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Jeffrey R. Seul

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Jeffrey R. Seul*

Abstract: Negotiation, mediation, and other consensus-based alternatives to litigation are most often studied and defended in the context of ordinary disputes, in which liability and distributive issues are contested, but the background norms that govern the outcome of a lawsuit are not. Many consider adjudication to be the only acceptable process for addressing "significant cases": disputes about abortion, school prayer, the environment, and other value-laden issues in which background norms are contested. I argue that this perspective is ironic because litigation, like negotiation, entails compromise. Litigation is a lottery in which the substantive values a party seeks to defend, and which it claims are absolute, may be wholly or partially discredited by the court. Furthermore, litigation merely shifts the burden of negotiation to judges. I distinguish two types of negotiation, bargaining and moral deliberation, and argue that both should be viewed as legitimate alternatives to litigation for processing disputes involving deep moral disagreement. Deliberative dispute resolution processes present important opportunities for democratic participation, and settlements resulting from them may benefit both the parties and society in ways that litigation cannot. Even where parties are incapable of engaging in genuine moral deliberation, however, settlement for strategic reasons sometimes may be a sensible alternative for parties to a significant case, and should not invite scorn. Litigation and negotiation are complementary, mutually reinforcing social processes, and each has a legitimate role to play in our nation's moral discourse and the evolution of social norms.

* Lecturer on Law, Harvard Law School. B.A.S., 1984, Regis University; J.D., 1988, University of Colorado School of Law; M.T.S., 1997, Harvard University; LL.M., 2001, Harvard Law School. I thank Harvard Law School for supporting this project through a Climenko-Thayer Fellowship. I thank Robert Bordone for his comments on an early manuscript, and Carl Bogus, Carrie Menkel-Meadow, Michael Moffitt, Tim Seul, Esther Whitfield, and participants in the University of Oregon School of Law Fall 2003 ADR Survey Seminar for their comments on drafts of the Article in its present form.

INTRODUCTION

Relatively few litigants attempt to obtain a hearing before the United States Supreme Court. Parties engaged in run-of-the-mill litigation may feel they have been wronged and that justice must be done, but most cases settle without a hearing on the merits.[1] Legal disputes that have the potential to create new law on important public policy matters—one class of what Owen Fiss dubbed "significant cases" in his oft-cited polemic *Against Settlement*[2]—are, however, different. When a dispute is about abortion, affirmative action, religion, use or preservation of the natural environment, gun control, controversial medical technologies like stem cell research, or other issues involving deep value differences, settlement is rare, and talk about the possibility of settlement may seem naïve or even reckless to some.

Consider the following example. A Colorado statute establishes an eight-foot floating buffer zone around persons entering and leaving

1. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. (forthcoming Nov. 2004) (charting a precipitous decline in the number of federal and state civil and criminal trials over recent decades, despite increases in the number of case filings, lawyers, and judges).

2. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984). According to Fiss, "significant cases" mark "the real divide" between proponents and opponents of settlement. *See id.* He challenged negotiation proponents to "speak to these more 'significant' cases, and demonstrate the propriety of settling them." *Id.*

health care facilities.[3] Within a 100-foot radius of any entrance to a hospital or clinic, those wishing to influence women seeking abortions—whether through picketing, spoken protest, distribution of literature, or otherwise—are prohibited from coming within eight feet of a woman without her consent.[4] The statute was challenged by abortion opponents through litigation that reached the U.S. Supreme Court.[5] After five years of protracted litigation, the Court ultimately upheld the statute.[6]

It is not difficult to imagine ways this case could have been settled at an earlier stage, and on terms that at least partially respected the parties' respective values and objectives, whatever one may think of the options and the likelihood of achieving them. For example, groups opposing abortion could have agreed not to protest outside health care facilities or to limit their protest activities in specified ways if the health care facilities agreed to provide women considering an abortion with literature that presents cautionary, or even openly critical, perspectives of abortion. Or, perhaps the parties could have jointly produced a video designed to inform women (and men) considering an abortion about the full range of perspectives on the social, moral, religious, and health-related issues attending their decision, and about the various forms of public and private support available to those who make one choice or the other. Perhaps the parties could have agreed to a program of optional counseling for women interested in meeting, separately or together, with counselors on both sides of the debate. Perhaps one of these suggestions could have been combined with a 24-hour pre-abortion waiting period requirement.[7]

Regardless of one's views on abortion, settlement of a case like this may seem improbable at best. Settlement terms like those outlined above also may seem odd to some—out of touch with parties' respective self-understandings and values and the divergent meanings they attach to abortion and the buffer zone statute. Settlement on these or any other

3. COLO. REV. STAT. § 18-9-122 (Cum. Supp. 1996).

4. *Id.*

5. Hill v. Colorado, 530 U.S. 703, 707 (2000).

6. *Id.* at 734–35.

7. In fact, such programs already have been implemented through legislation in many other states. *See* Kate Zernike, *30 Years After Abortion Ruling, New Trends but the Old Debate*, N.Y. TIMES, Jan. 20, 2003, at A1 (surveying federal and state abortion laws). Twenty-five states have a mandatory counseling requirement, mandatory waiting period, or both. *Id.* at A16. The U.S. Supreme Court has sanctioned pre-abortion waiting period requirements, provided they are not unduly burdensome. Planned Parenthood v. Casey, 505 U.S. 833, 887 (1992).

grounds would smack of the worst sort of moral relativism to others. Even those for whom these or other settlement possibilities have some practical appeal may fear that the judiciary's role in the production of norms regarding divisive social issues could be undermined by attempts to settle such significant cases.[8]

In this Article, I argue that negotiation—including its facilitated variants, such as mediation and consensus-building processes—should be viewed as a legitimate alternative to litigation for addressing disputes involving deep moral disagreements. Fiss and a small cadre of other critics of alternatives to litigation are particularly opposed to settlement of these significant cases.[9] With the exception of Carrie Menkel-Meadow[10] and a small handful of others,[11] however, few legal scholars

8. This is one of Fiss's key objections to settlement of significant cases. Fiss, *supra* note 2, at 1087.

9. In addition to Fiss, the more notable detractors of settlement include Richard Delgado, Trina Grillo, Laura Nader, Judith Resnick, Stephen Yeazell, and, at least in his earlier writings on the subject, David Luban. *See generally* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (arguing that members of minority groups are disadvantaged in mediation); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (arguing that mediation disadvantages women); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (arguing that settlement deprives the public of legal norms and that settlements are less just than litigated outcomes) [hereinafter *Erosion*]; Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (arguing that Alternative Dispute Resolution (ADR) proponents value harmony over justice); Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (criticizing trend toward promotion of settlement in Federal Rules of Civil Procedure); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (arguing that changes in civil process, including increased promotion of alternatives to litigation, have weakened the justice system by removing cases from appellate scrutiny).

10. Through a series of articles, Menkel-Meadow, one of settlement's most prolific and jurisprudentially inclined proponents, progressively develops the most robust argument for settlement of significant cases that has been offered to date. *See, e.g.*, Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500–01 (1985) (arguing that it can be hard to distinguish "private" from "public" oriented disputes and that parties to important public disputes may often achieve a higher quality of justice through settlement than they could through litigation); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002) (examining new roles for lawyers as neutral third parties who can assist in the resolution of all types of disputes, including those involving significant public policy issues); Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice* 70 FORDHAM L. REV. 1761, 1763 (2002) [hereinafter Menkel-Meadow, *Pursuing Peace*] (arguing that lawyers and parties can serve their interests by "searching for consensus solutions to seemingly intractable public policy and legal disputes"); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 835–36 (1984) (arguing that "cases where the law must be clear, and in abortion, school busing, etc." are "appropriately settled by total victory,"

but that some of these disputes "may still benefit from a problem-solving conception both before and after the decree"); Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 35 (1996) [hereinafter Menkel-Meadow, *Trouble*] (suggesting that consensus-oriented approaches to dispute resolution can be used effectively "for policy deliberations"); Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y. 37, 39 (2002) [hereinafter Menkel-Meadow, *Litigation*] (exploring "how processes that enable the expression and 'handling' of conflict may serve the public interest as well as, if not better than, the simplistic Anglo-American conception of adversary justice or public interest litigation"); Carrie Menkel-Meadow, *Whose Dispute Is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2676 (1995) [hereinafter Menkel-Meadow, *Whose Dispute?*] (arguing that settlement can be seen as a form of "democratic expression" that enables parties to obtain more individualized forms of justice and even to "explore avenues for law reform"). Menkel-Meadow does not draw a tight distinction between ordinary and significant cases as I have defined them, no doubt in part because she believes that what I call ordinary cases sometimes present significant policy issues. *See* Menkel-Meadow, *Whose Dispute?* at 2667 n.24 ("It is not only our larger 'structural' lawsuits that raise important issues of public values, but even the 'smallest' of cases has significant public, as well as private, possibilities of value clarification."). Her belief in the potential public significance of seemingly ordinary cases is a byproduct of her experience mediating automobile accident cases, in which "multicultural/racial issues" and questions regarding "standards of human behavior and responsibility" often surfaced. *Id.* In her most recent work, however, Menkel-Meadow focuses on settlement of what I refer to as significant cases more explicitly than she does in most of her earlier work. This suggests her acknowledgment that some cases present exceptional public policy issues and that her general defense of consensual dispute resolution processes applies to these cases with equal force. *See, e.g.*, Menkel-Meadow, *Pursuing Peace* at 1763 (advocating the search "for consensus solutions to seemingly intractable public policy and legal disputes").

11. Several other legal scholars, practicing lawyers, and mediators have also offered explicit justifications for settling significant cases. *See, e.g.*, Margaret G. Farrell, *Revisiting* Roe v. Wade*: Substance and Process in the Abortion Debate*, 68 IND. L.J. 269, 330–60 (1993) (discussing potential benefits of consensus-oriented, "participatory adjudication" model for resolving the issues presented by *Roe v. Wade*, 410 U.S. 113 (1973)); Barbara Ashley Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1236–44 (1983) (advocating the use of mediation in policy disputes); Riley M. Sinder et al., *Promoting Progress: The Supreme Court's Duty of Care*, 23 OHIO N.U. L. REV. 71, 122–32 (1996) (arguing that the U.S. Supreme Court should exercise its authority in a manner that does not dictate solutions to social problems, but which encourages the development of consensus solutions to them). Earlier strains of legal scholarship that are not focused specifically on settlement of the types of significant cases I address—particularly the work of "legal process" scholars—also lend support to the notion of settling value-laden disputes. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 645 (William Eskridge & Phillip Frickey eds., 1994) (encouraging use of negotiation and mediation for "disputes which are not susceptible of solution by reasoning from generally applicable criteria of decision"); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298–1302 (1976) (discussing the changing role of courts in institutional reform, including their role in helping parties fashion negotiated remedies, often with the help of third parties functioning as mediators); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978) (arguing that adjudication is ill-suited to the resolution of disputes involving "polycentric" problems, in which the parties' relationships have many, interrelated strands); Lon Fuller, *Mediation—Its Form and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) [hereinafter Fuller, *Mediation*] (describing the

of negotiation and alternative dispute resolution have openly supported the prospect of settling significant cases.[12] To date, most settlement proponents have focused primarily on what one might call ordinary cases: disputes that typically occur against a background of relatively well-settled legal norms that are widely considered to be morally legitimate.

I believe negotiation should be viewed as a credible alternative to litigation for resolving disputes that raise important public policy questions. As explained more fully below, I use the term "negotiation" in two senses. The first is "strategic settlement": pure, self-interested bargaining in which each party is willing to satisfy others' interests *solely* as a strategy for satisfying its own interests. The second is collective moral deliberation, in which parties explicitly seek mutually recognizable moral grounds on which to justify the terms of their agreement. When moral deliberation produces a formal or informal agreement among the parties, the agreement necessarily results from some degree of change regarding one's own perspective, others' perspectives, or both. Although I do not suggest that we should actively encourage crass bargaining as the best approach for resolving disputes

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"central quality of mediation" as "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship").

12. On the other hand, few legal scholars of negotiation and dispute resolution have openly opposed the idea. Robert Mnookin, Scott Peppet, and Andrew Tulumello advise that "some cases *shouldn't* settle," including cases in which "a party has a strong desire to create a lasting legal precedent" and those in which "a party's interest in public vindication is so strong that it cannot be met without adjudication." ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 107 (2000) (emphasis in original). This prescription seems to be offered as a reminder to the parties themselves that litigation is the only means of obtaining a judicial precedent and (in their view) the most visible means of obtaining public vindication, rather than as a general critique of settlement of significant cases. *See id.*; *see also* Robert H. Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077, 1082–90 (2003) (proposing a framework for deciding whether to negotiate in situations that raise questions regarding the appropriateness and effectiveness of negotiation). Alternative dispute resolution proponents Frank E. A. Sander and Stephen B. Goldberg suggest that, from the public's perspective, "a court resolution might be preferable to a private settlement" of a case involving a significant policy question, such as a dispute that "raises a significant question of statutory or constitutional interpretation." Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 60 (1994). For this reason, they argue that courts should not necessarily "encourage or assist settlement in such a case." *Id. But see* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 17 (1988) ("In at least some cases . . . rights-based court procedures are preferable, from a societal perspective, to resolution through interests-based negotiation.").

involving deeply held values, I argue that both types of negotiation can play a legitimate role in the management and the eventual, just resolution of these disputes in various circumstances and make valuable contributions to democracy.

Litigation of a dispute involving deep moral disagreement has costs as well as benefits, from the perspectives of both the parties and the public. Negotiation also has costs and benefits. Even in the realm of significant cases, litigation's ultimate value—to the parties and to society as a whole—can be assessed only by comparing litigation to other available means of responding to the dispute.[13] The comparative costs and benefits of litigation versus settlement have been explored extensively with respect to the everyday types of disputes that crowd court dockets.[14] Legal scholars have said less about the relative benefits of litigation and negotiation with respect to significant cases.

In Part I of this Article, I examine some key differences between ordinary and significant cases—differences that may make settlement of significant cases seem inappropriate or implausible to some. In Part II, I discuss two ironies that are little acknowledged and discussed, but are implicit in resistance to the idea of settling significant cases. In Part III, I respond to claims that it is impossible to settle significant cases because of the intractable nature of disputes involving deeply held values. In Part IV, I consider what litigants and the public stand to gain, and lose, when cases that present significant public policy questions are settled. I

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13. *See* Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 104–05 (1986) (noting that litigation and settlement each have costs and benefits); Fuller, *Mediation*, *supra* note 11, at 307 (arguing that we must develop the ability "to appraise the relative aptness, for solving a given problem, of the various competing forms of social ordering"); Menkel-Meadow, *Pursuing Peace*, *supra* note 10, at 1770 ("Claims about the fairness and 'justice' of all forms of process must be considered both for what they promise and do internally, as well as in relation to what else is available."); Sander & Goldberg, *supra* note 12, at 60 (discussing advantages and disadvantages of various alternatives to litigation).

14. Much of this analysis has been done from a law and economics perspective. *See generally* Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); Bruce L. Hay & Kathryn E. Spier, *Settlement of Litigation*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442–51 (Peter Newman ed., 1998); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163 (1982); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

explore the relationship between settlement and deliberative democratic theory in Part V, arguing that settlement processes that invite collective moral deliberation can be an important form of democratic participation. In Part VI, I anticipate and respond to claims that my perspective represents a form of moral relativism. I also present a set of principles for designing consensual dispute resolution processes geared toward resolving disputes involving deep value differences. Fidelity to these principles, I argue, increases the likelihood that the outcomes of such processes will be morally sound, socially desirable, and durable.

I. DIFFERENCES BETWEEN ORDINARY AND SIGNIFICANT CASES

As indicated above, the types of cases I refer to as "ordinary cases" typically involve disputes that occur against a background of relatively well-settled legal norms that the parties accept as legitimate. For example, in a typical contract action, the parties do not question whether the plaintiff is entitled to damages if the defendant breached a contract with the plaintiff. They disagree about whether the defendant breached and, if the judge or jury concludes that it did, the amount of damages to which the plaintiff is entitled. Similarly, in the typical tort action, the parties dispute whether the defendant caused the plaintiff's injuries and, if so, how much compensation is appropriate. They do not question whether a party responsible for another's injuries is liable to the injured party.

Significant cases are different. They involve contested social norms, and the competing norms defended by the parties often are foundational to their respective worldviews.[15] Fiss identifies four types of significant cases:

> cases in which there are significant distributional inequalities; those in which it is difficult to generate authoritative consent because organizations or social groups are parties or because the power to settle is vested in autonomous agents; those in which the court must continue to supervise the parties after judgment; and those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative

15. *See* Theodore M. Benditt, *Compromising Interests and Principles*, *in* COMPROMISE IN ETHICS, LAW, AND POLITICS 26, 32 (J. Roland Pennock & John W. Chapman eds., 1979) (distinguishing between disputes about ideals and disputes about interests). For a general taxonomy of dispute types, see generally GEORG SIMMEL, CONFLICT (Kurt H. Wolff trans., 1955).

interpretation of law.[16]

I give some attention to cases that exhibit the first three of these characteristics, but I focus on the final type of case for two reasons. First, I believe cases likely to produce an authoritative interpretation of law often (though, obviously, not always) also fall into one or more of the other categories. For instance, the early school desegregation and busing cases exhibited all four characteristics to some degree, but the fourth characteristic arguably is what made them most socially, politically, legally, and morally significant.[17] Second, I consider Fiss's and others' objections to settlement to be most compelling with respect to the fourth type of case, and less has been offered by way of rebuttal to these objections.

Significant cases either present novel legal issues or, much to the contrary, arise against a well-settled background of *legal* norms that a segment of the population considers to be out-of-step with contemporary (or at least their preferred) *social* norms. In the first instance, background legal norms are extremely thin or nonexistent. Because the parties are not "bargaining in the shadow of the law" in any meaningful sense, it would be very difficult for them to resolve their dispute consensually based upon convergent expectations about how a court would resolve it.[18] The most reliable type of information—a prior decision that addresses the disputed issues—is simply unavailable. A

16. Fiss, *supra* note 2, at 1087.

17. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

18. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979) (arguing that disputants' relative substantive and procedural rights influence negotiation behavior and outcomes). *But see* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 40–81 (1991) (reporting results of empirical study of animal trespass and boundary fence dispute settlements among farmers and ranchers in Shasta County, California, in which parties based settlements on informal norms rather than relevant legal principles, of which they were generally unaware); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 125–26 (1991) (reporting results of empirical studies which, among other things, indicate that most people are unaware of decisions of the U.S. Supreme Court); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 505–68 (1991) (reporting results of empirical study of securities fraud settlements in which settlement amounts bore little or no relation to expected value of trial outcomes). While the average citizen may be unaware of decisions of the U.S. Supreme Court that affect their interests, representatives of social groups that typically influence or control litigation of significant cases (e.g., activists and public interest lawyers) no doubt are aware of them. Interestingly, Ian Ayres and Eric Talley argue that uncertain legal norms actually may create incentives that promote equitable agreements. Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1102 (1995).

notable example of the second type of case—one where existing law was challenged and unsettled as a result of a shift in prevailing social norms—is *Brown v. Board of Education.*[19] *Brown I* upended segregationist legal norms established, legitimated and protected by *Plessy v. Ferguson*[20] and a series of prior U.S. Supreme Court decisions.[21] In this second type of significant case, a prior decision addressing the disputed issues exists, but one party opposes it and is hopeful that it can persuade the Court to alter or reverse the decision.

As Paul Campos explains, significant cases are difficult to resolve through the type of rational argumentation and decision-making that occurs when fundamental principles are not at stake and generally accepted legal norms make the outcome of litigation more predictable.[22]

> [M]ost difficult legal problems involve not only complicated empirical problems, but also problematic judgments concerning questions of moral value, and (often as a direct consequence of these other difficulties) various conceptually incommensurable definitions of what sorts of facts are said to constitute legal meaning. These latter types of disputes will tend not to be amenable to resolution through the procurement of more evidence via the workings of the dispute processing system, either because they involve conceptual disagreements about what should even count as evidence, or because they can't usefully be thought of as involving evidentiary questions at all.[23]

One might say that ordinary cases involve questions of justice with a small "j," whereas significant cases involve questions of Justice writ large. In significant cases, the parties are trying to establish or buttress background legal norms, either by creating a new legal norm where none presently exists, or by subverting or reaffirming an existing legal norm that mirrors a favored social norm. Each party is pursuing justice in the

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19. 347 U.S. 483 (1954) [hereinafter *Brown I*].

20. 163 U.S. 537 (1896).

21. *See generally* CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

22. PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW 63 (1998); *see also* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÉCLE) 42–43 (1997) (arguing that parties are incapable of reaching consensus in ideological disputes).

23. CAMPOS, *supra* note 22, at 63. As Campos explains, "within such a zone powerful competing considerations can be adduced for holding a variety of views. Furthermore such considerations can't be refuted without recourse to some axiomatic ground of argument that others do not accept and that, precisely because it *is* axiomatic, cannot be argued for rationally." *Id.* at 160 (emphasis in original).

larger sense of a legal order that affirms a social order one considers normative. The parties are pursuing their respective universalizing projects by attempting, through adjudication, to establish, alter or defend a legal rule.[24]

When we litigate significant cases, we do so—and say we do so—to advance or defend a claimed right or state of affairs that we believe follows axiomatically from a deeply held value, such as the sanctity of life, personal freedom, or equality.[25] Though this point is obvious enough, here is a small sampling of quotes that illustrate it:

On abortion:

> "[I]f you step back and consider this, that the richest people that have ever lived on the face of this earth have somehow engaged in *killing* one of every three of *their own offspring*, you have to think something *is bad*, bad wrong there."[26]

> "It really comes down to *whether women will have an equal place* at life's table, whether we value children enough that we want them to be planned and wanted and cared for."[27]

On the Boy Scouts' exclusion of homosexuals:

> "The Boy Scouts of America, as a private organization, must have the *right to establish its own standards of membership* if it is to continue to instill the values of the Scout Oath and Law in boys."[28]

> "The dissents strongly embrace a sensitive and fair understanding of *gay equality* . . . and clearly have the better of

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24. *See* KENNEDY, *supra* note 22, at 39–70 (discussing adjudication in terms of ideological conflict over legal rules).

25. *See* Benditt, *supra* note 15, at 34 (noting that disputants' favored policies flow from their moral convictions).

26. Zumike, *supra* note 7, at A16 (quoting David O'Steen, executive director, National Right to Life Committee) (emphasis added).

27. *Id.* (quoting Gloria Feldt, president, Planned Parenthood) (emphasis added).

28. News Release, Boy Scouts of America (June 28, 2000) (commenting on the U.S. Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)) (emphasis added), *available at* http://www.scouting.org (last visited Jan. 2, 2004).

the argument."[29]

In the eyes of these disputants, social justice will not exist on a grand scale unless a cherished value is actualized through enforcement of a claimed right or the institution or eradication of a particular state of social affairs. Parties to significant cases seek to establish or defend structures they consider essential to a just social order.

Deeply held values are among the raw material from which an individual's sense of self and the identity of significant social groups to which one belongs are constructed.[30] Significant cases often pit one moral community and at least one of its identity-defining norms against other communities and at least one of their respective, identity-defining norms. For example, in the anti-segregation phase of the civil rights struggle, African-Americans and other anti-segregationists opposed segregation laws and policies based on their commitment to the dignity and equality of African-Americans, and segregationists attempted to preserve those same laws and policies, at least in part, on the basis of their commitment to notions of federalism.[31] The values and norms at stake in significant cases also partially define social boundaries and generate and maintain social structures and institutions in which individual and group identities and perceptions of self-interest are constructed.[32]

It is not merely the subject matter of the dispute that gives rise to a significant case. Some disputes about school prayer generate significant cases, and others do not. The parents of students attending a private, Christian school might agree that their children should pray together, but they may disagree about how frequently the students should pray. Nor are significant cases necessarily a byproduct of disputes between members of social groups whose boundaries are partially defined by

29. Lambda Legal Defense and Education Fund, *Cases:* Boy Scouts of America v. Dale (Sept. 1, 2000) (emphasis added), *available at* http://www.lambdalegal.org (last visited Jan. 2, 2004).

30. Support for this proposition is readily found within the literature on social psychology. *See, e.g.*, Kimberly A. Wade-Benzoni et al., *Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions*, 27 ACAD. MGMT. REV. 41, 44–45 (2002) (discussing the relationship between values and individual and group identity); *see also* Benditt, *supra* note 15, at 31 (arguing, from a philosophical perspective, that "our principles often define us, at least in part").

31. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243–44 (1964) (concerning states' rights defense of white-only accommodations).

32. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 8 (1983) ("Men and women take on concrete identities because of the way they conceive and create, and then possess and employ social goods."); Wade-Benzoni, *supra* note 30, at 43–47.

divergent, deeply held values. A simple contract dispute between a gun control advocate and a member of the National Rifle Association is unlikely to produce a significant case. These examples raise distributive questions that are comparatively easy to resolve, because the parties' disagreement arises against a background of mutually accepted social or legal norms.

II. TWO IRONIES OF LITIGATION

The ardor with which significant cases are litigated is understandable in light of the depth of the litigants' respective commitments to the values they seek to advance or defend, but two characteristics of adjudication as a process for achieving one's objectives also make it somewhat ironic. Litigation is a lottery in which the substantive values a party seeks to defend, and which it claims are absolute, may be wholly or partially discredited by the court. Furthermore, litigation merely shifts the burden of negotiation to judges. In both of these ways, litigation, like negotiation, entails compromise.

A. Risking It All

Litigation always involves risk of an unfavorable ruling. It frequently produces binary, win-lose outcomes. When it does not, both parties lose to some extent.[33] As Martin Shapiro explains, "lurking within such judicial institutions as money damages and equitable discretion are major elements of compromise."[34] Compromise is built into the system—not negotiated compromise, but compromise in the sense of choosing to forgo alternatives and accept the risk that courts will endorse a norm that is not wholly consistent with one's perspective.[35]

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33. Judith Resnick, a prominent critic of alternative dispute resolution, observes that judicial decisions often are more complex than some negotiation proponents suggest. Resnick, *supra* note 9, at 537 n.205. Interestingly, some critics of settlement miss this point. Jules Coleman and Charles Silver, for example, argues that settlements, unlike judgments, almost never do justice because neither party prevails completely over the other. Coleman & Silver, *supra* note 13, at 104.

34. Martin Shapiro, *Compromise and Litigation, in* COMPROMISE IN ETHICS, LAW, AND POLITICS 163, 173–74 (J. Roland Pennock & John W. Chapman eds., 1979). Shapiro associates winner-take-all outcomes primarily with suits at law, where the remedy is money damages, and more integrative outcomes (i.e., a balance of the equities) with suits at equity. *Id.* at 167–68. He cites the school desegregation cases as the prime example of the latter. *Id.* at 170.

35. *See* Arthur Kuflik, *Morality and Compromise, in* COMPROMISE IN ETHICS, LAW, AND POLITICS 38, 40 (J. Roland Pennock & John W. Chapman eds., 1979) ("[T]he mere fact that the

Most disputants who litigate a significant case undoubtedly are painfully aware that the outcome of their lawsuit may be an unfavorable legal precedent, as Jules Lobel explains.[36] Lobel, a law professor who litigated and lost many significant cases opposing the United States' interventions in Central America during the 1980s, still questions his efforts, even as he defends them.[37] Lobel ultimately concludes that litigation is an acceptable strategy for pursing social change because it catalyzes political engagement and influences public discourse, contributing to the creation of a "culture of legal struggle that continually informs and inspires future generations to challenge oppressive practices."[38]

Whether or not one accepts Lobel's vision of justice as endless struggle, one can appreciate litigation's potential value in rallying others, including future generations, around one's cause. As Lobel acknowledges, however, it is not the only potential way to mobilize others. Given litigation's high costs, it seems odd that he makes "no special claim for . . . [its] strategic usefulness . . . as compared with other forms of political and social action."[39] Short of life-threatening forms of protest (e.g., hunger strikes) and acts of civil disobedience involving risk of physical retaliation or imprisonment, litigating a case all the way to the Supreme Court in an unfavorable social and political climate surely is one of the most costly signals of the strength of one's convictions and one of the riskiest approaches for achieving one's ultimate ends. Nonetheless, Lobel encourages lawyer-activists to "reject . . . the solution of minor improvement in favor of total redemption."[40] By doing so, they accept that their efforts may not improve, and perhaps may

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contending parties have agreed to submit their dispute to the determination of a certain procedure will be sufficient to ascribe a compromise to them, however they fare in the end."); *id.* at 53 (stating that litigants "affirm that they are prepared to make concessions to one another if, in the considered judgment of a competent judge, that is what they *ought* to do") (emphasis in original); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 389 (1989) [hereinafter *Quality*] (noting that a "trial is in effect a lottery"); Shapiro, *supra* note 34, at 168–69 (arguing that, even in suits at law that produce winner-take-all outcomes, parties compromise by agreeing to abide by the court's decision).

36. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1336 (1995).

37. *Id.* at 1337.

38. *Id.* at 1353.

39. *Id.* at 1355.

40. *Id.* at 1338.

worsen, the lot of those they represent.[41] Things may get worse, or stay bad much longer, before they get better.[42]

The losers will likely view their loss as a temporary setback or, like Lobel, a marginal gain in light of the perceived benefits realized in terms of promoting one's cause. Yet, legal norms articulated by courts often further entrench social norms that the losers opposed. As Riley Sinder and colleagues argue, until *Brown I*[43] overturned *Plessy v. Ferguson*,[44] "segregationists could use federal and state governments to block problem-solvers from providing adequate education for blacks."[45] Whether the costs of unsuccessful litigation are ultimately justified is a

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41. It is interesting to note that many of the lawyers litigating significant cases are not among the class of persons they seek to protect. For example, Lobel, a citizen and resident of the United States, sought to protect Central Americans through litigation in U.S. courts. *Id.* at 1333–34. Albion Tourgeé, who represented the losing parties in *Plessy v. Ferguson*, was white. (For an account of Tourgeé's life and legal work, see generally OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGEÉ (1965)). Lobel's heavy focus on the lawyer's motivations and justifications for litigating, as well as his many florid references to activist litigators as "prophets," visionary "fools," "artists," "poets," and the like, arguably gives the lawyers' narratives and professional identities precedence over the developing narratives, and practical circumstances, of those they represent. Lobel, *supra* note 36, at 1331, 1341. To borrow a phrase from Menkel-Meadow, one cannot help but ask, "[w]hose dispute is it anyway?" Menkel-Meadow, *Whose Dispute?*, *supra* note 10, at 2663. I wonder whether those whose interests Lobel and his colleagues represented fully appreciated the negative consequences of litigation pursued and lost, as compared to other forms of political engagement. *See also* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976) (questioning whether civil rights lawyers' pursuit of their own litigation goals compromised their clients' educational goals); Farrell, *supra* note 11, at 334 ("Ideologically motivated attorneys, many of whom work with organizations with predetermined litigation programs, may consciously or unconsciously subordinate the interests of class members or subgroups of class members to their political agendas."). As long as there are disagreements on matters involving deeply held values, the pursuit of opposing views of justice will indeed produce social struggle, but many lawyers may be too quick to file a complaint and too convinced of the necessity and inevitability of litigation to final judgment. As Lobel himself argues, "in a nation like ours, where the idea of justice historically has been attached to courts and judicial proceedings, it is inevitable that lawyers who are connected with radical social movements will introduce their struggles into the judicial arena even when they recognize that their chances of success are small." Lobel, *supra* note 36, at 1355.

42. Jack Greenberg, former director-counsel of the NAACP Legal Defense Fund (and another white civil rights litigator), advises against such high-stakes litigation when social and political conditions make a favorable ruling very unlikely. Jack Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 REC. ASS'N BAR CITY N.Y. 320, 349 (1974) ("Lawyers ought to try to avoid creating a new *Plessy v. Ferguson* and should apply energies where they will be most productive.").

43. *Brown I*, 347 US 483, 495 (1954) (overturning "separate but equal" doctrine in public education).

44. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (holding that Louisiana statute requiring separate but equal railway accommodations for white and colored persons was not unconstitutional).

45. Sinder, *supra* note 11, at 102.

complex (and perhaps unanswerable) question, as Lobel suggests, but there can be no doubt that there are costs.[46]

B. Letting Others Negotiate for Us

Litigating a significant case to final judgment is ironic in another sense. Those who litigate let others negotiate for them. Though their most cherished values are at stake, the litigants in a significant case relinquish control of its resolution to a small group of strangers. These strangers have authority to leave the litigants' concerns unsatisfied or to produce a "balanced" outcome that is different than the balance the litigants, who have greater knowledge of their own interests, preferences and moral convictions, might otherwise strike for themselves. In effect, they let judges and juries do their compromising for them—in this case, compromise in the sense of a negotiated resolution of the dispute.

Others negotiate for us at all levels within the judicial system. Jury deliberations determine the outcome of many trials, but even bench trials are resolved by negotiation in the sense that trial court judges render their decisions through a conversation with other judges that occurs through published opinions which address the same or analogous issues. Panels of judges decide appeals. I focus on the U.S. Supreme Court in the remainder of this Part because it is the "negotiation delegate" of last resort in any significant case.[47]

Although negotiation among the justices of the U.S. Supreme Court is highly stylized, there is no question that they negotiate. They do not engage in the type of coarse horse-trading that sometimes occurs within the other branches of government; rather, they "accommodate" their own ideological perspectives to others' perspectives as necessary to substantially achieve their own objectives.[48] The author of an opinion

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46. Some have argued that the cost of the U.S. Supreme Court's decision in the *Dred Scott* case was no less than all the lives lost in the Civil War. *See, e.g.*, EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 371–72 (1962) (stating that the Civil War might have been avoided if the Court's decision had in some way acknowledged the depth of antislavery sentiment in parts of the country); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 98 (1985) (stating that the Court's decision "made the Civil War all but inevitable").

47. U.S. CONST. art. III § 1.

48. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 144–45 (1991). Although the focus of Perry's study is the Court's decision-making behavior on petitions for certiorari, he frequently compares the Court's behavior at the certiorari stage to its decision-making behavior on the merits of a case. *See generally id.* Of course, a U.S. Supreme Court justice's votes naturally reflect his or her "attitudes, values, or personal policy

may circulate many drafts in an effort to produce a majority, sometimes engaging in strategic behavior such as exposing less than the full court to a particular draft in an interim effort to address the requirements of a particular justice or group of justices.[49] Because a single justice cannot dictate the Court's decision, most decisions are the product of some degree of compromise among those in the majority. Through discussion and successive draft opinions, justices tinker their way toward a conclusion that produces an outcome and supporting rationale with which each member of the majority is, by definition, at least minimally satisfied.[50]

As a result of these efforts to accommodate the perspectives of other members of the Court, many judicially created norms represent an amalgam of reasons and values.[51] The U.S. Supreme Court's holding in *Roe v. Wade*[52] is one notable example of such a compromise result.[53] The litigants themselves might have reached this compromise if they had attempted to author a draft bill on the issue and lobbied for its passage. Pro-life activists surely do not consider the Court's holding to be a "win-win" outcome, but at least some of them would admit that the Court attempted to balance respect for a pregnant woman's autonomy and respect for the developing human fetus.

Unanimous decisions frequently involve a high degree of mutual accommodation.[54] The following quote from an unidentified justice, recorded by H.W. Perry, Jr. during his study of the U.S. Supreme Court's behavior when considering petitions for certiorari, illustrates the

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preferences." Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557 (1989) (reporting results of empirical analysis demonstrating correlation between U.S. Supreme Court justices' personal ideological beliefs as expressed in personal writing, speeches, and positions taken in the Court's opinions).

49. *See* PERRY, *supra* note 48, at 144–45.

50. *See id.* at 195 ("[J]ustices . . . [bargain] when it comes to the reasoning in an opinion, if not the judgment. We know that bargaining (or accommodation) takes place at that stage.").

51. *See generally* Aleksander Peczenk, *Cumulation and Compromises of Reasons in the Law*, *in* COMPROMISE IN ETHICS, LAW, AND POLITICS 176 (J. Roland Pennock & John W. Chapman eds., 1979) (arguing that compromise and aggregation of reasons is much more common in the creation of legal norms than mutually exclusive choices among them).

52. 410 U.S. 113 (1973).

53. *Id.* at 164–65 (recognizing a woman's right to have an abortion prior to the point at which the fetus would be independently viable, and a state's right to proscribe abortion thereafter, except when abortion is necessary to protect the mother's life or health).

54. *See* PERRY, *supra* note 48, at 148; *cf.* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 121 (2003) ("We should never lose sight of how regrettable it is when the Court cannot find its way to agreement.").

point:

> Chief Justice Warren was credited a lot for having a unanimous Court in Brown. The cost was having "all deliberate speed" come in. I think it would have been better to have the dissent spelled out . . . have the dissenters tell their problems, and then have a strong opinion answer the dissent rather than coming down with a weak opinion so that everyone would sign. I think it is better to acknowledge what argument there is on a controversial issue like that.[55]

As this remark makes clear, the justices of the U.S. Supreme Court not only negotiate, they sometimes join opinions that seem incrementalist to some signatories and too progressive to others.

On occasion, the Court likely reaches unanimity relatively easily because the justices' perspectives on an issue already are well aligned. Conversely, the Court may sometimes reach unanimity as a result of a significant change in the perspective of at least one justice. Although it is impossible to know, the Court's decision in *Virginia v. Black*,[56] which upheld (in substantial part) Virginia's statute prohibiting cross burning with an intent to intimidate,[57] may be the most recent example of this. During oral argument, Justice Thomas, who ordinarily says little or nothing, interjected with several forceful comments and questions that reportedly had a visible emotional impact on other members of the Court, leading one observer to speculate that he had changed the perspectives of the other justices, who previously had expressed doubt about the constitutionality of the statute.[58]

Despite the pressure to produce unanimous decisions, the Court very often is divided. Sometimes it is so divided that "the" Court's opinion consists of a thin majority perspective and multiple dissents. Other times it is so vehemently divided that we get the oddest of all opinions: a plurality opinion, in which one can barely discern the common thread that joins those viewpoints which together constitute the Court's

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55. *See* PERRY, *supra* note 48, at 148.

56. 538 U.S. 343 (2003).

57. In a plurality opinion, the Court upheld the portion of the Virginia statute that outlawed burning a cross with intent to intimidate. *Id.* at 363. It struck down the portion of the statute that said, in effect, that burning a cross is prima facie evidence of intimidation. *Id.* at 367. Justice Thomas dissented with respect to the latter aspect of the plurality opinion. *Id.* at 388–400 (Thomas, J., dissenting).

58. Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1.

decision. The Court's opinion in *Bush v. Gore*[59] is just one highly visible, recent example.

Whether the Court is unanimous or bitterly divided, it arrives at decisions through processes akin to those by which settling litigants, legislatures, and the public at large arrive at decisions. When the Court's decision is unanimous, we have an example of consensual decision-making—the very result litigants achieve when they resolve their dispute without a final decision on the merits. When the Court's decision is not unanimous, we have an example of decision-making by majority vote. This is the method by which many negotiations are resolved, from three friends' selection of a restaurant to the U.S. Congress's adoption of the Civil Rights Act. Even when the Court reaches its decision by putting the matter to a vote among the justices, however, some degree of "accommodation" likely has occurred among the members of the majority.

Some argue that the U.S. Supreme Court's structure, formal and informal norms and procedures, and relative insulation from political influences eliminate crass bargaining in the process by which it arrives at its decisions, thereby encouraging moral deliberation among the justices.[60] The Court's mandate and institutional design, the life tenure of its members, and other factors probably do conspire to produce a higher quality of dialogue than is typical within most other institutions and spheres of social life. Ultimately, however, the Court renders its decisions on contentious matters through processes available to other institutions and groups—negotiation and voting.[61] While bargaining may

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59. 531 U.S. 98 (2000).

60. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25–26 (1962) ("Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."); RONALD DWORKIN, LAW'S EMPIRE 375 (1986) (arguing that courts are more likely to "reach sound decisions about minority rights" than legislatures, because they are insulated from political pressure); RONALD DWORKIN, A MATTER OF PRINCIPLE 9–71 (1985) ("Judicial review ensures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself.").

61. Amy Gutmann and Dennis Thompson note that claims about the Court's superior ability to engage in moral deliberation are empirically unfounded. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 45 (1996). On the other hand, the Supreme Court law clerks interviewed by Perry provide some evidence that the justices sometimes *do* engage in bargaining. While they generally reported that the justices bargain very little with respect to their decisions on motions for certiorari, they reported that the justices bargain more in decisions on the merits, though less than the circuit judges for whom the clerks had served. *See* PERRY, *supra* note 48, at 150–60. Numerous other studies have produced evidence of bargaining and strategic behavior among

be more prevalent in other political contexts, moral deliberation does occur, and there is no reason why it cannot be considered normative.

Viewed longitudinally, the Court appears as just another participant—albeit one with a privileged role and special powers—in a never-ending process by which we negotiate social norms. The extent to which its role in the construction and maintenance of *legal* norms influences the ongoing construction and maintenance of *social* norms is discussed below.[62] Suffice it to say here, however, that the Court's ultimate influence in the construction and maintenance of social norms is open to question. At most, perhaps it acts sometimes as an accelerating force, and sometimes as a crude brake, with respect to the development of dominant social norms.

C. *Explaining the Ironies: An Implicit Reason We Litigate*

If the explicit reason disputants litigate is to advance or defend some cherished value that conflicts with a value held by one's adversary, why do they submit their dispute to a process in which others will negotiate a resolution that may leave them wholly or partially disappointed?

I believe that a significant, implicit reason we litigate must be that we also value the relatively pacific resolution—or at least processing—of disputes. Litigation provides a forum in which we can safely confront our adversaries and be heard—by the court itself, if not by the other party or parties. The parties' choice among available means for addressing their dispute suggests they implicitly recognize that they, and the court before which they have brought their dispute, are participants in a larger social system that, overall, is worth maintaining and attempting to enhance.[63] The disputants, like the rest of us, inhabit a social context in which many of their other cherished values are aligned, even though those that are the subject of their current dispute are not.

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appellate judges. *See, e.g.*, LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 89–124 (1997) (surveying empirical studies of strategic behavior among judges); LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 79–81, 115–16 (1999) (presenting evidence of bargaining and threats in memoranda circulated among U.S. Supreme Court justices).

62. *See infra* Part IV.A.2.

63. Some would argue that at least some litigants embrace litigation as their strongest available strategy for opposition in light of the state's monopoly on violence. History is, however, replete with violent uprisings and other forms of protest, so the decision to litigate clearly seems a decision to participate in the system—to rail against some aspect of it, rather than attempt to subvert it completely. *But see* ELLICKSON, *supra* note 18, at 144 (arguing that self-help remedies and other laws that enable parties to use force demonstrate that the state does not monopolize violence).

The fact that people litigate over their most deeply held values calls into question their claims that those values are absolute. This in no way implies that participants in an ideologically based dispute have an easy time choosing between litigation and its alternatives, as if litigation were just one tactic among others for expressing and attempting to advance one's moral convictions.[64] It seems little acknowledged, however, that litigation essentially permits us to negotiate what we allege is non-negotiable, effectively creating a market through which seemingly incommensurable values can be traded.[65] In the realm of significant cases, litigation prevents—or at least buffers us against the worst potential effects of—failures in the market for social norms.[66] The parties' competing values may be incommensurable in the abstract, but their actual disputing behavior seems to demonstrate that they are willing to compromise their values to some extent because they wish to inhabit a social system that is capable of containing and processing their dispute in a reasonably pacific manner.[67]

Litigation also plays a significant role in the construction and maintenance of individual and group identities. As a form of social activism, litigation has the advantage of seemingly saving disputants

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64. It does appear, however, that negotiated alternatives may indeed be more easily chosen in ideologically based disputes when litigation is an unattractive alternative. *See* Ann E. Tenbrunsel et al., The Reality and Myth of Sacred Issues in Ideologically-Based Negotiations (August 7, 2002) (unpublished manuscript, on file with author) (presenting empirical evidence that participants in disputes about deeply held values are more inclined to negotiate when they expect to lose a lawsuit).

65. Cass Sunstein argues that competing values truly are incommensurable, but that "the legal system often must put problems of incommensurability to one side, leaving those problems for ethics rather than law." Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 820 (1994). In other words, courts sometimes must make binary choices between competing values when the parties cannot synthesize them through some unitary medium of exchange (e.g., money). If one takes a more global perspective on the role of courts in resolving value-laden disputes, however, it is clear that litigation—not "law," but the legal *process*—facilitates an exchange that the parties are unwilling to make without an intermediary. In effect, the parties synthesize, or at least coordinate, their values procedurally. Their shared desire for a relatively pacific resolution of their dispute serves as a common currency; they trade the substantive values they defend (in the sense of placing them at risk) in exchange for the relative social stability they enjoy by submitting their dispute to litigation, rather than resorting to violence or taking other, more drastic action.

66. *See* John A. Stookey, *Trials and Tribulations: Crises, Litigation, and Legal Change*, 24 LAW & SOC'Y REV. 497, 498 (1990) (noting that "[a] 'consensus'-oriented theoretical tradition emphasizes that litigation functions to achieve social integration when traditional forms of nonstate control weaken").

67. Political Scientist Joseph H. Carens calls this desire a "commitment to union." Joseph H. Carens, *Compromises in Politics*, *in* COMPROMISE IN ETHICS, LAW, AND POLITICS 123, 136 (J. Roland Pennock & John W. Chapman eds., 1979).

from making accommodative exchanges on matters they consider sacred and incommensurable, thereby sparing competing individuals and groups from the uncomfortable process of identity reconstruction that might be occasioned by a consensual resolution of the dispute.[68] Public defense of one's values through litigation sends powerful signals to one's cohorts.[69] It rallies others around the same cause, making social groups to which one belongs, and which contribute to one's self sense, more cohesive and distinct.[70] Litigating a case through trial and multiple appeals is a relatively public and taxing way to demonstrate the genuineness and strength of one's convictions.[71] An activist who attempts to advance his or her cause incrementally, through forms of political engagement that require others' acquiescence or active support, may be perceived as making taboo trade-offs.[72] Negotiation may seriously undermine one's social identity or standing in the eyes of others.[73] For some, litigation may seem to be the only means to defend values one considers non-negotiable without undermining one's sense of self and risking sanction by one's peers.[74]

In the realm of significant cases, litigation permits disputants to maintain a sense of absolute conviction to a cherished value while also

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68. This may be the answer to Malcolm Feeley's question about why so many people resort to the court despite its limited ability to cause broad social change. Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745, 756–57 (1993) (reviewing GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)).

69. *See* ERIC A. POSNER, LAW AND SOCIAL NORMS 18–29 (2000) (offering a signaling theory of individual and group identity construction).

70. It is easier to mobilize groups with strong collective identities than to mobilize loosely connected individuals. *See* Michael W. McCann, *Law and Political Struggles for Social Change: Puzzles, Paradoxes, and Promises in Future Research*, *in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 319, 336 (David A. Schultz ed., 1998).

71. On the other hand, litigation is less costly than violent confrontation, so it arguably makes moral outrage easier to express. *See* Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853, 868 (2000) (suggesting that moral outrage is expressed most vehemently when the perceived violation of the moral order is egregious and outrage is not costly to express).

72. *Id.* at 854; Leigh L. Thompson & Richard Gonzalez, *Environmental Disputes: Competition for Scarce Resources and Clashing Values*, *in* ENVIRONMENT, ETHICS, AND BEHAVIOR: THE PSYCHOLOGY OF ENVIRONMENTAL VALUATION AND DEGRADATION 75 (Max H. Bazerman et al. eds., 1997).

73. *See* Benditt, *supra* note 15, at 31 ("[T]o compromise on matters of principle is to risk a loss of esteem, not only on the part of others, but even on one's own part."); Tetlock, *supra* note 71, at 867 (concluding, based upon experimental evidence, that "taboo trade-offs undermine core assumptions underlying relationships that are central to our conceptions of our selves and our social world").

74. *See* Tetlock, *supra* note 71, at 855–56 (arguing that protection of sacred values has two goals, "to convince oneself of one's moral worthiness and . . . to shore up the external moral order").

enabling them to live in a world that accommodates—and which, I believe, they implicitly want to have the capacity to accommodate—a diversity of competing perspectives. Litigants go to court to serve two values, not one. One value is defended through briefs and oral argument; the other is implicit in the choice to litigate rather than secede or use violent forms of coercion. Adjudication is a more constructive response to the reality of social pluralism than dueling and other forms of violence, and that, I believe, is why we embrace it.[75] Each of the litigants no doubt hopes that his or her perspective will prevail, but each implicitly wishes his or her perspective to prevail within a society that is capable of peacefully resolving even its most seemingly intractable conflicts.

III. IS SETTLEMENT POSSIBLE?

There is understandable skepticism about the possibility of settling the types of disputes that give rise to significant cases. As Fiss contends, "[w]e turn to the courts because we need to, not because of some quirk in our personalities."[76] Before considering what the disputants and the public might gain through efforts to settle the types of disputes that give rise to significant cases, it is worth considering whether settlement is possible in the first place.

The types of disputes that give rise to significant cases admittedly are among the least tractable of all conflicts. Social psychologists have discovered a number of cognitive errors and biases that systematically distort disputants' perceptions and judgments in any negotiation, making agreements more difficult to achieve and often less than optimal when they do occur.[77] These barriers, some of which are discussed below in

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75. *See* HART & SACKS, *supra* note 11, at 4 ("The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision."); Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 32 (2002) ("The disputants' willingness to submit their dispute to adjudication by a recognized tribunal is itself an affirmation of community, far more so than the self-help remedies of the blood feud, duel, or riot.").

76. *See* Fiss, *supra* note 2, at 1089. Fiss's skepticism about the potential for settlement of significant cases is reinforced in his brief response to McThenia and Shaffer's critical review of *Against Settlement*. *Compare* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664 (1985) (arguing that the goal of ADR processes is not efficient dispute processing, but reconciliation), *with* Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985) (arguing that courts exist to resolve disputes in a just manner when reconciliation is not possible).

77. *See* LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 120–39 (1998) (surveying social psychological research on cognitive errors and biases that can affect negotiation

Part III.B.1, may be especially high in value-laden disputes.[78] Researchers have observed that mainstream theories and advice about negotiation, developed primarily with reference to ordinary disputes and negotiations in which financial issues predominate, are less powerful in the context of ideologically based disputes.[79]

Despite the many barriers to settlement of the types of disputes that give rise to significant cases, two types of settlements, though rare, can and do occur. One type can be thought of as strategic settlement. Strategic settlement occurs when at least one of the parties is motivated primarily by a desire to avoid the risk of an adverse decision. This party hopes that progress can be made politically, without the burden of a recently affirmed, adverse legal norm. Perhaps this party also hopes to bring "better facts" before the court at a later date. The other type of settlement results from some degree of true perspective change that produces an informal understanding or a formal agreement regarding action the parties will (or will not) take regarding matters of common concern.

Strategic settlements result from bargaining, in which the goal is maximal satisfaction of one's own interests through compromise.[80] Perspective change results from collective moral deliberation.[81] As explained further in Part V, the goal of moral deliberation is the complete or partial transformation of interests, rather than their mere aggregation.[82] The remainder of this Part demonstrates that each type of

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behavior).

78. Social psychological research confirms that, "[t]o the extent that conflicts involve people's core values and beliefs, people will be more emotional, less able to think in an integratively complex fashion, . . . less likely to conceive or consider tradeoffs on issues involving those core values[,] . . . more rigid and single minded in their argument content and style[,] . . . [and] more likely to defend these values at any cost." Wade-Benzoni, *supra* note 30, at 44.

79. *See, e.g.*, Tenbrunsel, *supra* note 64, at 5 (observing that mainstream "[b]ehavioral negotiation theories—which focus on agreements over scarce resources, competing issues and/or situations in which the basic nature of the dispute is understood . . . are not particularly useful for examining negotiations . . . that are rooted in differences in ideological beliefs").

80. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 61, at 57–63 (comparing deliberation and bargaining).

81. *Id.*

82. Bargaining often is associated with the type of interest group dynamics that are taken for granted by liberal political theorists, and deliberation often is associated with the republican political ideal. For discussions of the distinction between interest group politics and republican forms of political action, see generally Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). *See also* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW and DEMOCRACY 296–97 (William Rehg trans., 1996) (associating bargaining with the

settlement is possible—not just in theory, but also in practice.

A. Strategic Settlement

The agreement reached shortly before the case of *Piscataway Township Board of Education v. Taxman*[83] was to be heard by the U.S. Supreme Court is an example of strategic settlement.[84] Sharon Taxman, a white public high school teacher in Piscataway, New Jersey, lost her job when the school district decided to eliminate a position in her department.[85] An African-American teacher in her department, Debra Williams, who started her job on the same day as Taxman and was equally qualified, was retained.[86] Under New Jersey law, school workforce reductions are to be made on the basis of seniority, with less senior employees being laid off first.[87] Because both teachers had received favorable performance reviews, the school needed another basis for making its decision about whom to release from Taxman's department.[88] The board had broken all past seniority ties by drawing lots.[89] In this instance, however, it made the decision on racial grounds, releasing Taxman and retaining Williams because the School Board believed its decision would promote diversity and support the goals of affirmative action.[90]

Taxman sued, claiming reverse discrimination.[91] The trial and appellate courts ruled in her favor,[92] and the U.S. Supreme Court granted

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liberal tradition in political theory and deliberation with republicanism).

83. 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997).

84. This is a case of strategic settlement because the Piscataway school board settled primarily to avoid an adverse legal precedent. *See* Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and Its Lessons About Interest Group Path Manipulation*, 9 GEO. MASON U. CIV. RTS. L.J. 207, 215–16 (1999) (reporting events preceding settlement). The settlement was not the product of changed perspectives about the underlying conflict resulting from a process of collective moral deliberation.

85. *See* United States v. Bd. of Educ. 832 F. Supp. 836, 840 (D.N.J. 1993), *aff'd en banc sub nom.* Taxman v. Bd. of Educ., 91 F.3d 1547 (3rd Cir. 1996), *cert. granted sub nom.* Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997).

86. *Bd. of Educ.*, 832 F. Supp. at 840.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 837.

92. *Id.* at 851, *aff'd en banc*, 91 F.3d 1547 (3rd Cir. 1996).

certiorari.[93] Fearing a precedent with a negative effect on affirmative action programs throughout the country, a coalition of civil rights groups persuaded the school board to settle.[94] The Reverend Jesse Jackson, one of the leaders of the coalition, prevailed upon the board's president to make Ms. Taxman a generous offer of settlement, $300,000 of which would be supplied by the coalition.[95]

Supporters and opponents of affirmative action alike decried the *Piscataway* settlement.[96] Many accused both sides of selling out—of "placing the route to the Supreme Court on the open market."[97] Nonetheless, the *Piscataway* settlement demonstrates that significant cases can be, and sometimes are, settled on strategic grounds.

A strategic settlement of a significant case is not the type of win-win, value-maximizing outcome that proponents of legal negotiation typically promise and extol. As discussed below in Part IV.A, while strategic settlement may occasionally be preferable to continued litigation from the perspective of the parties and even the public, it is a win-win outcome only in a very limited sense. While some of the various psychological barriers to settlement may have been overcome in order to achieve it—particularly disputants' tendency toward overconfidence about their alternatives to settlement[98] and reactive devaluation of an opponent's offers of settlement[99]—the fundamental psychological dynamic among the parties has not shifted from simple, polarized thinking to anything approaching the sort of integratively complex thinking that proponents of settlement hope parties can achieve. Anyone who aspires to help parties to disputes involving deep value differences

93. Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997). Writ of certiorari was dismissed after the case settled. Piscataway Township Bd. of Educ. v. Taxman, 522 U.S. 1010 (1997).

94. *See* Estrada, *supra* note 84, at 215–16 (reporting events preceding settlement).

95. *Id.*

96. *See* Nat Hentoff, Editorial, *Escaping from the Supreme Court*, VILLAGE VOICE, Dec. 30, 1997, at 22. It probably is fair to say, however, that opponents of affirmative action were more distressed by the settlement than supporters. *See, e.g.*, Steven A. Holmes, *Rights Settlement May Only Have Forestalled Major Decision, Experts Say*, N.Y. TIMES, Dec. 1, 1997, at A15 (reporting outrage regarding *Piscataway* settlement expressed by affirmative action opponents); J. Scott Orr, *Affirmative Action Buys Some Breathing Room*, SUNDAY STAR-LEDGER, Nov. 23, 1997, at 13 (reporting outrage regarding *Piscataway* settlement expressed by affirmative action opponents).

97. *See* Hentoff, *supra* note 96, at 22.

98. *See, e.g.*, MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 56–64 (1992) (discussing the overconfidence effect in negotiation behavior).

99. Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 394–95 (1991).

engage in the type of discourse that may result in genuine perspective change and the emergence of creative settlement options will likely view a strategic settlement as a missed opportunity and, at most, only a minor validation of the potential of negotiation to contribute to the resolution of ideological disputes.

B. Moral Deliberation

Settlements resulting from collective moral deliberation are also possible, though academics from disciplines other than law generally have been more inclined to promote deliberative dispute resolution processes and shown greater optimism about their potential to change the perspectives of parties to ideologically based disputes.[100] Scholars in social psychology,[101] political science,[102] urban planning,[103] and other fields have made important theoretical, empirical, and prescriptive contributions to our understanding of disputes involving deep value differences and productive methods for resolving them.

1. Barriers to Settlement

As indicated above, social psychologists have identified various systematic biases and errors in judgment that operate as barriers to settlement and which produce suboptimal outcomes when settlements do

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100. Skepticism about the potential for settlement of ideological disputes is not, of course, limited to legal circles. *See, e.g.*, Carens, *supra* note 67, at 129 (questioning whether "integrative compromise" is possible or desirable in disputes where one party doubts the legitimacy of another party's perspective); Martin P. Golding, *The Nature of Compromise: A Preliminary Inquiry*, *in* COMPROMISE IN ETHICS, LAW, AND POLITICS 3, 10–11 (J. Roland Pennock & John W. Chapman eds., 1979) ("It is far from clear that conflicts that are rooted in differences of principle or ideology . . . can be terminated either by a directly negotiated compromise or by submission to a third party.").

101. *See, e.g.*, Tenbrunsel, *supra* note 64, at 23–24 (presenting evidence that negotiators on either side of an environmental issue tend to be more open to compromise if they expect to lose a lawsuit on the issue); Thompson & Gonzalez, *supra* note 72, at 84–98 (discussing psychological obstacles to the resolution of ideological disputes and offering prescriptions for overcoming them); Wade-Benzoni, *supra* note 30, at 43–46, 51–53 (discussing value differences as a barrier to conflict resolution and offering suggestions for further research regarding value conflict and its resolution).

102. *See infra* Part V.

103. *See generally* JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES (1999) (encouraging deliberative approach to resolution of urban planning disputes and other difficult conflicts over resource use); LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING PUBLIC DISPUTES (1996) (encouraging deliberative approach to resolution of urban planning disputes and other difficult conflicts over resource use).

occur.[104] Skilled mediators sometimes can help disputants overcome these barriers to settlement, producing changed perspectives about the dispute and the possibilities for its resolution.[105] Research and practical experience demonstrate that disputants who manage to overcome win-lose thinking and other psychological obstacles to settlement often achieve more satisfactory results through cooperation, both individually and collectively, than they would through continued conflict.[106]

Some psychological barriers to settlement may be particularly high in ideologically based disputes. These include the tendencies to attribute more extreme and homogenous views to one's opponents, and even to one's own cohorts, than they actually hold; to resist making trade-offs one considers taboo; and to apply self-serving notions of fairness.[107]

Research by social psychologists establishes that participants in the types of disputes that give rise to significant cases typically view themselves as reasonable and ready to cooperate, while falsely viewing others as unreasonable and unwilling to cooperate—an attribution error that has been aptly named naïve realism.[108] Researchers have found that "when each group is asked to name the cause of the dispute, each will attribute the negative aspects of the conflict to the dispositions of the other party."[109] In essence, parties on all sides of disputes involving deep value differences falsely believe that *others*, unlike themselves, are completely intransigent.[110] One or both sides tend to "greatly exaggerate the difference between their own and the other's belief systems in a way that exacerbate[s] the conflict."[111] In disputes regarding fundamental

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104. *See* THOMPSON, *supra* note 77, at 124–34.

105. *See* Robert H. Mnookin & Lee Ross, *Introduction*, *in* BARRIERS TO CONFLICT RESOLUTION 2, 22–23 (Kenneth Arrow et al. eds., 1995) (discussing mediator's role in overcoming psychological and non-psychological barriers to settlement).

106. *See generally* Max H. Bazerman et al., "YOU CAN'T ENLARGE THE PIE": SIX BARRIERS TO EFFECTIVE GOVERNMENT (2001).

107. Thompson & Gonzalez, *supra* note 72, at 84–94 (discussing these and other cognitive errors and biases that operate as barriers to resolution of value-laden conflicts).

108. *See* Robert J. Robinson et al., *Actual versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 404–05 (1995); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173 (Leonard Berkowitz ed., 1977).

109. *See* THOMPSON, *supra* note 77, at 268.

110. The same often may be true of the lawyers that represent them.

111. THOMPSON, *supra* note 77, at 268. Interestingly, while liberal and conservative research subjects in studies by Robinson and his colleagues considered the views of members of the opposite group to be more extreme than they actually were, liberals, "neutrals," and even conservatives

values, each side tends to attribute to the other extreme attitudes they do not actually hold.[112] Disputants also tend to perceive "the other side to be more uniform in their views, whereas they perceiv[e] their own views to be more varied and heterogeneous."[113] Consequently, "[t]he general principle appears to be that coercion is viewed as more effective with our enemies than with ourselves, whereas conciliation is viewed as more effective with ourselves than with our enemies."[114]

In a study of English teachers on opposite sides of the "Great Books" debate, for example, social psychologists Robert Robinson and Dacher Keltner found that traditionalists exaggerated the position of revisionist teachers, attributing to the revisionists an exaggerated degree of ideological difference and predicting a degree of oppositional behavior that they did not exhibit.[115] Traditionalists and revisionists on average selected seven books in common when asked to develop a fifteen-book reading list for an introductory college literature course.[116] Another example: a March 2000 poll found that eighty-three percent of Americans believe evolution should be taught in the schools, and seventy-nine percent believe creationism should be taught. In other words, a very substantial number of Americans believe students should be exposed to both perspectives.[117] These and other studies suggest there is often less ideological and practical distance between opposing moral communities than individuals on each side of a dispute realize.[118]

Interestingly, individual disputants tend to believe that it is not only

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themselves overestimated the extremeness of the views held by conservatives. Robinson, *supra* note 108, at 414. The researchers found that, in general, liberals tend to be less accurate in their construal of their adversaries, while conservatives tend to be less accurate in their construal of their peers. *Id.* at 413.

112. Robert Robinson & Dacher Keltner, *Much Ado About Nothing? Revisionists and Traditionalists Choose an Introductory English Syllabus*, 7 PSYCHOL. SCI. 18, 24 (1996).

113. THOMPSON, *supra* note 77, at 268 (citing P.W. Linville et al., *Perceived Distributions of Characteristics of In-group and Out-group Members: Empirical Evidence and a Computer Simulation*, 57 J. PERSONALITY & SOC. PSYCHOL. 165–88 (1989)).

114. Thompson & Gonzalez, *supra* note 72, at 90.

115. Robinson & Keltner, *supra* note 112, at 21.

116. *Id.*

117. James Glanz, *Survey Finds Support Is Strong for Teaching 2 Origin Theories*, N.Y. TIMES, Mar. 11, 2000, at A1.

118. *See, e.g.*, ALAN WOLFE, ONE NATION, AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH OTHER 268–74 (1998) (summarizing evidence, presented earlier in the book, that the majority of middle-class Americans are not deeply divided over moral issues).

their enemies whose beliefs are ideologically predetermined (unlike their own views, which they see as based upon reasonable interpretations of all available evidence); who are less capable of seeing "shades of gray"; and who are less open to conciliation. As Robert J. Robinson, Dacher Keltner, Andrew Ward and Lee Ross found in their studies of pro-choice and pro-life views of partisanship in the abortion debate and of liberal and conservative views regarding the 1986 Howard Beach racial incident, partisans also believe *their own cohorts* are "extreme, unreasonable, and unreachable," though somewhat less so than their opponents.[119] In other words, many of us privately see ourselves as complex moral thinkers who are surrounded by ideologues both within and outside our own moral community.

As Robinson and his colleagues explain, the consequences of this belief are unfortunate: "Partisans, accordingly, are apt to underestimate the possibility of finding common ground that could provide the basis for conciliation and constructive action; as a consequence, they could be reluctant to enter into the type of frank dialogue that could reveal . . . commonalities in interests or beliefs."[120] They also are reluctant to signal "their doubts or ambivalence to their ideological peers—lest they face coolness, suspicion, criticism, or even ostracism."[121] The bitter irony is that many individuals on each side of an ideologically based dispute may believe that all parties could profit from cooperation, but few are willing to engage in dialogue because they believe the risks of proposing it are too great in light of their low expectations about the likelihood of success.

All of this is not to say, however, that the differences between parties to the types of disputes that give rise to significant cases are not real and substantial. At times, there may be very little overlap between their underlying values (save their implicit willingness to resolve the dispute through relatively peaceful means). Perhaps more commonly, disputants embrace a similar set of values in the abstract, but place dramatically inverted emphasis on them in the context of their dispute.[122] Pro-choice advocates generally do not dispute the sanctity of life and the value of the family. Pro-life advocates typically do not entirely reject the

119. Robinson, *supra* note 108, at 405.

120. *Id.*

121. *Id.* at 415.

122. *See* Benditt, *supra* note 15, at 34 (noting that conflicts of principle may arise from "different weights being given to similar principles").

principles of individual freedom and self-determination. In the abortion context, however, each privileges one set of values over the other. Nonetheless, the fact remains that disputants tend to systematically attribute more extreme and homogenous views to both one's opponents and one's peers than they actually hold, and this tendency creates a significant barrier to settlement.

A second psychological barrier to settlement, which was briefly introduced above,[123] is related to this first one. To believe that one's adversaries and one's cohorts hold pure and highly polarized views regarding the subject matter of a dispute is to believe that both see the dispute as a zero-sum game in which cooperation is not possible. As indicated above, however, if one privately believes cooperation may be possible, one may nonetheless be reluctant to cooperate, in part because of the social signaling costs one would incur, both in terms of one's own reputation and in terms of the threat to group cohesiveness. When an issue is viewed as sacred, any exchange related to it is likely to be considered a "taboo tradeoff" that would invite the scorn of one's peers and compromise one's sense of self-worth and social standing.[124] If one is afraid even to publicly suggest that a contested issue may be somewhat morally ambiguous, it follows that one will be even more afraid to actually act as if that is the case. As Wade-Benzoni and her colleagues explain, however, "[t]he simple truth is that it is virtually impossible for people *not* to make trade-offs among core values, since tradeoffs are a consequence of social existence."[125] Common sense and empirical evidence[126] confirm that the degree to which one holds a value to be sacred often is situational, depending to a significant extent on how much one can afford to maintain an inflexible position.[127]

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123. *See supra* Part II.C.

124. Tetlock, *supra* note 71, at 854.

125. Wade-Benzoni, *supra* note 30, at 45 (citing MILTON ROKEACH, THE NATURE OF HUMAN VALUES (1973); Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853 (2000)).

126. *See, e.g.*, Jonathan Baron & Sarah Leshner, *How Serious Are Expressions of Protected Values?*, J. EXPERIMENTAL PSYCHOL.: APPLIED 183 (2000) (providing empirical evidence that values proclaimed to be sacred change based on situational factors); Tenbrunsel, *supra* note 64, at 21–22 (reporting evidence that suggests that parties to ideological disputes who see litigation as their alternative to agreement, and who believe they are likely to lose in court, are more likely to settle).

127. As I argue above, litigation masks this reality by creating a mechanism by which such trade-offs occur without the appearance that one has treated the core value one seeks to defend as commensurable with other values (e.g., maintaining social order). The mechanism (adjudication)

Another potentially significant barrier to settlement of ideological disputes is the tendency of disputants to be self-serving—and to be completely unaware that they are being self-serving—in their perceptions and judgments regarding fairness.[128] Disputants tend to focus on information that favors their own interests, discount information that favors others' interests, and thus apply fairness principles in self-serving ways, claiming for themselves more of whatever (material or symbolic) resources are available for trade than an independent third party would award to each of them.[129] In a dispute over forest use, fishing rights or pollution, for example, environmentalists and parties representing commercial interests may have difficulty agreeing on what level of resource use or degradation is fair under the circumstances.

Wade-Benzoni and her colleagues speculate that such "egocentric interpretations of fairness" may be especially pronounced in ideological disputes.[130] Beliefs about what is fair in ideologically based conflicts emerge from moral beliefs, which are deeply ingrained, hard to change, and associated with powerful emotions. In addition, outcomes are tied to issues of high importance, so the parties believe there is much at stake. Under such circumstances it is difficult for individuals to engage in reciprocal perspective taking (i.e., trying to see the situation from the other party's point of view), which has been shown to help mitigate egocentrism.[131]

Egocentrism tends to be more extreme in disputes that involve a great deal of uncertainty,[132] either because there is disagreement about what counts as evidence, because evidence is lacking, or because the standards in light of which evidence should be judged are disputed. As we have seen, the types of disputes that produce significant cases often exhibit one or more of these characteristics.

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operates by transferring decision authority from the principal parties in the dispute to third parties who negotiate for them. To participate, one must accept the risk that these third parties will return a decision that wholly or partially repudiates the core value one seeks to defend. The trade-offs made in settlement are taboo only because those made through litigation remain implicit. *See supra* Part II.C.

128. Wade-Benzoni, *supra* note 30, at 43–44.

129. *Id.*

130. *Id.*

131. *Id.* at 44.

132. *Id.*

2. *Overcoming Barriers to Settlement*

To overcome these and other psychological barriers to settlement of an ideological dispute, one or more of the disputants must achieve a measure of perspective change sufficient to make settlement appear more attractive than continued litigation. At least one of the parties must come to view the other(s) as less extreme and more reasonable; view the dispute, or at least aspects of it, as amenable to win-win resolution; view possible trade-offs as less likely to be personally destabilizing and stigmatizing, or become more willing to accept potential ostracism; or view the facts and circumstances surrounding the dispute, and the options for its resolution, less egocentrically.

Unsurprisingly, research on attitude change indicates that the stronger one's perspective on an issue, the more resistant one is to change.[133] However, this same body of research indicates that perspective change is possible, even where one's perspectives are strongly held. Most people are open to influence through deliberation and respectful persuasive appeals.[134] Activities and experiences that tend to produce perspective change over time include: sustained exposure to alternate perspectives; appeals to shared values; experiencing the cognitive dissonance that comes from recognition of kernels of truth in another's perspective and the potential, negative extremes of one's own position; exploring the complexity of and internal inconsistencies within one's own perspectives and value set; and humanizing interactions with one's opponents.[135] These findings are consistent with research, discussed above, indicating that most partisans afford themselves the capacity for change (even if they deny others the same potential).[136] Skilled mediators and other types of facilitators can help parties reduce psychological barriers to settlement by creating and guiding them through processes in which activities and experiences that produce perspective change occur.[137]

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133. Alice H. Eagly & Patrick Kulesa, *Attitudes, Attitude Structure, and Resistance to Change: Implications for Persuasion on Environmental Issues*, *in* ENVIRONMENT, ETHICS, AND BEHAVIOR 122, 129–30 (Max H. Bazerman et al. eds., 1997).

134. *Id.* at 130–37.

135. *Id.* Tenbrunsel and her colleagues also recommend encouraging disputants to realistically assess their alternatives to reaching agreement, a prescription that is consistent with the mainstream theories of negotiation that they consider less powerful in the context of ideological disputes. Tenbrunsel, *supra* note 64, at 25.

136. *See supra* Part III.B.1.

137. In negotiation analytic terms, they attempt to influence the parties' perceptions of their reservation values and the Pareto frontier, creating a zone of possible agreement where none

Perspective change may indeed be difficult to achieve, but the evidence indicates that it can and does occur. Perspective change does not necessarily entail abandonment, or even deep questioning, of one's fundamental values. However, it does entail a minimal recognition that one's own values and those held by one's adversaries can co-exist and, at least to some extent, be practically accommodated. For example, mediators in Colorado helped a diverse group of state officials, activists, conservative Christians, and others achieve consensus on a plan for utilizing federal funds available for HIV prevention programs.[138] Similarly, dialogues sponsored by the Network for Life and Choice have produced collaboration among pro-life and pro-choice activists on programs designed to minimize the number of unwanted pregnancies, assist pregnant drug addicts, and promote adoption, among other initiatives.[139] Parties to such agreements typically do not surrender their values or beliefs, but they do achieve sufficient mutual recognition and tolerance to make possible coordinated efforts to address a problem about which all are concerned.[140] They reach "consensus not on paradigms, value systems, or belief systems but on practical options to support together."[141]

Even if the respective value systems of the parties in the two disputes

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previously existed. *See, e.g.*, HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 139 (1982) (explaining the concept of the Pareto frontier); HOWARD RAIFFA, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 110–12 (1982) [hereinafter, SCIENCE AND ART] (explaining the concept of zone of possible agreement). In the context of ideological disputes, the parties' reservation values are, or are defined by, the sacred values they seek to defend. Sacred values may be harder to maintain when one is prevented from quickly coming to moral closure on a dilemma that implicates them. *See* Tetlock, *supra* note 71, at 867 ("If this process of reaching rapid moral closure is impeded, the mental self-control necessary for preserving taboos can become more problematic. The boundaries of the unthinkable do shift over time."). Good faith participation in deliberative exercises with one's ideological opponents may stimulate an attitude of moral openness, rather than moral closure.

138. John Forester, *Dealing with Deep Value Differences*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 463, 479–89 (Lawerence Susskind et al. eds., 1999) [hereinafter *Dealing*]; *see generally* Michael A. Hughes, *Facilitating Statewide HIV/AIDS Policies and Priorities in Colorado*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 1011 (Lawrence Susskind et al. eds., 1999) (case study).

139. Michelle LeBaron & Nike Carstarphen, *Finding Common Ground on Abortion*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 1031, 1032, 1045 (Lawrence Susskind et al. eds., 1999).

140. Forester considers this focus on practical alternatives, as opposed to misguided efforts to produce a synthesis of the parties' value systems, to be the true wisdom of mediation. Forester, *Dealing*, *supra* note 138, at 489.

141. LeBaron & Carstarphen, *supra* note 139, at 483.

just discussed remained largely unchanged, the resolutions they achieved are markedly different from the settlement produced by the parties to the *Piscataway* case. Their settlements were not tactical moves in the service of an overarching adversarial strategy, but genuine efforts to accommodate conflicting perspectives in a manner each party presumably hoped would prove to be durable and, at least to some degree, mutually beneficial. If the parties' fundamental moral perspectives did not change, their perspectives about each other and the possibilities for cooperation on matters where their interests are aligned certainly did.

Of course, opportunities to promote perspective change may be limited if attorneys, professional activists, and others who lead or represent social groups are conditioned to believe that it is unattainable or undesirable. Wade-Benzoni and her colleagues argue that institutions represent yet another barrier to settlement of ideologically based disputes.[142] Institutions are social structures that influence our behavior, perceptions, and judgments,[143] including our expectations about what is possible and socially acceptable. They include professional cultures—their processes of education and socialization, the incentive structures that permeate them, and the norms that regulate them. To the extent that members of the legal profession, as a result of legal education, incentive structures,[144] and other influences, are conditioned to believe that settlement of significant cases is impossible or without potential benefit to the parties or society, this represents a powerful barrier to consensual resolution of the ideologically based disputes that give rise to them. As Jules Lobel observes, "in a nation like ours, where the idea of justice historically has been attached to courts and judicial proceedings, it is inevitable that lawyers who are connected with radical social movements will introduce their struggles into the judicial arena . . . ."[145] Those involved in ideologically based disputes frequently turn to lawyers for guidance and assistance in obtaining redress. If lawyers fail to see, or excessively discount, the potential value of negotiation as a strategy for serving their clients' interests, this may make settlement of ideologically

142. Wade-Benzoni, *supra* note 30, at 47–51.

143. *Id.* at 47.

144. Needless to say, lawyers often have a vested interest in litigating, not just for financial gain, but for reputational gains and ideological satisfaction. *See* Feeley, *supra* note 68, at 758 (arguing that lawyers enhance their own social power by "promoting the belief in an extraordinarily powerful court" capable of causing sweeping social change).

145. Lobel, *supra* note 36, at 1355.

based disputes all the more infrequent, because they may fail to recognize, or may counsel their clients against exploring, possibilities for consensual resolution of the dispute.[146]

Of course, there is little hope for overcoming these barriers to settlement if the disputants and their representatives do not appreciate the potential benefits of settlement, both to themselves and to society more generally. Any assessment of potential benefits must, however, acknowledge the costs of settlement. I discuss these costs and benefits in the next Part.

IV. POTENTIAL COSTS AND BENEFITS OF SETTLING SIGNIFICANT CASES

One may advocate litigation of significant cases because one believes settlement is not possible or because it is better for the parties and society in very practical ways, but I find it difficult to regard the U.S. Supreme Court as an institution peculiarly capable of making moral judgments.[147] Given that the Court often compromises through a stylized blend of the same decision-making processes used by other political institutions and social groups (i.e., negotiation and voting),[148] it is difficult to view the Court as a body uniquely capable of dispensing justice and of articulating "our chosen ideals."[149] Indeed, each word in this brief quote from Fiss's *Against Settlement*—our, chosen, ideals—is questionable. As others have argued extensively, the judiciary is in many senses the least democratic of the three branches of government because it is unelected and does not consult the full spectrum of its constituents before acting,[150] so a Supreme Court decision arguably expresses "our"

146. Menkel-Meadow argues that lawyers not only should embrace negotiation as a credible alternative to litigation for achieving just resolutions of disputes, but that lawyers are particularly well qualified to help parties reach consensus by virtue of their greater "process consciousness." *See* Menkel-Meadow, *Pursuing Peace*, *supra* note 10, at 1763.

147. The Court has sometimes acknowledged as much. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 159 (1973) ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [in response to the difficult question of when life begins], the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

148. *See supra* Part III.B.

149. Fiss, *supra* note 2, at 1089.

150. *See, e.g.*, ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 152–54 (2002) (arguing that the U.S. Supreme Court's scope of review should be limited because the judiciary is not accountable to the public through elections). The so-called "countermajoritarian

ideals in a very thin sense, if one grants that it expresses them at all.

Parties to litigation typically represent only a small sampling of the range of perspectives on an issue. When the Court fully validates the perspective of one of the parties, others' perspectives obviously are discounted. When it does not fully validate either party's perspective, perhaps the most we can say is that the Court's opinion represents the chosen ideals of the justices who joined it, as well as those who happen to agree with them after the fact. Because many majority opinions result from some degree of "accommodation" (i.e., compromise), however, one can legitimately question whether these opinions even express the *signatories'* chosen ideals as purely as Fiss and others imagine.

Adjudication is but one process for managing social conflict; the judiciary is but one institution among many that assist in social coordination and the development of social norms. Accordingly, we must consider what the parties and society gain and lose by turning to the courts to settle not only ordinary cases, but also the types of disputes that give rise to significant cases. Even in the realm of significant cases, litigation's ultimate value can be assessed only by comparison to other available means for managing the dispute.

Too little sustained attention has been given to the comparative costs and benefits of litigation versus settlement of significant cases, because, with a few notable exceptions discussed below, almost all of the literature on legal negotiation, and most of the literature on negotiation generally, focuses on ordinary disputes. As Leigh Thompson and Richard Gonzalez explain, "[t]he negotiation literature, in a sense, conveniently sidesteps the problem of values by focusing on trade-offs of interests among parties who are already in agreement on the basic nature of the dispute."[151] Settlement of a significant case, or of a dispute that could give rise to one, involves both costs and benefits for the parties and the public, and the costs and benefits differ depending upon whether settlement occurs for strategic reasons or results from changed

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difficulty" is, of course, one of the central preoccupations of U.S. constitutional law. *See generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (offering historical account of counter-majoritarian concerns with judicial activity); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002) (offering historical account of counter-majoritarian concerns with judicial activity).

151. Thompson & Gonzalez, *supra* note 72, at 99; *see also* Alexander, *supra* note 18, at 596 ("Our willingness to accept the [economic] model as descriptively accurate may owe much to its intuitive ring of truth in our experience of paradigm lawsuits such as simple, two-party breach of contract or personal injury cases, the sorts of cases on which the models are usually based.").

perspectives about the dispute.

In the first major subpart below, I consider the potential costs and benefits of strategic settlement. I am not suggesting that we should actively promote coarse bargaining over litigation of significant cases, but I believe we should not be surprised, or consider it an abomination, when a strategically motivated settlement does occur. In the second major subpart below, I consider the potential costs and benefits of settlements born of genuine perspective change resulting from the disputants' participation in types of deliberative processes that can be distinguished from the sort of coarse bargaining that produces strategic settlements. While I acknowledge the limitations and potential costs of such deliberative processes, I argue that, unlike coarse bargaining, we *should* actively promote deliberative processes as a method for helping parties explore whether their respective values, needs and preferences, as well as the public interest, might be better served through settlement than through continued litigation.

Whether settlement results from bargaining or moral deliberation, the parties incur two primary types of costs when a significant case is settled: opportunity costs and signaling costs.[152] Settlement obviously implies foregoing the opportunity to litigate and the potential benefits litigation may produce. It also sends signals to others that may damage one's reputation or threaten the cohesion of social groups to which one belongs. Others share in these costs because legal norms are public goods and events that affect group cohesion and inter-group relations may have ripple effects throughout a culture. The potential benefits to the parties and the public are varied and, therefore, harder to generalize. As discussed below, the relative costs and benefits of settlement take on a different character, depending upon whether they are being assessed in the context of a strategic settlement or a settlement resulting from genuine moral deliberation.

A. Strategic Settlement

When one or more of the parties to a significant case is unwilling to examine their own values and commitments critically, or to explore the

152. For a brief discussion of opportunity costs in the context of legal disputes, see MNOOKIN, *supra* note 12, at 226 ("For a legal dispute, pursuing litigation is typically a client's [best alternative to a negotiated agreement]. A rational settlement process requires that a client compare the advantages and disadvantages of a possible settlement with the opportunities and risks of litigation."). For a discussion of signaling costs, see POSNER, *supra* note 69, at 18–22.

potential for cooperation on practical matters despite their conflicting values, the case is unlikely to settle unless at least one of the parties wishes to do so for strategic reasons, as did the school district and its supporters in the *Piscataway* case.

1. Potential Costs and Benefits to the Disputants

From the perspective of a party involved in a significant case, the benefits and costs of strategic settlement are fairly obvious. By definition, each party offers the other something in settlement that the other values more than the outcome it desires from litigation, discounted by its estimate of the probability of an unfavorable ruling.[153] For both parties in the *Piscataway* case (and, presumably, for at least some of those who advised or otherwise supported them), the perceived benefits of settlement apparently exceeded the perceived costs.

The opportunity costs incurred by one or both parties to a strategic settlement include foregoing the chance to establish or reinforce a legal norm aligned with one's values, and the ancillary benefits that flow from the norm (e.g., public vindication of one's perspective and the bargaining endowments legal norms afford those whom they favor). They also include the intra- and interpersonal benefits that might flow from defending those values by litigating a case to final resolution, regardless of whether one wins or loses the litigation or achieves some intermediate result: certainty that one is serving one's deepest beliefs and principles, increased status and influence within a social movement, and stronger bonds within one's group. When all parties tacitly acknowledge that the court is more likely to rule in favor of one of the parties, these opportunity costs theoretically are borne to a greater degree by the party favored to win the lawsuit if it is not settled.

Signaling costs result from the symbolic significance of the disputants' behavior.[154] In our society, litigation is one prominent method by which moral communities express themselves, becoming more cohesive in the process. Litigation is an especially public and costly way of signaling the strength of one's convictions. When the parties settled the *Piscataway* case, those observers on both sides of the issue who expressed shock and dismay no doubt reacted that way, at least in part, because of the ambiguous signals the settlement sent, and

153. *See* MNOOKIN, *supra* note 12, at 101–07.

154. *See* POSNER, *supra* note 69, at 18–22.

because of the potential for those ambiguous signals to erode the cohesiveness of the parties' respective moral communities.[155] These strong, negative reactions from some stakeholders on each side of the affirmative action issue who were not party to the lawsuit were signals to those within and outside their own communities that they believe the opposing perspectives in the dispute truly are incommensurable, despite the fact that the parties to the lawsuit apparently disagreed. Through their expressions of outrage,.nonparties on both sides of the affirmative action debate signaled their view that the settling parties had defected from their respective communities by treating as commensurable that which those protesting the settlement consider to be absolute.

From the perspective of a party to a strategic settlement, the decision to settle certainly may strain relations with at least some of one's cohorts. A group's most ardent members may interpret the settlement as a complete renunciation of the group's values, and thus a complete defection from the group. The signals sent by a strategic settlement are, however, ambiguous. The Piscataway school board and its supporters believed they were *defending* their principles in the most strategic way possible at the moment they settled, and not that they were abandoning their principles.[156] Ms. Taxman perhaps believed that she already had adequately demonstrated the merits of her perspective. Because most moral communities are not completely homogeneous, at least some of each party's cohorts are likely to interpret the settlement not as a defection from the group, but as a principled response to a complex decision problem.

Why might a party like Ms. Taxman, who was favored to win her case, decide that the benefits of settlement outweigh the costs? In very general terms, the value of the school district's settlement offer obviously exceeded the risk-adjusted value Ms. Taxman placed on the opportunity to have her case heard by the highest court in the land, and the benefits she hoped would flow from the hearing. Given the personal and public significance of the principles at stake in the litigation, however, how could she reach this conclusion?

As previously discussed, success in litigation is never assured, so the prospect of an unfavorable or compromise ruling naturally influences a

155. *See supra* note 96 and accompanying text.

156. *See* Abby Goodnough, *Why Piscataway Decided to Avoid Spotlight*, N.Y. TIMES, Dec. 2, 1997, at B5 (reporting that Piscataway school board members elected to settle because they were persuaded the U.S. Supreme Court would use the case as an opportunity to abolish affirmative action).

party's decision regarding settlement. In addition, the parties' (as well as onlookers') relative tolerance for risk may differ. Many people prefer a certain result to a speculative result with a higher utility value (i.e., they choose the certain outcome even though the probability adjusted value of the speculative outcome is greater).[157] Furthermore, even a party engaged in an ideological dispute values things other than those principles implicated in the dispute. By accepting a monetary settlement from the school district, Ms. Taxman could claim vindication of her principles, obtain a substantial sum for her material support, and avoid the expense, stress and other costs of continued litigation. Ms. Taxman may never have intended to create a lasting precedent on reverse discrimination, but only to obtain redress for the harm she felt she had suffered.[158]

Opponents of affirmative action who were upset by Ms. Taxman's decision seem ignorant of how they seemingly expected her to bear privately all or most of the expense of establishing the public good they desired. Ms. Taxman understandably may have felt she already had borne an adequate share of the costs of defending her perspective for the benefit of others similarly situated, that she had created a significant public good through her trial and appellate court victories, and that declining the school district's settlement offer was too great a personal cost to bear in light of the risks of continued litigation.

Sophisticated parties in Ms. Taxman's position also are no doubt aware of the possibility of repeat play. While the settlement obviously had preclusion effect, thereby prohibiting Ms. Taxman from attempting to re-litigate her claim,[159] she may have been aware that a similarly situated person might later press his or her claim to final resolution before the U.S. Supreme Court. Ms. Taxman established a line of precedents that has significant strategic value to those who share her perspective on affirmative action. Perhaps she ultimately cared less about establishing a clear, *universal* legal norm against reverse discrimination than about publicly defending her own professional competence. Perhaps Ms. Taxman also believed that the signals sent by

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157. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRIA 263, 288 (1979).

158. McCann's research suggests that many lawsuits on contentious moral issues are filed for the same reason that many ordinary cases are filed: to extract concessions through settlement, rather than to obtain a final judgment. *See* McCann, *supra* note 70, at 340.

159. *See* Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 32 (3d Cir. 1991) (holding that an agreement dismissing civil suit bars future action on same claims).

her decision to settle, while ambiguous, were unlikely to destabilize the broader community of affirmative action opponents or subject her to insufferable ridicule among her like-minded associates.

The Piscataway school district's motivations for settling are easier to understand, regardless of whether one agrees with its decision. Both the school district and the advocacy groups that intervened on its behalf obviously felt that the risk-adjusted value of avoiding a U.S. Supreme Court ruling on the merits of the case exceeded the value of the funds paid to Ms. Taxman to settle the dispute. The school district and its allies sought to avoid a negative precedent in hope that a positive one might be obtained at a later time—or at least that a negative precedent could be postponed indefinitely.[160]

In light of the way the case had evolved through trial and its first appeal, and given the defendant's and its supporters' reasonable fears about the probable outcome of a hearing before the Supreme Court as it was then constituted, the opportunity costs of settlement for the school district and its supporters arguably were not great. No doubt their biggest concern was the potential signaling costs of settlement. Those costs seem modest considering the high cost of an unfavorable U.S. Supreme Court decision, and the school district's and its supporters' strong expectation of a negative decision.[161] At any rate, the *Piscataway* case demonstrates that settlement on strategic grounds will occasionally be desirable to at least one of the parties if a dispute evolves in a particular way, and that there may be terms on which the other party will be amenable to settlement.

2. *Potential Social Costs and Benefits*

From the public's perspective, the principal cost of strategic settlement is the missed opportunity to create, reinforce, or refine a legal norm. Judge-made norms arguably can contribute to the maximization of

160. Our courts are designed to make inputs into our fund of social norms only in response to requests by citizens and governmental actors for rulings on particular issues that they cannot resolve themselves. Because the courts' inputs carry significant, if limited, weight, parties are rightfully cautious about which issues they submit to the courts for resolution, and when. As Lisa Estrada explains, "[t]he idea that interest groups come before our nation's courts to influence or guide the litigation process is far from original. . . . As a pioneering civil rights lawyer in the middle part of this century, Thurgood Marshall . . . meticulously select[ed] and advanc[ed] court cases which fit his strategy of laying a brick-by-brick foundation of court precedents that would ultimately support a school desegregation ruling in *Brown v. Board of Education* . . . ." Estrada, *supra* note 84, at 217–18 (citations omitted).

161. *See* Goodnough, *supra* note 156, at B5.

public welfare by, for example, establishing fundamental rights intended to protect vulnerable members of our society,[162] helping reduce the risk of physical injuries to acceptable levels in light of the costs of prevention,[163] and reducing waste in the use of resources (e.g., by ensuring resources reach those who value them most, even if promises must be broken in the process).[164] The missed opportunity to develop legal norms is one of the principal costs of settlement of significant cases that Fiss and other critics cite.[165]

From the public's perspective, there are at least two major reasons not to lament this opportunity cost when strategic settlements occur. One is the risk of a "wrong" decision by the Court. The other is the questionable ability of a judicial decision to contribute decisively to the resolution of social conflict involving deeply held values.

In the realm of significant cases, where perspectives are so polarized, there is good reason not to be overly solicitous of the Court's perspective on an issue. Needless to say, it is difficult to judge, from anything like a neutral perspective, whether a given legal norm on a divisive moral issue would maximize social welfare or otherwise be morally "right."[166] Different norms obviously suggest different visions of society. How

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162. Two important contemporary examples are *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (mandating school desegregation on the grounds that African-American students could not obtain an equivalent education in segregated schools) and *Gideon v. Wainright*, 372 U.S. 335 344–45 (1963) (establishing right to counsel in criminal proceedings).

163. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 312 (1987) (arguing that "the rules of Anglo-American common law of torts are best explained as if designed to promote efficiency in the sense of minimizing the sum of expected damages and costs of care").

164. The following hypothetical illustrates this concept:

> [I]f a seller (S) owns a widget that S values at $90, that one buyer (B1) values at $110, and that another buyer (B2) values at $130, an efficient legal rule is one that will induce the parties to behave in such a way that B2 will get the widget at a cost of no more than $130 and S will get at least $90. A rule under which S would keep the widget would not be efficient. Nor would a rule under which B1 ended up with the widget. (However, a rule under which S sold the widget to B1 and B1 then sold the widget to B2 would be efficient.)

E. Allan Farnsworth & William F. Young, Contracts: Cases and Materials 20 (5th ed. 1995).

165. *See* Fiss, *supra* note 2, at 1087 (arguing that settlement of significant cases leaves unsatisfied some "genuine social need for an authoritative interpretation of law"); Luban, *Erosion*, *supra* note 9, at 2623 ("[A]djudication may often prove superior to settlement for securing peace because the former, unlike the latter, creates rules and precedents.").

166. *See generally* RICHARD A. POSNER, *Are There Right Answers to Legal Questions?*, *in* THE PROBLEMS OF JURISPRUDENCE 197 (1990). For many affirmative action opponents, the *Piscataway* case fell into Professor Fiss's fourth category of significant cases—those where "justice must be done." *See* Fiss, *supra* note 2, at 1087. Many supporters of affirmative action undoubtedly would have felt that justice had *not* been done if the court had ruled in Ms. Taxman's favor, as it was widely expected to do.

much abortion is optimal as a matter of substantive social policy: none; free access to abortion procedures through full state subsidies at any point during pregnancy, regardless of financial need; or something in-between these two poles? This question is not answerable in any meaningful, non-ideological sense in the absence of a broad consensus on the value trade-offs implicit in a given policy choice. Utilitarian policy analysis can tell us something about abortion's role in maintaining sustainable population growth in both overpopulated regions and countries where the birth rate is undesirably low, but only the most ardent utilitarian seeking to stem or promote population growth will embrace this type of analysis as the primary basis for establishment of abortion policy.[167]

Some who reject utilitarian policy justifications for legal norms argue in favor of deontological norms in the form of fundamental legal rights.[168] A right created by a court or legislature for one party's benefit, however, often is a right denied to another party, or a significant interest compromised.[169] Any humane, democratic society must establish and protect a set of baseline liberties and opportunities, but liberties and opportunities often clash, and locating the baseline can be contentious. Because women still are denied membership in some clubs, they suffer a (less pervasive and stigmatizing) form of one type of discrimination African-Americans suffered during the Jim Crow era. If whites are not free to exclude African-Americans from dining and other private social establishments, why should men be able to exclude women? I would not deny women the right to join clubs that still exclude them, but many Americans, including a majority of the current members of the U.S. Supreme Court,[170] likely believe that some men have an interest in associating among themselves that outweighs some women's expressed interest in associating with them, and with each other, in the facilities

167. Most forms of utilitarianism recognize limits to compromise. *See* Kuflik, *supra* note 35, at 44–48.

168. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 26–35 (1974) (rejecting utilitarianism in favor of Kantian framework of individual rights).

169. *See* Amy Gutmann, *How Not to Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 12–14 (1999) (discussing, among other examples, consideration of race in university admissions); *see also* Menkel-Meadow, *Pursuing Peace*, *supra* note 10, at 1765–67 (discussing limitations of legal rights frameworks in achieving social justice).

170. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 2–3 (1988) (upholding New York City ordinance banning discrimination in clubs with more than 400 members, but recognizing right to expressive association which entitles "distinctively private" clubs to exclude members based upon gender and other factors).

from which they currently are excluded. Many people still believe that freedom to golf at Augusta National Golf Club or to join another traditionally male club is not a baseline liberty that all women should enjoy.

As Carrie Menkel-Meadow emphasizes, ours is a party-driven legal system.[171] Parties initiate lawsuits as one approach to dealing with conflict, and they ordinarily are free to terminate them. Where intense and fundamental moral disagreement exists, it seems best to let the parties determine when a judicial norm is needed—in other words, to let them decide for themselves, as citizens immediately affected by a moral dispute, or when they believe justice must be done. It seems best not only from the perspective of the parties, but also from the public's perspective. As *Plessy v. Ferguson* and other cases one could list illustrate,[172] U.S. Supreme Court decisions sometimes further entrench social norms that are later widely considered to be repressive, making it much more difficult to alter them, and the structures they maintain, through political action.[173] The opportunity to create, reinforce or refine a legal norm that a settled case presented is not lost forever, though some cases, like *Piscataway*, undeniably present especially compelling facts—for better or worse, depending on one's perspective. If there is truly a compelling need for a judge-made norm on a contested social issue, however, another case that presents the issue is likely to emerge.

One might respond by arguing both that the U.S. Supreme Court is frequently *right*, even if it is sometimes *wrong*, and that authoritative legal norms reduce the intensity and costs of social conflict, regardless of their rightness.[174] However, Gerald Rosenberg's empirical study of the effects of decades of U.S. Supreme Court decision-making in the areas of civil rights, abortion and women's rights, the environment, reapportionment, and criminal law calls such claims into question.[175]

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171. Menkel-Meadow, *Whose Dispute?*, *supra* note 10, at 2680. The party-driven nature of our legal system is a product of the constitution's "cases and controversies" requirement. U.S. CONST. art. III, § 2, cl. 1; *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

172. *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896). Other notable examples include the Dred Scott case, *Scott v. Sandford*, 60 U.S. 393, 421–23, 427 (1856) (holding that slaves and former slaves were not citizens) and *Buck v. Bell*, 274 U.S. 200, 206–07 (1927) (upholding Virginia statute authorizing forced sterilization of detainees of mental health institutions who were found to be "afflicted with hereditary forms of insanity, imbecility, &c.").

173. Sinder, *supra* note 11, at 124.

174. *See, e.g.*, Luban, *supra* note 9, at 2623 ("[A]djudication may often prove superior to settlement for securing peace because the former, unlike the latter, creates rules and precedents.").

175. *See* ROSENBERG, *supra* note 18, at 337 (concluding, based upon empirical research, that

Rosenberg's research suggests that "there is little evidence of . . . courts' causal contributions" to social change in these areas, either as a result of the direct effects of institutional change ordered by the Court or as a result of the symbolic value of the Court's decisions.[176]

Whether or not one fully accepts Rosenberg's conclusions, most would agree that the U.S. Supreme Court cannot make all citizens instantly adopt, and behave in accordance with, its majority views.[177] This is unsurprising, particularly because the Court itself does not always speak univocally. Deep differences of opinion persist within the wider population after the Court presumably "resolves" a significant policy question. We may respect the Court as a political institution, but this respect does not deter us from protesting the Court's decisions through whatever lawful means we can, including further litigation. Rosenberg's research suggests that the Supreme Court never single-handedly causes significant social reform.[178] Indeed, Rosenberg found

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"[w]here there is local hostility to change, court orders will be ignored. Community pressure, violence or threats of violence, and lack of market response all serve to curtail actions to implement court decisions").

176. *Id.* at 8.

177. Some scholars critical of Rosenberg's work nonetheless agree with his narrow conclusion that the court's rulings have little independent influence on behavior, let alone cause sweeping social change. These scholars argue, however, that Rosenberg's approach is too "top-down" (i.e., focused on the court's role in producing social change) and positivist. Their own approaches to the study of law and social change tend to be "bottom-up" and interpretivist, focusing, through case studies and other qualitative empirical methods, on the role of law and litigation in the mobilization of grass roots support for social reform movements and the reconstitution of identities and social meaning. For an extended exchange regarding the strengths and weaknesses of Rosenberg's and others' methodological approaches, see generally Michael W. McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being so Positive . . .)*, 21 LAW & SOC. INQUIRY 457 (1996) [hereinafter McCann, *Explanations*] (rejecting positive, causal explanations of the impact of judicial decisions in favor of an interpretive approach that examines the thought and behavior of specific political actors and groups in response to judicial decisions); McCann, *supra* note 70 (elaborating on interpretive approach, discussing various methodological difficulties, and proposing directions for future research); Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1992) [hereinafter McCann, *Reform Litigation*] (critiquing Rosenberg's methodology and comparing it to interpretive approach); Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 LAW & SOC. INQUIRY 761 (1992) [hereinafter Rosenberg, *Other Aspirations*] (responding to methodological and other critiques); Gerald N. Rosenberg, *Knowledge and Desire: Thinking About Courts and Social Change*, *in* LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 251 (David A. Schultz ed., 1998) [hereinafter Rosenberg, *Knowledge and Desire*] (critiquing McCann study of pay equity reform movement on theoretical and empirical grounds); Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435 (1996) (critiquing McCann study of pay equity reform movement on theoretical and empirical grounds).

178. *See* ROSENBERG, *supra* note 18, at 338; *see also* Menkel-Meadow, *Pursuing Peace*, *supra* note 10, at 1762 (observing that judicial rulings do not substantially change "the underlying social,

that the majority of Americans are unaware of the Court's decisions in significant cases.[179]

Brown I and the second *Brown v. Board of Education*[180] decision were followed by years of inaction in some parts of the country, and, ultimately, a cascade of further litigation.[181] Rosenberg argues that

> [t]he courts were ineffective in producing significant social reform in civil rights in the first decade after *Brown* for three key reasons . . . First, political leadership at the national, state, and local levels was arrayed against civil rights, making implementation of judicial decisions virtually impossible. Second, the culture of the South was segregationist, leaving the courts with few public supporters . . . . Third, the American court system itself was designed to lack implementation powers, to move slowly, and to be strongly tied to local concerns. The presence of these constraints made the success of litigation for significant social reform virtually impossible.[182]

According to Rosenberg, while *Brown I* was reflective of growing social disapproval of segregated education, the Court's desegregation policies had very little practical effect until Congress and the executive branch began to actively support and implement them.[183]

Rosenberg's conclusions obviously do not suggest that the Court can play no meaningful role in social reform, and Rosenberg himself would

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economic or political relations between the parties . . . .").

179. ROSENBERG, *supra* note 18, at 338.

180. 349 U.S. 294 (1955) [hereinafter *Brown II*].

181. *See* ROSENBERG, *supra* note 18, at 42–57. Indeed, some prominent African-American civil rights scholars now question whether desegregating schools has done more harm than good for African-Americans, despite the role the *Brown* decisions played in eliminating segregation in other social institutions. *See* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 160–79 (2004) (arguing that resource disparities, pervasive racism, and other factors, rather than segregation, disadvantage African-American students); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 267–69, 302–03 (2004) (discussing author's effort to establish a charter school for African Americans and advocating education reform as responses to unmet promises of *Brown* decisions).

182. *See* ROSENBERG, *supra* note 18, at 93. Rosenberg contends that three constraints limit the Court's ability to produce social change: the Court's authority is limited by the Constitution and existing precedent; the Court's dependence upon political support to effect change; and lack of effective, autonomous means for implementing its decisions. *Id.* at 336–37. He argues that the Court can produce significant social reform when some or all of these constraints are overcome as a result of the existence of sufficient political and/or social support for change. *Id.* at 10–36.

183. *Id.* at 105–06.

not support that position.[184] The Court may be incapable of mandating broad acceptance of norms it sanctions, but it no doubt does contribute to the process of social change, which, of course, is highly recursive. Federal and state courts, Congress and state legislatures, and federal, state, and local executives and executive agencies are constantly engaged in what can be thought of as a "meta-dialog" on significant social issues—a dialog generated and informed by cooperation and conflict among activists, community groups, and other individuals and groups.

While the U.S. Supreme Court may be incapable of instantly changing the behavior of millions, its holdings add to an array of social processes that contribute to the ongoing development of social norms. The Court invalidates a regulation; the agency responsible for its administration modifies it, but not enough to avert further litigation. Congress legislates around a Supreme Court ruling, only to find the new legislation challenged in court.[185] Social change surrounding divisive issues occurs gradually with inputs coming from many agents and many angles, and litigation before the nation's courts no doubt plays a very significant role. If, as Rosenberg concluded, Supreme Court rulings are never independent causes of social change, they are likely contributing factors in a larger chain of causal events.[186] While only a minority of citizens may follow the activities of the Supreme Court, the policies, strategies and activities of those who do—activists, lawyers, educators, politicians and other social elites—are informed and influenced by the Court's rulings. Law surely influences and informs social norms and social meaning, even when changes in law do not immediately cause broad, corresponding social change.[187]

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184. *See* Rosenberg, *Knowledge and Desire*, *supra* note 177, at 254 ("*The Hollow Hope* is often misinterpreted as arguing that courts are irrelevant to social change and that court decisions have no impact on society.")

185. For example, Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4 (2000), following the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 877–78 (1990) (holding that the First Amendment does not protect Native Americans who use illegal drugs in religious ceremonies), but the Supreme Court later held the Act to be unconstitutional. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

186. *See* McCann, *Explanations*, *supra* note 177, at 459–66 (arguing that the positive model of the Court's causal contributions to social change neglects or undervalues a host of contingent aspects of human social behavior that are influenced by law and legal struggle before the Court). *But see* Rosenberg, *Knowledge and Desire*, *supra* note 177, at 279–80 (noting that research for his book THE HOLLOW HOPE produced no evidence that the Court's decisions independently changed citizens' beliefs or enabled activists to build support for their causes).

187. *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943

Within the constrained view of the Court's ability to catalyze social change presented by Rosenberg, however, one of the major rewards arguably sought by at least one party to a significant case—social change *mandated* by the Court's decision—appears very speculative.[188] For this reason, one may legitimately question, as does Rosenberg, whether reformers are justified in expending scarce resources on a potential contributor to social change that can be expected to produce uncertain results even if it is facially successful.[189] From the public's perspective, the Court's decisions also appear less likely to dampen social conflict or reduce its costs, because parties that the courts leave disappointed frequently register their ongoing protests through further litigation.

The point is not that the Court is impotent; the point is simply that it is less potent than many parties and members of the public likely assume. "Law is created against a pre-existing set of background norms and affects those norms in complex ways," as Eric Posner explains.[190] "Even if people do not like a particular [state of behavioral] equilibrium [produced by prevailing norms], it is never clear that legal intervention will improve the situation . . . . [I]ncremental changes in the law may fail to change behavior or may cause massive and unpredictable cascades, frustrating efforts to use the law to fine-tune people's actions."[191] Posner concludes that, "[l]egal regulation, done poorly, will produce fewer gains than communal regulation [through the ongoing development of

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(1995) (examining reciprocal relationship between changes in law and changes in social meanings underlying social norms).

188. Feeley suggests that activist litigants and lawyers do not *really* believe that a victory in court will alone produce desired social change, and therefore do not litigate with that hope. Feeley, *supra* note 68, at 749 (suggesting reformers make exaggerated claims about the court's efficacy). Rosenberg persuasively refutes this argument. *See* Rosenberg, *Other Aspirations*, *supra* note 177, at 763–64.

189. *See* Rosenberg, *Knowledge and Desire*, *supra* note 177, at 258, 278–80. Just as Rosenberg seeks to encourage reform-minded litigators to adopt nonadjudicative *unilateral* strategies (e.g., lobbying) for achieving social change when conditions for overcoming the constraints on the Court's ability to contribute to it are absent, I seek to encourage both those who seek reform and those who oppose it to consider utilizing an alternative to adjudicative *and* nonadjudicative unilateral strategies of engagement, i.e., consensual approaches to dealing with social conflict.

190. POSNER, *supra* note 69, at 4.

191. *Id.* at 176; *see also* McCann, *supra* note 70, at 336–37 (discussing the complexity and unpredictability of changes in perspective and behavior resulting from changes in law); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 28 (1989) (arguing that, paradoxically, school desegregation cases created impediments to desegregation).

social norms]."[192]

Rosenberg's research suggests that, when the Court does contribute to social change, its "contribution . . . is akin to officially recognizing the evolving state of affairs, more like the cutting of the ribbon on a new project than its construction."[193] If Rosenberg is right, then it is difficult to justify a blanket preference for seeking the Supreme Court's perspective on each matter of deep public significance at the earliest possible moment. Furthermore, if social conflict resists the parties' most strenuous efforts to resolve it through litigation, perhaps litigation sometimes perpetuates social conflict, rather than helping to resolve it.

From the public's perspective, a major potential benefit of strategic settlement is, in a sense, delay—delay and a winnowing of the number of cases brought before the Supreme Court for resolution. Only failed settlement efforts can tell us how urgently a legal norm is needed.[194] With time, the issues brought before the Court may be further refined, and the perspective of one of the parties (or yet another perspective) on the issues may come to predominate, so that creation of a legal norm becomes unnecessary or a subsequent Supreme Court decision on the matter, to the extent it is consistent with the emerging consensus, may be more widely accepted. Because judge-made law is created by a very small number of public officials (i.e., the trial and appellate judges who hear cases) in response to issues framed by as few as two individuals, and because judicial decisions typically go unchecked by the other branches of government, judge-made law should, in my view, be created cautiously and sparingly.[195]

If this argument seems blasé—indifferent to the morally charged

192. POSNER, *supra* note 69, at 220.

193. *See* ROSENBERG, *supra* note 18, at 338.

194. Furthermore, producing legal norms at a feverish rate would not necessarily be a good thing. As David Luban admits, "our rapidly expanding legal system cannot tolerate a greatly accelerated adjudication rate because of the confusion and bad law that would result." Luban, *supra* note 9, at 2620; *see also* Coleman & Silver, *supra* note 13, at 117–18 (arguing that reaffirmation of well-established legal precedents is wasteful).

195. For arguments (from different points on the political spectrum) favoring the abolition or limitation of judicial review on the basis that the judiciary is an inherently contermajoritarian institution, see, e.g., ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 317–30 (1996) (blaming perceived cultural decay, in part, on antidemocratic decisions of judiciary); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM AT THE SUPREME COURT 24–45 (1999) (advocating judicial restraint and arguing that it promotes a deliberative conception of democracy); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 174 (1999) (advocating abolition of judicial review on grounds that it would "distribute constitutional responsibility throughout the population").

nature of the types of disputes that produce significant cases and the urgent priorities and needs of the litigants and others for whom they serve as proxies—consider that *both parties* in the scenario I am describing prefer settlement to continued litigation. Even if an absence of controlling precedent means the parties are not bargaining in the shadow of the law, they are at least bargaining in the shadow of the adjudicative process.[196] As indicated above, my perspective regarding settlement of significant cases is contingent upon the existence of adjudication as an alternative to settlement. Consider also that another party may bring the same issue before the Court at a later date. Finally, consider the potential social costs of a "wrong" decision when compared to the potential social benefits of a "right" decision that is too far ahead of an evolving public consensus. Given the relatively slow rate of attrition among the justices of the Supreme Court and the Court's reluctance to overturn itself, decisions that affirm existing legal norms may impede social change by revalidating those norms and extending their political "half lives," whereas decisions that disrupt existing legal norms may have little power to effect immediate social change.

Another potential cost of settlement is diminution of the skill and experience of courts and litigators in ushering disputants through the adjudicative process, particularly its advanced stages (i.e., trial and appeal).[197] While this point may seem like a bad joke to anyone who believes we live in an overly litigious society, there can be no doubt that fewer trials and appeals mean fewer opportunities for lawyers to acquire and develop the skills necessary to help citizens address their grievances through litigation when necessary. A well-functioning justice system is an important public good. My arguments about the comparative benefits of settlement are not intended to suggest otherwise; indeed, they are dependent upon the existence of adjudication as a meaningful alternative to settlement.

There seem to me to be two principal—and persuasive—responses to this concern. First, I seriously doubt that strategic settlement of significant cases will occur at such a dramatic rate as to inhibit the development of litigation skills among the lawyers who handle these types of cases or judging skills within the courts that hear them.

196. Marc Galanter aptly calls the process by which most lawsuits get resolved "litigotiation." Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

197. *See* Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 837 (1990).

Significant cases likely represent a small fraction of all pending litigation, and judges seldom complain about a paucity of cases on their dockets. Furthermore, significant cases that reach the U.S. Supreme Court (or have a real prospect of reaching it) are seldom settled for purely strategic reasons, and probably seldom will be in the future. Strategic settlement is most likely to occur when the case was initiated in a clearly unfavorable climate (i.e., the plaintiff's lawyers arguably made a serious tactical error) or the climate, though ambiguous when the suit was initiated, has become clearly unfavorable (e.g., the Supreme Court recently has denied certiorari on an unfavorable appellate court ruling in another circuit). At the U.S. Supreme Court level, examples of strategic settlement like *Piscataway* are relatively rare no doubt because these conditions are rare.[198] For these reasons, it seems unlikely that significant cases will settle for strategic reasons so frequently that lawyers and judges become incapable of trying them.

Second, even though litigation allows lawyers to hone certain types of advocacy skills, it tends to inhibit the development of problem-solving skills among the parties themselves. Citizens' recourse to lawyers and courts often signals their lack of capacity to solve their problem constructively without the *coercive* intervention of a third party. Given a choice between development of the skills of lawyers and judges in managing the (coercive) process of adjudication, on the one hand, and development of the parties' own (consensual) problem solving skills, on the other, I believe the latter choice is better for society as a whole.[199] This is a key theme of the next subpart, which examines the costs and benefits of settlements resulting from deliberative processes that produce some degree of perspective change among the parties.

B. Moral Deliberation

When parties to a significant case are willing to engage in a process through which they examine their own values and commitments or

198. On the other hand, purposefully commencing litigation with the expectation of settling it strategically may be an effective approach to achieving incremental progress in an unfavorable political climate. *See* McCann, *Reform Litigation*, *supra* note 177, at 737–39 (arguing that evidence from case studies and interviews of participants in pay equity movement demonstrates that litigation played an important role in extracting concessions through negotiation with employers, even though the movement met with little success in cases that were litigated to judgment).

199. In fact, like Menkel-Meadow, I also believe every lawyer's repertoire should be broadened to include collaborative problem solving skills. *See* Menkel-Meadow, *Litigation*, *supra* note 10, at 59–61; Menkel-Meadow, *Pursuing Peace*, *supra* note 10, at 1763–65.

explore the potential for cooperation on practical matters despite their conflicting values, a settlement born of perspective change may emerge. As Lon Fuller observed long ago with respect to mediation, its

> central quality . . . [is] . . . its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.[200]

Fuller's view of mediation is highly idealized, and not all mediators and facilitators strive for the "new and shared perceptions" that Fuller sees as the principal byproduct of mediation or have the knowledge and skill to craft processes likely to produce perspective change when it is an explicit or implicit goal.[201] Nonetheless, skilled neutrals are capable of structuring processes that increase the likelihood that perspective change will occur, typically over multiple sessions spanning a significant length of time. When perspective change does occur, any potential settlement discussed by the parties, will, like a strategic settlement, have both benefits and costs for the parties and society.

1. Potential Costs and Benefits to the Disputants

In an insightful article that explores the moral and democratic value of settlement generally, Carrie Menkel-Meadow catalogs many of the benefits parties may realize when they settle a case, rather than continuing to litigate.[202] These potential benefits apply equally to ordinary and significant cases. They include:

(1) Party autonomy with respect to both process and outcome, a feature that furthers the goals of democracy whenever settlements are the product of genuine consent;
(2) A wider range of possible outcomes that may better serve the parties' needs and preferences;
(3) The ability to express "a moral commitment to equality, precision in justice, accommodation, and peaceful coexistence of conflicting interests"[203] *through compromise.*

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200. Fuller, *Mediation*, *supra* note 11, at 325.

201. On the variety of approaches to mediation and their diverse methods and objectives, see generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed,* 1 HARV. NEGOT. L. REV. 7 (1996).

202. Menkel-Meadow, *Whose Dispute?*, *supra* note 10, at 2692.

203. *Id.*

(4) The ability to express fidelity to non-legal norms and principles through the terms of settlement, rather than resolving the dispute solely with reference to norms that have been embodied in law;
(5) A richer and more humane opportunity for participation than one ordinarily experiences in adjudicative processes, including greater potential for cathartic, educational, and other transformative moments;
(6) A greater ability to accommodate the values, needs and preferences of multiple stakeholders; and
(7) The exchange of more and different types of information that shed new light on the dispute and facilitate problem solving.

A further potential benefit can be added to this list when the dispute settled is the type that gives rise to a significant case. The parties may experience both satisfaction and personal growth from participating in a process that they hope will contribute to a more integrative form of social change, even if they also experience some anxiety about their decision.[204]

As with strategic settlements, the principal costs of settlements resulting from genuine moral deliberation are opportunity costs and signaling costs, though each takes on a somewhat different character in this context. When parties settle a significant case primarily for strategic reasons, they do not intend the terms of their agreement to be a partial or complete substitute for the legal norm they hoped to establish or reaffirm through litigation. There is no mutual acknowledgement of others' perspectives, however incomplete or imperfect that acknowledgement may be, when a significant case is settled. The parties merely call a truce in what they assume will be an ongoing social struggle.

In contrast, settlements resulting from collective moral deliberation are intended to resolve the underlying dispute or some aspect of it, or to achieve incremental progress toward the dispute's ultimate resolution. One forgoes or postpones the chance to establish or reinforce a legal norm aligned with one's values, and the ancillary benefits that one hopes would flow from it, in return for an agreement that represents a partial advancement or preservation of the substantive values one had hoped could be advanced or preserved more completely through litigation. One also may forgo the opportunity for more complete retribution for, or

204. *See* Kuflik, *supra* note 35, at 51 (arguing that participation in sincere dialogue is an intrinsic good).

public vindication of, past harms.[205]

The opportunity costs incurred when a settlement of a U.S. Supreme Court case results from moral deliberation are greater than those incurred through a strategic settlement, because the parties' respective investments in cooperative (or at least non-hostile) activities is greater. When a strategic settlement occurs, the primary motivation of at least one of the parties is fear of defeat in litigation. That party intends to carry on the fight in different forums, or to support others similarly situated in their fights before the Court once the political winds have shifted or the Court has been reconstituted. When a settlement results from genuine moral deliberation, the parties are, in a sense, giving up the fight—or, rather, electing to re-channel at least some of the energy they were investing in it. The settlement, and whatever activities or constraints flow from it, becomes a primary strategy for promoting one's values going forward.

As with strategic settlements, parties elect to incur the opportunity costs associated with terminating litigation—or, where litigation has not yet commenced, of foreclosing it as an option—because they believe the benefits of settlement outweigh these costs. A settlement based on some measure of genuine perspective change may in fact provide each party more of what it wants than would success in court, particularly in light of the risk that a favorable outcome in litigation may not produce real social change where political will is lacking. It also may create a foundation for ongoing cooperation by the parties that delivers further benefits to each over time. Litigants who do not settle may rationalize the risk of loss by viewing the possible setback as temporary—a step on the path to ultimate victory, and therefore not truly a compromise of the value they seek to defend. While their commitment to that value may remain absolute, however, the value itself has no legal force following a decisive loss in litigation. Through settlement, the loser's values would have become at least partially actualized, and further activism and cooperation might produce further, incremental improvements—and, perhaps ultimately, conditions in which one's cherished value becomes as fully actualized as one hoped it would through litigation.

Signaling costs also assume a different character in the context of

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205. However, as Martha Minow explains in the context of political settlements in the wake of mass violence, settlements sometimes can address the desire for retribution and public vindication through remedies such as truth commissions and reparations. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 52–117 (1998).

settlements resulting from genuine moral deliberation. A settlement of a significant case that has a cooperative or value-integrating dimension is more likely to be viewed as betrayal of one's cohorts or even a defection from the group. Furthermore, a settlement in which a significant number of members of a social group participate, or which is supported by a significant number of a group's members, may threaten the group's cohesion and disrupt established identities. When one defends one's values, one also defends one's identity, both as an individual and as a member of any group to which those values are central.[206] Exposing one's values to genuine inquiry and potential transformation may alter our current self-perceptions, others' perceptions of us, and even others' perceptions of themselves.

The risk that settlement presents to the stability of social groups simply underscores the extent to which most social groups are not monolithic in terms of their members' value orientations, needs, and preferences. Litigation tends to mask divisions within interest groups, leaving internal differences unexamined and unchallenged, because legal argumentation is dialectical. Advocates representing groups in conflict typically make polarized arguments that leave little room for ambiguity and admit few exceptions (or at least do not admit the claim made by one's opponent as an exception). In contrast, settlement processes designed to produce perspective change may destabilize groups by permitting expression of alternate viewpoints, thereby forcing the groups to confront internal diversity and inconsistencies. In ideological conflicts, competing groups frequently have both hawkish and dove-like members.[207] As Robinson and his colleagues found, a substantial number of the members of an identity group likely believe that they privately hold views that are more moderate than those held by the average member of the group.[208]

Social psychologist Herbert Kelman argues that the development of coalitions across conflict lines is critical to the resolution of deep-seated

206. For a general discussion regarding the construction and defense of individual and group identity, including the role of values, see GLYNIS M. BREAKWELL, COPING WITH THREATENED IDENTITIES 98–100 (1986) (discussing the construction and defense of individual and group identity, including the role of values).

207. *See generally* Herbert C. Kelman, *Coalitions Across Conflict Lines: The Interplay of Conflicts Within and Between the Israeli and Palestinian Communities*, *in* CONFLICTS BETWEEN PEOPLE AND GROUPS 236 (S. Worchel & J.A. Simpson eds., 1993) (considering ways in which constructive interactions between pro-negotiation factions within conflicting groups can influence group members who oppose negotiation and reconciliation).

208. Robinson, *supra* note 108, at 414.

social conflict.[209] Peaceful social change ultimately requires the progressive transformation of relationships within identity groups, as well as relations between them. As Kelman explains, conciliatory interactions between members of opposing groups help promote intra-group change as well as inter-group change, provided those who participate in the interactions maintain sufficient credibility within their own groups.[210] It seems reasonable to assume, for example, that moderate white citizens' experiences interacting with blacks during the civil rights era played a role in transforming other white citizens' perspectives on racial issues. Conflict resolution practitioners often employ informal, nonbonding dialog processes in an effort to develop coalitions between members of opposing groups, in the hope that these interactions might eventually promote such intra-group change, creating the conditions from which informal cooperation and formal agreements between groups can emerge.[211] Indeed, it is in all groups' interests to produce an agreement that their more extreme members can minimally support; otherwise, the agreement is unlikely to prove durable.

Public settlements—formal or informal agreements that involve some level of coordinated action or inaction—impose signaling costs on those who participate in them. As with opportunity costs, however, participants in settlements accept them because they believe the cumulative costs of foregoing litigation are outweighed by the cumulative benefits of cooperation. Those who incur these costs alter the social environment in a way that may decrease the signaling costs for those who later elect to cooperate with members of opposing groups. In other words, a settlement may sometimes provide social "cover" in the same way that a U.S. Supreme Court ruling can. By affirming the equal rights and dignity of black citizens, the Supreme Court's landmark civil rights decisions no doubt lowered the potential reputational costs incurred by whites inclined to express non-racist perspectives among whites who continued to hold racist views, or whose views were undisclosed. As Robinson and his colleagues observe, when one sees other members of one's group expressing perspectives widely thought to be taboo, it becomes easier to express those perspectives oneself.[212]

Before concluding this Part, I wish to return briefly to Fiss's principal

209. *See* Kelman, *supra* note 207, at 254.

210. *Id.* at 240–42.

211. *Id.* at 238–39.

212. *See* Robinson, *supra* note 108, at 416.

objections to settlement of significant cases. Of the four types of significant cases identified by Fiss, I believe three can be viewed as expressions of skepticism about whether mutually beneficial settlements of the fourth type of case are truly achievable. Expressed in simple terms, Fiss's list of significant cases comprises those involving (1) significant power imbalances between the parties, (2) representational complexities, (3) enforcement complexities, or (4) differences in deeply held values.[213] While each of these characteristics may exist independently of the others, I believe cases that arise from differences in deeply held values frequently exhibit one or more of the other characteristics. When this is true, the presence of one or more of the other characteristics amplifies questions about whether it is possible to do justice through settlement.[214] From Fiss's perspective, judges ensure that justice is done not only by making authoritative declarations of law, but by producing their declarations through a process that Fiss believes ensures that weaker parties are treated fairly; the interests of those affected by the outcome but not participating in the process directly are protected; and the obligations resulting from the Court's judgment are actually performed. An authoritative declaration of law would be morally suspect, of little practical consequence, or both if any of the latter three conditions were absent.

Power imbalances, which may be partially generated by existing legal norms, will often affect the terms of a settlement. Assuming the weaker individual or group is adequately represented, however, I would not interfere with the parties' decision to settle, even if I objected to the terms. Adequate representation may come in the form of strong and determined members of social groups that are at odds with one another, competent counsel, or a combination of the two. Strong individuals at the vanguard of a group's cause typically are the protagonists in disputes that give rise to significant cases, and the plaintiffs (or plaintiff's chief supporters) in any litigation that ensues. Their lawyers can be extremely

213. Fiss, *supra* note 2, at 1087.

214. I realize that Fiss demands a separate justification for settlement of each type of case. The bulk of this article is my effort to provide that justification with respect to his fourth type of case, those that he views as requiring an authoritative interpretation of law. *Id.* The present discussion is a minimal effort to justify settlement where the other three characteristics are present. As indicated above, I give less attention to these characteristics because they have received sustained attention by many others and because I consider Fiss' objections to settlement of cases where he believes an authoritative interpretation of law is required to be his most powerful line of argument against settlement.

capable and vigorous advocates.[215] If *these people* believe perspective change significant enough to create a foundation for improved social relations has occurred, why should their decision not be respected, especially because they have litigation as an alternative and those similarly situated individuals who are not participants in the settlement remain free to initiate a lawsuit if they disapprove of the settlement?

Many join Fiss in expressing concern about negotiation's potential for disempowerment of members of minority groups, women, the poor, and members of other socially disadvantaged groups when compared to litigation.[216] While this risk is real, it is minimized significantly in any well-facilitated deliberative process—perhaps minimized to the point that the risk of disempowerment is less than that which weaker individuals face in court. One role of the facilitator(s) of any well-managed deliberative process is to ensure that participants have equal voice and that all parties have thought critically about a proposed agreement before they consent to it.[217]

Other scholars see the ways in which well-facilitated consensual processes actually can be empowering for those who participate in them, including members of disadvantaged groups.[218] The participants, who typically would be heard relatively little during a trial and not at all upon appeal, are encouraged by facilitators to contribute to the dialogue. Indeed, skilled facilitators endeavor to structure and conduct deliberative

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215. Mark Tushnet's account of Thurgood Marshall's decades-long campaign against racial discrimination on behalf of the NAACP provides a forceful example. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

216. *See* Menkel-Meadow, *Litigation*, *supra* note 10, at 57. Mediators with a "transformative" orientation are especially conscious about seizing opportunities for party empowerment. *See* ROBERT BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 85–89 (1994). For a discussion of some of the potential limitations and challenges of achieving this goal, see Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135, 157–67 (1999).

217. *See generally* Michael L. Poirier Elliott, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 199 (Lawerence Susskind et al. eds., 1999) (discussing roles of neutral third parties in consensus-based dispute resolution processes).

218. *See, e.g.*, Linda Singer et al., *Alternative Dispute Resolution and the Poor, Part I: What ADR Processes Exist and Why Advocates Should Become Involved*, 26 CLEARINGHOUSE REV. 142, 152–53 (1992) (arguing that consensual dispute resolution processes often present improved opportunities for problem solving in disputes involving the poor); Linda Singer et al., *Alternative Dispute Resolution and the Poor, Part II: Dealing with Problems in Using ADR and Choosing a Process*, 26 CLEARINGHOUSE REV. 288, 290 (1992) (same).

processes in ways that make it safe for participants to speak openly and honestly.[219] Participants acquire new information about their adversaries and themselves that will inform, and may transform, their own perspectives, interests and objectives, empowering them to make better decisions about how to achieve their objectives in the dispute, whether through settlement, litigation, or some other form of social action. With litigation as an ever-present alternative to settlement, it is very difficult to see how a well-facilitated deliberative process can disempower those who participate in it.

Problems of representation and generation of authoritative consent arguably are greater in litigation than in settlement. If adequacy of representation and consent are values that Fiss and others wish our justice system to promote, then, on several levels, litigation serves them less well than consensual dispute resolution processes. In the context of significant cases, small panels of judges establish norms on highly divisive issues that are binding upon citizens generally, the vast majority of whom will have had no meaningful voice in the litigation and no opportunity to consent. Furthermore, interest groups that supposedly are represented through the parties to litigation—whether African-Americans, abortion opponents, evangelical Christians, or Libertarians—are seldom monolithic in their views.[220] Litigants often purport to express the unified perspective of groups that, in fact, are often internally heterogeneous. As discussed above, they often frame issues in polarized ways that fail to capture the full range of perspectives on a moral problem that are held by the group's members. Deliberative processes typically can be structured to make room for expression of a range of perspectives, including the divergent perspectives held by members of a single social group. The outcomes they produce typically do not bind those who have not consented.[221]

Fiss's claim that the need for ongoing court supervision and

219. *See, e.g.*, Richard Chasin et al., *From Diatribe to Dialogue on Divisive Public Issues: Approaches Drawn from Family Therapy*, 13 MEDIATION Q. 323, 331–37 (1996) (discussing efforts made to prevent reenactment of the conflict in dialogue process and to promote expression of previously unexpressed feelings and perspectives); LeBaron & Carstarphen, *supra* note 139, at 1031 (discussing the importance of ground rules for creating a safe environment).

220. Some of the problems generated by the presence of pluralistic parties in negotiations are addressed in RAIFFA, SCIENCE AND ART, *supra* note 137, at 465–83.

221. Luban demonstrates that some settlements nonetheless produce negative externalities, shifting costs to parties who were unrepresented in the process. *See* Luban, *supra* note 35, at 404–05. This possibility is the main reason well-designed deliberative processes include representatives of the broadest possible range of stakeholders.

enforcement following resolution of some types of disputes cannot be addressed through settlement is also questionable. Fiss is primarily concerned with institutional reform litigation—cases that are frequently resolved by consent decrees that contemplate the Court's continued involvement in the implementation of their terms.[222] There is no reason why courts cannot play a role in the post-settlement relations among parties to other types of significant cases when the parties see advantage in the Court's continued involvement.[223] For example, had the parties in the abortion clinic buffer zone case discussed in the introduction to this Article agreed that groups opposing abortion would limit their protest activities outside health care facilities in specified ways if the health care facilities provided women considering an abortion with literature that presents cautionary perspectives, they could have asked the Court to enter their agreement as a consent decree and to monitor their compliance with it.

In sum, if parties to a significant case achieve a measure of genuine perspective change and wish to settle their case as a result, I believe that decision is entirely legitimate—provided, as explained below,[224] that basic liberties and opportunities are protected. Social conflict is at least partially a product of conflicting values and meanings. When parties feel that previously conflicting values and meanings have been brought into sufficient harmony (or at least sufficiently constructive tension) that, on balance, there are more grounds for cooperation than for continued conflict, there is no reason to expect or encourage the parties to continue to litigate. I may personally disagree with the parties' decision, and I may even speak or act in protest of it, but I would not deprive them of their ability to decide. Responding to Fiss's and Luban's opposition to settlement in defense of the undifferentiated interests of an abstract public, Menkel-Meadow asks rhetorically, "Whose dispute is it anyway?"[225] Particular individuals and groups suffer discrete or generalized harms, and litigation is one way they may voice their grievances. Deliberative processes enable these individuals and groups

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222. *See* Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds 58–60 (April 16, 2003) (unpublished manuscript, on file with author) (concluding, based upon extensive case analysis, that institutional reform cases frequently are settled).

223. This, of course, is one of the contemporary roles of courts, as Chayes was first to observe. Chayes, *supra* note 11, at 1298–1302.

224. *See infra* Part V.

225. Menkel-Meadow, *Whose Dispute?*, *supra* note 10, at 2663.

to choose for themselves between the state of affairs that a given settlement promises and the state of affairs that might eventually exist after obtaining a judgment in their favor.

2. *Potential Social Costs and Benefits*

As with strategic settlement, there are at least two principal costs, from the public's perspective, of a settlement resulting from genuine moral deliberation. The first is the missed opportunity to create, reinforce, or refine a *legal* norm. The second cost is the lost opportunities for courts and lawyers to enhance their skills at processing disputes through adjudication. These costs are discussed at length above,[226] so I will not repeat that discussion here.

These costs of settlement must be assessed in light of the costs of litigating significant cases, of which I believe one particularly stands out. Because parties currently turn to adjudication to address their moral disagreements so frequently and so quickly, our society's capacity for problem-solving, among both citizens and their representatives (i.e., those who advocate their causes and public officials), arguably is not as robust as it could be.[227] I believe that compulsively litigating the types of disputes that give rise to significant cases all the way to a supposedly definitive judicial "resolution" inhibits the development of our capacity to manage our toughest problems. Disputes present opportunities to build social capital.[228] When we litigate conflicts, we undertake our most difficult conversations in a way that is overly mediated—mediated, that is, through the impersonal strictures of the judicial process, where our primary conversation partner is the Court—rather than having these conversations directly with other affected parties, or with minimal mediation among the parties, through a facilitated, non-binding negotiation process. As a result, we practice a weaker form of democracy than we otherwise could.

From this perspective, a trial of a significant case is a failure,[229] and a

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226. *See supra* Part IV.A.2.

227. *See* Sinder, *supra* note 11, at 124.

228. *See* Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 45–53 (2002). The concept of social capital—connections between individuals that are fundamental to the health of civil society—is discussed in ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 15–28 (2000).

229. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (calling a trial a failure).

settlement resulting from genuine moral deliberation is a sign of democratic health. As Riley Sinder, John Lopker and Ronald Heifitz have argued, if we require the judiciary to dispense answers and corrective remedies where authoritative texts do not clearly supply them, the judiciary may stifle the democratic process and retard social progress.[230] As they explain, "the Court's issuance of a technical decision balancing rights and interests may merely perpetuate [social] work avoidance by establishing the next judicial battleground in which adamant perceptions of self-interest will compete."[231]

By contrast, the primary potential social benefits of settling a significant case through a process of genuine moral deliberation are the development of citizens' capacity to manage their most difficult conflicts more constructively, the strengthening of social bonds, and, of course, the meaningful, substantive contributions to social change that may result from the settlement. In the next Part, I describe how the promise of collective moral deliberation may be realized in the context of settlement of significant cases.

V. SETTLEMENT AND THE PRACTICE OF DELIBERATIVE DEMOCRACY

The capacity for social problem solving is a key feature of what Benjamin Barber calls "strong democracy."[232] As he explains, "[w]here weak democracy eliminates conflict . . . , represses it . . . , or tolerates it . . . , strong democracy *transforms conflict.*"[233] One form of weak democracy identified by Barber is what he calls "juridicial democracy," in which social conflict is resolved "*through deferring to a representative judicial elite.*"[234] Barber's notion of strong democracy is an expression of what Amy Gutmann, Dennis Thompson and other political theorists call deliberative democracy.[235] From a deliberative perspective, the goal of democracy is the transformation of political

230. *See* Sinder, *supra* note 11, at 124; *see also* Kuflik, *supra* note 35, at 50 (arguing that "controversy is sometimes more to be welcomed than lamented, for it can become the occasion for persons to broaden their perspectives and enlarge their understanding").

231. *See* Sinder, *supra* note 11, at 124.

232. BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 151 (1984).

233. *Id.* (emphasis in original).

234. *Id.* at 142 (emphasis in original).

235. *See* GUTMANN & THOMPSON, *supra* note 61, at 1.

preferences through rational dialogue, rather than the mere aggregation of preferences through bargaining or voting.[236] Transformation of preferences is synonymous with what I refer to in this Article as perspective change. Settlement processes that create opportunities for perspective change through collective moral deliberation can be important forums for democratic participation.

A key tenet of deliberative democracy is that "political choice, to be legitimate, must be the outcome of [collective] *deliberation about ends* [as well as means]."[237] Theorists differ on the extent to which well-constructed deliberative processes ensure the moral integrity of the outcomes they produce. At one end of the spectrum is Jürgen Habermas, who posits an ideal discursive process from which, he argues, morally justifiable decisions necessarily follow.[238] At the other end are Gutmann and Thompson.[239] While they believe that deliberative processes which satisfy specified conditions are likely to produce outcomes that are morally sound rather than just politically expedient, they argue that an outcome is not morally acceptable if it denies any party certain basic liberties and opportunities.[240] I consider the differences in these perspectives in the discussion of moral relativism that follows in Part VI.A. The key point for present purposes is that the negotiation processes imagined by deliberative democrats involve moral deliberation about practical alternatives, not brute bargaining over them.[241]

Reason giving is the core practice of deliberative democracy. As Gutmann and Thompson explain, from a deliberative perspective, "when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions."[242] Gutmann, like Barber, advises disputants to "avoid taking a moral conflict to court if possible."[243]

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236. Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY 8, 1 (Jon Elster ed., 1998).

237. *Id.* at 5 (emphasis in original).

238. *See infra* note 303 and accompanying text.

239. *See* GUTMANN & THOMPSON, *supra* note 61, at 17–18.

240. *Id.*

241. The form of negotiation that leads to strategic settlement is what proponents of deliberative democracy and some legal scholars, such as Duncan Kennedy, call bargaining. The form of negotiation that produces perspective change regarding the nature of a dispute and the possibilities for its resolution is what proponents of deliberative democracy call deliberation and what Kennedy calls dialogue. *See* KENNEDY, *supra* note 22, at 43–44 (comparing dialogue and bargaining); *see also* GUTMANN & THOMPSON, *supra* note 61, at 55–63 (comparing deliberation and bargaining).

242. GUTMANN & THOMPSON, *supra* note 61, at 1.

243. Gutmann, *supra* note 169, at 1.

Deliberation lies somewhere between bargaining (i.e., compromise with a focus on interests) and arguing (i.e., trying to persuade others to abandon their own reasons in favor of one's own), and involves elements of both.[244] Deliberative outcomes must be supported by "reasons that are recognizably moral in form and mutually acceptable in content."[245] One party need not be converted to another's perspective, but each party must be able to acknowledge that every other party is defending a legitimate moral value.[246]

Dialogue of this quality is not easy to achieve. It requires an uncommon degree of openness to others' perspectives and demonstrated respect for those with whom one fundamentally disagrees.[247] All participants in a truly deliberative process must be genuinely "motivated to find reasons that can be accepted by others."[248] One of the key characteristics that distinguishes deliberation from pure bargaining is the attitude with which participants engage in the process.[249]

Deliberative processes need not, however, be completely free of

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244. Diego Gambetta, *"Claro!": An Essay in Discursive Machismo*, *in* DELIBERATIVE DEMOCRACY 19, 19 (Jon Elster ed., 1998).

245. GUTMANN & THOMPSON, *supra* note 61, at 57.

246. Theodore Benditt argues that acknowledgment of "the sincerity and earnestness of one's opponent" is a legitimate basis for compromise. Benditt, *supra* note 15, at 35. In my view, it is not enough to believe that one's opponent is sincere. One must also believe one's opponent's perspective is grounded in a legitimate moral perspective. Hitler no doubt sincerely believed that genocide was a justifiable means of "purifying" the German population and culture, but absolute genetic and cultural homogeneity are not morally defensible values.

247. *See* Golding, *supra* note 100, at 17 ("Where full reciprocity exists, the parties recognize each other as moral equals despite their relative bargaining strengths.").

248. GUTMANN & THOMPSON, *supra* note 61, at 53. Participation in deliberative processes admittedly takes considerable time and effort—more time and effort than many social activists will be willing to invest. *See* Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY 670, 682 (2001) (arguing that a deliberative process "co-opts the energy of citizens committed to justice, leaving little time for mobilizing people" for other activities intended to produce reform). The succession of unsuccessful legal challenges to discriminatory laws and policies over the century preceding the *Brown I* decision demonstrates, however, that alternative processes for achieving social change also take considerable time and effort. *See, e.g.*, Tushnet, *supra* note 215, at 169–72 (reviewing history of anti-segregation litigation preceding *Brown I*).

249. *See* Benditt, *supra* note 15, at 26–27 (differentiating bargaining from "compromise" based upon the parties' attitudes); *see also* Carens, *supra* note 67, at 136 ("Even in moral arguments, one approaches disagreements quite differently if one is seeking areas of mutual agreement and if one is willing to be persuaded than if one merely wishes to score a few logical points and to refute the other's case."); Kuflik, *supra* note 35, at 44 (arguing that "democracy is in danger of degenerating into a generalized 'prisoner's dilemma'" unless compromise is premised upon "the genuine expression of mutual respect").

bargaining.[250] To continue an example begun above, if the members of Augusta National Golf Club and women who seek membership in it were to agree, as a consequence of a genuinely deliberative process intended to avert litigation, that men and women will have exclusive use of the club on alternating Saturdays and Sundays, and that both men and women can use the club during the remainder of the week, I suspect most proponents of deliberative democracy would approve. While this hypothetical outcome could be partially motivated by the parties' respective fears about the risks of litigation, it also could reflect their changed perspectives regarding the possibilities for accommodating the seemingly conflicting values of inclusiveness and gender equality, on the one hand, and freedom of association, on the other. Through the process, each party would offer reasons to support the outcome that the other may come to recognize as morally legitimate, even if each party is inclined to privilege one moral principle over others served by the parties' decision. The outcome is a product of deliberation to the extent that the parties' motivation for settlement is grounded in mutual respect and an appreciation of the moral quality of the reasons offered by others. The outcome is the product of crass bargaining to the extent that parties consider it a prudent compromise in light of the costs and risks associated with litigation.

Campos and others are highly skeptical about the power of reason to resolve moral conflict (at least when the reasons are offered by a judge or group of judges). From Campos' perspective, a judicial decision is not reasoned unless competing moral principles have been brought into complete harmony.[251] In a pluralistic society such as ours, where values considered legitimate by large numbers of people often are in fundamental conflict, this typically will be impossible.

Participants in deliberative processes seldom completely abandon their own moral perspectives for those of another party, nor should they be expected to do so.[252] Even the best-designed and best-managed consensual dispute resolution processes are unlikely to produce a

250. GUTMANN & THOMPSON, *supra* note 61, at 71–73 (arguing that the deliberative perspective accepts bargaining with respect to some issues in dispute (e.g., contested empirical questions) provided the agreement as a whole is founded on mutually recognizable moral reasons). *See also* Carens, *supra* note 67, at 133 (arguing that bargaining can play a legitimate role in democratic politics, even when it detracts from deliberation).

251. *See* CAMPOS, *supra* note 22, at 160 (arguing that decisions embracing one moral value to the exclusion of others are "arational").

252. GUTMANN & THOMPSON, *supra* note 61, at 93 ("The aim of a [deliberative] process is not necessarily to induce citizens to change their first-order moral beliefs.").

complete "harmonic convergence" among parties involved in a heated moral dispute. When perspective change sufficient to produce some form of agreement occurs, however, and when the reasons given by each of the participants to justify their decision have a moral quality that is recognized by each of the other parties, I believe a form of collective reasoning has occurred. Reasoning has occurred in the sense that people who wish to serve multiple values—the substantive values underlying one's own perspective; democratic participation; self-determination; the pacific resolution of disputes; even, to some extent perhaps, the values defended by other stakeholders—collectively embrace those values, albeit with varying emphasis, as reasons for some concrete policy or action.[253] The choice between one party's moral perspective and another's need not be binary for the outcome of moral deliberation to be considered reasoned and coherent. Deliberation can bridge moral perspectives.[254]

To the extent deliberative forms of social and political engagement succeed in reorienting understandings and relationships among citizens divided by deep value differences, they may often contribute as much or more to the evolution of social norms than would a U.S. Supreme Court decision. While much of the discussion among political theorists regarding deliberative democracy focuses on promoting and enhancing moral deliberation among elected officials, some proponents of deliberative democracy also hope to increase the quantity and quality of deliberation between representatives and citizens, as well as directly among citizens.[255] Deliberative democracy is practiced both when public

253. Deliberative democracy is not about achieving harmony at the expense of the substantive values the parties seek to advance through deliberative processes. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 61, at 93 ("Deliberative reasoning is not correctly represented if it is described as giving more weight to the value of mutual respect or deliberation than (for example) to the sanctity of life.").

254. *See* Kuflik, *supra* note 35, at 50 (arguing that "a morally appropriate balance between valid concerns is not to be equated with a compromise of moral integrity").

255. *See* GUTMANN & THOMPSON, *supra* note 61, at 42 (advocating the creation of more "deliberative forums" that bring "previously excluded voices into politics"). New York University law professor Larry Kramer considers deliberative democracy to be anti-populist because, in his view, its procedural requirements "can be met only by small bodies far removed from direct popular control." Larry Kramer, *We the People: Who Has the Last Word on the Constitution?*, BOSTON REV., Feb.-Mar. 2004, at 14, 19 (2004). While it becomes more difficult to meet the procedural requirements of deliberative democracy as the size of a group increases, the requirements can nonetheless be met in groups with several hundred members. Proponents of deliberative democracy envision deliberative processes being employed in the U.S. House of Representatives, for example, or by state legislatures. *See* GUTMANN & THOMPSON, *supra* note 61, at 46–47 (encouraging deliberation among legislators). Furthermore, the proceedings of smaller groups, including groups

officials deliberate and when deliberations among citizens are purposefully structured and managed to provide inputs into broader political processes. In order to maximize the potential for settlements of significant cases to contribute to the evolution of social norms and public policy, we must look for ways to connect deliberation among citizen-disputants to broader political processes and to encourage open (i.e., non-secret) settlements.

Broadly participatory negotiation processes have long been a major feature of the administrative rulemaking process.[256] Consensus-building processes also are frequently used in efforts to resolve, or to contribute to the constructive management and eventual resolution of, the types of disputes that can give rise to significant cases but which are not necessarily the subject of pending litigation to which participants in the process are party. These processes, which often are facilitated by non-lawyer conflict resolution practitioners, have been used to foster understanding and facilitate cooperative action among opposing parties in a wide variety of disputes, including opposing factions in the abortion debate;[257] policy makers and activists concerned with development and population policy;[258] government officials, activists and taxpayers with opposing perspectives on the use of public funds for HIV/AIDS treatment programs;[259] and environmentalists, landowners, government officials and others divided over how to respond to pollution and other public health problems.[260]

Although, as Abram Chayes first observed, courts have become increasingly involved in helping parties fashion negotiated settlements, such broadly inclusive, consensus-based processes typically have not

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of ordinary citizens, sometimes can be linked effectively to more inclusive political processes.

256. *See generally* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (critiquing existing approaches to negotiated rulemaking and offering suggestions for reform); Philip J. Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 GEO. L.J. 1 (1982) (advocating even greater negotiation among stakeholders and agencies in the development of administrative rules).

257. *See, e.g.*, Chasin, *supra* note 219, at 327 (describing deliberative process involving opposing factions in the abortion debate); LeBaron & Carstarphen, *supra* note 139, at 1037–43 (describing deliberative process involving opposing factions in the abortion debate).

258. *See* Chasin, *supra* note 219, at 328 (describing dialogue among nongovernmental organizations concerned with population, women's health, and environmental issues in advance of United Nations Conference on Population and Development).

259. *See* Hughes, *supra* note 138, at 1014–28 (describing deliberative process regarding use of public funds for HIV/AIDS treatment programs).

260. *See, e.g.*, SUSSKIND & FIELD, *supra* note 103, at 42–59 (describing consensus building approach to resolving an environmental dispute).

been formally integrated into the adjudicative process.[261] Over the course of the past decade or so, however, courts have increasingly begun to experiment with notions of problem-solving[262] and restorative justice[263] in ways that involve the disputants and other affected stakeholders in shaping the outcome of a judicial proceeding.

Margaret Farrell offers one vision of how litigation and negotiation could have interacted to produce a substantive outcome in *Roe v. Wade* that, in her view, may have more fully reflected the complexity of the issues involved and better accommodated the full range of affected parties—not just women and the unborn, but health care providers, fathers, local, state and federal agencies, and others.[264] Farrell contends that

> by trying to resolve the social issues raised by abortion technology through litigation, we have transformed real-life, contextual, relational, complex facts about abortion into a two-sided contest between generalized maternal rights to privacy and theoretical state interests in potential human life, a process that teaches us little about the moral and social problems that we seek to resolve.[265]

Farrell envisions the use of court-connected processes geared toward achieving collaborative solutions to the fundamental problems underlying a dispute.[266] The specific process Farrell would have had the trial court in *Roe v. Wade* employ is an adaptation of the negotiated rulemaking process employed in the development of administrative regulations.[267] This process typically involves an assessment period during which affected parties are identified, followed by notice to affected parties, a fact-finding stage, and a facilitated, consensus-based process that culminates in the development of a draft regulation that is

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261. *See* Chayes, *supra* note 11, at 1298–1302.

262. *See, e.g.*, Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 126–27 (2001) (providing examples of courts that attempt to reform dysfunctional social systems, rather than merely adjudicating liability based upon past conduct).

263. *See, e.g.*, Mark Umbreit, *Mediation of Victim Offender Conflict*, 1988 MO. J. DISP. RESOL. 86, 86–96 (describing victim-offender mediation process implementing restorative justice ideal in criminal proceedings).

264. *See generally* Farrell, *supra* note 11, at 330–53 (discussing Roe v. Wade, 410 U.S. 113 (1973)).

265. *See id.* at 274.

266. *See id.*

267. *See id.* at 330–31.

published for public commentary.[268]

Farrell imagines a court-connected process that incorporates many of these elements. After *Roe* was initiated, she would have had the Court orchestrate a process in which other affected parties were identified and joined, discovery and other fact-finding efforts were undertaken, and settlement talks occurred (though not necessarily facilitated by the judge). If a consensus solution had emerged, it then would have been expressed in a multi-stakeholder settlement agreement or in a proposed bill or administrative rule. If a consensus solution did not emerge, the judge would have rendered a decision that was informed and constrained by the totality of facts presented, the competing perspectives of a broad range of affected parties, and, of course, existing substantive law.

I am not necessarily advocating widespread deployment of Farrell's proposed approach in all its particulars. Needless to say, many practical and legal issues would have to be resolved before the exact process imagined by Farrell could be utilized.[269] Farrell's process nonetheless illustrates that it is possible to imagine a court-connected settlement process with the potential to inform official political processes and influence legislation and administrative policy. Procedures like Farrell's, and others we could imagine, can create "feedback loops" among the various social and political actors that contribute to social change.[270] Of course, there are constitutional and practical limits to what the parties can accomplish by agreement in some cases. In the *Roe* case, existing Texas law banned abortions.[271] The parties could not have agreed simply to permit the plaintiff to terminate her pregnancy. Settlements resulting from deliberative processes must be designed to influence official lawmaking processes whenever current law prevents conduct the parties wish to permit.

Even when a settlement process is not formally or informally linked to legislative or administrative policy-making processes, however, settlement of a significant case can contribute to the fund of social norms that influence behavior (including others' litigation and settlement decisions), the development of public policy, and subsequent judicial

268. *See id.* at 325–30.

269. Farrell anticipates and addresses many of these issues. *See id.* at 325–43 (discussing procedures for inclusion of nonparties and fact-finding).

270. Where a settlement does become linked to an official lawmaking process—for example, by producing and advancing a draft rule or bill—one would hope that the process by which regulators or legislators consider it is as deliberative as the process by which the parties produced it.

271. Roe v. Wade, 410 U.S. 113, 117–18 (1973).

decisions. As Robert Ellickson has observed, "[i]n a well-functioning civilization . . . informal rules [that contribute to the maintenance of social order] . . . are among the most magnificent of cultural achievements."[272] Settlements resolving significant cases will not always have the force of law (except among the parties), but they may have important social influence nonetheless.

To maximize a settlement's contribution to the fund of "informal rules" praised by Ellickson, its terms arguably should be made public.[273] This is undoubtedly true, yet the mere fact of settlement may alter the social atmosphere surrounding the dispute. A settlement presumably signals to (approving and disapproving) others that some minimal economy of shared values developed among the parties. A settlement suggests that the parties concluded that they inhabit a universe of shared meaning after all, even if they occupy distant corners of it. The simple confirmation that *settlement possibilities exist* is arguably a significant contribution to the ongoing development of social norms concerning the central issues in any dispute involving deeply held values. As Robinson and his colleagues explain, dialogue processes "free partisans of some illusions that they hold not only about their ideological adversaries but about their own side as well (i.e., illusions of homogeneity, moral consensus, and extremism), which would in turn make it easier for them to express their own dissenting views."[274] If partisans who are not involved in a settlement see that agreement is possible, they may be more inclined toward conciliatory interaction with those ideological adversaries who they themselves encounter.

I doubt that many settlements of significant cases would remain entirely secret in jurisdictions where confidential settlements are permitted, since public disclosure of at least some of the principal settlement terms is likely to be a key interest of one or more of the parties and a necessary byproduct of implementation of the settlement. While damage payments and other monetary expenditures may be one feature of the parties' agreement in some cases, most settlements of

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272. ELLICKSON, *supra* note 18, at 184.

273. *See* Luban, *Erosion*, *supra* note 9, at 2648–58 (arguing against confidential settlements). For my purposes, mass tort cases, where defendants frequently wish to keep secret the amount of damages paid in settlement of the plaintiffs' claims, are not "significant cases." Much of Luban's concern about secrecy arises in response to settlement of these cases. *Id.*

274. Robinson, *supra* note 108, at 416. *See also* Thompson & Gonzalez, *supra* note 72, at 98 (arguing that disputants will be more persistent and creative in their efforts to reach agreement if there are precedents for resolving ideological conflict through negotiation).

significant cases about school prayer, abortion, pollution entitlements or environmental resource allocation, affirmative action, and the like are unlikely to be premised primarily on financial terms. Nonetheless, I generally favor policies limiting or prohibiting confidential settlements where they are not necessary to protect trade secrets, preserve established privileges, or serve other narrowly focused and beneficial social purposes.[275]

In this Part, I have argued that settlements, like adjudication, can have democratic value and make positive contributions to the evolution of social norms. David Luban, a thoughtful critic (though not an ardent opponent)[276] of settlement, acknowledges this possibility, but he believes that adjudication's contributions to democracy are bound to be qualitatively superior to settlement's contributions. Luban associates adjudication with what he calls the "public-life conception" of politics, which is characterized by forms of deliberation in which individuals work at "building consensus around ideals rather than getting the right answer, and in discovering worthy ends in addition to efficient means."[277] Although Luban's later writing on settlement acknowledges the potential of consensual dispute resolution processes to contribute to social change by occasionally producing what he calls "revisionary justice," he nonetheless associates settlement primarily with a "problem-solving conception" of politics, which is about finding the cleverest means to one's desired end.[278]

Luban acknowledges that a "lucky and skillfully-conducted mediation might actually end in both parties giving according to their abilities and receiving according to their needs," but he believes that such moments

275. For an overview of arguments for and against placing limits on confidential settlements, see the following white paper published by New England Legal Foundation: CHRISTINE HUGHES, CONFIDENTIAL SETTLEMENTS (2003) (on file with author). Confidentiality of court documents and settlement terms must be distinguished from confidentiality of settlement negotiations, which should remain private to the extent necessary to protect the parties or sustain the process. Parties to deliberative processes sometimes participate at significant personal risk to their reputations (and even their physical safety), and they should determine whether and when to publicize their participation. *See infra* Part VI.B. Of course, sunshine laws may sometimes prevent parties from conducting their discussions privately.

276. Luban's earlier writings on settlement are somewhat more negative and skeptical than his later writings. *Compare* Luban, *Quality*, *supra* note 35, at 407–11 (arguing that alternative dispute resolution processes are unlikely to contribute to social change), *with* Luban, *Erosion*, *supra* note 9, at 2634 (acknowledging limited potential of consensual dispute resolution processes to contribute to social change).

277. Luban, *Erosion*, *supra* note 9, at 2634.

278. *Id.*

will be rare and that we therefore should not expect consensual dispute resolution processes to contribute significantly to major social change.[279] Luban believes that consensual dispute resolution processes will seldom produce revisionary justice because more powerful parties will refuse to use them, or will exit from them, if they perceive that neutrals are attempting to empower weaker parties to make more than incremental gains through the process.[280] According to Luban, this limits the extent to which dispute resolution processes can produce outcomes that depart significantly from existing legal entitlements.[281]

It may be true that sweeping social change will seldom be achieved through deliberative dispute resolution processes, yet excessive attachment to adjudication may cause our collective consensus-building capabilities to atrophy, which arguably makes attempts at collective deliberation even more difficult to undertake and even less likely to succeed. I believe it is wrong to associate adjudication primarily with the service of the public interest and the potential for significant social progress and to associate settlement primarily with the service of private interests and incremental change within the current system of legal entitlements. While it is true that all parties, including those with greater economic and social power, enter mediation, adjudication, or any other dispute resolution process with their own self-interested objectives, those who participate openly in deliberative processes may find that their own and others' perceptions of self-interest shift, producing greater alignment between competing conceptions of justice at play in the dialogue and a greater willingness to serve "public" objectives through whatever outcome is produced.[282] At their best, consensus-based processes aimed at settlement of the types of disputes that give rise to significant cases are a form of political activity consistent with the public-life conception of politics that Luban favors.

Fiss, unlike Luban, is unwilling to grant that settlement can play any role in promoting social justice. He argues that settlement allows society

279. Luban, *supra* note 35, at 408–09.

280. Luban acknowledges that even incremental gains may be preferable to no gains at all, when that is what one can expect from litigation. "[W]hatever virtue ADR programs possess will lie in the fact that they are marginally better than existing alternatives . . . and not in the expectation that they achieve utopian justice." *Id.* at 387.

281. *Id.* at 409.

282. Luban certainly acknowledges that such shifts *can* occur. Luban, *supra* note 35, at 398. He simply doubts that many powerful parties will be willing to put themselves in harm's way. *Id.* at 413.

to "mask[] its basic contradictions."[283] This is true only with respect to settlements that are strategically motivated. Processes that promote moral deliberation and perspective change actually bring social contradictions to the surface, where they can be constructively examined and addressed by the parties themselves. Compared to these processes, litigation allows us to mask our contradictions—chief among which is the desire to impose our own values on others, even though we know we live in a world that must be capable of peacefully reconciling our own values with others' values. Litigation, as I have argued, temporarily shifts the broader social negotiation that must occur to a different location in the social sphere where, by institutional design, a "resolution" appears more readily achievable. As Rosenberg's research arguably demonstrates, however, a U.S. Supreme Court decision seldom, if ever, single-handedly produces a durable resolution of deep social conflict. In the end, each deep division must be bridged, if at all, through a meta-dialog in which the Court is an influential, but not an omnipotent, participant.[284]

It is, of course, impossible to say, from "the public's perspective," whether settlement of a particular ideologically based dispute is preferable to a judicial decision, because citizens' views on any contested moral issue are, by definition, diverse. At best we can identify a range of coherent moral perspectives on a given issue that are held by significant numbers of people. If those citizens most immediately affected by a dispute experience some degree of genuine perspective change as a result of their participation in a process of moral dialogue, and if their changed perspectives produce somewhat more constructive and mutually beneficial relations, I would likely respect the outcome of their process, even if it did not give full expression to my own "chosen ideals." If I did not, and if I had standing and cause to sue, I obviously would be free to seek a judicial decision consistent with my ideals. Indeed, one of the potential costs of settlement of any significant case is

283. Fiss, *supra* note 2, at 1086.

284. As Habermas states,

> [D]eliberative politics remains part of a complex society, which, as a whole, resists the normative approach practiced in legal theory .... [T]he discourse-theoretic reading of democracy has a point of contact with a detached social-scientific approach that considers the political system neither apex nor center nor even the structural core of society, but just *one* action system among others. On the other hand, because it provides a safety mechanism for solving problems that threaten social integration, politics must be able to communicate through the medium of law with all the other legitimately ordered spheres of action ....

HABERMAS, *supra* note 82, at 302 (emphasis in original).

that the benefits realized as a result of the time, effort and other resources expended in achieving it will be nullified by a subsequent decision on the merits in a case brought by parties who are similarly situated.

VI. THE MORAL LEGITIMACY OF SETTLING SIGNIFICANT CASES

Having discussed the practical ways in which parties and the public may benefit through settlement of a significant case, or the type of dispute that may give rise to one, I wish to address the normative dimension of settlement more explicitly. Some argue that "peace" by whatever name—for example, "participatory politics," "social capacity to deal with tough problems," or "consensus"—should not come at the expense of "justice" or moral rightness.[285] From this perspective, a compromise reached by parties to a value-laden dispute is indicative of weakness of character and moral relativism—which, in its strongest form, is the belief that everyone's values are as valid as everyone else's values, so it is wrong to judge others or to try to make them comply with one's own values.[286] Greater public participation and greater social capacity to manage strong disagreement may be important benefits of deliberative forms of democratic practice, but are the decisions they produce morally unsound? Is peace achieved at the expense of justice?

As indicated above, I do not consider courts to be uniquely capable of making moral judgments. Courts, however, sometimes do make absolutist judgments, in the sense that they validate one party's moral perspective to the exclusion of other perspectives. In contrast, settlement typically involves acceptance of an outcome that balances the perspectives and objectives of all parties, though such outcomes can, and often do, favor one party's perspectives and objectives over those of others. This distinction—between the inevitability of accommodation in settlement and the possibility of an uncompromising judicial decision—naturally raises questions about the moral integrity of settlement relative to a judgment reached through adjudication.

In this Part, I anticipate and counter claims that an agreement resolving a significant case necessarily lacks moral integrity. I also present a set of principles for designing consensual dispute resolution

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285. *See* Fiss, *supra* note 2, at 1075; *see also* Coleman & Silver, *supra* note 13, at 108 (arguing that "we sacrifice justice for the sake of efficiency and peace" when we settle).

286. *See* David Wong, *Relativism*, *in* A COMPANION TO ETHICS 442, 442 (Peter Singer ed., 1993).

processes geared toward resolving disputes involving deep value differences. Fidelity to these principles, I argue, increases the likelihood that the outcomes of such processes will be morally sound (as well as socially desirable and durable). We should not be satisfied with the increased public participation and greater social capacity to manage strong disagreement that may result from deliberative forms of democratic practice unless we also believe that such practices are capable of producing agreements that are morally sound.

A. Moral Relativism?

I should note preliminarily that I do not consider strategic settlement to be indicative of moral relativism for the simple reason that neither party has acknowledged the legitimacy of the other's perspective. In the *Piscataway* case, for example, Ms. Taxman presumably believed that her moral perspective had been sufficiently vindicated through her trial and appellate court victories, and that further litigation therefore was not justified in light of other things she valued—for example, privacy and financial security, both of which might be jeopardized through continued litigation.[287] The Piscataway school district determined that the best way to advance its values was not to attempt to advance them before the U.S. Supreme Court at that time. Neither party's decision to settle was motivated by deference to the other party or the other party's perspective.

The issue of moral relativism is more pressing in the context of settlements resulting from collective moral deliberation. Those who consider such settlements to be indicative of moral relativism are, in a sense, correct, but one must distinguish between moral relativism in its strong and weak forms. One who embraces moral relativism in its strongest form (as defined above) would have difficulty ever justifying litigation or any other form of coercive engagement with someone who holds different views. For an extreme relativist, negotiation would be the only acceptable means for resolving moral conflict—if indeed one sought to advance one's substantive values in the face of others' resistance at all.

In the weak form of moral relativism, one has genuine confidence in

287. Had Ms. Taxman settled before trial, rather than after achieving significant success in court, her decision still would not necessarily indicate moral relativism. While one party or the other is likely to be the clear victor in litigation, each party may reasonably conclude that the costs of proceeding to trial are too great in light of one's tolerance for risk.

one's moral convictions,[288] but one's convictions include what philosopher David Wong calls the justification principle.[289] The justification principle holds that it generally "is wrong to impose one's views on another person unless one can justify them to him or her . . . . [It is] an ethic that values interaction between members of different cultures through mutual consent."[290] One finds firm support for the justification principle in both deontological and social contractualist moral theory.[291] From a Kantian perspective, the justification principle follows from the notion that people are to be regarded as ends in themselves, not as means to satisfaction of one's own objectives or preferences. From the perspective of social contract theory, the justification principle affirms the moral value of consent in human relations.

The justification principle is an inherent feature of the theory of deliberative democracy.[292] It gives rise to a prima facie duty to obtain consent before interfering with others' actions, but this duty exists alongside those that flow from one's other moral convictions. Whenever the justification principle conflicts with one's other convictions, one must make a judgment about whether it should be overridden—that is, whether unilateral, coercive action in service of another conviction one holds is justified under the circumstances.[293] In the context of disputes involving deeply held values, these circumstances may include those where the other party refuses to negotiate and the moral dangers of delay are great, or where the other party is not negotiating in good faith. Settlement is not itself a primary goal; when it is achieved, it is merely the byproduct of the parties' efforts to serve their respective moral

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288. As Wong explains, confidence in one's convictions need not depend upon an absolute belief that "one's morality is the only true or the most justified one." Wong, *supra* note 286, at 449.

289. DAVID WONG, MORAL RELATIVITY 180 (1984).

290. *Id.*

291. *Id.* at 181; *see also* Wong, *supra* note 286, at 448 (associating weak form of moral relativism with social contract tradition).

292. *See, e.g.*, Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY 17, 22 (Alan Hamlin & Philip Pettit eds., 1989) (noting that reason-giving and a commitment to resolving disagreements "through free deliberation among equals" are features of deliberative democracy); GUTMANN & THOMPSON, *supra* note 61, at 55 (arguing that deliberative democracy can be embraced only by citizens motivated to find mutually acceptable terms for social cooperation). The search for mutually acceptable terms of association is a feature of the social contract tradition more generally, as expressed in the work of theorists such as Locke, Rousseau, Kant, and Rawls. *See, e.g.*, Kuflik, *supra* note 35, at 56–57 (associating notion of "justice as mutual accommodation" with social contract tradition).

293. *See* WONG, *supra* note 289, at 186.

convictions in a manner that satisfies the justification principle. The justification principle gives rise to a presumption in favor of negotiation, however, at least for the purpose of sincerely exploring whether and where common ground may exist.[294] The justification principle does not dilute or undermine one's other moral convictions; rather, it engenders a certain humility with respect to them,[295] and a certain confidence (as opposed to smugness) that allows one to engage in open and honest dialogue about them with other sincere people willing to engage one in good faith.

The strong form of moral relativism, which is associated with a lack of convictions tending toward nihilism, is too often conflated with moral relativism in its weak form.[296] For example, Fiss implicitly brands proponents of settlement as advocates of the strong form of moral relativism by accusing them of pursuing peace at the expense of justice[297] and by insisting that settlement in the service of one's ideals is not possible.[298] However, the substantive moral principles implicated in a dispute, and the justification principle alike, are legitimate values, all worthy of defense. One can be a relativist in the weak sense without being amoral, and one can pursue peace without sacrificing justice.[299]

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294. I would not translate this presumption into a requirement that parties attempt to resolve an ideologically based dispute as a condition of filing suit or proceeding to trial—a requirement of which Fiss also would disapprove. *See* Fiss, *supra* note 76, at 1670–71.

295. *See* CARL COHEN, DEMOCRACY 182 (1971) ("[O]ne's knowledge of the truth and justice of his principles, or his firm belief in them, is counterbalanced within the [democratic] community by others who also know, or firmly believe, that other principles, in direct conflict with his own, are just and true."); Benditt, *supra* note 15, at 35 (arguing that an "attitude of humility" creates potential for a compromise resolution of a conflict of principles).

296. *See* Wong, *supra* note 286, at 449 (noting that the strong form of moral relativism has given the weak form a bad name).

297. *See* Fiss, *supra* note 2, at 1075. Coleman and Silver argue that, from the public's perspective, it would be desirable to litigate *all* disputes if litigation costs were zero, because litigated outcomes are just outcomes. *See* Coleman & Silver, *supra* note 13, at 108. Their claim has some appeal with respect to most ordinary cases, where social norms and legal norms are aligned and broadly accepted, but it is questionable when applied to significant cases, where social norms are hotly contested, for at least two reasons. First, losers of significant cases and their sympathizers are even less likely to view the unfavorable decision as just than losers of ordinary cases. Second, from the public's perspective, the only potential advantage of litigating all significant cases is the possibility that a recently established or reaffirmed legal norm will dampen further conflict. As we have seen, however, the court's ability to resolve social conflict on morally charged issues unilaterally is limited.

298. *See* Fiss, *supra* note 2, at 1086.

299. *See* JOHN RAWLS, A THEORY OF JUSTICE 126 (1971) ("The circumstances of justice may be described as the normal conditions under which human cooperation is both possible and necessary."); Menkel-Meadow, *Pursuing Peace*, *supra* note 10, at 1767 (arguing that we should

Fiss and others are too quick to associate firmness of principle with morality, and compromise with expedience and moral weakness.[300] Settlements reached through truly deliberative processes are not sell-outs. We do not succumb to moral relativism in its strong form merely by challenging ourselves to understand, and, when we glimpse something of their logic and legitimacy, accommodate, others' values through agreements that also acknowledge our own. Settlements resulting from moral deliberation are evidence that the parties recognize the moral and social costs of effectively outlawing one perspective or the other, and have concluded that justice may find a fuller expression under the circumstances in some arrangement that attempts to confront the full complexity of the situation. We can compromise asserted claims and favored policies without sacrificing the moral principles on which they are based.[301]

As I indicated earlier,[302] all proponents of deliberative democracy consider reason-giving (and reason-probing) to be a central feature of deliberative processes, but they differ regarding the extent to which the structure and integrity of the process itself validates, from a moral perspective, the reasons on which an outcome is premised. At one end of the spectrum is Habermas's discourse theory, which seems to hold that any outcome produced by a process that satisfies certain procedural norms is, by definition, morally justified, provided the participants

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"seek to achieve 'peaceful' coexistence, mutual understanding and justice simultaneously").

300. Luban sometimes seems to fall prey to such dichotomizing, as in a hypothetical he offers in one of his articles:

> Suppose half the people in a nation believe—with arguments—"To each according to his need," while the other half believes "To each according to his work." (The latter too have arguments.) Each finds the other's principle unacceptable; eventually they compromise on "To each according to his work, unless his work does not suffice to meet his most basic needs: then we keep him afloat with transfer payments." The compromise principle is wrong, even *morally* wrong, if either side is right, for it violates distributive justice. It is, moreover, a principle believed by no one in the society.

David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397, 415 (1985) (emphasis in original). Luban assumes his negotiators reached their decision solely for purposes of expedience, by logrolling issues at play in the negotiation. He could have just as easily imagined the negotiators genuinely influencing each other, resulting in genuinely changed perspectives. There is nothing morally incoherent about the third principle Luban's negotiators produce, as Luban suggests. Luban's hypothetical loses its force if we imagine that the negotiators' third principle is not the product of superficial horse-trading around entrenched interests, but the product of a truly deliberative process through which some degree of perspective change has occurred.

301. *See* Benditt, *supra* note 15, at 27.

302. *See supra* Part V.

regard each other as "free and equal" and the outcome is consistent with that premise.[303] At the other end of the spectrum are Gutmann and Thompson, who believe that procedural norms can help promote, but cannot alone ensure, the moral integrity of the outcome of a deliberative process. In their view, the outcome of a deliberative process lacks moral justification if it fails to protect certain basic liberties and opportunities of those affected by it.[304]

Like Gutmann and Thompson, I believe the outcome of a deliberative process cannot be morally justified solely by efforts to adhere to procedural norms. Proponents of alternatives to litigation have been criticized—fairly, I believe—as sometimes being too focused on procedures and not sufficiently focused on the substantive integrity of the outcomes produced by the procedures they advocate.[305] The sort of ideal discursive conditions imagined by Habermas and others will seldom, if ever, be fully realized in practice. In the context of a process designed to explore the potential for settlement of a significant case, the participants and facilitator(s) will at best achieve a close approximation of the type of ideal process he imagines. If we accept that procedural norms cannot ensure the moral integrity of outcomes, however, a difficult question arises: Who determines whether the basic rights of those affected by a settlement are adequately protected?

In the United States, the decision about whether to settle, and on what terms, typically is wholly within the discretion of the parties themselves.[306] Like Menkel-Meadow, I believe this is the proper place

303. Although no substantive norms constrain the process Habermas imagines, he apparently believes that any decision that satisfies the procedural norms he specifies, including the character of the participants' regard for one another, would safeguard the basic rights of all who are affected by the decision. *See generally* Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, *in* MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 43 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990) (explaining discourse ethics theory).

304. GUTMANN & THOMPSON, *supra* note 61, at 199–229. Basic liberties protect "the physical and mental integrity of persons," ensuring freedom from such physical violations as "compulsory organ donations" and such mental violations as constraints on "religious or moral convictions." *Id.* at 204. Basic opportunities include access to such goods as an adequate income (i.e., the ability to compete for a job), physical security, and basic levels of education, health care, food, and housing. *Id.* at 217; *see also* Kuflik, *supra* note 35, at 43–48 (arguing that compromise is illegitimate if it disregards minimum constitutional guarantees).

305. *See, e.g.*, Gutmann, *supra* note 169, at 6–8 (criticizing negotiation proponent Roger Fisher and colleagues for emphasizing procedural considerations at the expense of moral substance in their prescriptions regarding cease-fire negotiations in Yugoslavian civil war).

306. Under the Federal Rules of Civil Procedure, court approval of settlements is required only in class actions and receivership proceedings. FED. R. CIV. P. 23(e), 66. A small number of federal and state statutes require judicial approval of settlements in special types of cases. *See, e.g.*, Tunney Act,

for decision-making power to reside. Fiss and other critics of settlement of significant cases would not, of course, deprive parties of the right to settle their dispute on terms of their own choosing. They simply do not recognize settlements as morally legitimate to the extent they reflect an apparent compromise of the parties' moral convictions.[307] This perspective is ironic, given that many judicial decisions often are careful "balancing acts" that try to accommodate features of competing moral views.[308]

Of course, it is possible that parties to a process designed to encourage moral deliberation could agree to a settlement that they do not regard as even minimally protective of some basic liberty or opportunity, but which they regard as superior to the outcome they would achieve through litigation or legislation. Settlement is considered the *least bad* alternative, rather than a good alternative. In this event, while it is possible that parties could view settlement as pragmatic and rational in some very narrow sense, it is not morally justified according to the principles of deliberative democracy articulated by Gutmann and Thompson. Disengaging from the negotiation and pursuing one's objectives through other means—including, perhaps, litigation, even if one fully expects to lose—is the morally preferable course of action, even if its effects are largely expressive.[309] Settlement on terms that the weaker party does not consider adequately protective of basic liberties and opportunities achieves neither justice *nor* peace (in any sense that is likely to prove durable), so we obviously should not encourage it.

These arguments in favor of the justification principle and, implicitly, for moral relativism in its weak sense obviously will be entirely unsatisfying to anyone whose perspective on a charged moral issue is completely deontological—for example, a pro-life advocate who does not believe that a basic liberty of a woman who wishes to have an

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15 U.S.C. § 16(b)–(h) (1997) (mandating judicial review of antitrust settlements). Settlement in all other cases occurs without judicial review.

307. *See* Fiss, *supra* note 2, at 1086 ("To settle for something means to accept less than some ideal.").

308. *See supra* Part II.B.

309. *See* Gutmann, *supra* note 169, at 8 ("An immoral negotiated resolution to a moral conflict in politics may be worse than going to war or no resolution at all."); *see also* Benditt, *supra* note 15, at 29–30 (arguing that genuine compromise cannot occur where "the alternative is to be forced into a still worse situation"). *But see* Carens, *supra* note 67, at 130 ("[I]t might be necessary for the party with the more legitimate interests to compromise at times simply because the other has more power, but it would be a political and moral error to accept the other party's interests as legitimate simply because of this power.").

abortion will be denied if she cannot obtain one, and that this interest should be afforded some degree of deference. Anyone who holds such views would react disapprovingly to a settlement in which, for example, a pro-life and a pro-choice organization agreed to an extended period of cessation from litigation on the condition that each organization engage in specific activities that they hope will measurably reduce both the number of unwanted pregnancies and the number of abortions. During this standstill period, abortions obviously would continue to occur, even if the parties' efforts were dramatically successful at reducing their number. The only way a pro-life advocate could regard such an agreement as having moral integrity is through a willingness to accept a balancing of moral perspectives and objectives that he or she hopes will contribute to a reduction in unwanted pregnancies and increased utilization of alternatives to abortion (i.e., parenthood with adequate social and economic support or adoption), while also preserving abortion as an option that is used less frequently as a result of the parties' efforts.[310] The pro-life advocate who refuses to recognize the choice to terminate a pregnancy as a fundamental liberty must bear in mind, however, that the outcome of litigation may be a balancing of perspectives and objectives that he or she finds similarly unacceptable.

In sum, I find it difficult to understand why a decision reached by the disputants through an adequate deliberative process lacks moral integrity if a decision by empanelled judges does not—even if we assume, perhaps somewhat generously, that the interaction among appellate judges typically has the character of genuine moral deliberation.[311] For the reasons indicated at the beginning of this subpart, it also is difficult to understand why a strategic settlement like the one that concluded the *Piscataway* litigation lacks moral integrity. Why should we not regard

310. Such a balancing achieved through genuine moral deliberation differs from an outcome based upon utilitarian principles, even when the outcome resembles one that a utilitarian policymaking process might produce. As indicated above, deliberative processes seek to do more than uncover preferences and other private information in a search for an outcome that will maximally satisfy the participants' competing interests. They seek to align preferences through discourse about the type of society in which the participants wish to live, and they do not necessarily treat all conceptions of the good as fungible, which much of utilitarian theory tends to do. *See* GUTMANN & THOMPSON, *supra* note 61, at 165–98 (comparing and contrasting deliberative and utilitarian approaches to policymaking).

311. For one recent example of interaction among appellate judges that falls far short of the deliberative ideal, see Adam Liptak, *Order Lacking on a Court: U.S. Appellate Judges in Cincinnati Spar in Public*, N.Y. TIMES, Aug. 12, 2003, at A10 (reporting repeated accusations of "lying and underhanded conduct in important cases involving the death penalty and affirmative action" among the judges of the United States Court of Appeals for the Sixth Circuit).

an outcome that emerges from the types of negotiations I have described as having moral substance, particularly when adjudication, if *it* is presumed to have moral integrity, is an effective alternative to negotiation? As I have indicated, I accept the prerogative of parties to press their claims to a final judgment, with or without first attempting to negotiate, when they reasonably believe, after efforts to achieve consensus (or giving due consideration to such efforts), that there is only one way that justice can be served. I also believe, however, that the very fact that parties have this prerogative should dispel any general hesitation one might have about exploring the potential for a consensual resolution of the dispute through an adequate deliberative process.

B. Deliberative Democratic Theory and Dispute Process Design

If the structure of a deliberative process cannot ensure the moral integrity of the outcome it produces, sound design and administration of the process according to the principles of deliberative democratic theory can at least help promote the just, consensual resolution of disputes involving deep moral disagreement. Deliberative democratic theory provides meta-principles that dispute resolution practitioners can use to structure and manage dialogues intended to contribute to the resolution of disputes involving divisive moral issues.[312] These principles are distinct from the many micro choices and moves that neutrals must make, but they can serve as touchstones that guide their process choices.

The foundational principles of deliberative democracy are concerned with its goals, its procedural features, and the ideal disposition of the participants in deliberative processes. These principles can be grouped and labeled, and their requirements elucidated, as indicated in the following chart. To the extent these principles do not encompass other, more familiar principles that are widely considered to be cornerstones of mediation and consensus-building processes—such as facilitator neutrality, informed consent, and party self-determination—they are intended to complement, rather than displace, them.

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312. Habermas might object to the extension of deliberative principles into the realm of settlement processes, though Cohen, Gutmann, and Thompson would not. *See* GUTMANN & THOMPSON, *supra* note 61, at 131; HABERMAS, *supra* note 82, at 304–05; Cohen, *supra* note 292, at 21.

PRINCIPLES FOR DELIBERATIVE DISPUTE RESOLUTION PROCESS DESIGN	
Principle	Requirements
GOALS	
1. Reasoned Agreement	Consensus based on reasons that all parties recognize as being grounded in legitimate moral visions which are sincerely held and advocated in good faith.[313]
2. Protection of Basic Rights	All parties believe the agreement adequately protects basic liberties and opportunities.[314]
3. Public Influence	To the extent practicable, the process and/or its output are formally or informally linked to official political processes or otherwise designed to influence the development of social norms regarding the subject matter of the dispute.
PROCEDURE	
4. Inclusiveness	The process is broadly inclusive of those potentially affected by its outcome or representatives who are accountable to them, all of whom

313. *See* GUTMANN & THOMPSON, *supra* note 61, at 57; HABERMAS, *supra* note 82, at 306; Cohen, *supra* note 292, at 23.

314. *See* GUTMANN & THOMPSON, *supra* note 61, at 199–29. Gutmann and Thompson do not address the difficult problem of who decides whether rights are minimally satisfied. In the context of settlement of significant cases, or the type of disputes that could give rise to them, I place that determination with the parties themselves.

	have an equal opportunity to be heard.[315]
5. Publicity	The process and its outcome are made as public as they can be without compromising the physical or psychological security of the participants or the sustainability of the process itself.[316]
6. Open Agenda	Participants are free to make any assertion and to introduce any issue that could be addressed effectively through an agreement or could influence its terms.[317]
7. Open Exchange	Participants exchange and critically evaluate perspectives, information, proposals, and reasons.[318]
PARTICIPANT DISPOSITION	
8. Reciprocity	Participants regard one another as free and equal persons and treat each other respectfully,[319] keeping strategic motivations and coercive behavior in check, speaking to make oneself understood, and

315. *See* GUTMANN & THOMPSON, *supra* note 61, at 128–64; HABERMAS, *supra* note 82, at 305; Habermas, *supra* note 303, at 89.

316. *See* GUTMANN & THOMPSON, *supra* note 61, at 95–127; HABERMAS, *supra* note 82, at 305; *see also* Luban, *supra* note 35, at 416 ("The publicity principle—intended as a moral requirement on public policy—requires of any defensible policy that it be capable of withstanding general, public knowledge that it is in place.").

317. *See* HABERMAS, *supra* note 82, at 306; Habermas, *supra* note 303, at 89.

318. *See* HABERMAS, *supra* note 82, at 305; Cohen, *supra* note 292, at 22.

319. *See* GUTMANN & THOMPSON, *supra* note 61, at 52–94; HABERMAS, *supra* note 82, at 305–06; Cohen, *supra* note 292, at 23.

	listening and inquiring in a sincere effort to understand.[320]
9. Reflection	Participants are willing and able to express and jointly reflect upon the needs, attitudes and assumptions that underlie their own and others' ideals, interests, and preferences.[321]
10. Openness to Influence	Participants attempt to suspend attachments to pre-existing positions and established norms at least enough to remain open to others' perspectives and proposals.[322]

Needless to say, complete fidelity to these deliberative principles will be difficult or impossible to achieve, both for neutrals and for those well-intended participants who strive to maintain the proper disposition throughout the settlement process.[323] The closer the ideal they represent is approximated, however, the more integrity the outcome of a deliberative settlement process is likely to have from a moral perspective.[324] The principles can operate as regulative ideals that practitioners and parties attempt to approach without expecting to fully realize them. Indeed, some dispute resolution theorists and practitioners are consciously employing some or all of these principles in the design, administration, and evaluation of dispute resolution processes.[325] Of

320. Minimizing strategic behavior is inherent in the notion of mutual respect and creation of a forum where participants are free from coercion. I thank Herbert Kelman for the expression "speaking to be understood and listening to understand" (personal communication with author).

321. *See* HABERMAS, *supra* note 82, at 306; Cohen, *supra* note 292, at 23.

322. *See* Cohen, *supra* note 292, at 22.

323. If those engaged in deliberation employ a facilitator, it also is needless to say that the facilitator's training, skill, experience, rational and affective capabilities, biases, and general level of maturity will affect the process for good or ill, influencing the extent to which the principles are realized.

324. *See* GUTMANN & THOMPSON, *supra* note 61, at 17 ("Deliberative democracy does not assume that the results of all actual deliberations are just. In fact, most of the time democracies fall far short of meeting the conditions that deliberative democracy prescribes. But we can say that the more nearly the conditions are satisfied, the more nearly justifiable the results are likely to be.").

325. *See, e.g.*, JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING

course, some dispute resolution practitioners undoubtedly utilize process designs and norms that satisfy some or all of the principles of deliberation without conscious appropriation of deliberative democratic theory.

Some principles of deliberation will be harder to remain faithful to than others in the context of settlement discussions among parties to a significant case. The principle of inclusiveness will be difficult to honor in many two-party disputes—particularly those among private parties, but even in those where the public is nominally represented through a government official or agency—unless the parties are willing to include representatives of other stakeholders, and other members of their social groups who hold different views, in the process (or unless litigation is pending and others have standing to intervene). The principle of publicity potentially is compromised if parties want the process to remain private, though the principle should acknowledge exceptions where secrecy is necessary to protect the security of the participants or the sustainability of the process.[326] The less the outcome of the process will affect non-participants, however, the less concerned we should be about lack of inclusiveness and the secrecy of the process (as opposed to its outcome, which we should hope will be made public, so that it influences others' perspectives and actions).

PARTICIPATORY PLANNING PROCESSES (1999) (applying deliberative democratic theory to participatory land use planning); Forester, *Dealing*, *supra* note 138, at 464–65 (discussing the ways in which consensus-building processes that call on "deliberative abilities to listen, learn, and probe both fact and value together" can help produce agreement despite deep value differences); Judith E. Innes, *Evaluating Consensus Building*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 631, 647–55 (Lawerence Susskind et al. eds., 1999) (including Habermas' ideal speech conditions among criteria for effective consensus building processes); Menkel-Meadow, *Pursuing Peace*, *supra* note 10, at 1771 (linking Habermas' theory of discourse ethics and concepts of deliberative democracy to the development of new processes "to respond to a host of legal and political conflicts"); *see generally* JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES (1999) (applying deliberative democratic theory to participatory land use planning).

326. Gutmann and Thompson recognize that it sometimes may be appropriate for deliberation to occur secretly so that participants can "speak candidly, change their positions, and accept compromises without constantly worrying about what the public and the press might say." GUTMANN & THOMPSON, *supra* note 61, at 115. Conflict resolution practitioners who facilitate dialogues among identity groups also recognize that secrecy may be necessary at some stages in the process to safeguard the reputations, and even the physical well-being, of those courageous enough to participate. *See, e.g.*, Herbert C. Kelman, *The Interactive Problem Solving Approach*, *in* MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 501, 507 (Chester A. Crocker et al. eds., 1996) (discussing value of secrecy in dialogues among representatives of groups engaged in conflict).

VII. CONCLUSION

It is ironic that the courtroom is viewed by many disputants, lawyers, and legal academics as the only acceptable forum for addressing disputes involving deeply held values, because litigation, like negotiation, entails compromise. Litigation involves compromise in at least two respects. First, litigation is a lottery in which the substantive values a party seeks to defend, and which it considers absolute, may be wholly or partially discredited by the court. Second, litigation merely shifts the burden of negotiation to others.

Negotiation should be viewed as a legitimate alternative to litigation for processing and resolving disputes involving deep moral disagreements. People accept the compromise inherent in adjudication of ideological disputes because they value not only the substantive moral perspectives they seek to defend, but also the pacific resolution of the dispute itself. Settlements achieved through deliberative dispute resolution processes may benefit both the parties and society in ways that litigation cannot. From the public's perspective, deliberative dispute resolution processes can multiply opportunities for democratic participation and help citizens build social capacity to resolve tough problems. Even where parties are incapable of engaging in genuine moral deliberation, however, settlement for strategic reasons sometimes may be a sensible alternative for parties to a significant case, and one that should not invite scorn. Litigation and negotiation each have a legitimate role to play in our nation's moral discourse and the evolution of social norms. Litigation and negotiation are complementary, mutually reinforcing social processes, even in the realm of disputes involving deep moral disagreement. Settlement has an important and constructive role to play in the pursuit of justice, the development of social norms, and the strengthening of social bonds. Interactions between law and social norms, and between the processes and institutions that produce them, are complex and unpredictable. We should not assume that one institution or process always is superior to others for righting wrongs or producing social change.