identity and rights*; Cornell *Moral images of freedom* (2008). See also Van Marle 'No last word: Reflections on the imaginary domain, dignity and intrinsic worth' (2002) *Stell LR* 299.

³²*Leaves of grass* (1881-1882) 17 (emphasis added).

³³*Id* 218.

the pluralist that he is, makes him 'constitutionally incapable of disagreeing with anyone'. It may well be – and only Justice Sachs can say – that what he really means is that he recognises the 'truth' of the experience of the many individuals who live in South Africa, that he revels in this country's pluralism, and that he believes that only by recognising the pluralism of South Africa's politics can we achieve the kind of solidarity that will permit this heterogeneous country of ours to survive.

Sachs starts slowly, and in a relatively easy judgment, marks out the 'equal concern and equal respect' to which we are all, as individuals, entitled as sexual beings. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Sachs J – along with a majority of the Court – secures the right of homosexuals to engage in consensual sodomy.³⁴ He writes:

Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution ... [and] the right to be different in the open and democratic society contemplated by the Constitution. ... It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? ... In the case of male homosexuality, however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. If proof were necessary, it is established by the fact that consensual anal penetration of a female is not criminalised. Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony. The effect is that all homosexual desire is tainted, and the whole gay and lesbian community is marked with deviance and perversity ... People are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself.³⁵

But Sachs, like Whitman before him, is not simply interested in formal equality for all sorts of discrete and insular minorities. Sachs believes 'that the emancipatory elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind'.³⁶ Like Whitman before him, Sachs places sexual difference and sexual desire – and its radical heterogeneity of form – at the heart of what it means to be human. He challenges the majority of South Africans to acknowledge that the acceptance of their own inevitably idiosyncratic sexuality (and we are all idiosyncratic in and outside the bedroom) in the hope that it will connect them more powerfully to the idiosyncratic sexuality of others and thereby forge a democratic solidarity through

³⁴1999 1 SA 6 (CC).

³⁵*Id* paras 107-109.

³⁶*Id* para 109.

the recognition that we are each entitled to 'equal space' to be ourselves and to explore – with the support of others – that which makes each of us unique.

Sex, once again, provides the basis for Sachs's investigation of individualism, pluralism and solidarity in *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)*.³⁷ In their dissent, Sachs J and O'Regan J find that that the criminalisation of prostitution discriminates against women. They write:

We see no reason why the plover of sex for money should be treated as more blameworthy than the client. If anything, the fact that the male customers will generally come from a class that is more economically powerful might suggest the reverse. To suggest ... that women may be targeted for prosecution because they are merchants of sex and not patrons is to turn the real-life sociological situation upside-down. The evidence suggests that many women turn to prostitution because of dire financial need and that they use their earnings to support their families and pay for their children's food and education. As we have stated, we do not regard this as an excuse or a justification. However, to suggest that male patrons who are able to use their economic means to obtain sexual gratification are somehow the less blameworthy partners in the eyes of the criminal law appears to us to be markedly unfair.³⁸

Not exactly an 'Ode to a common prostitute' – but, at the very least, Sachs J recognises that the lived experience of prostitutes is subject to the same constraints and the same demands we all face – survival, support of the family and the need to feed and to educate our children. Prostitutes are, in short, just like us: and demand equal concern and equal respect for how they choose to use their bodies to earn a living and equal concern and equal respect for how they make use of their 'slow, rude muscles'.³⁹

Again and again, Sachs returns, in dissenting and concurring judgments, to sex, to intimate relationships and sexual practices, generally, as markers of difference and as true tests of South Africa's commitment to individualism, pluralism and solidarity. In *Daniels v Campbell NO*, he places customary Muslim marriages on an equal footing with their legally sanctioned civil counterparts.⁴⁰ In *Volks*, Sachs rejects the majority's finding that the appellant, 'having chosen cohabitation rather than marriage ... must bear the consequences' and thus could not avail herself of the benefits of the Maintenance of Surviving Spouses Act:

³⁷(N 28).

³⁸*Id* para 68.

³⁹Well, that's not entirely accurate. Sachs and O'Regan JJ fall into an 'autonomy' trap regarding the sexual commodification of the body – a trap in which they find that prostitutes are not entitled to the same respect for the commodification of the body – through work – to which constitutional court judges are entitled when they commodify their own bodies – through work. See Woolman 'Dignity' in Woolman, and Bishop (eds) *Constitutional law of South Africa* (2006) (2nd ed) ch 36. That Sachs and O'Regan JJ fail to acknowledge that the radical givenness of the world determines the actions for prostitutes and Constitutional Court judges themselves is a metaphysical error with genuinely deleterious consequences – for the prostitutes and our constitutional jurisprudence. See Woolman *The selfless constitution: Experimentation as the foundations of South Africa's basic law* (forthcoming 2011).

⁴⁰*Daniels v Campbell NO* 2004 5 SA 331 (CC).

Respecting autonomy, he writes, means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not ... penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.⁴¹

As attractive as it may be to try and squeeze all of Sachs's important contributions to a theory of democratic solidarity from his judgments on sex and intimate associations – life and law rarely yield to such descriptive and prescriptive simplicity. Sachs's judgments are no different. For it is in *Prince* that Justice Sachs first articulates his notion of a 'right to be different'.⁴² In demanding that his colleagues, the State and his fellow citizens 'walk the extra mile' when it comes to discrete and insular minorities like the 10,000 Rastafarians that inhabit South Africa, Sachs writes:

Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs and practices considered alien and threatening. At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct.⁴³

So while the laws criminalising dagga or marijuana use do not have as their aim the destruction of the Rastafarian way of life, that result is the ultimate consequence of South Africa's laws on narcotics trafficking and drug possession. And Sachs will have none of it. Indeed, he comes close to accusing those who view dagga use as dangerous – as opposed to the legal use (and abuse) of alcohol – as in the grip of a blinkered hypocrisy. He writes:

In conclusion I wish to say that this case illustrates why the principle of reasonable accommodation is so important. The appellant has shown himself to be a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs. An inflexible application of the law that compels him to choose between his conscience and his career threatens to impoverish not only himself but all of South Africa and to dilute its burgeoning vision of an open democracy. Given our dictatorial

⁴¹*Volks v Robinson* 2005 5 BCLR 466 (CC).

⁴²*Prince v Law Society* 2002 2 SA 794 (CC) ('*Prince*') Sachs, in addition to sexuality and religion, also discusses the politics that rarely speaks its name: 'class'. See *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 184 ('Given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not loomed as large in this country as it has in other parts of the industrialised world ... And as long as government and the Legislature continue to be preoccupied with major questions of social transformation, and only now begin to tackle consumer protection in a comprehensive way, the common law, under the impulse of the values of our new constitutional order, is called upon to shoulder the burden of grappling in its own quiet and incremental manner with appropriate legal regulation to ensure basic equity in the daily dealings of ordinary people.')

⁴³*Prince* (n 42) para 168.

past in which those in power sought incessantly to command the behaviour, beliefs and taste of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order. Some problems might by their very nature contain intractable elements. Thus, no amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest. Yet faith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters. The central issue in this case has accordingly not been whether or not we approve or disapprove of the use of dagga, or whether we are believers or non-believers, or followers of this particular denomination or that. Indeed, in the present case the clarion call of tolerance could resonate with particular force for those of us who may in fact be quite puritan about the use of dagga and who, though respectful of all faiths, might not be adherents of any religion at all, let alone sympathetic to the tenets of Rastafari belief and practice. The call echoes for all who see reasonable accommodation of difference not simply as a matter of astute jurisprudential technique which facilitates settlement of disputes, but as a question of principle central to the whole constitutional enterprise. In *Christian Education* this Court held that a number of provisions in the Constitution affirmed ‘the right of people to be who they [were] without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the “right to be different”. In each case, space [had] been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledged the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.’ The [*Christian Education*] Court went on to say: ‘It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity’. The above passage is directly relevant to the situation in which the Rastafari find themselves. The test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is ‘unusual, bizarre or even threatening (emphasis added).⁴⁴

The majority’s suppression of cultural and religious differences harms not only the individuals and the communities concerned, but society as a whole. Sachs J continues:

[F]aith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a

⁴⁴*Id* paras 170-172.

constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.⁴⁵

For Sachs J, freedom of belief and the freedom to express such belief are fundamental not only to the freedom and the dignity of the believers concerned, but also to the diversity and the openness that are the lifeblood of a democracy. Democracy, Sachs J seems to be saying, presupposes the capability of marginalised and vulnerable minorities to challenge the normative closure into which political communities tend to lapse. A political community can only remain free if it values plurality and difference, and allows out-groups to disturb and to challenge deeply held majoritarian beliefs and practices. For this reason, the critical challenge for our constitutional 'democracy' consists 'not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is "unusual, bizarre or even threatening"'. What is perhaps most significant about his judgment is the manner in which he displaces the Court's formally individualistic account of the language of dignity with a more nuanced account of democracy and solidarity – a Whitmanian vision of democracy that ties the ability of individuals to reimagine their own identities to the capacity of the political community for transformation.⁴⁶ Underlying Sachs's radically democratic vision is an equally egalitarian concern 'the demand for equal recognition', as Charles Taylor puts it – for marginal cultures, worldviews and lifestyles.⁴⁷ Sachs J emphasises the political powerlessness of the Rastafari in a manner that recalls the concerns of representation-reinforcing process theory. The continuing disempowerment of the Rastafari unmasks the power relations lurking beneath a veneer of formally equal treatment, and shows how facially neutral laws are conditioned by background assumptions that define 'normality' in terms of conformity to the tenets of mainstream religions. At the same time, it presents the political community with an opportunity to reconsider the ways in which the boundaries of citizenship are being drawn. Of the relationship between the 'romantic-liberal' view of constitutionalism and the struggle of out-groups for recognition, Frank Michelman writes:

A chief aim of the romantic-liberal constitution must be to free 'the life-chances of the individual from the tyranny of social categories' of 'classes, sexes, and nations'. The benefit accrues not only to the emancipated: it is structural and systemic, and accrues to everyone. Everyone, in the romantic view, has reason to welcome confrontation and challenge of his or her accustomed or habitual ways and values, from all quarters known and unknown. Democracy accordingly becomes not just a procedural but a substantive ideal.⁴⁸

⁴⁵*Id* para 170.

⁴⁶For a fuller elaboration of this understanding of democracy, see Michelman *Brennan and democracy* (1999) 68–89; Michelman 'Law's republic' (1988) 97 *Yale LJ* 1493.

⁴⁷Taylor *The ethics of authenticity* (1992).

⁴⁸Michelman *Brennan and democracy* (n 46) 71.

That radical democracy and the right to be different are both substantive ideals and inextricably bound up with one another is made crystal clear in *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs*.⁴⁹ For those who might doubt that Sachs's judgment (if not remedy) represents a 'radical rupture' with our authoritarian apartheid past ... or are still not convinced that Sachs's thought moves from individualism to pluralism to solidarity, paragraphs 59 through 61 should dispel such skepticism.

Again Sachs J starts slowly when he writes:

This Court has thus in five consecutive decisions highlighted at least four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed. The first is that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. The second is the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual. The third is that although a number of breakthroughs have been made in particular areas, there is no comprehensive legal regulation of the family law rights of gays and lesbians.⁵⁰

And so he establishes the constitutional basis for all of us – heterosexuals, bisexuals, gays and lesbians alike – to be the individuals we want to be and to be accorded equal concern and equal respect. But he does not dabble in liberal theorisation about the South African constitution for long. Sachs J then writes:

[O]ur Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough.⁵¹

If liberal individualism, with a dab of pluralism, is not enough – then what is? *Democratic solidarity*. Sachs J writes:

A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. *Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference.* At the very

⁴⁹2006 1 SA 524 (CC).

⁵⁰*Id* para 59.

⁵¹*Id* para 59.

least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. *The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.*⁵²

Now one can identify any number of liberal democratic politics in the hodgepodge of rhetorical flourishes that Sachs offers above. But I am not, for the moment, interested in Sachs's internal inconsistency or lack of analytical rigour. What stands out is that the democracy Sachs has in mind takes us beyond the franchise, beyond formal equality, beyond tolerance for each group (or individual) doing its own thing. *In a heterogeneous democracy such as ours, only the actual recognition and material support for difference across individuals, groups and the country as a whole is sufficient.* I think Sachs sells his vision somewhat short when he writes: 'As was said by this Court in *Christian Education* there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18'.⁵³ I prefer instead the spin, first put forward in *Prince*, that these rights 'taken together, affirm the right of people to self-expression (without being forced to subordinate themselves to the cultural and religious norms of others), and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different"'. The acceptance of a difference in sexual orientation when it comes to the marriage of gays and lesbians requires that all members of the state – and the state itself – provide all other members of the polity with the same degree of respect that they would expect for themselves – no matter how dominant their own views might be. Moreover, you can hear Sachs pressing us all to accept the proposition that a democracy can only flourish in a society such as ours when we take the 'vision of the good' or the 'sexuality' of others as seriously as we view our own 'vision of the good' or 'sexuality'. The solidarity of which Whitman and Sachs both speak is born of recognising other

⁵²*Id* para 60 (emphasis added).

⁵³*Id* para 61.

individuals as equals – in every sense –and more importantly, attempting to come to grips with that difference so that we may better understand our own and better understand what it means to be human.

Conclusion

Radical democracy: Individualism, pluralism and solidarity

Walt Whitman and Albie Sachs do not only share a poetic sensibility. This article suggests that they also hold quite similar, and radical visions, for a democratic United States and a democratic South Africa. That should come as no surprise: both ‘philosophies’, *weltanschauungs*, are born of repression, strife and political upheaval. Whitman’s vision took shape in the Union’s fight against the South for universal emancipation and a bloody Civil War that, ultimately, made democratic solidarity possible. Sachs’s political imagination was forged in his costly struggle against apartheid, his commitment to a new constitutional order and his 15 years of service on the bench.

Each committed himself to a radical individualism – a vein of political thought very much alive in Whitman’s time; but somewhat less so in Sachs’s era. That individualism first finds expression in the body, and for both authors, in the hotly contested space of sexuality. Again, it is hard to imagine the stark otherness of Whitman in ante-bellum America. But his position in American letters secured some traction by being read through the less contentious, but still radically individualist, works of Emerson and Thoreau. It is somewhat ironic, then, that over 150 years later, Sachs finds himself with a smaller – if growing – following. *Fin-de-siecle* South Africa tilts towards a fairly conservative ‘state of mind’ – and the rupture that brought about the demise of apartheid has not made it significantly less so. It turns out that South Africa’s deeply traditional/conservative – English, Afrikaner, African, Indian – cultures elicit an edginess, a provocativeness, and even a lack of patience from Sachs (no matter how much he concurs) with a South Africa still so out of step with the rest of the world. But whether it is onanism, sodomy, slow rude muscles, homosexuality, heterosexuality, bisexuality, prostitution, one night stands, common law unions, legally unrecognised religious bonds or run of the mill marriages, Whitman and Sachs find room, demand room, for all of them in their respective democracies. Did it have to be sex and sexuality? The answer again must be ‘Yes!’: Very little else speaks so directly to each of us, creates so much tension, and challenges us. Few other aspects of the human condition find themselves under regular scrutiny and regulation.

As for their pluralism, again sex may be a primary driver – though class and marginalisation also push Whitman and Sachs to re-imagine a re-united United States and a post-apartheid South Africa. Now, however, our differences do not separate us, or merely require tolerance: They form the basis for a profound recognition that individually and collectively we are *radically heterogeneous creatures*. That radically heterogeneous self – and the heterogeneous society in

which we all find ourselves (no matter how repressive) – demands a commitment to pluralism, a deep and profound appreciation for difference.

From this commitment to democracy – the politics not of the majority but of the individual – comes the commitment to democratic solidarity. How so? Once we recognise our own difference, sexual or otherwise, and demand its recognition by others, we have no ‘coherent’ choice but to recognise the difference of others. To put it more pointedly, once we recognise the otherness of others and demand such recognition for ourselves, we are committed to a society in which every member can comfortably live out that difference. Does that commit us to socialism or communism or some particular political order? Since labels tend to bar understanding, I would say, at the very minimum, that we must commit ourselves to a political order in which the space we demand for ourselves is fundamentally equal to the space required by others. If that requires – at this particular historical moment – significant redistribution of wealth, then so be it. But the bottom line, once you embrace a Whitmanian or Sachsian commitment to democratic solidarity, is that you must be willing to afford others the material conditions in which they can recognise and express their difference. It is only through such a commitment, Whitman and Sachs tell us, that we can forge a new nation.

Albie Sachs: Poet-democrat

I find myself in the pleasant but awkward position of agreeing with colleagues who disagree with each other. In my view the rationale of each of their judgments is essentially the same, even though they are framed in different conceptual matrices.⁵⁴

Poet-democrats are only dangerous when they wield unbridled power. But when they take the shape of a Whitman or a Sachs, they are but gadflies – offering constant, unremitting challenges to their colleagues and to our collective conscience. But Whitman and Sachs remain more than gadflies. Again: What we have seen in the arc of Whitman’s poetry and the sweep of Sachs’s opinions – over time (and as they work their views through) – is a rather organic development from a romantic individualist vision of politics, to a commitment to value pluralism, to a state grounded in democratic solidarity in even the most heterogeneous of societies.

⁵⁴ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC). Sachs’s successful efforts as a poet-philosopher do not save him from charges of conceptual incoherence. While it is sometimes possible to show that ‘apparently’ different thinkers are singing off the same hymn sheet, often times the clear meaning of the words of different writers defy such efforts at synchronisation and harmonisation. Moreover, Sachs’s admission that he is ‘constitutionally incapable of disagreeing with anyone’ is an abdication of the intellectual responsibility to show how divergent lines of thought only appear to diverge and, as importantly, to mark off the space within which rational disagreement – a mainstay of constitutional law – is inevitable.