QUESTIONING DIALOGUE BY JUDICIAL DEGREE: A DIFFERENT THEORY OF CONSTITUTIONAL REVIEW AND MORAL DISCOURSE

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[A] society so riven that the spirit of moderation is gone, no court can save; . . . a society where that spirit flourishes, no court need save; . . . in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.¹

I. INTRODUCTION

In the article, Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue,² Professor Stanley Ingber demonstrates that constitutional dialogue about our nation’s fundamental public values helps shape the substance of constitutional judgments and the response to judicial decisions by the political branches of government. He suggests that there is an important element of dialogue, a dialogue in the spirit of civic republicanism,³ that precedes constitutional

³ Id. at 1685 (encouraging “a dialogue that considers the commitments that make up our sense of community or that tries to articulate those public values that can serve as a basis for a common notion of the
litigation and continues in its aftermath. The traffic of ideas flowing through constitutional conflict does not run only in one direction nor does it come to a halt with the adjudication of a particular case. Debate in scholarly discourse, political forums, and the courtroom about matters of constitutional right and principle influences the Supreme Court in its deliberations toward a decision, and, in turn, the pronouncements of the Court influence the evolution of policy in other institutions. The announcement of a constitutional decision does not close the debate. Conflicting parties then struggle to interpret the decision, to affect its implementation, and to urge its retention, abandonment, or revision in future adjudication. Professor Ingber’s article makes an important contribution to our understanding of the modes of discussion about constitutional principles and the dialectical relationship between the courts and other constituents of public society.⁴

social good," and stating that the “civic republican tone of this perspective is readily apparent”); see also id. at 1490 (discussing republican vision of “civil society as a teacher—a molder of character—rather than just a regulator of conduct”).

4. As Professor Ingber says, “dialogue” has become a “central motif” in recent constitutional law scholarship. Ingber, supra note 2, at 1479 n.10 (citing Robert A. Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455 (1984)). Barry Friedman, in a recent article about the dialogic process between the courts and society, argues that “an elaborate dialogue” as to the Constitution’s meaning is an accurate description of, and not merely a prescription for, the process of judicial review (although his article also does appear to endorse dialogue as a normative theory of judicial review). Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 580-81 (1993); see also LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988) (arguing that constitutional principles emerge from a dialogue among all three branches of the federal government, as well as the states and the general public).

As discussed in the text following this footnote, Professor Ingber takes the next logical step in the dialogic theory of constitutionalism. He not only offers dialogue as a justification for constitutional review of government conduct, but also adopts dialogue as the measure by which to judge the product of judicial review. Thus, a Supreme Court decision which creates and facilitates ongoing debate about the nature and application of constitutional values upholds the Court’s proper role in mediating societal dialogue. A decision which removes an issue from constitutional debate, however, and thereby discourages continued dialogue, falls
However, Professor Ingber seeks to do more than merely describe an interrelative process of discussion of policies between institutions of public life. He further intends to suggest the preservation of an ongoing constitutive dialogue as the *justification* for and the *evaluative* measure of judicial review. Professor Ingber envisions the republican dialogue surrounding constitutional litigation as a broadly encompassing one, a discussion of fundamental values that moves beyond mere legal interpretation of a constitutional text to the exploration of national aspirations. He views the Supreme Court's proper role as the "mediator" in a constitutive dialogue that "requires consideration of both who we are and who we wish to be." Constitutional judicial review thus becomes the opportunity for "moral evaluation" of public policy, rather than merely being the occasion for enforcement of a legal text by legal interpretation. Constitutional law is seen as intertwined with moral philosophy, and constitutional adjudication as the forum for examination of public virtues. Thus, Professor Ingber seeks to enhance a civic republican dialogue of a particular type, one that hopefully extends throughout society but which nevertheless revolves around constitutional adjudication with a special focus upon the courts to guide the discussion and to require

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short and represents an abdication of the Court's constitutional responsibility.

5. Ingber, *supra* note 2, at 1479 (calling for "the development of a value hierarchy not itself provided by the constitutional text"); *see also* Owen Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739, 753-54 (1982) (characterizing an emphasis upon the words and original meaning of the Constitution as an "arid and artificial conception of interpretation," and urging the judge to "read the moral as well as the legal text" so as to render a decision based upon "the public morality embodied in that text"); Michael J. Perry, *Morality, Politics, and Law* 133 (1988) [hereinafter Perry, *Morality*] (arguing that the constitutional text "signifies to us (in addition to the original meaning)... certain basic, constitutive aspirations or principles or ideals of the American political community and tradition").


7. *Id.* at 1494; *see also* Michael J. Perry, *The Constitution, The Courts, and Human Rights* 97-100 (1982) (arguing that judicial review should serve the function of "prophecy" to call us to a deeper understanding of ourselves through a moral dialogue).

the engagement of all public actors.  

Because of his view of the essential value of this constitutional discourse and "the preeminence of courts—and most specifically the Supreme Court—in initiating and structuring constitutional dialogue," Professor Ingber is troubled by trends in constitutional theory at the Supreme Court.  

When the Court declares that the Constitution does not speak to a particular issue of public life, the Court abdicates the role that Professor Ingber asks for it to play and diminishes "the importance of the Constitution in forging our national character."  

Professor Ingber argues that the national discussion attendant to questions of constitutional interpretation is of such importance that constitutional adjudication should proceed in a manner that promotes dialogue about national values. In other words, not only should the republican dialogue shape Supreme Court decisions, but Supreme Court opinions should be composed with the conscious goal of continuing and shaping the dialogue about public values.

Professor Ingber contends that the Supreme Court impairs dialogue whenever it removes a matter of public concern from constitutional review. When the Supreme Court removes itself from constitutional oversight of an area of governmental activity, Professor Ingber believes that the Court also withdraws the incentive for others to confront the value questions that may be raised with respect to that public concern. Instead, Professor Ingber urges, the Court should keep a hand in the game, by adopting decisions that assert the continued relevance of constitutional precepts to an issue. By so doing,

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9. Id. at 1532-43 (arguing for the proper preeminence of the courts in this constitutive dialogue); see also FrankMichelman, Law's Republic, 97 YALE L.J. 1493, 1503-07 (1988) (articulating a theory of republican constitutionalism, conceived as an ongoing normative dialogue, with a central place given to the judiciary to preside over the debate).

10. Ingber, supra note 2, at 1543.

11. Id. at 1480-86, 1655-56, 1689.

12. Id. at 1655.

13. Id. (stating that the purpose of the article is "to show the expanding pattern of decisions and opinions in which the Supreme Court has found the Constitution irrelevant—and thus constitutional dialogue unnecessary—in evaluating acts of government").

the Court would force others to confront questions of principle and, through this engagement, continue the essential dialogue. Without the threat of judicial review, the political branches of government may choose to act without fully weighing the impact of legislative and executive decisions on values of freedom, privacy, and equality.

Professor Ingber fears that the Supreme Court has shifted its approach to constitutional issues in a mistaken direction, by increasingly limiting the reach of constitutional provisions and declaring that many areas of public life are outside the limitations of constitutional restrictions. The shift could be viewed, however, as a swing of the pendulum back into balance. The movement in constitutional theory outlined by Professor Ingber looks most significant if we look at history as beginning with the Warren Court. For most of our nation's history, the Court has maintained a rather low profile. The exceptions—the *Dred Scott* case\(^\text{15}\) and the *Lochner* era\(^\text{16}\)—have been conspicuous precisely because they were exceptions. The changes in constitutional attitude during the era of the Warren Court made it possible to frame claims in constitutional terms that would have been regarded as absurd during the previous 175 years. Before the late 1960's, for example, no one seriously could have contended that homosexual conduct had a claim on the Constitution\(^\text{17}\) or that the govern-

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15. *Id.* at 1482-85, 1655-56, 1688-89.

16. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 447-50 (1857) (holding that slaves were property protected by the Constitution, even after residing in free states or territories, thereby invalidating the Missouri Compromise by ruling that Congress lacked authority to abolish slavery in the territories). For commentary on the *Dred Scott* decision as having invented the concept of "substantive due process" which was later featured so prominently in creation of constitutional rights, see generally Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 Nw. U. L. REV. 1038, 1049-51 (1992).

17. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating a state law establishing maximum work hours in bakeries as violating the constitutional "right to contract" implicit in "substantive due process").

18. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (upholding a state sodomy law in a 5-4 decision, ruling that there is no fundamental constitutional right to engage in homosexual conduct). Even following the constitutional revolution of the Warren Court, Justice White, as author of
ment was constitutionally obliged to fund abortions at public expense. Even though these claims were rejected, the constitutional revolution of the Warren Court made them plausible.

Although Professor Ingber is undoubtedly correct in identifying the current trend of constitutional adjudication, the central question remains: is this course "bad"? Or is it a healthy development, reflecting a shift from a fixation on rights and judicial governance to democratic dialogue, political compromise, and discussion of values in a moral-cultural context? Should our society's dialogue about values proceed in the context of the Constitution, and more particularly, in the arena of constitutional litigation with primacy given to the courts as moral tutors? Is Professor Ingber correct in viewing dialogue about public values as the animating purpose of constitutional judicial review? By asking such transparently rhetorical questions, the answer I reach in this responsive Essay should be apparent.

I agree with Professor Ingber that the flow of ideas that occurs incident to constitutional conflict is indeed a dialogue about fundamental values and, in this regard, I find his article insightful in its description of this dialectical process of constitutional debate. However, as detailed below in Part II of this Essay, I believe that constitutional debate should concern truly fundamental values, in the sense of being foundational in nature, rather than proceeding as a dissertation toward

the Bowers opinion, characterized the argument that the right to engage in homosexual conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" as "at best, facetious." Id. at 194.

19. See, e.g., Harris v. M'Crae, 448 U.S. 297, 326-27 (1980) (upholding the constitutionality of the Hyde Amendment which excludes coverage of abortion, except to save the life of the mother, from the federal Medicaid program); Maher v. Roe, 432 U.S. 464, 479-80 (1977) (holding that state and local governments are not constitutionally compelled to pay for abortions for those who cannot afford them, even if the government subsidizes normal childbirth procedures).

20. See Owen Fiss, A Life Lived Twice, 100 YALE L.J. 1117, 1118 (1991) (tribute to Justice William J. Brennan, Jr.) (stating that the Warren Court embarked upon "a program of constitutional reform almost revolutionary in its aspiration and, now and then, in its achievements").
aspirational fulfillment. The Constitution is the framework of our national government, within which our national public life must be built, and a guarantee of fundamental rights. But it is not the sole source of values or principles for us as a nation or as a people. A dialogue about fundamental constitutional values attendant to constitutional adjudication must be focused upon the Constitution as a legal text and, because it is a legal text, the debate must be grounded in legal sources and legal analysis. We ask too much of the Constitution, and too little of ourselves, when we view it as the well-spring from which to draw comprehensive notions of public virtue or when we project into it our aspirations as a national community.

Thus, at the threshold, Professor Ingber and I disagree about the purpose and meaning of the Constitution in general and the role of courts in particular. Because of that disagreement, we also disagree on the use of constitutional adjudication as a vehicle for pursuit of a moral dialogue about civic virtue. While dialogue about fundamental constitutional values may serve an important role in informing the decisional product of constitutional litigation, the preservation or facilitation of that dialogue should not serve as a justification for judicial intervention into political decisions or expansion of constitutional rights into new frontiers. Dialogue should be the servant of judgment—not the master. Constitutional review exists for reasons other than to foment dialogue about our aspirations as a nation; it exists to enforce those values incorporated into our

21. Gregory E. Maggs denominates as the “perfection fallacy” that misguided tendency to see the Constitution as the source of our national well-being:

The Framers of the Constitution deserve much credit for the document that they produced. Few would dispute that the Constitution has done much good throughout the history of the Republic. A common trick builds upon their success by carrying it to the point of perfection: if society has a problem, the Constitution must solve it; and if something is good, the Constitution must protect it.

Maggs, supra note 16, at 1054; see also Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. REV. 353, 358 (1981) (similarly criticizing the “perfectionist” theme in constitutional scholarship which contends that the Constitution, when properly construed, guarantees the values a commentator believes a liberal democracy ought to possess).
national charter.

Moreover, in Part III of this Essay, I suggest that, rather than enhancing broad and open dialogue, judicial adjudication skews discussion in a particular legalistic direction and suppresses the value of dialogue in other settings. Because constitutional discourse is primarily the preserve of lawyers, dialogue in academic literature or constitutional litigation is conducted in a legal dialect that both distorts discussion of values and makes it inaccessible to the general public. While constitutional judicial review is vital to safeguard our constitutional freedoms, a degree of moral and philosophical deliberation flowing from constitutional litigation cannot justify the costs that overreaching judicial rights declaration has for public debate and democratic governance.

Finally, in Part IV of this Essay, I assert that moral discourse is too important to be captive to constitutional litigation or, for that matter, governmental institutions, political or judicial. Our values as a people should not be constrained within the straitjacket of the Constitution. The Constitution serves the discrete purposes of establishing the framework for a limited government and ensuring certain basic rights for individuals. It has little to say about most of the matters that should be important to us as individuals and as a community. Notwithstanding the growth of government and the proliferation of litigation, the center of life for most Americans remains family, friends, and private groups—not political and legal institutions. In my view, many of our social problems today demand a resurrection of values in a manner that cannot be compelled by constitutional command or legislative enactment.

I. JUDICIAL REVIEW, CONSTITUTIONAL DIALOGUE, AND MORAL ASPIRATION

My most profound difference with Professor Ingber lies in our sharply contrasting theories on the role of the judiciary and the justification for constitutional review. My own view is not original and thus may be stated briefly. Although my theory of constitutional law may be out of fashion in today's legal academy, it fits comfortably within the modern conservative and the traditional liberal views of the courts. I begin with certain basic premises: I affirm the existence of law and the possi-
bility of meaningful rules of law. I recognize the Constitution as a legal text subject to legal interpretation by judges who derive their authority to render a judicial decree from the existence of the Constitution as a source of law. Whether one views constitutional interpretation as grounded in a theory of original meaning or the traditional liberal theory of judicial restraint and neutral principles, the distinctive nature of this approach is that it is legal in nature. One need not retreat into formalism, ignore the importance of "practical wis-

22. On original meaning as a basis for interpretation of the Constitution, see generally ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849 (1989); Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 NW. U. L. REV. 226 (1988); and Monaghan, supra note 21. Although originalism is commonly identified with conservative ideology, the theory is not tied to political viewpoint. Originalism, like any theory, can be abused toward ideological ends. Properly applied, however, it is neutral as to outcome. Scholars who are not politically conservative are among those attracted to an original meaning approach to constitutional interpretation. See STEPHEN L. CARTER, THE CULTURE OF DISBELIEF, 298 n.37 (1993) ("I tend to be a supporter of constitutional jurisprudence that is guided by the original understanding, although I do not endorse the contemporary political trend of using that approach as a prop for decisions to fit ideological programs on the left or on the right.").

23. On the traditional liberal approach to constitutional interpretation, see generally Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959); and LEARNED HAND, THE BILL OF RIGHTS (1958). For a general, and critical, discussion of judicial restraint as a theory of judging, from Oliver Wendell Holmes and Felix Frankfurter to the present, see RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 130-66 (1985). A modern proponent of a similar theory, although a person not often identified as liberal, is Charles Fried, whose approach to constitutional interpretation is founded upon a concept of the rule of law. Fried, while concluding that originalism is a false hope, asserts that courts may be restrained by "a conception of law disciplined by respect for tradition, professionalism, and careful, candid reasoning." CHARLES FRIED, ORDER AND LAW 70 (1991).

nor deny the "creative element in judging,"26 to insist

25. See Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 21 (1993) (arguing that "hard cases require the exercise of practical wisdom: a subtle and discriminating sense of how the (often conflicting) generalities of legal doctrine should be applied in concrete disputes"). Drawing upon the jurisprudence of Karl Llewellyn, Kronman argues that common law judges are not constrained as much by legal rules as by traditions of work and habits of thought developed through experience — what Kronman characterizes as the trait of "practical wisdom." Id. at 209-25 (discussing, with approval, Llewellyn's ideas as expressed in Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960)). I am somewhat less skeptical about the constraining power of legal rules than Kronman (and Llewellyn), and further believe that a judge undertaking to interpret an authoritative text, especially a document of supreme law like a constitution, operates under different and greater constraints than does a common law judge. However, because law is a peculiar art rather than a mechanical science, I conclude that a contextually-bound form of "practical wisdom" — reflecting the ability to consider opposing positions with both sympathy and detachment — may be valued as an element of wise constitutional judgment within a theory of modest judicial authority.

26. Posner, supra note 23, at 217. Likewise, there is room for consideration of justice without abandoning the theory of a rule of law governed by neutral principles. Professor Ingber properly reminds us of the immediate human element in judging, in that "courts confront the 'flesh and blood of . . . actual cases,' thereby being forced to consider the impact of their actions on real people and real life." Ingber, supra note 2, at 1530 (quoting Alexander M. Bickel, The Least Dangerous Branch 26 (2d ed. 1986)). I agree that every judge must remember that a legal case involves the lives and concerns of the actual people before the court. By this, I do not mean to suggest that a judge should strive to do equity in each case without reference to rules of law. There will be many instances in which, notwithstanding the appearance of inequity in an individual case, adherence to established and justified principles of law mandate a particular outcome. Statutes of limitations are one example. Depriving an individual of a legal remedy because of a time period limitation may seem unjust in an individual case, but the cause of justice in general may be promoted by precluding stale claims. See Texaco, Inc. v. Short, 454 U.S. 516, 551 (1982) (Brennan, J., dissenting) ("[S]tatutes of limitations 'are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.") (quoting Chase Securities Corp v. Donaldson, 325 U.S. 304, 314 (1945)). However, when the result in an individual case appears unjust, it should be the occasion for the court to consider whether the legal rule mandating that result is itself justified. A constitutional
that constitutional decision-making be carefully bounded by the text, historical understandings, legal doctrine, and a modest view of the role of the judiciary.27

or statutory command, or a clear silence from the Constitution or statutory code, may compel the result. However, the apparent injustice in a particular case may signal a flaw or shortcoming in the application of a rule of law. Thus, the moral claim for justice of the individual litigant serves to call attention to the need for continual evaluation of legal doctrine, in a manner consistent with and faithful to the constitutional or statutory provision at issue and the overriding principle of the rule of law. The rule of law is not static in time nor blind to the claims of justice.

27. Professor Ingber sees the “general or open-ended” provisions of the Constitution, such as the Due Process and Equal Protection Clauses, as particularly fertile ground for sowing a constitutional theory of moral discourse. Ingber, supra note 2, at 1478, 1490-91. In contrast, although somewhat extreme, some advocates of judicial restraint deny that any constitutional provision is truly general in nature. Lino A. Graglia, The “Open-Ended” Clauses of the Constitution, 11 HARV. J.L. & PUB. POL'Y 87, 89 (1988) (asserting that “the Constitution does not have any ‘open-ended’ clauses”); RAOUl BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 409-18 (1977) (arguing that the Equal Protection Clause was intended by its Framers to prohibit certain specific practices and not to establish a general right to equal treatment); see also ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 15 (1989) (“The phrase ‘due process of law’ probably had quite a definite meaning to the framers, who used it to refer to certain familiar judicial procedures. The term now seems expansive because we have become accustomed to using it in many other ways.”). Other scholars and jurists recognize the general nature of such provisions, while simultaneously insisting that the appropriate level of generality can be discerned from an historical understanding of the Constitution, from adherence to constitutional text, or from an appreciation that the exercise of judicial power is justified only to enforce the rule of law. Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (Opinion of Scalia, J.) (stating that, in constitutional interpretation, the Court should select “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”); BORK, supra note 22, at 151 (“Original understanding avoids the problem of the level of generality in equal protection analysis by finding the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports.”) LESLIE F. GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 94 (1991) (“Judges must fill the open-ended clauses of the Constitution with principles that are traceable not to a justice’s own vision of national ideals, but to some expression of the will of the sovereign people (i.e., some statute or some
Judge Frank H. Easterbrook’s words well summarize my own view:

The power of judges to say what the law is comes from the existence of law. Unless a question has been settled by the Constitution, a judge cannot insist that other people abide by his answer. When the document is vague, when the history is obscure, the living must settle their own affairs.28

Based upon this understanding of law and the Constitution as a source of law, I cannot accept Professor Ingber’s invitation to mold constitutional decision-making to serve the end of republican dialogue. Constitutional issues do create conflict which promotes dialogue about the meaning of constitutional norms. But the existence of this dialogue cannot serve to justify the judicial decree. Nor should obstruction of the traffic in ideas count among the factors to be weighed by a court in establishing a constitutional precedent (other than, of course, when freedom of thought is the very purpose of the constitutional provision, as in First Amendment cases).29 A constitutional decision, both in outcome and reasoning, must be justified by reference to legal authority. As John Hart Ely has said, before the Supreme Court may make any constitutional pronouncement, “it is under an obligation to trace its premises to the charter from which it derives its authority.”30 The values

aspect of the constitutional text).”); Frank H. Easterbrook, Abstraction and Authority, 59 U. CHI. L. REV. 349, 372 (1992) (arguing that the court should not “assum[e] power and then search[] for a level of abstraction,” but rather “should search for that degree of generality capable of justifying a judicial role,” and, if unable “to find an answer that adequately differentiates judicial from political action,” should “allow political and private actors to proceed on their way”). Thus, acknowledging that a provision is “general” need not be a concession that it is “open-ended” or wholly indeterminate. The problem of interpreting the general constitutional provision is soluble on legal, as opposed to morally aspirational, terms.


29. See also infra text following footnote reference 74 (discussing dialogical element in Free Exercise Clause interpretation).

30. John H. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 949 (1973); see also GOLDSTEIN, supra note 27, at 4 (arguing “that when judges announce ‘fundamental rights’ that are
espoused in a constitutional decree must be rooted in the Constitution, not in our hopes and aspirations for a better society. Judicial decision-making calls for wise employment of that singular form of human thought known as legal reasoning.

By contrast, we do not ask our Courts to engage in capacious moral or philosophical inquiry, nor should we. As Judge

nowhere implied in the constitutional text, in decisions that strike down popularly adopted laws that restricted those rights, those judges pervert the judicial function and usurp the legislative function as those roles are contemplated in the structure of government that the Constitution establishes.


32. See Charles Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 TEX. L. REV. 35, 57 (1981) (arguing that legal reasoning is a “distinct method” of “analogy and precedent” that involves “the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively”).

33. Litigators, even those who argue constitutional cases in the Supreme Court, do not present a case in terms of moral or philosophical truth, except perhaps as an occasional rhetorical device or make-weight for a legal argument. As any litigator soon discovers, the courts have little patience with the naked appeal to public policy, except as used to bolster a position grounded in legal text or doctrine. Judges truly do care about constitutional text, statutes, precedent, and doctrine. As former Solicitor General Charles Fried learned from his experience in handling hundreds of appellate decisions before the high Court, “even in constitutional cases, precedent and analogy are the stuff of legal argument, and . . . legal argument is what moves the Court.” FRIED, supra note 23, at 66; see also Earl M. Maltz, Critical Theory, Neutral Principles, and the Future of Legal Scholarship, 43 FLA. L. REV. 445, 450 (1991) (observing that, although legal scholars may feature political factors prominently in contemporary scholarship, “the fact remains that judges typically do not consciously focus on those factors in reaching their decisions; instead, virtually all are committed to Wechsler’s ideology of neutral principles”); Daniel A. Farber, The Case Against Brilliance, 70 MINN. L. REV. 917, 929 (1986) (speaking tongue in cheek, Professor Farber concludes that “because judges are not as clever as the scholars who [argue that precedent and valid legal argument may be used to justify any conclusion],
Learned Hand once observed, we have not anointed the Justices of the Supreme Court to rule us as a “bevy of Platonic Guardians.” 35 Professor Ingber protests that he does not see judges as supreme guardians or envision judges as all-powerful moral seers. 36 Indeed, Professor Ingber desires that all governmental institutions be involved in constitutional dialogue, arguing that modern constitutional scholarship has made a “most significant mistake” in “concentrat[ing] exclusively on the judicial process as the situs of constitutional dialogue and for the enhancement of constitutional values.” 37 He does not wish the courts to “dominate the political process,” but rather to “stimulate, provoke, and participate in the polity’s incessant search for a better way of living.” 38 However, in a forthright “defense of the preeminence of courts,” 39 he simultaneously insists that the courts, in contrast with other institutions of government, are better able by reason of their position and nature to facilitate the constitutive dialogue and to demand that it continue in other institutions and elsewhere in society. 40

Notwithstanding Professor Ingber’s hope that transformative deliberation would flourish throughout society with but a friendly nudge from the Supreme Court, he ensures judicial

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34. See BORK, supra note 22, at 252 (“The principles of the actual Constitution make the judge’s major moral decisions for him.”).

35. LEARNED HAND, THE BILL OF RIGHTS 73 (1958) (“For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”); see also GOLDSTEIN, supra note 27, at 125 (arguing that the jurisprudence of modern scholars, who believe it appropriate for the Supreme Court to announce fundamental rights not implied in the text of the Constitution, is “distressingly similar to the rule ‘by a bevy of Platonic Guardians’ once condemned by Judge Learned Hand”).

36. Ingber, supra note 2, at 1532-33.

37. Id. at 1656.

38. Id. at 1533.

39. Id. at 1543.

40. Id. at 1658 n.641 (“I continue to believe that the structure and craft of courts best situate them (if they are so disposed) to stimulate and provoke this dialogue far beyond that which would exist without their participation.”); see also id. at 1532-43 (arguing for preeminence of courts in facilitating constitutional dialogue).
supremacy over political and moral discourse through his summons to the Court to serve as the generating agent of constitutive dialogue. Under Professor Ingber’s theory, the Court would be not merely a neutral parliamentarian moderating public debate, but would be concurrently engaged as a vital participant in the dialogue, using its power of constitutional review to shape the substance of societal deliberation. Indeed, Professor Ingber reports with approval that the Court’s previous work has positively molded community values and changed moral perceptions, suggesting in no uncertain terms that he means to free the Court to pursue its vision of the virtuous community as well as to provoke such deliberation elsewhere in society.

Under the dialogic theory of constitutionalism, all roads begin at the Supreme Court and all roads eventually lead back to the Supreme Court. The Court would “initiat[e] and structur[e] constitutional dialogue.” The Court would be empowered to raise topics for discussion and to insist upon consideration of values it deemed neglected. When we and our political representatives are not as attentive to the deliberations as the Court desires, the Court could call us back to the discussion table. When the topic has been exhausted or the conversation has become repetitive, the Court could nonetheless demand that we give the matter still further attention. When we and our political representatives decide that one value should prevail over another, the Court may second-guess that decision and declare the results of our deliberation wrong and unacceptable. And when the Court speaks, it is not simply one more voice in the crowd. The Court’s voice is a commanding one, rendered in the form of binding judicial decrees.

41. Id. at 1511-12 (describing the “crucial symbolic residual effect” of the Supreme Court’s abortion decision in Roe v. Wade, 410 U.S. 113 (1973), by removing the moral “taint” upon abortion and thus affecting “moral sensibilities”); id. at 1606 (describing the Supreme Court’s abortion decision as having a significant effect on “community value molding, including a restructuring of the role of women in society”); see also infra notes 121-49 and accompanying text (discussing, through the particular example of Roe v. Wade, the effect upon dialogue when the Supreme Court sets the agenda by choosing which values to elevate and which values to denigrate).

42. Ingber, supra note 2, at 1543.

43. See infra notes 112-20 and accompanying text (discussing the
Moreover, the Court's exercise of its power of judicial review for the purpose of questioning and shaping policy deliberation would encroach upon the authority of other elements of public governance and could eventually overpower dialogue outside of the courtroom. The Court's initial decision in an area of public concern might provoke general dialogue, through the identification of values for consideration and the designation of interests for evaluation. However, each successive decision, like the drawing of ever-smaller concentric circles, would further narrow the boundaries of permissible policy choice and progressively circumscribe the constitutive dialogue. Because the Court can speak only through judgments, it is institutionally incapable of offering friendly advice on issues of public moment. When a policy decision is challenged on the merits as violative of a substantive constitutional norm, the Court must pass judgment. It must approve or disapprove of the policy choice at issue in the case before it. Thus, if we were to free the Court from its responsibility to adjudicate disputes through the application of legal reasoning and were instead to grant it the privilege of engaging in policy-making through political and philosophical deliberation, judicial supremacy over political and moral discourse would inevitably follow.

In sum, Professor Ingber's argument for the special position of the Supreme Court to guide constitutional dialogue, together with his definition of that dialogue as a "dynamic constitutive process" designed to shape us into a national community, envisions a role for the Court that is heavy with philosophical, moral, and political responsibility. And power. Professor Ingber may see the Court as a benevolent tutor, but it is a teacher endowed with the authority to issue passing or failing grades in the form of judicial decrees enforceable by the power of contempt.

I remain unconvinced that judges possess sufficient knowledge and virtue to undertake this mission of "moral evalua-

"edge" given to the Court in any conversation because its actions are taken in the form of judicial decrees enforceable by contempt.

44. Ingber, supra note 2, at 1532-43.
45. Id. at 1543.
46. See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 65 (1989) ("Lofty as guardianship may appear as an ideal [form of government], its
tion" through the episodic venues of cases and controversies. Nor do I believe that the democratic process, of political institutions accountable to the people, is so hopelessly imperfect that the preceptorship of the courts is preferable. The perception of the average American, however simplistic or formalistic some may regard it, remains that the judge’s vocation is the neutral application of established rules of law. Americans would not long respect—or tolerate—a Court which forthrightly assumed the position of national moral guidance counselor. If the Court were truly to undertake the charge of serving as our national conscience, thereby becoming empowered through constitutional deliberation to make choices that “delineate our ‘moral identity’ as a people,” then the Court would simultaneously lose its legitimacy as a court of law.

extraordinary demands on the knowledge and virtue of the guardians are all but impossible to satisfy in practice.”); see also Ronald J. Allen, Constitutional Adjudication, The Demands of Knowledge, and Epistemological Modesty, 88 NW. U. L. REV. 436, 440 (1993) (“With all due respect to the hard-working and honorable members of the Court, past and present, for whom in fact I have enormous respect, they are not collectively a group that commands our fealty because of the profundity of their moral insight.”).

47. Ingber, supra note 2, at 1494.
48. See Perry, Morality, supra note 5, at 129:
An originalist judicial role accords nicely with a popular—“civics book”—understanding of American government, in which it is the function of the electorally accountable legislative branch, sometimes in conjunction with the electorally accountable executive branch, to make policy choices, it is the function of the electorally accountable executive branch to administer policy choices, and it is the function of the electorally unaccountable judicial branch merely to enforce policy choices.

49. See Planned Parenthood of Southeastern Penn. v. Casey, 112 S. Ct. 2791, 2885 (1992) (Scalia, J., concurring in part, dissenting in part) (“The people know that their value judgments are quite as good as those taught in any law school—maybe better.”).
50. Ingber, supra note 2, at 1479.
51. Michael S. Paulsen, 10 Constitutional Commentary 221, 229-30 (1993) (reviewing Robert A. Burt, The Constitution in Conflict (1992)) (“The legitimacy of the Supreme Court in our constitutional system rests not on its ability to fashion social and political compromises but on its ability to render decisions that the public readily can recognize as straightforward interpretations of a constitutional or statutory text.”).
What then is the purpose of constitutional review? When the constitutional mandate is sufficiently clear from the text, the understanding of the Framers, or the structure of constitutional government, it removes certain matters from popular control and majoritarian rule. The Constitution is designed to be a trump card. When the Supreme Court is acting within its area of legitimate authority by applying principles genuinely drawn from the Constitution, its decision may very well suppress or constrain debate about alternative approaches. When the Constitution truly speaks, I want that message to be heard and heeded, not taken as an invitation to the political branches for further manipulation or resistance. Thus, in my view, the dialogue should be about whether the Constitution conveys such an unequivocal command, not about whether our values as a society should be formed by constitutional litigation. Prior to constitutional adjudication, dialogue may help determine whether the Constitution speaks to a particular point. Following a ruling, dialogue may reveal that the Court has failed to correctly hear what the Constitution says. But when the Constitution speaks, it is not an invitation to dialogue, it is a command.

My contrary theory of constitutional review may be understood by discussing its application in the context of two decisions of the Supreme Court from the same Term. The first case, Employment Division v. Smith, is discussed by Professor Ingber as an illustration of “the Court’s apparent willingness to narrow the scope of constitutional relevance” at the cost of dialogue about national values and aspirations. The second case, Maryland v. Craig, could be lauded as inviting and facilitating continued dialogue, but, in my view, only at the price of enforcement of clear constitutional command.

In Employment Division v. Smith, the Supreme Court in an opinion by Justice Scalia held that the Free Exercise of Religion Clause of the First Amendment did not prohibit enforcement of Oregon drug laws against sacramental use of peyote by Native Americans. More significantly, the Court ruled

53. Ingber, supra note 2, at 1622.
that Oregon did not need to establish any compelling governmental interest to justify application of these laws in a manner that burdened a religious practice.\footnote{56} Enforcement of a law of general application that is formally neutral toward religion, the Court ruled, does not infringe upon the free exercise of religion, notwithstanding that application of such a general law may significantly burden the exercise of religious faith through religious practice.\footnote{57} Thus, a general law does not even implicate the First Amendment and is not subject to any constitutional scrutiny.\footnote{58}

Professor Ingber and I both regard the \textit{Smith} decision as unfortunate and are in general agreement in our criticisms of the Court's reasoning, but our reasons for disapproval of the decision nevertheless differ in emphasis. Professor Ingber's primary concern is with the deleterious effect of the decision on the dialogue about public values.\footnote{59} By insulating laws of general application from constitutional oversight, irrespective of the severity of the burden on sincere religious practices, the \textit{Smith} decision gives government a green light to proceed for-

\footnote{56} \textit{Id.} at 885. 
\footnote{57} \textit{Id.} at 882. 
\footnote{58} As Professor Ingber notes, \textit{Smith} has been subject to widespread criticism both inside and outside the Court. Ingber, \textit{supra} note 2, at 1624 n.517 (including citations). In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993), several concurring Justices explicitly argued that \textit{Smith} should be re-examined. \textit{Id.} at 2240 (Souter, J., concurring in part and concurring in the judgment) (expressing "doubts about whether the \textit{Smith} rule merits adherence" and stating that "in a case presenting the issue, the Court should re-examine the rule \textit{Smith} declared"); \textit{id.} at 2250 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (stating that they "continue to believe that \textit{Smith} was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle"). In the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (to be codified as 42 U.S.C. § 2000bb), Congress by legislative enactment has re-established the "compelling interest" standard for evaluating any government regulation, national, state or local, that burdens religious exercise. On the Religious Freedom Restoration Act, see generally Ingber, \textit{supra} note 2, at 1644-52; Ira C. Lupu, \textit{Statutes Revolving in Constitutional Law Orbits}, 79 VA. L. REV. 1, 52-66 (1993); Douglas Laycock, \textit{The Religious Freedom Restoration Act}, 1993 B.Y.U. L. REV. 221.
\footnote{59} Ingber, \textit{supra} note 2, at 1622-55.
ward, heedless to the oncoming traffic of ideas about sensitivity toward, and accommodation of, religious communities and individuals. Without the "constitutionally imposed requirement of dialogue," that is, without the obligation of governments to explain and justify regulations that burden religious practice, the incentive to engage in a careful deliberation of these concerns disappears. In other words, without the possibility of mandatory accommodation of religious practice imposed by constitutional review, Professor Ingber argues that the impetus for permissive accommodation of diverse religious practices is greatly weakened. "The effect of [Smith]," Professor Ingber concludes, "is that no institution—whether judicial or political—feels any pressure to participate in constitutional dialogue."

In contrast, my principal objection to Smith simply is that it is wrong because it denies a constitutional protection to religious practice guaranteed by the text, and the history, of the Free Exercise Clause. The Smith Court ruled that the Free Exercise Clause protects "the right to believe and profess whatever religious doctrine one desires," but does not extend protection to religious practices that contradict generally applicable law. The constitutional text, however, does not refer to the holding of religious beliefs; it refers to the "free exercise" of religion. The plain import of the phrase "free exercise" is one of acting upon one's beliefs; "exercise" denotes action, not passive contemplation. As Justice O'Connor stated in her con-

60. Id. at 1627-28.
61. Id. at 1635-36; see also Edward M. Gaffney, Jr., The Religion Clause: A Double Guarantee of Religious Liberty, 1993 B.Y.U. L. REV. 189, 214-18 (arguing, with examples, that the "consequences for religious liberty that have ensued since Smith have been disastrous," as government agencies have failed to accord protection to religious conscience and federal judges have disregarded claims involving religious liberty); Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1, 1-2 (providing similar examples of how government and courts have relied upon Smith to justify intrusive regulation of religious groups).
62. Ingber, supra note 2, at 1637.
64. Id. at 882.
65. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").
66. See U.S. Department of Justice, Office of Legal Policy, Report to
currence in Smith: "[T]he First Amendment does not distinguish between religious belief and religious conduct. . . ." If, as Justice Scalia suggests, the Free Exercise Clause does little more than protect religious expression, then it is commensurate in substance and scope with the Free Speech Clause of the First Amendment, and thus becomes largely superfluous. 68

Further, the Smith decision fails to adequately consider the historical understanding of the religion clauses of the First Amendment. 69 The more substantial historical evidence shows

the Attorney General—Religious Liberty Under the Free Exercise Clause 19 (1986) (observing that the words "free exercise" "mean more than advocacy of belief: by definition, the words denote action or activity") (the authors of this valuable historical report were now-Professor Jay S. Bybee of the Louisiana State University Law Center and Lowell V. Sturgill, Jr., now with the Appellate Staff, Civil Division of the U.S. Department of Justice); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1489 (1990) [hereinafter McConnell, Origins and Historical Understanding] ("As defined by dictionaries at the time of the framing [of the Free Exercise Clause], the word 'exercise' strongly connoted action."). Oddly enough, Justice Scalia in Smith acknowledged that the "exercise of religion" involves "not only belief and profession but the performance (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." Smith, 494 U.S. at 877. Nevertheless, Justice Scalia would not hold that the conduct component of exercise of religion warranted any protection from laws that would eviscerate the practices of a religious community, provided that the law at issue was not intentionally designed to disadvantage that particular religious practice. This is a strangely cramped understanding of a right to "exercise" religion. See Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1115 (1990) [hereinafter McConnell, Free Exercise Revisionism] (arguing that a reading of "free exercise" to prevent the government from enacting laws that make a religious practice illegal is the "more obvious and literal meaning").

67. Smith, 494 U.S. at 893 (O'Connor, J., concurring in the judgment).

68. As Professor Ingber observes, the Smith holding is reminiscent of the "reduction principle," a proposal by commentators in the past "whereby religious Free Exercise and Establishment claims were to be assimilated into the general mass of Free Speech and Association claims." Ingber, supra note 2, at 1628 n.535.

69. See generally McConnell, Origins and Historical Understanding, supra note 66 (detailing the origins of the Free Exercise Clause). Indeed,
that the Framers intended by the Free Exercise Clause to preserve the ability of citizens to fulfill obligations as members of civil society without surrendering their religious convictions. As Michael W. McConnell explains, the Free Exercise Clause reflects the “theological proposition” that “civil law must be subordinate to conscience”:

To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like “God” that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority. Those are propositions that few Americans, today or in 1789, could accept.

Finally, the Smith decision is premised on the false view that application of general laws, despite religious objections, reflects true neutrality toward religious beliefs. As Stephen L. Carter writes, with the particular example of the Smith case in mind:

Take, for example, the case of a religious worship practice that runs afoul of a law of general application, such as a law against drug use or animal abuse. One might argue that the

as commentators have noted, the author and other members of the Court claim to be originalists in interpretation of the Constitution, and yet the Smith decision ignores the historical evidence about the understanding of the Framers of the Free Exercise Clause. See Gaffney, supra note 61, at 212; Ira C. Lupu, Employment Division v. Smith and the Decline of Supreme Court-Centrism, 1993 B.Y.U. L. REV. 259, 260.


71. McConnell, Free Exercise Revisionism, supra note 66, at 1152; see also Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233, 285 (1989) (concluding that, while “all conflicting ideologies must defer” to the command of law, “[r]eligious conscience must be distinguished” and granted special protection because the religion clauses represent a unique “realization that for many there are duties or obligations that precede those made by human beings”).
state is only neutral if it enforces the law against the religion in question. However, enforcement of the law constitutes neutrality only from the point of view of the state. From the point of view of the religion, matters are quite different. By punishing adherents of the religion for doing what their faith demands of them, the state is not—in their eyes—acting with neutrality toward the truth or falsity of the belief in the religious demand. On the contrary, by presuming to punish members of the faith who follow its dictates, the state is necessarily treating their beliefs as false—for if the beliefs were true, there would be no reason for the state to outlaw the practice that the beliefs demand.\textsuperscript{72}

Thus, the traditional requirement that the state establish a compelling reason for imposing a legal obligation contrary to a religious practice\textsuperscript{73} comports with the text and history of the Constitution, as well as a sensitive appreciation of the purpose behind the protection of religious expression. As Professor Ingber rightly says, the Religion Clauses were intended "to recognize and protect the importance of religion and religious institutions in our society—an effort to protect the preciousness of religious belief and conduct in our community."\textsuperscript{74}

Accordingly, like Professor Ingber, I am quite at odds with theSmith decision. But my point of disagreement withSmith lies with principles of legal interpretation, focusing upon such legal sources as text, history, and historical understanding. I criticize theSmith decision as a misapplication of standards of constitutional interpretation, not because it reduces constitutional dialogue. However, my critique ofSmith as unfaithful to the purpose of the Free Exercise Clause to protect religious

\textsuperscript{72} Carter, supra note 22, at 221; see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2241 (1993) (Souter, J., concurring in part and concurring in the judgment) ("A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids.").


\textsuperscript{74} Ingber, supra note 2, at 1652; see also Michael W. McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1, 9 (observing that "the text of the First Amendment itself 'singles out' religion for special protections").
expression and conduct does strongly correspond with Professor Ingber's concern for dialogue about the value of religious conduct and diversity. In this particular context, his concern with dialogue and my concern with adherence to constitutional command converge. This intersection in our theories has its source in the nature of this particular constitutional provision. The Free Exercise Clause protects religious expression in word and deed. The sensitive consideration and appropriate accommodation of religious diversity is integral to a faithful interpretation and application of this special protection of religious expression. Thus, the dialogue that Professor Ingber cherishes is grounded in the substantive purpose of this distinctive constitutional amendment. Nevertheless, I would not elevate constitutional dialogue over constitutional substance. Indeed, I can imagine circumstances under which the facilitation of broader dialogue would be at the expense of protecting religious liberty. Most importantly, I would not conform constitutional interpretation to the preservation of dialogue when the constitutional provision is not one connected to expression.

With that in mind, let me then turn to the second case that I wish to discuss to contrast Professor Ingber's vision of dialogue with my view of judicial review as designed to enforce constitutional norms. In Maryland v. Craig,\textsuperscript{75} decided during the same Term as Smith, the Supreme Court upheld, against a Confrontation Clause challenge, a state's practice of allowing a child witness in a criminal child abuse case to testify outside of the physical presence of the accused.\textsuperscript{76} The Court approved testimony by one-way closed circuit television in order to protect the child from emotional trauma that would impair the child's ability to communicate.\textsuperscript{77} In an opinion by Justice O'Connor, the Court characterized the Sixth Amendment's guarantee of the accused's right "to be confronted with the witnesses against him"\textsuperscript{78} as merely expressing a "preference for face-to-face confrontation"\textsuperscript{79} that "must occasionally give way

\textsuperscript{75} 497 U.S. 836 (1990).
\textsuperscript{76} Id. at 851-52.
\textsuperscript{77} Id. at 852-53.
\textsuperscript{78} U.S. CONST. amend. VI.
\textsuperscript{79} Craig, 497 U.S. at 849 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).
to considerations of public policy and the necessities of the case." The Court held that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." The *Craig* decision would seem to fit perfectly with Professor Ingber's vision of constitutional dialogue. The Court decreed

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80. Id. (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).
81. Id. at 853.
82. Professor Ingber's primary goal in his article is to sound a warning against the Supreme Court's trend toward "constitutional irrelevance." Ingber, *supra* note 2, at 1689. Thus, he criticizes Court decisions declaring that a constitutional provision is not implicated under the circumstances of a case, thereby removing the matter altogether from constitutional evaluation. The *Craig* case poses the somewhat opposite scenario of an absolute or categorical constitutional guarantee. Nevertheless, as detailed in the text following this footnote, the contrast between the majority and dissenting opinions in *Craig* remains a good illustration of my differences with Professor Ingber. The adherence to a categorical constitutional protection (as we will see was the position of the *Craig* dissent) would have the same dampening effect upon the dialogic theory of judicial review as that which Professor Ingber fears from the "constitutionally irrelevant" decision. In either case, the Court would be closing the door on further debate.

Professor Ingber sees the facilitation of dialogue as the raison d'être for the Court's exercise of judicial review. To carry Professor Ingber's conclusion through to its logical end, a "dialogue-friendly" Court will not only expand constitutional provisions to bring more issues of public import within the scope of its power of constitutional review, it will also lean heavily toward constitutional doctrine "expressed in elaborately layered sets of 'tests,' 'prongs,' 'requirements,' 'standards,' or 'hurdles.'" See Nagel, *supra* note 27, at 121; see also Ingber, *supra* note 2, at 1515 (observing approvingly that "balancing is absolutely central to the constitutional analytical method adopted by the modern Court"); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (criticizing balancing as dominant form of constitutional reasoning). A dialogue-facilitating opinion, such as the adoption of a balancing test approach by the majority in *Craig*, advances Professor Ingber's vision, while the assertion of an unqualified right, as contended for by the dissent in *Craig*, smothers the essential discussion. See Ingber, *supra* note 2, at 1516 n.136 (affirming the belief that "constitutional dialogue—likely to be more active in a system of balancing than of [categorical rules]—is essential to the fulfillment of the Constitution's self-critical and aspirational functions"); see also Nagel, *supra* note 27, at 106-09 (observing, with disapproval, that constitutional "tests" applied by the modern
a case-by-case balancing of interests that demands ongoing
dialogue. In each case, the court must ask whether the benefits
of face-to-face confrontation in "enhanc[ing] the accuracy of
factfinding by reducing the risk that a witness will wrongfully
implicate an innocent person."\(^{83}\) is outweighed by the "emotional trauma" to be suffered if the witness must appear to
testify against the accused.\(^{84}\) Thus, the courts must inquire
whether there is present in each criminal prosecution "an im-
portant state interest"\(^{85}\) sufficient to overcome the constitu-
tional "preference"\(^{86}\) for genuine confrontation between an ac-
cused and his or her accusers. The analysis must be made by
the court "in a manner sensitive to [the purposes of the Con-
frontation Clause] and sensitive to the necessities of trial and
the adversary process."\(^{87}\) Consistent with Professor Ingber's
model of constitutive dialogue, the courts and legislatures will
be engaged in a conversation about the values implicated by
the presentation of witness evidence against a criminal defen-
dant and by society's concerns for the protection of victims
from "further trauma and embarrassment."\(^{88}\) Indeed, we may
expect (and commentators have already anticipated) that
states and prosecutors will contend that the societal interest in
the emotional and psychological well-being of adult rape vic-
tims is sufficiently weighty to overcome the "preference" for
confrontation.\(^{89}\) Should that claim succeed, there undoubtedly

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Supreme Court requiring government to justify its rules bring nearly
every aspect of public policy before the Court and allow the Court to
continually adjust and recalibrate doctrine toward the end of a "virtuous
social order").

83. Craig, 497 U.S. at 846; see also Coy v. Iowa, 487 U.S. 1012, 1019-
20 (1988):

It is always more difficult to tell a lie about a person "to his
face" than "behind his back." . . . That face-to-face presence may,
unfortunately, upset the truthful rape victim or abused child; but
by the same token it may confound and undo the false accuser,
or reveal the child coached by a malevolent adult.

84. Craig, 497 U.S. at 856.

85. Id. at 852.

86. Id. at 849.

87. Id.

88. See id. at 862 (quoting Globe Newspaper Co. v. Superior Court of
Norfolk County, 457 U.S. 596, 607 (1982)).

89. See Lisa H. Thielmeyer, Beyond Maryland v. Craig: Can and
will be others\textsuperscript{80} who will plausibly assert special needs or vulnerabilities justifying their requests to be shielded "from exposure to the harsh atmosphere of the typical courtroom."\textsuperscript{89} Proponents of a dialogic theory of judicial review should be pleased with the exchange of ideas and arguments about constitutive values that will flow in the wake of Maryland v. Craig. I am not.

As much as Justice O'Connor's opinion in Craig may serve to maintain a dialogue about constitutional values between Court and society, I am nonetheless convinced that it is wrong. Justice Scalia in dissent, joined on this occasion by Justices

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\textit{Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?}, 67 IND. L.J. 797, 809 (1992) (contending that, in light of the Craig Court's holding that face-to-face confrontation may be avoided when necessary to promote an important public policy, "[t]he question of whether an adult rape victim who would be emotionally traumatized by testifying in the presence of her alleged rapist can be afforded the same protection as Craig gives to child victims must, therefore, ultimately depend on whether protecting adult rape victims is an important public policy").

90. Prior to Craig, one scholar predicted:

If "confrontation" is redefined in child abuse cases, then it may be redefined in other categories of cases as well, depending on a judge's or legislature's inclination to weigh the victim's trauma in those cases more heavily than the trauma of other victims in other cases. One-way mirrors may appear not only in child abuse cases, but also in adult rape cases, attempted murder cases, kidnapping cases, and any other cases in which the victim has suffered physical and psychological trauma that may be aggravated by facing the defendant. The government could offer other equally compelling reasons for "excusing" confrontation, such as fear for the safety of witnesses who testify against defendants in drug cases, or in trials of terrorists or members of other violent organizations.


91. \textit{See} Coy v. Iowa, 487 U.S. 1012, 1022-23 (1988) (O'Connor, J., concurring) ("Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures.").
Brennan, Marshall, and Stevens,92 refused to join in the "sub-
ordination of explicit constitutional text to currently favored
public policy" in shielding alleged victims from face-to-face
confrontation.93 As Justice Scalia stated, the Confrontation
Clause provides "with unmistakable clarity" that the accused is
entitled "to be confronted with the witnesses against him."94
The constitutional guarantee to the criminally accused is cate-
gorical and admits of no exception, however worthy the inter-
est that government seeks to balance against it. Justice Scalia
concluded his dissenting opinion by saying:

The Court today has applied "interest-balancing" analysis
where the text of the Constitution simply does not permit it.
We are not free to conduct a cost-benefit analysis of clear and
explicit constitutional guarantees, and then to adjust their
meaning to comport with our findings. The Court has con-
vincingly proved that the [state] procedure serves a valid
interest, and gives the defendant virtually everything the
Confrontation Clause guarantees (everything, that is, except
confrontation). I am persuaded, therefore, that the [state]
procedure is virtually constitutional. Since it is not, however,
actually constitutional I would affirm the judgment of the
[state court] reversing the judgment of conviction.95

In Craig, the Constitution spoke clearly and unambiguously
to the question before the Court. The constitutional command
was not an invitation to dialogue and accommodation and
back-and-forth, case-by-case adjustment of process according to
shifting views of the values and interests involved. The Court
failed to listen to the text. Although the Court may have lis-
tened to the words of dialogue emanating from the many states
which had adopted legislation shielding child victims from
confrontation with their alleged abusers, the Court erred by
turning a deaf ear to the voice that should have mattered—the
voice of the Constitution.

When the Constitution speaks, the Court should amplify
that sound loudly and with commanding voice. When the Con-

92. Craig, 497 U.S. at 860-70 (Scalia, J., dissenting).
93. Id. at 861.
94. Id. at 860-61 (quoting U.S. CONST. amend. VI).
95. Id. at 870.
stitution is silent, the Court likewise should remain silent. If we free the Supreme Court from its bondage to a strict legal interpretation of the Constitution and those values articulated in that document, then the Court has lost its lawful authority to speak and we have lost our legal obligation to listen. Reasonable judges, legal scholars, and lawyers will hear the voice of the Constitution differently. But we must be listening with legal attention—not with the expectation of hearing the answer to our hopes and aspirations. The dialogue attendant to judicial review must likewise be legal, with an ear carefully attuned to legal analysis, to legal reasoning, to legal interpretation.

The role of the judiciary in constitutional review is to determine the substantive principles incorporate in the document for application to concrete individual controversies, while avoiding to the extent realistically possible an evaluation of the wisdom or desirability of the government policies at issue. Pluralist views of right and wrong—the question of "who we are as a community"—are best addressed and accommodated in a democratic political debate, with the judiciary serving the vital but secondary role of ensuring that basic rights are protected to prevent oppression of minorities by majoritarian rule. The absence of a constitutional right, and thus a judicial remedy, does not dictate a narrow or limited vision of a moral society. Rather, it means that recourse must be made to the political process—or beyond to the moral-cultural realm of our community.

There is, after all, one other individual right too often neglected by modern constitutional scholarship—the right of democratic self-government. Our revolutionary founders

96. See Ingber, supra note 2, at 1480 (expressing concern that Supreme Court decisions have caused the Constitution to become virtually irrelevant in shaping and evaluating government policies that "subtly but profoundly define who we are as a community").


98. See infra Part IV of this Essay (discussing moral discourse in the non-governmental moral-cultural realm of society).

99. DAHL, supra note 46, at 169 (“The right to self-government
fought for the right to elect their own representatives to make laws by democratic means.\textsuperscript{100} This right of democratic choice and the responsibility of democratic governance is not promoted by judicial imperialism, even if justified as showing some responsiveness to popular sentiments or public virtues. As Justice Felix Frankfurter said:

The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace.\textsuperscript{101}

Professor Ingber finds democratic government inattentive to constitutional values and failing in the mission of community building.\textsuperscript{102} He provides a troubling inventory of the imperfections of democracy and the anti-majoritarian aspects of even democratic institutions,\textsuperscript{103} defects that we should soberly consider whenever looking to political institutions for answers to difficult questions.\textsuperscript{104} Nevertheless, as John Hart Ely concluded, “we may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.”\textsuperscript{105} Reciting the imperfections of democracy does not lead ineluctably to the conclusion that the least accountable branch of the federal government is

\begin{itemize}
\item through the democratic process is itself one of the most fundamental rights a person can possess.
\end{itemize}

\textsuperscript{100} See generally Robert Middlekauf, The Glorious Cause 76-93 (1982) (stating that Colonial America’s angry response to taxation by an English parliament in which Americans were not represented—the rallying cry that “taxation without representation is tyranny”—was among the early sparks that ultimately caught fire in the Revolutionary War).


\textsuperscript{102} Ingber, supra note 2, at 1534-43, 1659-65.

\textsuperscript{103} Id.

\textsuperscript{104} But see Dahl, supra note 46, at 311 (concluding that the democratic process is superior to other feasible means by which people might be governed).

the better forum for our national debate about public values. The political branches are forthrightly designed and empowered to “reconstitute society;” the courts are limited to adjudication of discrete cases or controversies. The political branches are intended to be accountable; the judiciary is not. The members of the political branches are subject to electoral removal; the judiciary is not. The judiciary is the most elevated and isolated segment of our government, and it does not become less so when those elites characterize their value choices as best suited for the unfortunate and unrepresented.

Moreover, can it not be pleaded in the defense of democratic institutions that the influence of constitutional demands upon legislative choices has been weakened precisely because courts have asserted their role as the final arbiter of constitutional law? Every legislator knows that any controversial matter will be immediately challenged in court. It is easy to pass the buck to the judiciary. During the Warren and Burger Courts, liberal legislators came to rely upon the Supreme Court to give them what they wanted without having to make a political case for it to their constituents. Thus, it is hardly surprising that legislatures have grown unaccustomed to taking constitutional responsibility for their actions. As Professor Ingber ob-

106. In this regard, it behooves us to recall Winston Churchill’s aphorism that “democracy is the worst form of Government except all those other forms that have been tried from time to time.” Winston Churchill, Speech before the House of Commons, Nov. 11, 1947, reprinted in THE OXFORD DICTIONARY OF QUOTATIONS 150 (3d ed. 1979).

107. See Frank H. Easterbrook, Method, Result, and Authority: A Reply, 98 Harv. L. Rev. 622, 627 (1985) (“Legislatures ‘reconstitute society’ daily; they are the mechanism for aggregating preferences, setting change in motion, and expressing aspirations.”).


109. See DAHL, supra note 46, at 189:

Over time, the political culture may come to incorporate the expectation that the judicial guardians can be counted on to fend off violations of fundamental rights, just as greater self-restraint on the part of the demos and its representatives may become a stronger norm in the political culture of polyarchies without
serves, "early Congresses were much more likely than are their modern successors to focus debate and structure issues in constitutional terms." 110 Those predecessors to our modern legislators acted in an era before judicial supremacy on constitutional matters had been established in its full glory.

James Bradley Thayer warned nearly a century ago that "common and easy resort" to judicial review would tend "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." 111 I have argued above that an ambitious vision of the Supreme Court and constitutional judicial review as serving the goal of republican dialogue about public virtue is without legal justification, except as bound tightly to the values incorporated into our national charter. In Part III of this Essay, let me turn to the question of whether constitutional review, even if justified, serves to promote rather than inhibit a true republican dialogue about community values and aspirations.

III. JUDICIAL DECREES AND THE ADVANCEMENT OF DIALOGUE

Alexander M. Bickel once described Supreme Court decisions as "the beginnings of conversations between the Court and the people and their representatives." 112 He acknowledged that they were "never, at the start, conversations between equals," given that the "Court has an edge" because it initiates the discussion with "some immediate action." 113 Nevertheless, he insisted, "conversations they are." 114 As did Bickel before him, Professor Ingber sees Court decisions as the beginning of "an ongoing dialogue with the rest of society regarding society's basic values." 115

110. Ingber, supra note 2, at 1657 n.639.
111. JAMES B. THAYER, JOHN MARSHALL 107 (1901).
112. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1970); see also Ingber, supra note 2, at 1507 (quoting Bickel's characterization of the Court's decisions).
113. BICKEL, supra note 112, at 91; see also Ingber, supra note 2, at 1507 ("Although the Court may coax and cajole us to accept its view of civic virtue, it remains a two-way conversation.").
114. BICKEL, supra note 112, at 91.
115. Ingber, supra note 2, at 1507.
However, to say that the Court has an "edge" in the "conversation" is an understatement.116 The "immediate action," to which Bickel refers, is, of course, the judicial decree. We may laud a decision, or we may condemn it. We may embrace the Court's pronouncement as the articulation of public virtue and accept its declaration into our public conscience, or we may express abhorrence at the Court's edict and seek to avoid and overturn its decision as wrong and unacceptable. But, for the moment, we must live with it. We may discuss and debate, but the Court decides. A judicial decree is not a suggestion or an invitation to a conversation, as every litigator soon discovers.117 Moreover, the Supreme Court's declaration of

116. Earl M. Maltz, The Supreme Court and the Quality of Political Dialogue, 5 CONST. COMMENTARY 375, 380-81 (1988) [hereinafter Maltz, The Quality of Political Dialogue] (arguing that "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" and thus "give[s] judges an enormous advantage over other participants in the debate").

117. Professor Ingber argues, with citation to Robert A. Burt, that constitutional review is a method by which the Court "invoke[s] the Constitution as a rhetorical device to suggest to us a better course rather than as a means to coerce us into following their advice." Ingber, supra note 2, at 1685-86 n.730 (citing Burt, supra note 4, at 500-01). The existence of the contempt power suggests coercion is not foreign to the judicial power. Indeed, Professor Ingber has previously acknowledged that, notwithstanding the theoretical limits on the courts of "[l]ack of access to the executive sword and legislative purse" by which to implement a ruling, the modern reality is such that, "[g]iven the present majesty of the Supreme Court, . . . few of those with access to purse or sword would be wise to overtly disregard or reject Court rulings." Stanley Ingber, The Interface of Myth and Practice in Law, 34 VAND. L. REV. 309, 347 (1981) [hereinafter Ingber, Myth and Practice in Law]. If dialogue and exhortation are truly the purposes, Mary Ann Glendon observes that "the best way for the Supreme Court to fulfill [its] role . . . would be for it to set forth its views in essays, rather than stating them in such a way as to preclude future political action." MARY A. GLENDON, ABORTION AND DI- VORCE IN WESTERN LAW 172 n.178 (1987) [hereinafter GLENDON, ABORTION]; see also James A. Gardner, The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint, 71 N.C. L. REV. 805, 841-42 (1993) ("[A]djudication does not resolve disagreements over the meaning of the Constitution by discussion and dialogue, by seeking new consensus; instead it resolves disagreements by backing the claim of one party and by crushing the claim of the other through applications of the coercive power of the state.").
constitutional law is binding upon the entire polity—"everyone must dance to the judges' tune whether party to the litigation or not."\textsuperscript{118}

Once the Court has set its course, a form of dialogue with other institutions may follow, a dialogue which seeks to influence or adjust that passage. It is the Court, however, that sets the ground rules for the discussion. Although he suggests a dialogic theory of judicial review, Barry Friedman acknowledges that "[t]he Court dictates how the dialogue will proceed by choosing one interpretation."\textsuperscript{119} The one who chooses the agenda for the debate may thereby control much of the substance as well.\textsuperscript{120} By its decisions, the Court may choose which values to elevate and commend to public approval and which values to denigrate as unworthy of further consideration.

The clearest example of a deliberate adoption of one value at the expense of another, a judicial resolution which continues to distort public choice and dialogue, may be found in the abortion decision of Roe v. Wade.\textsuperscript{121} This decision announced a generalized and fundamental right to privacy, encompassing the power to undertake conduct with significant social and moral ramifications. The Roe decision created an absolute right to abortion during the first trimester of pregnancy and allowed only for very limited regulation of abortion even late in pregnancy.\textsuperscript{122} Although the Court purported to avoid "the difficult

\textsuperscript{118} Easterbrook, Judicial Review, supra note 31, at 171. Sanford Levinson has described the widespread acceptance of the Supreme Court's primacy in declaring what the Constitution means as "the 'catholic' embrace of judicial supremacy." SANFORD LEVINSON, CONSTITUTIONAL FAITH 44 (1988).

\textsuperscript{119} Friedman, supra note 4, at 654.

\textsuperscript{120} See Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REV. 1109, 1118 (1993) (observing that in a self-governing democracy, "[t]he state ought not to be empowered to control the agenda of public discourse, or the presentation and characterization of issues within public discourse, because such control would necessarily circumscribe the potential for collective self-determination").

\textsuperscript{121} 410 U.S. 113 (1973).

\textsuperscript{122} Id. at 164-65 (summarizing the Court's holding).
question of when life begins,\textsuperscript{123} the nature of the decision effectively answers that question. The Court’s aggressive withdrawal of protection from fetal life appears to resolve the question of when human life begins, in the Court’s view anyway.\textsuperscript{124} The Court elevated the value of individual autonomy over the value of the “continued existence . . . of . . . life or potential life,” while simultaneously pretending not to make such a choice and failing (or not really trying) to demonstrate a constitutional warrant for preferring one value over the other.\textsuperscript{125}

No general theory of constitutional law, whether framed in terms of dialogue or otherwise, can fail to come to terms with and explain, rehabilitate, or reject the most controversial Supreme Court decision of the modern era. Professor Ingber hints

\textsuperscript{123} Id. at 159.
\textsuperscript{124} Michael W. McConnell, \textit{How Not to Promote Serious Deliberation About Abortion}, 58 U. CHI. L. REV. 1181, 1185 (1991) (book review); see also CARTER, supra note 22, at 254 (noting that the Roe Court could “reach the result that it does only by declining to define the fetus as human”).
\textsuperscript{125} Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting) (companion case to Roe v. Wade) (the Court’s “marshaling of values” to prefer “the convenience of the pregnant mother” over “the continued existence and development of the life or potential life that she carries” was accomplished without “constitutional warrant for imposing such an order of priorities on the people and legislatures of the States”). As Stephen L. Carter has said, “[f]ew scholars . . . find Roe v. Wade a glowing example of judicial reasoning at its best.” CARTER, supra note 22, at 251. The most consistent basis of criticism has been the Court’s failure to connect its decision firmly to any demonstrable constitutional principle. Ely, supra note 30, at 947 (charging that Roe “is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of obligation to try to be”); see also Richard G. Morgan, Roe v. Wade and the Lesson of Pre-Roe Case Law, 77 MICH. L. REV. 1724, 1724 (1979):

Rarely does the Supreme Court invite critical outrage as it did in Roe by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court’s attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function.

Even such a liberal scholar as Michael J. Perry has characterized Roe’s dismissal of the moral concern about protection of fetal life as “plainly imperial.” PERRY, MORALITY, supra note 5, at 175.
that he recognizes Roe v. Wade as a less than exemplary example of the dialogic theory of judicial review.\textsuperscript{126} He further suggests that Roe's "practical impact over time may be seriously questioned."\textsuperscript{127} Nevertheless, Professor Ingber wishes to hold

\textsuperscript{126} Ingber, \textit{supra} note 2, at 1510 (acknowledging that "Roe seems written to thwart further legislative debate and to cool public passions"). Glendon remarks that those scholars who assert that the Supreme Court should participate in a continuing social dialogue should be opposed to even a greater degree than others to the Roe Court's acting "in such a way as to close off discussion once it has spoken." \textit{Glendon, Abortion, supra} note 117, at 44; \textit{see also Burt, supra} note 4, at 488 n.106 (stating that the Supreme Court "wrongly held itself to be the authoritative calculator" in the dialogue about abortion); \textit{Perry, Morality, supra} note 5, at 177 (stating that Roe attempted to "preempt discourse" about the abortion question).

\textsuperscript{127} Ingber, \textit{supra} note 2, at 1511. Gerald N. Rosenberg, after conducting an empirical sociological study, concluded that attempts to use courts to produce significant social reform have been unsuccessful. He argues, for example, that changes in legal availability of abortion were produced largely by non-judicial factors and social trends. \textit{Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change?} 173-265, 336-43 (1991). Of course, if Rosenberg is correct, then Professor Ingber (and I) overestimate the institutional ability of the courts to effect significant social change, either directly by decision or indirectly by persuasion. In the abortion context, I am not convinced by Rosenberg's conclusion. First, although the Supreme Court generally acts under significant constraints, the Roe v. Wade decision nevertheless coopted in a substantial and continuing way the legislative authority to limit abortions even on important grounds. Moreover, even if the Roe result proves temporary (\textit{but see infra} notes 138-46 and accompanying text), the dramatic increase in the numbers of abortions following the Court's decision constituted a real and concrete effect. Rosenberg anticipates this argument by citing estimates of high numbers of illegal abortions before Roe, thus suggesting that the total numbers of now-legal abortions post-Roe were not significantly higher. \textit{Id.} at 353-55. However, other studies, including less partisan and more reasonable estimates of illegal abortion rates pre-Roe, indicate that the number of abortions before the Court's decision was but a tiny percentage of the current rate. \textit{See Samuel W. Calhoun & Andrea E. Sexton, Is It Possible to Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers, 49 Wash. & Lee L. Rev.} 437, 478-79 n.202 (1992). Second, even if Rosenberg is correct in concluding that the general outcome—greater legal availability of abortion—was not produced by Roe, as opposed to other political and social forces, the substance of the debate was certainly distorted. As discussed further below in this Essay, Roe suppressed healthy discussion of all values im-
fast to what he sees as the “crucial symbolic residual effect of Roe.” He argues that Roe, by converting “the decision to abort [into] the exercise of a constitutional right,” removed the moral “taint” upon abortion and thus “affect[ed] both the moral sensibilities of some and, likely, the willingness of many women to choose the abortion option.” Ay, there’s the rub.

By transforming abortion from a controversial and complex moral and political question into a constitutional entitlement, Roe v. Wade bestowed upon abortion the status (in the minds of many) of a positive good. It withdrew from the supporters of liberal abortion laws the obligation to frame an ethical justification, beyond absolute claims of personal control and an

plicated, allowing supporters of liberal abortion laws to avoid addressing the moral dilemma, and conferred a measure of moral legitimacy upon abortion. Aside from any effect on policy choices, a change in moral climate attributable in part to a Court decision would be significant in its own right and demand our critical attention.

128. Ingber, supra note 2, at 1511.

129. Id. at 1512. Interestingly, while Professor Ingber speaks approvingly of the Supreme Court’s Roe decision as granting moral sanction to abortion and thus empowering women to choose this option, id., he simultaneously would prevent the government from taking any action that “convey[s] a public disapproval of the abortion procedure.” Id. at 1601. For example, in the abortion funding decisions, the Supreme Court held that, while the government may not prohibit abortion, it nonetheless remains free to make “a value judgment favoring childbirth over abortion, and . . . [to] implement that judgment by the allocation of public funds.” Harris v. McRae, 448 U.S. 297, 314 (1980) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)). In Professor Ingber’s view, this expression by the government of a value preference is not permitted. “[G]overnment must not be allowed,” he says, “to act in ways which convey repudiation of the value of our constitutional rights.” Ingber, supra note 2, at 1593. Thus, while the Supreme Court may confer its moral approbation upon abortion, the other branches of government are forbidden from taking any actions that even “symbolically condemn abortions,” id. at 1595, or that evidence “an improper public hostility to abortion decisions,” id. at 1592. It is difficult to understand how dialogue between government institutions can occur under such severe restraints.

130. See Planned Parenthood of Southeastern Penn. v. Casey, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“Roe created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. (‘If the Constitution guarantees abortion, how can it be bad?’—not an accurate line of thought, but a natural one.”)).
extremely isolated view of individual autonomy. As a right, and a fundamental right at that, abortion was inherently justified. For many years following Roe, most of those who supported liberal access to abortion would simply cite the Supreme Court's ruling and regard that reference as obviating any need to discuss the morality of abortion or consider the societal impact of hundreds of thousands of abortions performed annually.\textsuperscript{131} Only when the pro-life movement appeared to be succeeding did the pro-choice movement truly become energized and outspoken in defending the right to an abortion on political grounds, although even now it tends to avoid discussing the ethical dilemma underlying abortion.\textsuperscript{132}

Thus, although Professor Ingber is surely correct in concluding that Roe has had effect in molding community values,\textsuperscript{133}

\begin{footnotesize}
131. Elizabeth Mensch & Alan Freeman, The Politics of Virtue: Is Abortion Debatable?, 4 (1993) (stating that after Roe, the “pro-choice side . . . could too easily employ a close-out ‘rights’ and ‘choice’ rhetoric in an aggressive refusal to engage in moral discourse altogether”); Maltz, The Quality of Political Dialogue, supra note 116, at 388 (“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.”).

132. The unwillingness of pro-choice advocates to acknowledge that there is a moral dimension to the abortion issue was dramatically illustrated recently by the rather frantic and zealous efforts of one prominent abortion-rights leader to deny that she had ever characterized abortion as a “bad thing.” Kate Michelman, the president of the National Abortion Rights Action League, was quoted in a front-page story of the Philadelphia Inquirer on December 11, 1993, as saying: “We think abortion is a bad thing. No woman wants to have an abortion.” Howard Kurtz, Poor Choice of Words From Abortion Rights Advocate?, WASH. POST, Feb. 7, 1994, at C1. Even this mild observation that abortion is not a positive good was apparently too much of a concession for the pro-choice movement. Michelman issued a statement saying that she “has never said—and would never say—that ‘abortion is a bad thing.’” Id. Even after being reminded that the interview with the Philadelphia Inquirer had been tape-recorded, Michelman testified before a congressional committee that she “absolutely” had been misquoted. Id. Although a transcript of the interview provided by the Inquirer confirmed the quote, Michelman still felt obliged to insist that she “would never, never, never, never mean to say such a thing.” Id.

133. Ingber, supra note 2, at 1606 (describing Roe as having a significant effect on “community value molding, including a restructuring of the
I, together with most Americans, am uncomfortable with "a climate in which the destruction of unborn children is acceptable." I also regret the "moral side-effects" of the regime of abortion-on-demand: irresponsibility in sexual conduct, evasion of obligations by putative fathers, devaluation of children, and intolerance for the dependent, "inconvenient" members of our society. By framing abortion as a nearly unqualified constitutional right, without fully considering the claims of fetal life, we have not taken a stride to a more virtuous society. Instead, we have done great harm to our sense of community, responsibility, and respect for human life. Mary Ann Glendon asks us to consider "what a set of legal arrangements that places individual liberty or mere life style over innocent life says about, and may do to, the people and the society that produces them." Having taken that look, I do not like what I see.

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role of women in society").

134. See infra note 139 and accompanying text (discussing results of public opinion surveys on abortion).

135. See Jo McGowan, In India, They Abort Females, NEWSWEEK, Jan. 30, 1989, at 12 (describing the quandary of feminists in responding to the trend in India to use abortion for sex selection: "[w]hen the issue is sex determination and the 'selective' abortion of girls, they call it female feticide. But when the issue is reproductive freedom and the abortion of male and female fetuses, they call it a 'woman's right to choose'.")

136. GLENDON, ABORTION, supra note 117, at 62; see also Mother Teresa, Speech Before National Prayer Breakfast (Feb. 3, 1994), quoted in, Mona Charen, An Illuminating Clash of Values, ST. LOUIS POST-DISPATCH, Feb. 18, 1994, at 7B ("By abortion, the mother does not learn to love but kills even her own child to solve her problems. And by abortion, the father is told that he does not have to take any responsibility for the child he has brought into the world. . . . Any country that accepts abortion is not teaching its people love but to use any violence to get what they want.")

137. Although a narrative style has been somewhat in vogue in legal writing, I previously have eschewed that approach, harboring doubts about its place in scholarship on the law. See generally Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807 (1993) (raising concerns about the reliability of narrative scholarship, its connection to legal issues, and its analytical content). However, both because this provides an opportunity to show that personal narrative is a method available to those expressing a very different perspective from that ordinarily adopted by storytelling legal writers, and because the topic at the moment is one of values,
Moreover, I do not agree with Professor Ingber that Roe retains merely symbolic value or has only residual effects upon public policy. \textsuperscript{138} Roe continues to obstruct the implementation of the value choices of most Americans. Although most Americans oppose a total ban on abortion, substantial majorities believe abortion is immoral, should be subject to significant restrictions, and should be available only in the "hard cases" of rape, incest, fetal abnormality, or when the woman's life or health are threatened. \textsuperscript{139} The absolutist approach of Roe has rather than of legal reasoning as such, I will, with much trepidation, make an exception here.

My short personal narrative may further explain why I believe Roe has been a defeat, rather than a triumph, for a moral society. I am the child of an unmarried teenage girl whose name I undoubtedly will never know. I was the product of the "unwanted" pregnancy so often referred to by those urging the continued unqualified availability of abortion. Fortunately, I was born before the Supreme Court created a constitutional right to destroy human fetal life. I would like to think that, even had there been a right to abort, my birth mother would have chosen to preserve the life growing within her. But I am only too aware of the pressures placed upon pregnant young women in such a moment of crisis. I am reminded of the sad fact that the most dangerous place for a child in America today is in its mother's womb. Thankfully, my one chance for life was not snuffed out by "choice." I was granted my right of birth and was placed for adoption. And despite my origin as one of those supposedly "unwanted" children, I think I've turned out quite all right. Still, it haunts me to know that I was a classic candidate for abortion. To echo Glendon's question, I ask what it says about our society that all that I am and all that I have accomplished could legitimately have been taken from me before I was born.

\textsuperscript{138} See Ingber, supra note 2, at 1511.

\textsuperscript{139} Richard G. Wilkins et al., \textit{Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy}, 1991 B.Y.U. L. Rev. 403, 406-08 (surveying public opinion polls on abortion); see also GLENDON, ABORTION, supra note 117, at 41 (citations omitted):

Both before and after Roe, majorities (consistently around 55 percent) have been opposed to its major innovation, elective abortion, and to much of the content of Roe and other abortion decisions. At the same time, majorities have consistently opposed a total ban on abortion and believe that the law should specify the circumstances under which it is permissible. They strongly approve abortion if the woman's health is in danger, and disapprove if it is sought for no other reason than that the woman does not want the child.
prevented the emergence in the United States of the kind of
compromises reached in most other liberal Western democra-
cies, which grant very substantial protection to women’s inter-
ests while encouraging appreciation of the moral seriousness
that contemplation of this irrevocable act should provoke.\footnote{140}

The Supreme Court, by loosening the rigid structure of Roe
in recent decisions and approving legislative attempts to en-
sure informed consent to, and familial participation in, the
abortion decision, has restored some measure of democratic
dialogue to the abortion debate.\footnote{141} Nevertheless, the Court
continues to adhere to the core holding of Roe which estab-
lished a fundamental right to elective abortion prior to
viability.\footnote{142} Indeed, in Planned Parenthood v. Casey,\footnote{143}
Justices O’Connor, Kennedy, and Souter characterized their deci-
sion to preserve Roe v. Wade as a principled refusal “to su-
render to political pressure,” arguing that “to overrule under fire”
would threaten the continued legitimacy of the Court.\footnote{144}
Thus, the very attempt by the people to engage in dialogue
with the Court and to challenge the legitimacy of an earlier
decision was taken as proof of the need to maintain cloture on
debate.\footnote{145} The Court held onto the basic Roe formulation for

\footnote{140. See Glenndon, Abortion, supra note 117, at 10-62; Mary A.
Glenndon, Rights Talk: The Imposition of Political Discourse 58 (1991) [hereinafter Glenndon, Rights Talk].}

\footnote{141. Lynn D. Wardle, “Time Enough”: Webster v. Reproductive Health
Services and the Prudent Pace of Justice, 41 Fla. L. Rev. 881, 886
(1989) (arguing that a recent Supreme Court decision allowing regulation
of abortion “effectively reopened legitimate societal and political dialogue
regarding abortion policy, dialogue indispensable to the evolution of con-
nstitutional consensus and facilitative of more tolerance and truth than
Roe v. Wade has produced”).}

\footnote{142. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816-21 (1992)
(opinion of O’Connor, J., Kennedy, J., and Souter, J.).}

\footnote{143. Id. at 2791.}

\footnote{144. Id. at 2815.}

\footnote{145. Compare id. (calling upon “the contending sides of a national con-
troversy to end their national division by accepting a common mandate
rooted in the Constitution”) with id. at 2883 (Scalia, J., concurring in
the judgment in part and dissenting in part) (“I am appalled by, the Court’s
suggestion that the decision whether to stand by an erroneous constitu-
tional decision must be strongly influenced—against overruling, no
less—by the substantial and continuing public opposition the decision has

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the express reason that to do otherwise would suggest that they listen to and could be moved by public dialogue. In the meantime, the moral dimensions of the abortion question remain largely "frozen in the difficult-to-thaw substance of Supreme Court pronouncements." 146

By raising ethical doubts about abortion, I hope that I do not obscure my broader points about the dialogic theory of judicial review. 147 If the right to abortion announced by the Supreme Court in Roe v. Wade were truly grounded in the text or history of the Constitution, 148 rather than reflecting an "exercise of raw judicial power," 149 my moral qualms would provide no


The [Casey] analysis cites the political firestorm created by the holding in Roe as a reason for refusing to re-examine the holding itself. In essence, the opinion places the defenders of abortion rights in a position much like that of the child who murders its parents and then asks for mercy on the grounds that he is an orphan.

147. More than one of those who reviewed a draft of this Essay warned me that, by adverting to a position on abortion other than pro-choice, I took the risk that some readers would dismiss my general argument because of the vehemence of their disagreement on this particular issue. However, to address a theory of constitutional law that embraces moral discourse, it seems fitting to include a frank discussion of the larger moral dimensions of such a controversial issue. See Linda R. Hirshman, Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges, 137 U. PA. L. REV. 177, 179 n. 14 (1988) ("The centrality of the abortion issue to any discussion of law and morals approaches 'sky is blue' obviousness."). Moreover, I would be disappointed to learn that those interested in scholarly discourse about the very concept of dialogue would refuse to listen to the entire range of voices participating in the discussion.

148. See supra note 125 (discussing, with citations, the constitutional basis—or rather lack thereof—for the result in Roe v. Wade).

basis for avoiding the constitutional directive. I do not expect to find my moral philosophy codified in the Constitution. This, however, was an occasion upon which the Constitution was silent. The Court thus lacked any warrant for projecting its commanding voice into the moral discourse about abortion. I appreciate that many will find the moral claim of fetal life to be either weak or outweighed by the compelling interests of equality and individual autonomy. However, if we are to have a lively and fully textured exploration of matters of moral seriousness, both sides of the equation must figure in the calculation. By pointedly neglecting one side of the issue, Roe v. Wade stands as an obstacle to meaningful dialogue.

Roe v. Wade might be set to one side as an unfortunate decision that failed to uphold the promise of the dialogic theory of judicial review. However, litigation is not a friendly forum for a balanced discussion of the wide range of values and concerns relevant to the disposition of a public issue. Constitutional litigation and adjudication force communication along a narrow path. The focus of legal advocacy is upon rights and wrongs. The adversarial process encourages a winner-take-all attitude, suppressing the possibility of compromise. The values of responsibility, respect for others, and moral character are largely missing from “rights-talk” of the courtroom.

Mary Ann Glendon has written perceptively about the excessively “strident language of rights” that has developed in America and its deleterious effect upon public discourse:

As various new rights are proclaimed or proposed, the catalog of individual liberties expands without much consideration of the ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the general welfare. Converging with the language of psychotherapy, rights talk encourages our all-too-human tendency to place the self at the center of our moral universe. In tandem with consumerism . . . , it regularly promotes the short-run over the long-term, crisis intervention over preventive measures, and particular interests over the common good.151

Professor Ingber shares with Glendon a desire for a more

150. GLENDON, RIGHTS TALK, supra note 140, at x.
151. Id. at xi.
balanced view of individual rights and communitarian values. He envisions a true dialogic process, abandoning an absolute dualism between individual rights and state interests, and encompassing an understanding of communal and interpersonal values.  

152 Thus, I believe that Professor Ingber would agree with Glendon that there "are common sense restrictions that have to be placed on one person's rights when they collide with those of another person."  

153 Yet Professor Ingber views the courts as being in a preeminent position to initiate and guide the dialogue. He would further expand the catalog of rights to sweep more of the public agenda into the courtroom where public life would be subject to the mediating influence of Supreme Court decisions. This dynamic combination of an expansive view of rights and the election of litigation as the venue for resolution of disputes about values would inevitably feed the unhealthy "rights mentality" identified by Glendon. The court-centered view of rights as entitlements to be demanded by easy resort to litigation has fostered our peculiar American dialect of absolute rights and the corresponding decline in the language of responsibility.  

155 Litigation cannot save us from what litigation has created. 

Litigation, constitutional or otherwise, does not foster a balanced and measured response to conflict. As Louis L. Jaffe warned, the "appeal to law encourages...dogmatic excess if compared with solutions by custom or by political action."  

156 Rather than seeking "[t]he qualification of general propositions to accommodate competing interests,"  

157 adversaries in litigation naturally take diametrically opposite positions. The ad-

152. Ingber, supra note 2, at 1517-25. 
153. GLENDON, RIGHTS TALK, supra note 140, at 20. 
154. Id. at x. 
155. See Allen, supra note 46, at 445 (observing that "extremely complex moral issues get reduced to slogans in the context of constitutional litigation"). 
157. Id. (arguing that "legal zealots" scorn the "qualification of general propositions to accommodate competing interests" as demonstrated by civil liberties organizations and the "fury with which they track down and seek to extirpate from public life the tiniest vestige of religious sentiment").
versarial process exacerbates differences; it does not mediate them:

Litigation usually increases tensions and often destroys relationships. . . . [A] court process usually fails to deal with the underlying causes of conflict. In fact, the adversarial process, which encourages people to focus upon what they have done right and what others have done wrong, often leaves the parties with a distorted view of reality and may actually ingrain the flawed attitudes that caused the conflict in the first place. 158

Although there may be a communal value in the protection of individual rights, when a dispute ripens into a constitutional claim, there is an immediate and unavoidable clash of values between an individual and the community. When a conflict erupts into court litigation, the words spoken are not those of dialogue and compromise and community. The language of the courtroom is of demand and entitlement and individual rights.

The Supreme Court in its white marble temple is not removed from the adversarial process. Each matter comes before it in the form of a concrete case or controversy. 159 Cases are presented by contentious briefs and opposing oral arguments. 160 When the decision is rendered, there is a winner and a loser. 161 Parties to a lawsuit do not come before the

158. Ken SanDe, The Peacemaker 39 (1991) (arguing that resolution of conflict through mediation, including conciliation measures within churches and other community organizations, is more beneficial and presents greater opportunities for reconciliation than resort to the adversarial process of litigation).

159. U.S. Const. art. III, § 2 (providing that the judicial power extends to certain “Cases” and “Controversies”); see Flast v. Cohen, 392 U.S. 83, 94-95 (1968):

Embodied in the words ‘cases’ and ‘controversies are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

160. See Sup. Ct. R. 24-25 (Supreme Court rules governing the filing of briefs); Sup. Ct. R. 28 (Supreme Court rule governing oral argument).

161. James A. Gardner argues for judicial restraint and avoidance of
Court for mediation, but for judgment.

The Court itself has hardly been immune to the centrifugal tendency to adopt extreme characterizations of opposing positions, as evidenced by the Court's readiness to label legislative decisions with which it disagrees as "irrational," "prejudiced," "invidious," "suppressive," and "defiant."\textsuperscript{162} Robert F. Nagel remarks that "[w]e legal academics have been so busy applauding the judiciary's theoretical capacity for elevated dialogue and sensitive moral decision-making that we have not much noticed the tenor of much of what the judges have actually had to say."\textsuperscript{163} Gary Lawson finds it unsurprising that "constitutional discourse takes on the familiar and unpleasant character of [partisan] political discourse," given that we have asked the Court to engage in political decision-making rather than to adjudicate questions of law.\textsuperscript{164} Indeed, the realization of Professor Ingber's vision of dialogue may be thwarted by an internal contradiction: by the very step of moving beyond legal reasoning to resolving questions of moral and political values, the Court loses the characteristics of impartiality and independence from politics that are fundamental to the maintenance of a reasoned and responsive dialogue.

unnecessary constitutional exposition by the judiciary, on the ground that ambiguity about fundamental constitutional and legal values minimizes the chances of irrevocably alienating segments of society:

The loser of a case is in a sense repudiated by society; his or her vision of society and its values and laws is pronounced wrong-headed, flawed. Especially when the case concerns the Constitution, such a pronouncement can be deeply alienating; it says that the unsuccessful party did not fully understand, and therefore does not fully share, the values of the nation as a whole.

Gardner, supra note 117, at 847; see also Paul D. Carrington, A Senate of Five: An Essay on Sexuality and Law, 23 GA. L. REV. 859, 905-06 (1989) ("Those who lose in court are told, essentially once and for all, that their ideas and values are not to be expressed in the law of the state or nation. This can be, and perhaps has been, deeply alienating.").


163. Id.; see also supra notes 143-46 and accompanying text (discussing the Supreme Court's response to dialogue in the context of abortion).

Finally, the forum of the courtroom and the language of the law is alien and alienating to the average person. Professor Ingber hopes for a constitutive dialogue that proceeds with "unprejudiced participatory access for all." But by defending the preeminence of the courts in structuring constitutional dialogue and thereby bringing the core of the debate into the courtroom, he closes the door on those who do not have access to the legal process and, in a practical sense, to those who do not possess a degree in law. Constitutional litigation by its nature is exclusionary. The average American has not been inducted into the "intellectual culture of lawyers and judges." Most Americans are unfamiliar with the Constitution, other than as a vague object of reverence. Thus, to participate effectively in a constitutive dialogue carried on in the venue of the courts, one must be a member of the priestly class of our civil religion, that is, a lawyer or a person with a strong measure of formal or informal legal education.

Additionally, a dialogue conducted through Supreme Court opinions excludes even the majority of lawyers. Mary Ann Glendon, as well as many others, has observed that Supreme Court opinions are "addressed to a specialized interpretive community." Only a few lawyers and public officials ever

165. Ingber, supra note 2, at 1497.
166. Id. at 1543.
167. NAGEL, supra note 27, at 1.
168. See generally MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986) (finding that Americans are generally ignorant of and indifferent to the Constitution).
169. See Ingber, Myth and Practice in Law, supra note 117, at 312-13 (describing how, "[f]rom clerical robes to the use of incantations and rituals, the legal system has taken on many of the trappings of institutionalized religion," resulting in the formation of a decision-making elite "in which only those legally trained are deemed capable of understanding or dealing with the complexity of the decisional process").
170. GLENDON, RIGHTS TALK, supra note 140, at 95. Indeed, "interpretive community," like "dialogue," is a central motif of current constitutional law scholarship. However, the plainly elitist character of this "community" of legal scholars and jurists usually goes unremarked. But see BORK, supra note 22, at 242 ("The constitutional culture—those who are most intimately involved with constitutional adjudication and how it is perceived by the public at large: federal judges, law professors, members of the media, public interest groups—is not a cross-section of America
read the full text of a Supreme Court decision.\textsuperscript{171} Public understanding of Court decisions is further diffused when the results of certain select opinions are filtered through imprecise, superficial, and often inaccurate press reports.\textsuperscript{172} As a result, "constitutional requirements are frequently distorted in the public perception."\textsuperscript{173} Chief Justice Harlan Fiske Stone remarked more than 50 years ago:

I could not say that one who seeks to apply the Constitution today can dispense with an extensive technical training. The gloss which has been placed on the Constitution by a century of decisions and interpretation certainly has produced a labyrinth through which the judge would find great difficulty in threading his path, and at the same time keep his balance, unless he had an extensive legal knowledge of the forestry and what lawyers think it all means.\textsuperscript{174}

As Frederick Schauer suggests, "just as legal language is different in kind from ordinary language, constitutional language may be different from other legal language."\textsuperscript{175} Thus, the dialogue of constitutional deliberation is twice removed from the ordinary discourse of the people.\textsuperscript{176} Granting the Su-

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\underline{politically, socially, or morally.}}
\end{flushleft}

\textsuperscript{171} KAMMEN, supra note 168, at 359.

\textsuperscript{172} Id. at 250-51, 357-80 (describing press coverage of Supreme Court constitutional decisions); see Alexander Wohl, Court Reporters: Media Coverage of the Supreme Court Doesn't Always Dazzle, A.B.A. J., Jan. 1994, at 38 (observing that most people "learn[] about the Supreme Court's activities primarily from the general media, whose reports are comparatively few in number and limited in scope of subject matter"; because of limited news space, "reporters often find that they cannot fully explain the rationale, impact or context of a Supreme Court decision, leaving such intricacies on the journalistic version of the 'cutting room floor'\textsuperscript{176}).

\textsuperscript{173} NAGEL, supra note 27, at 122.

\textsuperscript{174} KAMMEN, supra note 168, at 12 (quoting private letter of Harlan Fiske Stone).

\textsuperscript{175} Frederick Schauer, An Essay on Constitutional Language, 29 UCLA L. REV. 797, 800 (1982).

\textsuperscript{176} A dialogic theorist might appropriately argue that the answer to this problem is to reduce the distance between constitutional and ordinary language by making constitutional deliberation more accessible to the people. Indeed, whatever one's theory of constitutional interpretation, a commitment to the ultimate sovereignty of the people demands that
preme Court supremacy in conducting public dialogue about values through the mechanism of judicial review disempowers the people from full participation in their government.\textsuperscript{177}

The authentic voice of the people may be heard in their

\begin{quote}
the Supreme Court be clear and candid in its articulation of constitutional principles. See Joseph Goldstein, The Intelligible Constitution: The Supreme Court’s Obligation to Maintain the Constitution as Something We the People Can Understand (1992) (arguing that the Supreme Court has an obligation to explain its constitutional decisions in a manner that is understandable to the people). However, the responsibility of the Court to explain a constitutional decision in comprehensible terms also includes the duty to honestly acknowledge when a decision is not required by the authoritative test of the Constitution but rather reflects the Court’s determination to participate in a political and moral dialogue about the nature of a virtuous society. See id. at 115 (arguing that the people are entitled “to full disclosure of the Court’s reasons for what it decides”). The result of such candor would be interesting. See Thomas W. Merrill, A Modest Proposal for a Political Court, 17 Harv. J.L. & Pub. Pol’y 137 (1994) (arguing that, if the Supreme Court renounced the idea that its decisions are compelled by law and openly acknowledged that it exercises political discretion, the Court’s weakness as a political institution would force it to modify its behavior, to become more restrained in exercising political power, and to pay more attention to legal sources to preserve its legitimacy).

Professor Ingber in an earlier work described the Supreme Court as having a “bank account of legitimacy,” into which deposits are made in the form of decisions that are “consistent with popularly embraced values,” and from which withdrawals are made when the Court makes decisions that serve “to educate and direct society rather than conform to and follow it.” Ingber, Myth and Practice in Law, supra note 117, at 339-40. If the Court were to issue decisions that not only were unpopular but that were also candidly political or moral in nature, forthrightly acknowledging the absence of an authoritative basis in textual law, I predict that the Court would rapidly reach “the point where withdrawals exceed deposits” and lose its legitimacy. See id. at 340 (saying that the legal system would “lose its legitimacy and become ineffectual” only at “the point where withdrawals exceed deposits” in the bank account of legitimacy); see also supra notes 49-51 and accompanying text (arguing that a Court that “forthrightly assumed the position of moral guidance counselor” would “lose it legitimacy as a court of law”).

\textsuperscript{177} See Dahl, supra note 46, at 358 n.5 (“Judicial review greatly increases the power of certain lawyers, and indirectly of the legal profession, over the shaping of the American constitutional and political system and its public policies. Thus the power of judicial review nicely serves the corporate interests of the legal profession.”).
\end{quote}
homes, neighborhoods, churches, synagogues, and voluntary organizations. The people do not speak in the language of the law; they do not talk of texts, precedents, doctrines, multi-pronged tests, or the balancing of factors. Instead, they speak of affection, moral duty, and commitment, as well as of needs and rights. We need to encourage and strengthen their voice, not by more and better Court decisions or laws, but by removing the impediments to involvement in the community. The neighborhood picnic and the school meeting are more important than the test case. The “democratic vision” offers the hope “that by engaging in governing themselves, all people, and not merely a few, may learn to act as morally responsible human beings.”

IV. INTERMEDIARY INSTITUTIONS AND THE FUTURE OF MORAL DISCOURSE

The Constitution is an inspired and inspiring document. The Framers and Ratifiers intended the Constitution to be a “permanent” text, establishing fundamental and immutable principles for republican government. However, even this sacred blueprint of national values sketches only a part of the cathedral of moral discourse in America. We must not fall into the error of speaking “as though the Constitution and the decisions explicating it constitute the whole of public morality.” Indeed, in my view, many of our social problems today demand a resurrection of values in a manner that cannot be compelled by constitutional command or legislative enactment.

By asking whether a constitutive dialogue to forge our national character and build a better community should be centered within the courts, as opposed to other branches of government, Professor Ingber states the question too narrowly. The question is not only whether to choose between the legislature and the judiciary in making value choices, but also

178. Id. at 79.
181. Ingber, supra note 2, at 1532-34.
whether law and politics—particularly law and politics emanating from the national centers of government—should play such a predominant role in moral discourse. Professor Ingber is not alone in envisioning a powerful role for government in molding values and pursuing virtue. For example, on the right, George F. Will upholds the classical conservative view of “statecraft as soulcraft,” believing that strong government should “proscribe, mandate, regulate, or subsidize behavior that will, over time, have the predictable effect of nurturing, bolstering, or altering habits, dispositions, and values on a broad scale.”182 On the left, Hillary Rodham Clinton crusades for a “politics of meaning,” seeking to articulate an all-encompassing theory of public virtue and thence “to remold society by redefining what it means to be a human being in the 20th century, moving into the new millennium.”183 Without denying that government and law inevitably, although not always predictably, influence behavior and values,184 genuine community and a meaningful ethos must be achieved outside of either the courtroom or the legislative chamber.

The heart and soul of American life remains in what Mary Ann Glendon calls the “law-free spaces, where social life is left to the regulation of norms other than those of state-guaranteed law.”185 As Glendon says:

182. **GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 19-20 (1983).**


184. **GLENDON, ABORTION, supra note 117, at 139 (stating that “there is no escape from the fact that, willy-nilly, law performs a pedagogical role”).**

185. **GLENDON, RIGHTS TALK, supra note 140, at 104. Glendon, although retaining a healthy skepticism about the promotion of virtue through law, sees a greater role for law in inculcating values than I am inclined to grant. She agrees that “[i]n societies where the common sense of the community is expressed in various customary, religious, or conventional understandings, it would be redundant to pile legal sanctions on top of social ones.” *Id.* at 87. But, in a society like that of the modern United
Most Americans still live, work, and find meaning within a variety of overlapping small groups that generate, as well as depend on, trust, fairness, and sharing. Around the kitchen table, in the neighborhood, the workplace, in religious groups, and in various other communities of memory and mutual aid, men and women maintain ongoing dialogues about freedom and responsibility, individual and community, present and future.\textsuperscript{186}

Professor Ingber acknowledges the primary role of private intermediary institutions—"situated somewhere between the isolated individual and the distant and often abstract state"—in the development of individual moral character.\textsuperscript{187} He agrees that "civic and voluntary organizations, social and recreational clubs, churches, workplaces, schools, families, and neighborhoods . . . serve as the sites of most of those experiences which give moral and intellectual meaning to our world."\textsuperscript{188} Moreover, he emphasizes that a true constitutive dialogue should involve all actors and elements of society.\textsuperscript{189}

\textsuperscript{186} Glendon, \textit{Rights Talk}, \textit{supra} note 140, at 174.
\textsuperscript{187} Id. at 1557; see also Peter L. Berger & Richard J. Neuhaus, \textit{To Empower People: The Role of Mediating Structures in Public Policy} 41 (1977) ("Within one's group—whether it be racial, national, political, religious, or all of these—one discovers an answer to the elementary question, 'Who am I?', and is supported in living out that answer.").

\textsuperscript{188} See Ingber, \textit{supra} note 2, at 1656-57 & n.641 (stating that modern constitutional scholarship has made a "most significant mistake" in
Yet the preeminent role that Professor Ingber would grant to the courts—and thus to the state—to define societal values would undermine the value-constitutive role of intermediary institutions, including families, neighborhoods, and religious communities. As often as it has been a friend, government has been an adversary of mediating structures. Law and politics have expanded to fill every nook and cranny of society, crowding out the moral-cultural realm of our lives and displacing associational and family initiative.\textsuperscript{190} Public assistance programs discourage individual and familial responsibility and simultaneously shield self-destructive behavior from the sanction of economic consequences.\textsuperscript{191} Busing of school children to promote racial balance in classrooms removes children from their neighborhood schools and destroys a sense of community.\textsuperscript{192} Officious social engineers of both the right and the left

\textsuperscript{190} See Michael Novak, The Spirit of Democratic Capitalism 56 (1982) (viewing society as three separate, although mutually dependent, systems: the political, the economic, and the moral-cultural, none of which should be dominated by the others).


\textsuperscript{192} See Robert A. Watts, Shattered Dreams and Nagging Doubts: The Declining Support Among Black Parents for School Desegregation, 42 Emory L.J. 891, 891 (1993) (reporting that many “black parents saw desegregation, particularly busing, as a policy that had failed, and beyond that, as a policy that in many instances harmed black students and neighborhoods”); Drew S. Days, III, Brown Blues: Rethinking the Integrative Ideal, 34 WM. & MARY L. REV. 53, 55-58 (1992) (concluding that “the black community has paid, in some instances, a high price for desegregation” as, for example, “schools that served not only as educational institutions but as community centers in predominately black neighborhoods have been closed;” thus, some blacks “argue that a return to neighborhood-school assignments makes more sense because parental and community involvement in the schools would be more likely to increase”); Derrick Bell, The Dialectics of School Desegregation, 32 Ala. L. Rev. 281, 283-84 (1981) (discussing how the closing of an all-black school as part of desegregation destroyed a central hub of the community). See generally
abuse the public schools to promote parochial agendas, whether by sanctioning the recitation of prayers over the school loudspeaker or by distributing contraceptives, even over parental objections, thereby undermining parental authority and impairing the ability of parents to form their own family values. When government then attempts to respond to the social problems caused by the breakdown of private intermediary institutions, its new programs invariably “weaken [...]

Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools 262-70 (1976) (discussing the costs of abandoning neighborhood schools).

193. See Forced Prayer in Mississippi, St. Petersburg Times, Dec. 9, 1993, at 18A (arguing in editorial that a Mississippi school which permits prayers to be read over the loudspeaker before class begins usurps the role of parents and churches by imposing religious beliefs on those who do not share them); see also William Booth, Bring Back School Prayer? That’s Rallying Cry in Mississippi, Wash. Post, Dec. 20, 1993, at A1 (discussing frequent incidence of organized classroom prayer in Mississippi public schools).

194. See Carter, supra note 22, at 197 (“The battles over such issues as sex education and condom distribution provide examples of just what many parents fear most about the public schools: that they will, because experts distrusted by the parents say so, shoulder aside values that the parents cherish most.”); Marcia M. Boumil, Dispensing Birth Control in Public Schools: Do Parents Have a Right to Know?, 18 Seton Hall L. Rev. 356, 377 (1988) (“It seems inimical to the principles of parental authority... [to render birth control] services without the knowledge or consent of... [parents] who have a genuine interest in their minors' sexual health and development.”); see also Alfonso v. Fernandez, 606 N.Y.S.2d 259, 265 (App. Div. 1993) (holding that New York City school board plan to distribute contraceptives to unemancipated minor children without the consent of parents was without common-law or statutory authority and violated the constitutional rights of parents). Professor Ingber has written previously about the battles between interested groups over value training in the public schools, as parents, teachers, school boards, communities, and student groups “fight to control the process of indoctrination.” Stanley Ingber, Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools, 1987 U. Ill. L. Rev. 15, 20 (1987). Professor Ingber concludes that value inculcation is inevitable in public education, but believes that blatant use of the classroom to proselytize for an ideology can be avoided through “a sensitive and complex system of checks and balances” in school curricular decision-making. Id. at 94; see also Stanley Ingber, Religious Children and the Inevitable Compulsion of Public Schools, 43 Case W. Res. L. Rev. 773 (1993) (discussing problem of religious objections to public school curriculums).
tional structures] further and mak[e] matters in some important respects worse. [Government social policies] are making no steady headway against a sea of misery.”\(^{195}\)

Professor Ingber looks hopefully to the Supreme Court as a “mediator” of the value conflicts and social breakdown in our society.\(^{196}\) The Court, however, remains an instrument of government. W. Cole Durham, Jr. and Alexander Dushku have described intermediary organizations as “those human-sized institutions such as the church, the family, the neighborhood, workplace organizations, and schools, which help mitigate and reduce the sense of alienation of modern life,” as contrasted with “the massive governmental institutions and bureaucracies that are so often the source of the alienation.”\(^{197}\) The Supreme Court undeniably falls into the latter category. The Court on occasion may give succor and protection to intermediary institutions, but it cannot truly be an intermediary institution. In any attempt to serve as a primary generating agent of constitutive dialogue, the Court removes further power to the central national government, thereby displacing local communities and private society as the locus of moral discourse and character building.\(^{198}\) The Court’s vision and understanding is necessarily national in scope; its answers and directives are uniform across state borders, city lines, and neighborhood boundaries.\(^{199}\) As sociologist Nathan Glazer observes, the Su-

\(^{195}\) GLAZER, supra note 185, at 3.

\(^{196}\) Ingber, supra note 2, at 1655.


\(^{198}\) See Kathryn Abrams, Law’s Republicanism, 97 YALE L.J. 1591, 1605 (1988):

Localities share histories and traditions that may be more vivid or tangible to their citizens than those of the state or nation; it may therefore be easier for citizens to grasp common norms at an applicable level of specificity. Because local citizens can see in comparatively concrete terms the ways in which their communities both change over time and retain a definable character, they may be better able to understand the kind of normative revision that occurs through decisionmaking.

\(^{199}\) See ROBERT A. NISBET, COMMUNITY AND POWER 256 (1962) (“[N]ot even the American judicial system can remain for very long untouched by the drive toward political uniformity and centralization.”); see also
Supreme Court in its decisions seeks to "further equality, establishing the same rights for persons in different roles."\textsuperscript{200} But, when we look at "the fine structure of society," that is, the diversity of intermediary institutions, it is precisely the existence of distinctive roles and different contexts that forms the foundation for discrete communities.\textsuperscript{201}

In this respect, Professor Ingber's invocation of the anti-Federalist conception of civic republicanism during the founding era to support his vision of dialogue through judicial review is somewhat ironic. As Professor Ingber correctly states, the anti-Federalists, who "were the force that galvanized support for the inclusion of a Bill of Rights,"\textsuperscript{202} conceived of "civil society as a teacher—a molder of character—rather than just a regulator of conduct."\textsuperscript{203} The anti-Federalists, however, vehemently rejected a strong national government as the instrument of that character building.\textsuperscript{204} Moreover, anti-Federalists were wary of judicial review. As Philip A. Hamburger explains, "some of the most prominent Anti-federalist writers raised the specter of judges who would expand the Constitution's provi-

\textbf{Berger & Neuhaus, supra} note 188, at 11-12 (arguing that "court judgments . . . tend to treat all neighborhoods alike," and this "legal tendency . . . to assume that there is a unitary national community rather than a national community composed of thousands of communities" means that the people of each community are "denied the right to determine democratically the character of the community in which they live").

\textsuperscript{200} Glazer, supra note 185, at 154.

\textsuperscript{201} Id.

\textsuperscript{202} Ingber, supra note 2, at 1490.

\textsuperscript{203} Id.

\textsuperscript{204} See Jackson T. Main, The Anti-Federalists xi (1961) (stating that anti-Federalism "was, first, the doctrine of those who preferred a weak central government"); Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 520 (1972) (stating that the anti-Federalists were 'localists,' fearful of distant governmental, even representational, authority for very significant political and social reasons that in the final analysis must be called democratic"); Carol M. Rose, The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism, 84 NW. U. L. REV. 74, 91-92 (1989) ("The preservation of local autonomy—and with it, the meaningful liberty of self-rule—was thus . . . at the center of the Anti-Federalist position; this concern animated their objections to consolidated government.").
sions for federal authority (congressional and judicial).\footnote{205} The anti-Federalists desired the adoption of a Bill of Rights, not to anoint the federal government and its judiciary as teachers of civic good, but to limit the power of the national government so that local institutions and local communities would retain the authority to fulfill that responsibility.\footnote{206}

Family and community may be experiencing a revival today despite, not because of, government policy. The yearning for community may be reflected in the exodus from the coasts\footnote{207} and the growth of cities in the American heartland, such as my own city of Des Moines, where neighborhoods survive and private society thrives. Within cities, a sense of community has been restored where residents of urban neighborhoods have been given responsibility for improving their own lives and a voice about decisions in their communities.\footnote{208} As many members of the baby boom generation become parents, they have returned to church with their children.\footnote{209} Significantly, however, the liberal mainline Protestant churches, which had grown to resemble and imitate the surrounding secular society, continue to decline in membership,\footnote{210} while the religious re-

\begin{footnotes}
\footnote{205} Hamburger, \textit{supra} note 179, at 307 (discussing writings of anti-Federalist opponents of the Constitution); see, \textit{e.g.}, Essays of Brutus XI-XV, \textit{reprinted in 2 THE COMPLETE ANTI-FEDERALIST 417-42 (Herbert J. Storing, ed. 1981) (writings of anti-Federalist essayist on judicial review).}

\footnote{206} See \textsc{Forrest Mcdonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 285 (1985)} (stating that the anti-Federalists believed that "[o]nly a small republic could maintain the voluntary attachment of the people and a voluntary obedience to its laws, make government responsible to the people, and inculcate the people with republican virtue").


\footnote{208} See Mary Kane, \textit{Newark, N.J., Inner City Rebuilt From Bottom Up, PLAIN DEALER (Cleveland)}, Jan. 11, 1993, at 1A.


\footnote{210} \textsc{Roger Finke & Rodney Stark, The Churching of America,}
vival centers around evangelical churches that have created communities of deeply shared meaning. There is a growing consensus about the value of intact two-parent families, together with an understanding of the societal risks posed by increases in births outside of marriage. 211 Although family planning experts still scoff, abstinence programs sponsored by private organizations and churches have successfully reached hundreds of thousands of teenagers, who are learning the rewards of postponing sex and avoiding pregnancy. 212

This revitalization of values and community is not proceeding from a creative and exciting new program devised by the best and brightest in the federal government or from a judicial edict issued by the Supreme Court. Rather, at the grass-roots level, we are seeing new strength in and appreciation of local communities and private intermediary institutions. As just one example, more and more people are becoming disillusioned with the cycle of national and state-mandated reforms in public education that have come forth with regularity during the last decade. As an Iowa leader in education reform recently said:

We have seen wave after wave of top-down reform efforts sweep the schools with little positive result. In the words of one teacher, "Changes come and go, but life stays pretty

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1776-1990 271, 275 (1992) (explaining that mainline churches decline when they become so worldly and secularized that the spiritual "rewards are few and lacking in plausibility," and are then replaced by churches that do not compromise with the secular environment and instead maintain "a vivid conception of active and potent supernatural forces"); see also Jeffrey L. Sheler, Spiritual America, U.S. NEWS & WORLD REPORT, April 4, 1994, at 48, 50 (same); Kenneth L. Woodward, Dead End for the Mainline?, NEWSWEEK, Aug. 9, 1993, at 46 (stating similar conclusion). As a member of a mainline denomination church, I view this decline with sadness and great concern. I do not yet despair, as I also see signs of hope; many within the church, although mostly outside of the national leadership, seek evangelical renewal and call upon us to return to our "first love." See Revelation 2:4-5 (King James) (chastising the Church at Ephesus for having "left thy first love" (Christ) and exhorting the church to remember "from whence thou are fallen, and repent").


much the same around here.”

It's little wonder. Reform initiatives developed without the participation of those most affected by their results are unlikely to be embraced. If our transformation efforts are to be effective in the long term, they must tap into the currents of energy and deeply held beliefs flowing in each community.²¹³

Our foundational charter begins with the words, “We the People of the United States,” thereby proclaiming “in whose name the Constitution is written and by whose sufferance the government holds power.”²¹⁴ We, the People, still grow up in families, live in neighborhoods, attend local schools, and belong to churches, synagogues, and voluntary organizations. It is here, in our local communities, that we must nourish values and a sense of belonging. It is here, where the moral bonds of voluntary attachment have not yet been stretched beyond the breaking point, that true dialogue, “especially over the highest things—matters of ultimate truth and value,” can be maintained.²¹⁵ It is here that we must seek and realize our aspirations for the future.

The Constitution is an anchor for our ship of state, not the sail for our voyage to tomorrow. The Framers did ordain certain enduring principles, which guard us on our journey and keep the passing waves of tyranny from crashing over us. When the winds of change blast us forward at dangerous speed

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²¹³ Jamie Vollmer, Local Control for Schools: What Iowans Want from Public Education, DES MOINES REG., Feb. 6, 1994, at 1C.
²¹⁴ CARTER, supra note 22, at 263.

[D]eliberation and debate, especially over the highest things—matters of ultimate truth and value—is best conducted in forums where the ties of common experience are closer and the threat of coercion is absent: the communities of church, synagogue, club, political association, debating society, university, labor union (if voluntarily joined), communications media, dinner table, and so forth. The political community, being more comprehensive, must necessarily be more heterogeneous. It cannot seek “moral knowledge” in quite the same way.
or when we tack too hard to port or starboard, we depend upon judges of fortitude and legal wisdom to cast the anchor overboard and keep us moored in our traditions of liberty and democratic government. We have not, however, appointed an oligarchy of judges as our governors in law or our counselors in morality. The commission to seek a better and more virtuous society belongs to each of us as individuals and as a collection of diverse local communities and institutions of voluntary attachment. We, the living, must work out our own passage to the new millennium.