THE SUPREME COURT AND THE QUALITY OF POLITICAL DIALOGUE

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The search for a "neutral" principle to justify the exercise of nonoriginalist judicial review has generated much of the immense literature on constitutional law. In the 1970s, most nonoriginalist theorists argued that judges were well-positioned to enforce fundamental moral values.[1] John Hart Ely then entered the fray, dramatically changing the terms of the debate with a powerful attack on such theories, together with a proposal that the courts adopt a "representation-reinforcement" approach.[2] Ely's model in turn was subjected to an avalanche of criticism.[3] Recently, dialogue theories have become increasingly prominent. These theories contend that judges can use constitutional rulings to enrich public debate over fundamental rights.

This article will challenge the claims of the dialogue theorists. The article will begin by describing the evolution of the dialogue analysis. It will then briefly outline the criteria by which dialogue theories should be judged, and conclude that they fail to satisfy these criteria.

I

While not new,[4] dialogue theory has experienced a resurgence in recent years. In part, this renaissance derives from the difficulties with theories that rest on very strong claims about the institutional competence of judges. Those theories begin with the assertion that the nonjudicial [hereinafter "political"] branches of government are

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1. *See, e.g.*, Perry, *Abortion, the Public Morals, and the Police Power*, 23 U.C.L.A. L. REV. 689 (1976); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

2. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

3. Two major symposia provide excellent examples of this criticism. *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

4. *See* Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

likely to slight fundamental values. Different commentators define the relevant values differently; all, however, agree that in the absence of judicial review, legislatures are unlikely to give these values appropriate weight in the lawmaking process. Generally, the rationale is expressed in institutional terms; because of the nature of their position judges are viewed as having a unique perspective on the public policy issues which come before them. This judicial perspective is said to be best expressed through the exercise of nonoriginalist judicial review.[5]

Professor Owen Fiss typifies the scholars who make the strongest claims based on these considerations. Unlike legislatures, which "see their primary function in terms of registering the actual, occurrent preferences of the people," Fiss contends that courts are seen as "ideologically committed [and] institutionally suited to search for the meaning of constitutional values."[6] He argues that because of this difference, judges are uniquely qualified to be the final arbiters on issues involving fundamental social values.

In assessing this claim, one might ask whether the results generated by such review have in fact advanced fundamental values. Unfortunately, no clear answer exists. First, there is no consensus on the proper content of fundamental values themselves. While some mainstream groups hale *Roe v. Wade*[7] as a vindication of fundamental rights for women, others (also well within the political mainstream) revile the decision as inconsistent with respect for human life. Second, even if a consensus about fundamental values existed, the results reached by different courts often point in quite different directions. Obviously, for example, *Dred Scott v. Sanford*[8] had implications that were quite different from those of *Brown v. Board of Education*[9] for the theory that American society should be based on the concept of racial equality. In short, the claim that in the long run the courts will generate better results than the legislature is at best unproven.

Seeking to avoid this problem, dialogue theorists make a weaker claim regarding a court's competence. These theorists do not claim that the judiciary will make better decisions on fundamental issues. They argue simply that nonoriginalist review improves the decisionmaking process by adding a different, distinctive

5. *E.g.*, Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981).

6. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

7. 410 U.S. 113 (1973).

8. 60 U.S. (19 How.) 393 (1856).

9. 347 U.S. 483 (1954).

voice to the dialogue which ultimately creates governmental policy. This position derives from a view of the interaction between the courts and other branches of government which was perhaps best articulated by the late Alexander Bickel:

> Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives. They are never, at the start, conversations between equals. The Court has an edge, because it initiates things with some immediate action, even if limited. But conversations they are, and to say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases, and in others it is a form of speech only.[10]

Taken alone, Bickel's conception simply describes the impact of judicial review on the overall decisionmaking process of government. Others, however, have elaborated on the concept in an attempt to justify judicial activism. The argument of Professor Michael J. Perry is typical:

> In the constitutional dialogue between the Court and the other agencies of government—a subtle, dialectical interplay between Court and polity—what emerges is a far more self-critical political morality than would otherwise appear, and therefore likely a more mature political morality as well—a morality that is moving (inching?) toward, even though it has never always and everywhere arrived at, right answers, rather than a stagnant or even regressive morality.[11]

Similar themes can be found in the work of a number of other commentators.[12]

Death-penalty law provides an excellent example of the process envisioned by those who embrace the Bickel/Perry model of judicial review. In 1972, a majority of the Supreme Court invoked the eighth amendment to strike down all then-existing capital punishment statutes in *Furman v. Georgia*.[13] While two members of the five-Justice *Furman* majority would have found capital punishment unconstitutional *per se*,[14] the other three limited their opinions to the specific statutes before them.[15]

In response to *Furman*, many states reinstituted capital punishment but modified the procedures for determining when the im-

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10. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 177 (1970).

11. M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 113 (1982).

12. *E.g.*, P. BOBBITT, CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION 182-83 (1982); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1047-49 (1984); Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 397 (1987). *See generally* Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMM. 9, 15 (1987).

13. 408 U.S. 238 (1972).

14. *Id.* at 257-306 (opinion of Brennan, J.); *id.* at 314-74 (opinion of Marshall, J-).

15. *Id.* at 240-57 (opinion of Douglas, J.); *id.* at 306-10 (opinion of Stewart, J.); *id.* at 310-14 (opinion of White, J.).

position of the death penalty was appropriate. Beginning in 1976, the Court considered the revised schemes, finding some constitutional and some not.[16] As states gradually conformed their legislative and judicial procedures to the decisions of the Court, the death penalty reemerged as a fact of American life. The formal prerequisites for imposition of the penalty were, however, quite different from those which had governed the pre-*Furman* era.

Rather plainly, the Court did engage in a dialogue with the state legislatures on the death-penalty issue. Such a dialogue takes place even when—as in the context of school prayer[17]—the Court does not change its ultimate conclusion. As Herbert Wechsler has pointed out, "[t]o say that [the Court] initiates a dialogue is not, of course, to say that it is necessarily attentive to its critics."[18] The point is that constitutional decisions are not set in stone; if criticisms from the populace and other branches of government are sufficiently cogent, the Court may be persuaded to change its position.

The mere existence of a dialectical relationship does not necessarily justify nonoriginalist activism. Dialogue theorists must also demonstrate that such activism improves the overall quality of the debate. The remainder of this article will challenge the assumptions which underlie that assertion.

II

In assessing the impact of constitutional activism on the political process, dialogue theories seem to proceed from an inaccurate perception of the position which courts would occupy in a nonconstitutional world. They apparently assume that in the absence of judicial review, the courts would have little input into the governmental debate over major ethical questions. This assumption ignores the impact of judicial decisions in common-law and statutory contexts. Although legal conventions clearly have a strong impact on nonconstitutional rulings, such decisions are also often strongly influenced by ethical arguments.

The interpretation of Title VII of the Civil Rights Act of 1964[19] illustrates this point in a statutory context. Among the issues raised by Title VII were first, the question of whether the statute prohibits discrimination against pregnant workers, and second,

16. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

17. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

18. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1003 (1965).

19. 42 U.S.C. § 2000e (1976).

the role of discriminatory impact in the statutory analysis. On both issues, a true dialogue took place between Congress and the Supreme Court.

The Court first addressed the pregnancy issue in *General Electric Co. v. Gilbert.*[20] Employees challenged a disability plan which excluded pregnancy from its coverage. Speaking for the majority, Justice Rehnquist argued that the plan did not discriminate "on the basis of sex." Instead, he said it distinguished between pregnant persons and nonpregnant persons (both male and female).[21] Thus the majority concluded that the discrimination did not violate Title VII.

Congress responded to *Gilbert* by passing the Pregnancy Discrimination Act of 1978 [the Pregnancy Act],[22] which provides that—

> [t]he terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy . . . shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

The full import of this provision was made clear in *Newport News Shipbuilding and Drydock Co. v. EEOC.*[23] After the passage of the Pregnancy Act, the employer in *Newport News* had amended its health benefit plan to provide coverage for pregnancy-related expenses of female employees, but not for those of the spouses of male employees. Tracking Rehnquist's argument in *Gilbert*, the employer argued that male employees were discriminated against not because of their sex, but rather because they themselves could not become pregnant. Under this interpretation the Pregnancy Act appeared only to overrule the specific *holding* in *Gilbert*, merely guaranteeing that female employees would be entitled to medical benefits for pregnancy-related conditions. Rejecting this approach, the *Newport News* majority concluded that Congress intended to overturn the theory underlying *Gilbert*—that pregnancy-based discrimination was not sex discrimination.[24] Thus, the employer's exclusion of coverage for spousal pregnancies was found to be illegal sex discrimination.

The development of the law of disparate impact reflects a somewhat different dynamic. The original legislative history of Ti-

20. 429 U.S. 125 (1976).
21. *Id.* at 137-40.
22. 42 U.S.C. § 2000e(k) (1976 & Supp. V).
23. 462 U.S. 669 (1983).
24. *Id.* at 684-85.

tle VII on this point contains substantial evidence that Congress intended to prohibit only intentional discrimination.[25] Nonetheless, in *Griggs v. Duke Power Co.*,[26] the Court held that because an employment test disqualified blacks in disproportionate numbers, the test could not be used absent a showing of "business necessity." When amending Title VII in 1972, Congress acquiesced in this interpretation.[27]

The treatments of the pregnancy and disparate impact issues illustrate two patterns in the nonconstitutional dialogue between the courts and the legislature. In both cases, Congress initiated the dialogue by passing Title VII. The Supreme Court then addressed one of the basic moral issues inherent in the Title VII language: in one case, the definition of discrimination on the basis of sex, and in another, the disparate impact issue. On the pregnancy issue, Congress responded by adopting a different definition of sex discrimination, and the Court deferred to the congressional definition; on the disparate impact issue, Congress adopted the Court's approach. But in each case the ultimate legal resolution of the moral issue emerged after a conversation between the legislative and judicial branches.[28]

The key difference between this dialogue and that created by constitutional decisionmaking is that in the statutory context it is clearly the legislature rather than the judiciary which has the last word.[29] One can, of course, argue that constitutional judgments are not always the last word on moral issues. Still, such judgments cannot be overturned by the ordinary legislative process. Moreover, the mere fact that a court chooses to speak in the name of the Constitution adds tremendously to the effect of its conclusions on the debate.

Thus the effect of constitutionally-based judicial activism is not to allow courts to participate in the debate over moral issues, but rather to give judges an enormous advantage over other participants

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25. *See, e.g.*, 100 Cong. Rec. 7247 (1964).

26. 401 U.S. 424 (1971).

27. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 982-83 (1982); Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 719 & nn.186-87 (1980).

28. Admittedly, the opportunity for the federal courts to participate in the dialogue over the proper shape of state law is more limited. The federal courts do, however, have some voice in this dialogue through the exercise of diversity jurisdiction. Moreover, a strong judicial voice is heard through the medium of the state courts.

29. Of course, even in the statutory context, the judiciary has a tremendous influence on the ultimate conclusion. The *Griggs* example demonstrates this point quite clearly. Once the courts have interpreted a statute, that interpretation can only be overturned by a concerted legislative effort. Moreover, the mere fact that the judiciary has issued an interpretation may make such an effort more difficult to mount; that interpretation will carry a certain moral force which can have the effect of deterring attempts at legislative change.

in the debate. It is this added advantage that dialogue theorists must justify.

The establishment of such a judicial advantage can only be justified if two conditions are satisfied. First, the judges must bring a *unique* perspective to the debate over fundamental issues of public policy. Second, there must be some reason to believe that that perspective is somehow superior to that of other governmental decisionmakers, and thus leads to an improvement in the overall decisionmaking process. An examination of representative case law demonstrates that neither of those conditions exists in the real world.

III

The judicial treatment of the problem of voluntary affirmative action programs provides an excellent case study of the impact of judicial activism on the quality of debate. Affirmative action plans imposed remedially by lower courts have generally survived scrutiny by the Supreme Court;[30] the major battleground involves the right of other government agencies to adopt such plans in the absence of a judicial mandate. Basically, the Court has developed its position through opinions in three cases: *Regents of the University of California v. Bakke*,[31] *Fullilove v. Klutznick*,[32] and *Wygant v. Jackson Board of Education*.[33]

Bakke was perhaps the most ballyhooed constitutional case since *Brown v. Board of Education*. The medical school of the University of California at Davis had reserved 16 of the 100 places in each entering class for disadvantaged members of minority groups. by a five to four vote, the Court held that the specific affirmative action program was unlawful. Four members of the majority based their conclusion entirely on statutory grounds.[34] Of the five Justices who addressed the constitutional issue, only Justice Powell found the challenged program objectionable.

Powell began by asserting that all racial classifications should be subject to strict scrutiny[35]—a conclusion joined by Justice White.[36] Powell identified two state interests which were potentially of sufficient magnitude to merit the use of a racial classifica-

30. *See, e.g.*, Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28, Sheet Metal Workers Int'l Assoc. v. EEOC, 478 U.S. 41 (1986).
31. 438 U.S. 265 (1978).
32. 448 U.S. 448 (1980).
33. 476 U.S. 267 (1986).
34. *Bakke*, 438 U.S. at 408-21 (opinion of Stevens, J.).
35. *Id.* at 291 (opinion of Powell, J.).
36. *Id.* at 267.

tion: redressing past discrimination[37] and maintaining diversity within the student body.[38] He argued that the Board of Regents was an "isolated segment of our vast governmental structure" which lacked the necessary institutional competence to address problems of past discrimination.[39] He contended, moreover, that the interest in diversity could be served by a less drastic means, namely, the simple consideration of race as a factor in the admissions process.[40] Powell therefore concluded that while some consideration of race in the admissions process was constitutionally permissible, the use of a quota was not.

Justices Brennan, White, Marshall, and Blackmun rejected the use of traditional strict scrutiny; they did, however, conclude that scrutiny of affirmative action programs should be "strict and searching" and that even compensatory racial classifications must be substantially related to important government objectives.[41] Unlike Powell, they viewed the Davis plan as an appropriate vehicle to remedy past discrimination.[42] Because the Davis plan also did not stigmatize any racial group, the Brennan group opinion concluded that the plan was constitutionally permissible.

Fullilove was a facial challenge to a provision in the Public Works Employment Act of 1977 which required that, in the absence of an administrative waiver, ten percent of the federal funds granted for local projects be allocated to businesses owned by members of specified minority groups. By a 6-3 vote, the Court held that this program did not violate the equal protection component of the due process clause of the fifth amendment.[43]

The six member majority split into two groups. Justices Brennan, Marshall, and Blackmun essentially reaffirmed the principles which they had espoused in *Bakke*.[44] By contrast, writing for himself, Justice White, and Justice Powell, Chief Justice Burger produced a remarkable opinion which, while noting the need for "close examination" of all race-based classifications,[45] failed to specify the

37. *Id.* at 307-10.

38. *Id.* at 311-19.

39. *Id.* at 309-10.

40. *Id.* at 315-19.

41. *Id.* at 356-62 (opinion of Brennan, White, Marshall and Blackmun, JJ.).

42. *Id.* at 369-72.

43. The Court has held that the due process clause of the fifth amendment imposes constraints on the federal government which are generally similar to those imposed on the states by the equal protection clause of the fourteenth amendment. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 93 (1976); Bolling v. Sharpe, 347 U.S. 497 (1954).

44. Fullilove v. Klutznick, 448 U.S. 448, 517 (Marshall, J., concurring in the judgment).

45. *Id.* at 472 (opinion of Burger, C.J.).

standard of review to be applied.[46] Burger repeatedly emphasized that special deference was due to congressional decisions regarding remedies for past discrimination,[47] a theme which Justice Powell also stressed in his separate concurrence.[48] In this context, the Burger opinion concluded that the minority set-aside program was facially constitutional. The opinion left open the possibility, however, that the failure to grant an administrative waiver in a specific case might be unconstitutional.[49]

The dissenters also split into two groups. Justices Rehnquist and Stewart concluded that all racial classification were unconstitutional.[50] Justice Stevens, on the other hand, portrayed the set-aside program as the product of a simple political tradeoff which failed to address the difficult problems which he viewed as inherent in the use of any racial classification.[51] Contending that when such a classification is adopted "[i]t is up to Congress to demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class,"[52] Stevens argued that this burden had not been carried in *Fullilove*.

The recent decision in *Wygant* completes the picture. There the Court considered the constitutionality of a provision in a collective bargaining agreement governing layoffs of teachers. Crafted against the background of chronic minority representation in the workforce, the agreement provided that such layoffs were to proceed according to seniority "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." The effect of the proviso was that whites with greater seniority would sometimes be laid off before minorities with less seniority. By a 5-4 vote, the Court found this provision to be unconstitutional.

Once again, the majority could not coalesce around any single opinion. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, prepared the plurality opinion. Powell first reaffirmed his view that strict scrutiny should be applied to all cases of racial discrimination.[53] He then dismissed the notion that the racial preference could be used to ensure that blacks would have appropriate

46. *Id.* at 492 ("[t]his opinion does not adopt, either expressly or implicitly, the formulas adopted in such cases as [*Bakke*]").

47. *Id.* at 472-73.

48. *See id.* at 499-502 (opinion of Powell, J.).

49. *Id.* at 486.

50. *Id.* at 522.

51. *Id.* at 541-42 (Stevens, J., dissenting).

52. *Id.* at 554.

53. Wygant v. Jackson Board of Educ., 476 U.S. 267, 273-74 (1986) (opinion of Powell, J.).

role models.[54] Powell did concede that the school board might properly use racial classifications as a remedy for past discrimination by the school board itself,[55] but he doubted that the school board had produced the "convincing evidence" of past discrimination necessary to justify the use of race as a factor.[56] He also concluded that subjecting whites to layoffs was an unduly intrusive means of serving the compelling interest[57]—a point which also formed the basis of White's brief concurrence.[58] Thus Powell found the classification unconstitutional.

Justice O'Connor disagreed with Justice Powell on two important points. First, she concluded that a pattern of minority underrepresentation alone could support an inference of past discrimination and thus provide the basis for the use of a racial classification as a remedial measure.[59] Second, she explicitly reserved the question of whether a system of race-based layoffs could ever be constitutional, arguing instead that the standard used by the school board to determine the appropriate level of minority representation was inappropriate.[60]

Dissenting, Justices Marshall, Brennan, and Blackmun once again reaffirmed the principles enunciated in their *Bakke* opinion, concluding that the school board had given valid reasons for the layoff provision.[61] In his separate dissenting opinion, Justice Stevens relied on three points for his conclusion: the challenged provision served a valid public purpose, it was adopted through a fair procedure, and it was given a narrow breadth.[62]

Although the outcome of affirmative action litigation points in a political direction that is different from most contemporary judicial activism, the structure of the decisionmaking process is in many ways typical of the Burger/Rehnquist era. The Justices are unable to unite on bold, clear principles; instead, the plethora of opinions reflects a wide diversity of viewpoints. The resulting pattern of activism (and nonactivism) has been described as "rootless" by one noted commentator.[63] In fact, the pattern is probably better described as multirooted. Unlike the Warren Court, which essentially

54. *Id.* at 274-76.
55. *Id.* at 277.
56. *Id.* at 277-78.
57. *Id.* at 279-84.
58. *Id.* at 294-95 (White, J., concurring in the judgment).
59. *Id.* at 292 (opinion of O'Connor, J.).
60. *Id.* at 293.
61. *Id.* at 295 (Marshall, J., dissenting).
62. *Id.* at 313.
63. Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198-217 (V. Blasi ed. 1983).

lacked representation from the conservative wing of mainstream American politics, the Burger and Rehnquist Courts have elements from all major sectors of the national political scene. Voices from each of these sectors thus contribute to the decisions of the Court to intervene (or not to intervene) on particular issues, with centrist Justices holding the balance of power. It is thus not surprising that the overall performance of the Court is not easily identified with any clearly-defined ideological position.

While this spirit of moderation might be in some senses admirable, it does little to provide legal guidance to government officials facing affirmative action issues. Consider the situation of a government decisionmaker who is considering adoption of a race-conscious affirmative action program. Presumably one would want that decisionmaker to weigh the various interests involved and then to decide tentatively upon a program which she feels would best accommodate the competing interests. This program would then be modified to meet potential constitutional objections.

Confronted with current legal doctrine, our decisionmaker has severe problems. She can be certain that Justice Rehnquist would vote to strike down any program which she adopted; conversely, she could be fairly confident of support from Justices Brennan, Marshall, and Blackmun. the decisionmaker would then be confronted with the necessity of satisfying the varying requirements of two of the five remaining Justices. Moreover, each of the separate standards is itself somewhat amorphous; indeed, in *Bakke* Justice White professed allegiance to two different standards in the same case.

The decisionmaker is thus faced with an extremely difficult situation—even leaving aside the possibility that the balance on the Court might shift because of a change in personnel. Admittedly she can take certain steps to improve the chances that her affirmative action program will survive intact; for example, whatever her true motives, if the program involves education she can state explicitly that it is designed to foster "diversity." But the decisionmaker can never be certain that a race-conscious initiative will survive judicial scrutiny. Indeed, if she guesses wrong in the position of even one Justice, the decisionmaker will be left with no affirmative action program at all. Such uncertainty must necessarily have a destructive impact on the decisionmaking process of the other branches of government.

The adverse effect of judicial diversity on other decisionmakers poses a major problem for dialogue theorists. At the same time, however, this diversity should highlight the claimed advantages of

judicial participation in the policymaking process. Certainly the debate is most strongly enriched when the best arguments from all sides are heard. Since the Justices on the Burger and Rehnquist Courts reflect a broad spectrum of opinion on the relevant issues, if basic dialogue theory is correct one would expect a particularly strong contribution to the discussion of important issues.

Unfortunately, one searches in vain for novel moral insights in the myriad opinions dealing with the affirmative action issue. Often these opinions focus only on distinctively legal points rather than more basic moral questions. As one might expect from a group of nine lawyers, the opinions spend a great deal of time discussing legal concepts such as standard of review and burden of proof. But sparring over verbal formulations hardly advances one's understanding of the ethical problems raised in the cases; indeed, such formulations often tend to obscure rather than elucidate the basic issues.[64]

Further, even when the Justices do address fundamental moral issues, their handling of these issues does not generally reflect any particularly strong insight. The majority opinion in *Roe* provides a classic example. Admittedly, one unfamiliar with the history of the long-running debate over abortion might gain some knowledge from the opinion.[65] Even the strongest defender of the result, however, would not characterize Justice Blackmun's handling of the great mass of evidence as particularly adroit. Similarly, the affirmative action opinions simply recapitulate the arguments which one might find in any legislative debate.

The failure of the members of the Supreme Court to exhibit any particularly moral insight should not be surprising. Appointment to the Supreme Court reflects none of the characteristics that one would normally associate with such insight; instead, it requires only that the appointee (a) be well connected politically; (b) share the same basic political philosophy as the president who appoints him; and (c) (if the appointment is to be considered a "good" one) have demonstrated mastery of the technique of manipulating the distinctive principles of legal analysis. Legislators have essentially

64. One finds clear examples of this phenomenon in both the abortion and affirmative action cases. For example, in urging rejection of the constitutional attack in *Roe*, Justice Rehnquist's dissent relied almost entirely on the need for the courts to defer to legislative judgments. Chief Justice Burger's plurality opinion in *Fullilove* rests on the same type of argument. Conversely, the lynchpin of Justice Stewart's dissent in *Fullilove* is the originalist argument that the drafters of the fourteenth amendment intended that all race-based classifications be held unconstitutional. None of these opinions makes any serious attempt to come to grips with the fundamental issues underlying the adoption of the measures before the Court.

65. *See* Roe v. Wade, 410 U.S. 113, 129 (1973).

the same qualifications except for legal expertise. As already noted, such expertise may actually deflect judges from the underlying moral issues raised by a case.

Perhaps cognizant of this problem, dialogue theorists typically depend on the institutional position of judges rather than their personal qualifications. The basic concept is that the judiciary brings a "neutral" view to these questions, while legislative consideration is tainted by political considerations. Ronald Dworkin captures the essence of this view.

> Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply as issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself.
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> . . . .
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> [It] call[ed] some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice.[66]

The suggestion is that because judges are insulated from short-term political pressures, their approach to fundamental moral issues will differ substantially from that of other governmental actors.

In a limited sense this observation is accurate. Judges are less likely than legislators to take into account the attitudes of their political supporters in making critical decisions. But this does not imply that judges are in any meaningful sense neutral on basic moral issues; like those of other governmental actors, judicial decisions on these issues can only reflect fundamental beliefs about basic issues. The major difference is simply that while the decision of a legislator must consider the positions of a wide variety of persons, judges can consult only their own political/ethical/moral biases without fear of reprisal. Of course, one can appeal to a judge to ignore his personal ethical system and be guided instead by some "higher" value; but there is no certainty or even likelihood that he will be guided by such values if they are in conflict with his own beliefs. Thus, judicial activism will have the likely effect of magnifying the importance of the views of a small number of government officials—judges—all of whom are members of the governing elite in any event. Depending on the respective orientations of judges and legislators, this shift in power may change the ultimate outcome; at the same time, however, it cannot be said to constitute a general improvement in the quality of the decisionmaking process itself.

66. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517-18 (1981).

IV

The inability of judges to contribute uniquely to public debate undermines dialogue theory. An even more serious criticism is that, because of its impact on the legislative process, judicial activism actually damages the quality of the debate over fundamental moral questions. Due to the near-mythic stature of the Supreme Court in American society, the simple assertion that a position is unconstitutional—i.e., inconsistent with the announced doctrine of the Court—is considered a sufficient response to any political argument. The result is that opponents of the policy are largely relieved of the responsibility for developing their own moral justification.

The abortion controversy illustrates this point. If a pro-life legislator introduced a bill to ban all abortions, pro-choice opponents would have no need to enter into an extended discussion of the moral justifications for the bill. Instead, they could simply cite *Roe v. Wade* and contend (correctly) that the proposal was unconstitutional. Rather than a serious moral discussion, the debate could thus be reduced to a matter of citation of legal authority.

Further, even when the Court's position is more equivocal, the vagaries of legal doctrine can divert attention from fundamental moral questions. Here the death-penalty cases are illustrative. As already noted, the Supreme Court has clearly held that the imposition of the death penalty is constitutional under some circumstances.[67] At the same time, however, the Court has developed a complex set of procedural and substantive rules which circumscribe legislative discretion in this area. Death-penalty opponents need not rest their criticism of a specific bill on basic moral arguments dealing with the central issue. Instead, they can also rely on what might be aptly labeled constitutional trivia—the procedural details governing the conditions under which the penalty may be imposed. Indeed, the debate over these details has played a large part in the discussions of the issue within the Court itself.[68]

The abortion cases illustrate another way in which judicial activism can damage the quality of political debate. As virtually every literate American knows, in 1973 the Supreme Court entered the controversy over abortion with its sweeping decisions in *Roe v. Wade*[69] and *Doe v. Bolton*.[70] Speaking for the majority, Justice Blackmun enunciated the famous trimester analysis. Initially, the

67. *See* sources cited at n.16, *supra*.

68. For a typical example, see the various opinions in Bell v. Ohio, 438 U.S. 637 (1978).

69. 410 U.S. 113 (1973).

70. 410 U.S. 179 (1973).

vagueness of some of the standards set out in *Roe*[71]—particularly those which related to second trimester abortions—generated the same type of uncertainty inherent in the affirmative action cases. Resolution of constitutional challenges to early post-*Roe* abortion regulations often rested not on the basic moral issues underlying the abortion debate, but rather on detailed factual determinations which related narrowly to the specific regulation challenged. For example, in *Planned Parenthood v. Danforth*,[72] the state of Missouri attempted to outlaw the saline amniocentesis method during the second trimester, declaring that procedure to be "deleterious to material health." The decision to strike down this regulation rested on the disputed factual conclusion that the prostaglandin method was unavailable in Missouri. Obviously, any legislation passed in such an atmosphere faced an uncertain future.

Subsequent decisions have, however, eliminated much of the initial uncertainty. The recent decisions in *Akron v. Akron Center for Reproductive Health, Inc.*[73] and *Thornburgh v. American College of Obstetricians and Gynecologists*[74] have made clear the point that for a majority of the current Court, virtually all regulations of second trimester abortions for adults are unacceptable. Indeed, these cases strike down even some third trimester restrictions. Thus, while some uncertainty remains, the basic message to the state legislatures is clear—do not attempt to regulate first and second trimester abortion.

Obviously, these decisions have imposed important limitations on the outcomes which may be generated by the political process. These limitations clearly favor the pro-choice position. *Roe* and its progeny have, also changed the political process in other ways. Focusing on the legitimating impact of decisions such as *Roe*, some have suggested that these changes have also favored the pro-choice forces.[75] In fact, the overall impact of the abortion decisions on the political dialogue has been more ambiguous.

To understand this ambiguity, one must begin by examining the state of the abortion debate prior to the Supreme Court's entry into the picture. In the five years prior to the *Roe* decision, the state

71. *Roe* held that in the first trimester of pregnancy the state could not prevent the performance of abortions by physicians; in the second trimester the state was allowed to "regulate the abortion procedure in ways that are reasonably related to maternal health"; and in the third trimester the state could totally proscribe all abortions except those which are necessary for the preservation of the life or health of the mother.

72. 428 U.S. 52 (1976).

73. 462 U.S. 416 (1983).

74. 476 U.S. 747 (1986).

75. *See* Jackson & Vinovskis, *Public Opinion, Elections and the "Single Issue" Issue*, in THE ABORTION DISPUTE AND THE AMERICAN SYSTEM 65-66 (G. Steiner ed. 1983).

legislatures had gradually been moving toward the relaxation of the requirements for a legal abortion. Five states had adopted the position that abortions could be performed for any reason; two others allowed abortions to preserve the life or health of the mother.[76] The most popular reform, however, followed the pattern of the Model Penal Code, which provided that abortions would be lawful in any one of a number of circumstances: if the continuance of the pregnancy posed a substantial risk of gravely impairing the physical or mental health of the mother, or of ultimately producing a child with a grave physical or mental defect; if the pregnancy resulted from rape; or if the pregnancy resulted from incest or other felonious intercourse.[77] This pattern of reform (and in some cases lack of reform) reflected the classic American legislative process, which often generates compromise even on issues which involve deeply-felt moral values.

Roe polarized the debate. The decision inflamed the passions of the pro-life forces in particular, making political compromises increasingly difficult.[78] Moreover, while the decisions of the Court in *Roe* and its progeny have (to at least some extent) put constitutional law into the service of pro-choice values, the pro-life groups have often been successful in winning political tests of strength with their pro-choice counterparts. The single greatest success of the anti-abortion forces came with the passage of the Hyde Amendment. Prior to 1973, federal funds had been available to fund abortions in those instances in which such abortions were legal under state law.[79] Under the Hyde Amendment, use of federal funds was barred except in limited circumstances involving rape and incest in those cases in which the life of the mother was threatened.[80] These restrictions were held to be consitutional in *Harris v. McRae*.[81]

Of course, even in the post-*McRae* world the pro-choice movement is almost certainly in a better legal position than it was prior to 1973. The basic point, however, is not one of substance but of process. As the abortion cases illustrate, the impact of judicial activism on the quality of debate over moral issues is widely uncertain. Thus even from a purely empirical perspective, any

76. Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and Problems*, 1972 U. ILL. L. F. 177, 179-80 & nn. 27, 29.

77. *See id.* at 180 & n.32.

78. For a detailed examination of the post-*Roe* activities of the pro-life movement, see Pearson & Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J.L. & PUB. POL'Y 427 (1985).

79. *See* Roe v. Norton, 522 F.2d 928 (2d Cir. 1975).

80. Joint Revolution for further Appropriations for Fiscal Year 1980 (Hyde Amendment), Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979).

81. 448 U.S. 297 (1980).

justification for judicial review which rests on the perceived need for the courts to enter the dialogue is problematic at best.

The difficulties faced by dialogue theories are endemic to justifications for nonoriginalist activism which rely on the perceived institutional competence of courts. The major difference between judges and legislators is that the former are more strongly influenced by legal conventions in their decisionmaking process. Arguments for nonoriginalist activism urge judges to downplay these conventions and address basic moral issues directly. Thus competence-based theories by their very nature undermine the considerations which purport to give them their force.

This is not to underestimate potential differences in the respective answers to fundamental moral questions which would be given by the courts and the legislatures. For a variety of reasons, the political balance on the Court may be quite different from that in Congress and the state legislatures. Further, judicial restraint has become a fundamental tenet of most right-center political philosophy in the late twentieth century; thus, on balance judicial activism is likely to favor left-center causes. But such potential differences in outcome are the result of political happenstance rather than institutional competence. Any plausible constitutional theory must respect this fact.