PLURALISM IN AMERICA: WHY JUDICIAL DIVERSITY IMPROVES LEGAL DECISIONS ABOUT POLITICAL MORALITY

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Why does the race of judges matter? This Note argues that racial diversity in the judiciary improves legal decisions about political morality. Judges play a substantial role in regulating our political morality; at the same time, race and ethnicity influence public views on such issues. In cases that involve difficult legal questions of political morality, judges should seriously consider all moral conceptions as potential answers. Racial and ethnic diversity is likely to improve the judiciary's institutional capacity for openness to alternative views—not because judges of any given race will "represent" a monolithic viewpoint, but because of the likelihood that judges of a particular race or ethnicity will be better positioned to understand and take seriously views held within their own racial or ethnic communities. Judicial dialogue, taking place within appellate panels and across courts, serves to diffuse alternative viewpoints more broadly. Greater judicial willingness to consider disparate moral views should ultimately result in better decisions regarding political morality. Specifically, the judiciary may fashion new compromises to resolve political-moral dilemmas, judges and society may better understand the contours of such dilemmas, and the public may even arrive at new conclusions regarding basic questions of political morality.

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INTRODUCTION

Judge Bruce Wright, a famously outspoken New York City trial judge, once criticized "black judges in skin color only" who "fail to understand that if there is no difference between white and black judges, there is no need to emphasize the paucity of black judges."[1] Those who defend race-conscious selection of judges must confront two questions embedded within Judge Wright's question: Do black judges adjudicate cases differently than white judges?[2] And, if not, why should we care about the race of judges?

To answer these questions, I begin with two realities of U.S. political life. First, judges play a visible and substantial role in regulating our public morality, as they rule on questions such as the legality of capital punishment, same-sex marriage, abortion regulation, and euthanasia.[3] Second, public disagreement about these issues is not only characterized by philosophical divergence. There are important structural divisions, including race, that coincide with our philosophical differences. As I will argue, our nation's moral pluralism is in part a product of the diversity of racial and ethnic communities in the

[1] BRUCE WRIGHT, BLACK ROBES, WHITE JUSTICE 65 (1987).

[2] The question logically extends to judges of all races, not simply black and white judges.

[3] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (capital punishment); Stenberg v. Carhart, 530 U.S. 914 (2000) (partial birth abortion); Washington v. Glucksberg, 521 U.S. 702 (1997) (physician-assisted suicide); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (2003) (same-sex marriage).

United States.[4] These two features are at the core of why race matters for the judiciary.[5] Once we recognize the role of judges in arbitrating public morality and the systematic cleavages that characterize disputes over public morality, race-conscious judicial selection is not merely legitimate, but—if it results in increased judicial diversity—should increase the quality of judicial decisionmaking.[6]

My argument for this proposition rests on particular assumptions about how judges ought to approach legal disputes over political morality. I start from a model of jurisprudence that views judges as constrained by legal rules, yet sees their decisionmaking as necessarily incorporating moral reasoning. This Dworkinian model[7] is controversial in some respects, but there are reasons for my choice. Formalist models of jurisprudence, to the extent that they require judges to rely solely on legal rules and formalistic legal reasoning, cannot support an account in which race and ethnicity affect legal decisionmaking. Moreover, because they fail to account for the effects of judges' varying backgrounds and beliefs, they are sociologically unconvincing.

On the other end of the spectrum, models of jurisprudence inspired by legal realism, to the extent that they suggest that judges simply follow their personal preferences in adjudicating questions of political morality, are more convincing as sociological accounts. However, those models are not satisfying to those who believe in the importance and distinctiveness of legal reasoning. More importantly,

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[4] *See infra* Part I. I agree with those social theorists who understand race as a fluid social construction, not a biological reality. *See, e.g.*, Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 8 (1994) (defining race as "a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry").

[5] Notably, democratic theorists are uneasy with both of these features of our political system: the role of unelected judges in arbitrating disputes of political morality, and the existence of disagreement over political morality that runs along preexisting cleavages such as religion and race. On concerns over the role of unelected judges, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–35, 334 n.1 (1998) (citing various works). On racial/ethnic cleavages and the worries they engender for liberal democracy, see generally MICHAEL KENNY, THE POLITICS OF IDENTITY (2004) (describing concern that political identification with ethnic or religious groups threatens core principles of liberal citizenship). Unlike life-tenured federal judges, many state judges are elected or undergo retention elections; their role in deciding disputes over political morality is less problematic for democratic theory.

[6] By focusing only on race/ethnicity, I do not intend to devalue the importance of other forms of diversity within the judiciary, such as gender, class, and religious diversity. If extended, my arguments would ultimately support seeking judicial diversity along multiple axes.

[7] *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

the value of judicial diversity appears obvious under such models. If judges behave as quasi-legislators, diversity among judges becomes important for the same reasons that diversity within the legislature is important. If substantive representation is improved when particular racial or ethnic communities are represented by persons of the same race or ethnicity, then it is arguable that the legislature should include the same spectrum of racial and ethnic diversity that is in the population. Transferring this model of political pluralism to the judiciary suggests that judicial decisions, at least in the aggregate, should incorporate the substantive views of all groups in the population. In effect, this would leave minority groups with a minority "vote" within the judiciary.

Here, however, I present an argument for judicial diversity that does not rely on the idea that the courts are simply another arena for legislative politics. We should care about the race of judges, not because an individual black judge will rule differently than a white judge in a particular case,[8] but because of the beneficial effects of judi-

[8] Studies comparing the decisions of judges of different races have had varied results. Some have found a link between race and judicial votes. *See* DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 87, 147–48 (2003) (finding that minority judges were more likely to vote in favor of gay and lesbian rights than white judges); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 164, 172 (1983) (finding Carter's black appointees to have cast significantly more votes in favor of criminally accused and in favor of sex discrimination claimants than their white counterparts, but not more in favor of racial discrimination claimants); Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1232–33 (2000) (finding that black justices were more likely than white justices to cast liberal votes in discrimination cases, feminist issue cases (sex discrimination, reproductive rights, and sexual harassment), but not in divorce cases); Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 131–33 (1988) (reporting that white judges were less likely to incarcerate white defendants than black defendants, and that black judges gave black defendants slightly shorter sentences than white defendants). Other studies have failed to find a link. *See* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 273–80 (1995) (finding no evidence that federal district court judges' minority status has significant impact on civil rights case outcomes); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 144–45 (2000) (concluding that black district court judges did not vote differently than their white colleagues on most issues, although they voted less frequently in favor of personal liberties claims); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 L. & SOC'Y REV. 1197, 1207–08, 1212–13 (1990) (reporting that "both black and white judges in Detroit imposed harsher sentences on black offenders" in violent felony cases, with no significant difference in sentence lengths, though black judges were significantly less likely than white judges to send black male offenders to prison at all); Thomas G. Walker & Deborah G. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 605–07 (1985) (finding no statistically significant evidence that black federal district court judges ruled differently than white judges in personal liberties, criminal justice, or economic regulation cases); *see also* Sheldon Goldman,

cial diversity in the aggregate, developed through judges' interactions with one another and the public over time. When the public is divided over questions of political morality, a diverse judiciary is more likely to comprehend and grapple with the full range of potential resolutions, and thus arrive at better legal answers about political morality. By making judicial reasoning more open and rigorous, we improve its results.[9]

The argument for judicial diversity runs as follows: Judges must choose between alternative moral views in adjudicating at least some cases. If judges vary in their openness to particular moral views, the identity of a judge (or judges, in the case of appellate courts) will affect legal outcomes in at least some cases. Differences in legal outcomes across courts will result.

Why would individual judges' racial or ethnic identities affect their openness to various moral views in deciding a particular case? Judges' membership in particular racial or ethnic groups does not imply that they personally subscribe to a particular moral viewpoint, but it may be linked to their understanding of and respect for certain

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Voting Behavior on the United States Courts of Appeals, 1961-1964, 60 AM. POL. SCI. REV. 374, 381–82 (1966) (finding little evidence that demographic variables such as age, religion, socioeconomic background, and education were related to appellate judges' voting behavior).

[9] Arguments for racial diversity among judges are not new. Sherrilyn Ifill and Sylvia Lazos Vargas have made compelling arguments for the functional value of a diverse bench. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000); Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150 (1999) [hereinafter Lazos Vargas, *Democracy and Inclusion*]; Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law that Is Inclusive?: What* Grutter v. Bollinger *Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101 (2004) [hereinafter Lazos Vargas, *Diverse Judiciary*]. Ifill describes the role of the judge as a representative who should engage with the understandings of minority communities in her decisionmaking. Ifill, *supra*, at 465–72. In her work, she emphasizes both the value of incorporating traditionally excluded views in judicial decisionmaking and an ideal of structural impartiality, in which the judiciary is not dominated by any particular social group. *Id.*; *see also* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 99 (1997) (proposing concept of structural impartiality). Lazos Vargas theorizes a relational model of judicial reasoning that allows judges to "engage both majority and minority epistemologies in intergroup conflict cases." Lazos Vargas, *Democracy and Inclusion*, *supra*, at 158–59. She suggests that a critical mass of minority judges can contribute to a broader and more informed judicial understanding of racial dynamics. Lazos Vargas, *Diverse Judiciary*, *supra*, at 152.

This Note adds another strand to the arguments for the functional value of a diverse judiciary, by starting from a somewhat different perspective on adjudication and focusing on the effects of judicial diversity in areas less explicitly linked to race. I rely on a Dworkinian view of adjudication to describe judges, not as representatives, but as decisionmakers who are obliged to independently evaluate legal arguments on legal and moral grounds. Also, I focus on the way that race and ethnicity can structure different understandings of moral conceptions even in areas that are not explicitly about race.

moral viewpoints. There is substantial segregation among racial and ethnic groups in the United States;[10] different, separate experiences and cultural institutions produce differences across groups in views regarding political morality. The "deep divide of racial polarization in public opinion" and "the depth of continued racial segregation in the nation" are linked.[11] Further, individuals are less likely to understand the foundations and nuances of political attitudes held outside of their communities. Segregation produces differences in views and incomplete understanding of other views.

For this argument to hold, individual black judges need not be different from individual white judges in their personal views of political morality. It must only be true that black judges are on average more familiar than judges of other races with views of political morality commonly held within black communities. The argument rests on the idea that judges of different backgrounds will vary in their openness to particular political-moral beliefs; thus, in the aggregate, a more diverse group of judges should be capable of considering a more diverse range of political values.

Importantly, our legal system is already structured so as to take advantage of variations in judges' thinking about the law. Appellate panels are made up of multiple judges. Judges frequently take note of other judges' rulings, even those that do not bind them in any sense. The Supreme Court uses its discretionary power of certiorari to avoid ruling on certain issues until it has the benefit of examining multiple rulings from appellate courts.[12] While we prize the ideal of a uniform law, we do not rush to erase all inconsistencies. Different legal rulings serve as fodder for the deliberation that occurs at multiple levels, as judges weigh the written opinions of other courts, their own under-

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[10] *See infra* Part I.A.2.

[11] Michael C. Dawson & Lawrence D. Bobo, *The Reagan Legacy and the Racial Divide in the George W. Bush Era*, 1 DU BOIS REV. 209, 210 (2004).

[12] On the Supreme Court's practice of allowing issues to "percolate" in the lower courts before ruling on them, see Lackey v. Texas, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) (arguing that "novel issue" of whether executing prisoner who had spent seventeen years on death row violates Eighth Amendment is ideal case for permitting state and federal courts to serve as laboratories because of "its legal complexity and its potential for far-reaching consequences"); Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); Johnson v. Texas, 509 U.S. 350, 379 (1993) (O'Connor, J., dissenting) (referring to "our practice of letting issues 'percolate' in the 50 states in the interests of federalism"); McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) ("In my judgment it is a sound exercise of discretion of the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

standings of the law, and, when serving on appellate panels, the views of fellow panel members.

Consideration of a broad range of political-moral views is likely to lead to better answers for at least four reasons. Openness to alternative legal resolutions prevents us from discarding meritorious resolutions out of hand, provides us with new information about the contours of the legal problem, and potentially produces new and better compromise answers. Most significantly, the collective experience of living with alternative moral solutions may be the surest way for us to agree on which solutions are the correct ones.

This Note begins in Part I by describing the extent of racial and ethnic segregation in the United States and discussing evidence that this produces group-level differences in views on political morality. Part II explains why, in a Dworkinian model of adjudication, judges should be receptive to varied conceptions of political morality, and suggests that racial and ethnic diversity among judges furthers this sort of open-mindedness. Part III sets forth specific reasons to believe that judicial diversity will improve legal decisions about issues of political morality.

I
How Conceptions of Political Morality Vary Among Racial and Ethnic Groups in the United States

What are the origins of public disagreement over issues of public morality? What do race and ethnicity have to do with that disagreement? In this Part, I describe the links that social science research has found between race/ethnicity[13] and Americans' views on issues of political morality. I note that any race-based differences in moral views are not based in any sort of "essential" differences between individuals of different races, but rather the differing set of social institutions and structural conditions experienced by different racial and ethnic communities within the United States.[14]

[13] In common discussion and in social science, broad racial and pan-ethnic categories are used to classify the entire population into subgroups. Most commonly the subgroups are: Whites, Blacks, Hispanics or Latinos, Asian Pacific Americans, and Native Americans. These categories do not satisfactorily include all Americans, and each group contains a significant amount of internal diversity. For example: "Asian American groups are distinguished from one another by such characteristics as language, cultural values and beliefs, history, acculturation, place of birth, socioeconomic status, and age." Pauline Agbayani-Siewert, *Assumptions of Asian American Similarity: The Case of Filipino and Chinese American Students*, 49 Soc. Work 39, 39 (2004).

[14] There is a risk of essentializing individuals when we examine the links between ascriptive categories like race and belief systems; however, I believe that it is important to

In part, individuals disagree over controversial issues simply because they are individuals who think differently from one another. Social science, however, looks for patterns in beliefs by investigating the degree to which individuals' characteristics are correlated with particular attitudes. Starting from hypotheses about the ways that a specific characteristic might predispose individuals toward certain attitudes, researchers use large data sets of public opinion surveys to test for such relationships. With statistical techniques that control for the effect of other factors, researchers can attempt to isolate the effects of specific traits. Testing the effects of more detailed variables also helps to elucidate the relationships between multiple variables—for example, an abortion study might test whether women are more supportive of abortion than men, but check to see whether controlling for religion, age, and class changes the observed patterns in attitudes.

Social scientists have used these techniques to examine the effect of race on individuals' attitudes in a wide variety of areas. Unsurprisingly, the bulk of research focuses on differences in attitudes about race, an area in which individuals' race tends to have a very large effect on their views. It turns out, though, that even in areas not explicitly linked to race, individuals' racial backgrounds are correlated with differences of opinion. In fact, there are pervasive racial divisions in public opinion on issues of public morality.[15] Controlling for differences in religion, age, gender, and class tends to diminish the explanatory power of race, but often race remains a significant factor even with such controls in place.[16] More nuanced analyses also frequently find that demographic variables have different effects on individuals of different races; for instance, religious fundamentalism appears to affect black individuals' attitudes differently than white individuals' attitudes.[17] Also, variables that tend to correlate with particular views among whites are sometimes uncorrelated with the same views among blacks, suggesting that individuals of different races may arrive at their views by different routes.[18]

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explore the effect that our involvement in distinct racial and ethnic communities has on our beliefs. Investigating difference does not imply that one believes difference to be fixed or necessary. For instance, philosopher Cornel West rejects the idea of "a black essence" or "one black perspective" shared by all black people, describing blackness instead as "the distinct styles and dominant modes of expression found in black cultures and communities." He writes: "These styles and modes are diverse—yet they do stand apart from those of other groups (even as they are shaped by and shape those of other groups)." CORNEL WEST, RACE MATTERS 28 (2d ed. 2001).

15 *See infra* Part I.B.1.

16 *See infra* Part I.B.2.

17 *Id.*

18 *Id.*

Thus, there is evidence that race tends to have some effect on individuals' attitudes on issues of public morality. We might first question why this should be so. Systematic differences in the experiences and/or beliefs of different racial groups would seem to be the most likely source of differences in views on public morality. To the degree that people of different races and ethnicities are segregated from one another in the United States, we might expect to see a greater difference in views. Therefore, before describing the results of social science research on racial differences in attitudes toward issues of political morality, I first discuss how different moral attitudes might originate and describe briefly the extent of segregation in neighborhoods and institutions such as schools and churches.

A. Development of Political Morality and the Effects of Segregation

By political morality, I mean the ethical framework that we as a society impose on ourselves through political mechanisms—in other words, the moral values that animate our laws. Legal philosopher Ronald Dworkin provides a useful distinction between a concept and a conception of political morality: A concept is a principle that has general meaning, which to be applied must be translated into a conception.[19] Dworkin gives the example of the constitutional prohibition on cruel punishments.[20] The ban on cruelty is the concept, upon which almost all can agree; however, the capital punishment debate revolves around differing conceptions of cruelty.[21] United States society appears to be in wide agreement about concepts (i.e., the importance of values like equality, liberty, and dignity) but in disagreement regarding conceptions (i.e., how to interpret these values in actual practice). Therefore, in suggesting that there may be systematic

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[19] Dworkin explains the difference between a concept and a conception as follows:

> Suppose a group believes in common that acts may suffer from a special moral defect which they call unfairness, and which consists in a wrongful division of benefits and burdens, or a wrongful attribution of praise or blame. Suppose also that they agree on a great number of standard cases of unfairness and use these as benchmarks against which to test other, more controversial cases. In that case, the group has a concept of unfairness, and its members may appeal to that concept in moral instruction or argument. But members of that group may nevertheless differ over a large number of these controversial cases, in a way that suggests that each either has or acts on a different theory of *why* the standard cases are acts of unfairness. They may differ, that is, on which more fundamental principles must be relied upon to show that a particular division or attribution is unfair. In that case, the members have different conceptions of fairness.

DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 134–35.

[20] *Id.* at 135–36; *see also* U.S. CONST. amend. VIII.

[21] DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 135–36.

differences of political morality across different racial and ethnic groups, I do not mean that Americans of different races disagree over whether human dignity is an important value, but simply that they disagree over how human dignity should be safeguarded in practice.

Segregation has two important effects for views on political morality among people of different races: It fosters systematic differences among groups, and it inhibits intergroup comprehension. Persistent racial segregation in the United States means that individuals of different races often experience different institutional and structural conditions.[22] These differing experiences contribute to different moral attitudes among individuals of different races or ethnicities, as a result of either learning different moral attitudes within different institutions or simply arriving at differing views as a result of distinct experiences in the world. Also, segregated conditions may inhibit individuals of different groups from understanding and sympathizing with the attitudes of those in other groups—an effect that is important for my arguments in Parts II and III.

Any link between race and views is thus not determinate or fixed. Yet in a highly contingent, historically- and geographically-situated context, views about political morality may in fact be connected to race. In the contemporary United States, a multitude of racial and ethnic groups inhabit the same territory but conduct daily life in conditions of substantial segregation. Race thus becomes a proxy for variables that bear an understandable link to political morality: involvement in particular social institutions, structural position within society, and the experience of majority or minority status itself.

1. Origins of Moral Attitudes

Where do our moral beliefs come from? How do we construct notions of equality, dignity, and fairness? Sociologists supply answers based on our membership in groups and our individual positions within society. Values, particularly in their concrete realizations, are not universals from this perspective: "Traditional sociological explanations explain moral value attitudes, defined as an individual's propositions for the ordering of human relations with regard to specific actions, to be the result of social structural experience—usually identified by social groups (e.g., Roman Catholics) or categories (e.g., Men)."[23]

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[22] *See infra* Part I.A.2.

[23] John H. Evans, *Worldviews or Social Groups as the Source of Moral Value Attitudes: Implications for the Culture Wars Thesis*, 12 SOC. F. 371, 372 (1997).

There are at least two potential paths for the transmission of moral attitudes within groups. Moral attitudes may be learned through interaction with the group. "[I]deology is inscribed into the collective memories as well as the written materials of collectivities and is taught to members of the group through interaction. It is the experience of interacting with the group that leads to the ideology that includes moral value attitudes."[24] Another approach views moral value attitudes as resulting from common experiences, based on similar external factors. That approach understands "the shared experience resulting from social structural location as affecting moral values. . . . [This approach] usually describes the mechanism that affects moral values as interest."[25] Here, moral attitudes might be seen as reactions to the group's status and experiences within society.[26]

For example, black and white Americans have different perceptions of basic structural conditions. In 2003, 50% of black adults said that black children had as good a chance as white children in their communities to get a good education, while 81% of white adults thought that black children's chances were as good.[27] While this is not a moral view in itself, this perception is the sort of material from which particular conceptions of what equality requires are formed. When members of different groups lead largely separate lives, differing opinions like these are bound to develop.

2. *Contemporary Segregation*

Significant racial segregation exists in the institutions where Americans have most of their formative experiences and substantive interactions: neighborhoods, schools, religious organizations, and workplaces. Over the last twenty years, residential segregation has not shown marked decreases for any groups.[28] Nor does the conventional account of immigrant assimilation—in which immigrants first move to ethnic enclaves, and later generations assimilate into ethni-

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[24] *Id.* at 374.

[25] *Id.*

[26] For examples of "status politics" explanations of groups' moral views, see Eric Woodrum, *Determinants of Moral Attitudes*, 27 J. SCI. STUDY RELIGION 553, 554–57 (1988).

[27] Heather Mason, *Equal-Opportunity Education: Is It Out There?*, GALLUP POLL TUESDAY BRIEFING, July 1, 2003, at 2, *available at* http://poll.gallup.com/content/default.aspx?ci=8731&pg=1 (subscription required).

[28] JOHN ICELAND ET AL., U.S. CENSUS BUREAU, RACIAL & ETHNIC SEGREGATION IN THE UNITED STATES: 1980-2000, at 96 (2002), *available at* http://www.census.gov/prod/2002pubs/censr-3.pdf (providing various measures of segregation between racial groups in United States).

cally-mixed neighborhoods—appear to have held true.[29] Residential segregation sets up educational segregation, and parents' choices to send children to less integrated private schools contributes further to educational segregation. Religious organizations also tend toward racial and ethnic homogeneity.

a. Neighborhoods

Overall levels of residential segregation have been fairly stable for the past twenty years. According to the United States Census Bureau, from 1980 to 2000, "African Americans experienced declines, albeit modest ones, in segregation across all dimensions, while other groups showed either mixed patterns or small increases over the 1980-2000 period."[30] In 2000, 64% of blacks living in major metropolitan areas would have had to move for the black population to be evenly

[29] *See* Richard D. Alba et al., *Immigrant Groups in the Suburbs: A Reexamination of Suburbanization and Spatial Assimilation*, 64 AM. SOC. REV. 446 (1999). The traditional model of spatial assimilation posited that "suburbanization [is] a distinct phase in an overall process whereby members of ethnic minorities improve their residential situations as they acculturate and achieve socioeconomic success. . . . [T]hey frequently forsake urban ethnic enclaves for more ethnically mixed suburbs, thereby ensuring further assimilation . . . ." *Id.* at 446–47. Alba et al. test the spatial assimilation model against current immigrant settlement patterns, and find mixed support for it, concluding that the model "needs modification." *Id.* at 458. At present, immigration status appears to be much less relevant to one's residential location than one's race or ethnicity. JOHN R. LOGAN, LEWIS MUMFORD CTR. FOR COMP. URBAN & REG'L RES. UNIV. AT ALBANY, AMERICA'S NEWCOMERS 11–12 (2003), *available at* http://mumford.albany.edu/census/NewComersReport/NewComer01.htm.

[30] ICELAND ET AL., *supra* note 28, at 110. Use of broad racial and ethnic categories masks more variegated residential patterns. For example, Kyle Crowder found that "West Indians have formed somewhat distinct residential enclaves" in metropolitan New York. These black West Indians are largely absent from white neighborhoods; although they are less segregated from African Americans than from other groups, they still live somewhat separately within African American areas. Kyle D. Crowder, *Residential Segregation of West Indians in the New York/New Jersey Metropolitan Area: The Roles of Race and Ethnicity*, 33 INT'L MIGRATION REV. 79, 95–96 (1999). There is evidence that black and white Hispanics experience different patterns of segregation. Nancy A. Denton & Douglas S. Massey, *Racial Identity Among Caribbean Hispanics: The Effect of Double Minority Status on Residential Segregation*, 54 AM. SOC. REV. 790, 798–806 (1989). Despite lower levels of segregation for Asian Pacific Americans than for other groups, some have described "growing concentration of poor immigrant Asian American communities from Southeast Asia." Robert T. Teranishi, *Yellow and* Brown*: Emerging Asian American Immigrant Populations and Residential Segregation*, 37 EQUITY & EXCELLENCE EDUC. 255, 258 (2004) (internal citation omitted). Research comparing the residential patterns of African Americans, Afro-Caribbeans, and African immigrants found that these groups were also segregated from one another. JOHN R. LOGAN & GLENN DEANE, LEWIS MUMFORD CTR. FOR COMP. URBAN & REG'L RES. UNIV. AT ALBANY, BLACK DIVERSITY IN METROPOLITAN AMERICA 7–9 (2003), *available at* http://mumford.albany.edu/census/BlackWhite/BlackDiversityReport/black-diversity01.htm.

distributed across neighborhoods.[31] This was true for 51% of Latinos, 41% of Asian Pacific Americans, and 33% of Native Americans.[32] (The Census Bureau did not calculate equivalent figures for whites.[33])

There are different patterns of residential segregation across racial groups, with blacks experiencing the most pronounced segregation.[34] For Asian Pacific Americans and Latinos, residential segregation is highest in areas where there are substantial numbers of others of their own group.[35] While the Asian Pacific American population is more heavily concentrated in the suburbs than other groups, its level of suburban segregation is similar to its level in urban areas.[36] Latino residential segregation shows a bifurcated pattern: Latinos are roughly split between neighborhoods with a high concentration of other Latinos, and neighborhoods with quite small numbers of Latinos.[37] This "highly concentrated and highly dispersed" residential pattern may be moving toward patterns of even higher concentration: From 1990 to 2000, the proportion of Latinos in majority-Latino neighborhoods edged upward from 39% to 43%.[38] Latinos also tend to be as segregated from blacks as they are from whites.[39]

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[31] ICELAND ET AL., *supra* note 28, at 96. This is an estimate based on a dissimilarity index, which "measures the percentage of a group's population that would have to change residence for each neighborhood to have the same percent of that group as the metropolitan area overall." *Id.* at 8. The indices are measured in different metropolitan areas for each group, as they were only calculated for metropolitan areas in which the group made up at least 3% of the population, or 20,000 residents. All numbers are weighted averages. *Id.* at 96.

[32] *Id.* at 96.

[33] The Census Bureau study's methodology relied on non-Hispanic whites as a reference group, and calculated measures of segregation "as if non-Hispanic Whites and the minority group in question were the only two groups present in the population." *Id.* at 7, 122. Thus, the study did not calculate separate segregation measures for whites, but relied on them as a baseline.

[34] For instance, while twenty-nine U.S. metropolitan areas have black-white hypersegregation, only Los Angeles and New York have Latino-white hypersegregation, and there are no areas with Asian Pacific American or Native American hypersegregation. Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-First Century*, 41 DEMOGRAPHY 23, 28–29 (2004). Wilkes and Iceland scored hypersegregation on five indices of segregation: evenness, exposure, concentration, centralization, and clustering. *Id.* at 28.

[35] ICELAND ET AL., *supra* note 28, at 51, 77.

[36] JOHN R. LOGAN, LEWIS MUMFORD CTR. FOR COMP. URBAN & REG'L RES. UNIV. AT ALBANY, THE NEW ETHNIC ENCLAVES IN AMERICA'S SUBURBS 1 (2001), *available at* http://mumford.albany.edu/census/suburban/SuburbanReport/page1.html.

[37] ROBERT SURO & SONYA TAFOYA, PEW HISPANIC CTR., DISPERSAL AND CONCENTRATION: PATTERNS OF LATINO RESIDENTIAL SETTLEMENT 6 (2004), *available at* http://pewhispanic.org/files/reports/36.pdf.

[38] *Id.* at 4–6. In majority-Latino neighborhoods, the median population share of Latinos was 70% in 2000; the median share in minority-Latino neighborhoods was just 3%. *Id.*

[39] JOHN R. LOGAN, LEWIS MUMFORD CTR. FOR COMP. URBAN & REG'L RES. UNIV. AT ALBANY, HISPANIC POPULATIONS AND THEIR RESIDENTIAL PATTERNS IN THE METROP-

b. Schools

In 2001, Gary Orfield reported that white children tended to attend the most homogenous schools, while Latino and black children attended schools with larger numbers of children from their own groups and other minority groups.[40] Evidence from the 1990s suggested a pattern of increasing integration among other racial groups, while white students became increasingly segregated from others. In 1995, researchers reported that in large metropolitan schools, "[g]roups other than white are becoming less segregated from each other, while segregation between white students and black, Hispanic, and Asian students in metropolitan areas is on the rise."[41] In suburban schools, there was evidence of rising segregation during the 1990s, as "suburban areas with the largest increases in minority enrollment shares tended to have the largest increases in segregation levels from whites from 1987 to 1995."[42]

Parents' choices to send their children to private schools are also closely tied to public school segregation. Overall, segregation appears to be higher in private schools than in public schools, though the extent of segregation in private schools varies by race.[43] Black-white and Asian-white segregation is higher in private schools, while Latino-white segregation is actually lower than in public schools.[44] When parents of one group shift their children to private schools in high numbers, it contributes to segregation in both public and private schools: For example, in the Memphis school district, the overall student population is 29% white. However, the private schools are 83% white while the public schools are 21% white.[45]

c. Religious Organizations

Churches usually exert even more direct influences on individuals' moral attitudes than do neighborhoods or schools. Thus, segre-

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OLIS 7 (2002), *available at* http://mumford.albany.edu/census/HispanicPop/HspReportNew/page1.html.

[40] GARY ORFIELD, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 32–34 (2001), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

[41] Sean F. Reardon et al., *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989-1995*, 37 DEMOGRAPHY 351, 357 (2000).

[42] Sean F. Reardon & John T. Yun, *Suburban Racial Change and Suburban School Segregation, 1987–95*, 74 SOC. EDUC. 79, 94 (2001).

[43] SEAN F. REARDON & JOHN T. YUN, CIVIL RIGHTS PROJECT, HARVARD UNIV., PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION 30 (2002), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Private_Schools.pdf.

[44] *Id.* at 31.

[45] *Id.* at 28.

gation in religious congregations is a powerful potential shaper of different views on moral issues among different racial/ethnic groups. In the present, it appears that many religious organizations continue to be racially and ethnically homogenous. In a 1998 national study of religious congregations, researchers found that 66.1% of attendees were part of congregations composed of more than 80% white, non-Hispanics.[46] Congregations composed of more than 80% blacks accounted for another 11.9% of attendees.[47] Another 5% of attendees were part of congregations that were more than 50% Hispanics.[48] In some instances, religious organizations constructed on ethnic lines play a foundational role in developing ethnic identity and accompanying attitudes. For example, sociologist Kelly Chong has described the "vitality of ethnic Christian institutions" among Korean Americans, noting that "religious participation of Korean Americans tends to be accompanied by an unusually high degree of ethnic identity and consciousness."[49]

Many religious organizations explicitly discuss politics and political morality, and even play a part in political campaigns, which potentially strengthens the link between attitudes about issues of public morality and segregation within congregations. For instance, the 1998 National Congregations Study showed that "black Protestant congregations are particularly likely to have voter registration drives and to invite political candidates and elected officials to congregations to give speeches."[50]

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[46] MARK CHAVES, CONGREGATIONS IN AMERICA 214, 226 (2004).

[47] *Id.*

[48] *Id.* Similar findings were reported in a study of three hundred Indianapolis congregations performed by the Polis Center at Indiana University's Project on Religion and Urban Culture: 39% of congregations reported that all members were of the same race, 48% reported that between 1% and 9% of members were of a different race than the remainder, and 13% reported that more than 9% of members were of a different race than the majority of members. Elfriede Wedam, *Ethno-Racial Diversity Within Religious Congregations in Indianapolis*, RES. NOTES (Project on Religion & Urban Culture, Polis Ctr., Indianapolis, Ind.), Aug. 1999, http://www.polis.iupui.edu/RUC/Newsletters/Research/vol2no4.htm#.

[49] Kelly H. Chong, *What It Means to Be Christian: The Role of Religion in the Construction of Ethnic Identity and Boundary Among Second-Generation Korean Americans*, 59 SOC. RELIGION 259, 260–61 (1998).

[50] CHAVES, *supra* note 46, at 117. Chaves stated:

> Thirty-five percent of those who attend African American churches are in congregations with voter registration efforts, 27 percent are in congregations that had a political candidate as a visiting speaker, and 25 percent are in congregations that had an elected official as a visiting speaker. All three of these numbers are substantially and significantly higher than the comparable percentage for congregations within other religious traditions.

Id.

d. Workplaces

As a setting in which people potentially discuss and form moral attitudes, the workplace is another institution that may help shape the moral views that people hold. It appears that workplaces may be less segregated than other institutions but are still far from being representative microcosms of U.S. society.[51] Judith Hellerstein and David Neumark used an expansive set of U.S. Census data to examine the degree of black-white and Hispanic-white segregation in U.S. workplaces.[52] In contrast to residential segregation, workplace segregation appears to be higher for Latinos than for blacks. Hellerstein and Neumark find that for the average black worker 23.7% of coworkers are black, while for the average white worker only 5.8% of coworkers are black.[53] For the average Hispanic worker 39.4% of coworkers are Hispanic, while for the average white worker only 4.5% of coworkers are Hispanic.[54]

B. Differences in Views

Thus, individuals in the United States frequently experience high degrees of racial and/or ethnic segregation in neighborhoods, schools, churches, and workplaces. Moreover, it is clear that these are not otherwise identical communities and institutions, differing solely in their racial and ethnic composition: To begin with, massive economic inequality between the races shapes these different communities and institutions.[55] Investigating more precisely how inequality and other structural differences in communities and institutions shape political-

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[51] *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 9–10 (2003) (citing various surveys to support argument that "given the high levels of segregation elsewhere in society, the workplace is where working adults are most likely to have genuine interactions across racial lines").

[52] Judith Hellerstein & David Neumark, *Workplace Segregation in the United States: Race, Ethnicity, and Skill* 6–13 (Nat'l Bureau of Econ. Research, Working Paper No. 11599, 2005) (describing data set).

[53] *Id.* at 21, tbl.6.

[54] *Id.* at 26, tbl.9.

[55] Douglas Massey writes:

> The residential environment experienced by most whites—suburbs—is overwhelmingly white (82 percent), native born (92 percent), and nonpoor (94 percent). Unemployment rates are low and incomes are high. In contrast, the living environment of most minorities—central cities—is nonwhite, foreign, and disadvantaged: 41 percent of those living in central cities are black, Hispanic, or Asian; 13 percent are foreign born; and 14 percent are below the federal poverty line. City dwellers are twice as likely as suburbanites to live in female-headed families, 56 percent more likely to be unemployed, and their incomes are about 26 percent lower than those in the suburbs.

Douglas S. Massey, *The New Geography of Inequality in Urban America*, *in* RACE, POVERTY, AND DOMESTIC POLICY 173, 175 (C. Michael Henry ed., 2004).

moral attitudes is beyond the scope of this Note; for now, I point out that it is highly likely that such material differences influence views on political morality. There is rich ground from which disparate understandings of the appropriate role of the state in regulating individual lives might arise.

In this section, I examine whether the extensive separation between racial groups in the United States has in fact produced systematic differences in political-moral views across racial groups. Using social science research that attempts to isolate the effect of race or ethnicity on public attitudes, I review findings with respect to abortion, gay rights, assisted suicide, the death penalty, and poverty.

The evidence indicates that the link between race and ethnicity and political-moral views is complex. Survey evidence shows racial divides in public opinion over issues such as abortion. When social scientists use statistical methods to control for factors like religion, gender, class, and age, race's correlations with moral attitudes diminishes. But deeper investigations of the variables that influence different groups' attitudes often show that the variables that affect whites' opinions on these political-moral issues affect other groups' opinions somewhat differently. In some instances, variables that influence attitudes among one group do not show any influence at all on another group's attitudes.

1. Evidence from the General Social Survey

The General Social Survey (GSS), conducted every two years by the National Opinion Research Center at the University of Chicago, is a national survey of the general public that asks questions across a broad spectrum of issues.[56] Social scientists frequently utilize the GSS because it has been conducted since 1972, with many of the questions repeated in identical form over periodic intervals to show trends in public opinion over time.[57] Below, I present responses to questions on abortion, capital punishment, assisted suicide, gay rights, and poverty from the 2002 GSS, with responses separated by race. The data show varying racial gaps in opinion on these issues, with the largest gaps between blacks and whites. Overall, groups appear to disagree most on capital punishment, assisted suicide, and government assistance to the poor.

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[56] Nat'l Opinion Resource Ctr., About NROC, http://www.norc.uchicago.edu/about/history.asp (last visited Apr. 2, 2006); Nat'l Opinion Resource Ctr., General Social Survey: GSS Study Description, http://www.norc.uchicago.edu/projects/gensocl.asp (last visited Apr. 2, 2006).

[57] Nat'l Opinion Resource Ctr., General Social Survey, *supra* note 56.

2002 GENERAL SOCIAL SURVEY[58]

Abortion *Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion if . . . the woman wants it for any reason?* (Percentage responding "Yes")	
Blacks	34.1
Whites	43.6
Latinos	39.1
Asian Pacific Americans	36.8

Capital Punishment *Are you in favor of the death penalty for persons convicted of murder?* (Percentage responding "Yes")	
Blacks	42.9
Whites	69.9
Latinos	75.8
Asian Pacific Americans	56.7

Assisted Suicide *Do you think a person has the right to end his or her own life if this person . . . has an incurable disease?* (Percentage responding "Yes")	
Blacks	33.0
Whites	63.0
Latinos	57.9
Asian Pacific Americans	52.4

[58] These percentages are derived from the "Cross-Tabulation" feature of the Cultural Policy & the Arts National Data Archive (CPANDA) codebook for the 2002 General Social Survey. James Allan Davis et al., Cultural Policy & the Arts Nat'l Data Archive, General Social Survey 2002, http://www.cpanda.org/data/a00079/a00079.html (last visited Apr. 2, 2006). The CPANDA codebook compiles and interprets the raw data from James Allan Davis et al., Nat'l Opinion Research Ctr., General Social Survey 2002. The procedure for calculation of these percentages is as follows (more detailed description is on file with *New York University Law Review*): Follow the "Quick Analysis" link and select the survey question. In the "Add a second question to your analysis" field, select "What is R's race 1st mention." Check the box marked "Show Percents." Click on "Get results!" Repeat procedure for each survey question. The percentages for Asian Pacific Americans were recalculated as the analysis separates them into national origin categories. Caution should be taken when interpreting these percentages; in particular, the total number of Latino and Asian Pacific American respondents was quite low.

Homosexuality *What about sexual relations between two adults of the same sex—do you think it is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?* (Percentage giving answers other than "not wrong at all")	
Blacks	78.7
Whites	62.0
Latinos	65.2
Asian Pacific Americans	73.7

Homosexuality and Civil Liberties *And what about a man who admits that he is a homosexual? If some people in your community suggested that a book he wrote in favor of homosexuality should be taken out of your public library, would you favor removing this book, or not?* (Percentage favoring removal of book)	
Blacks	28.1
Whites	21.5
Latinos	26.1
Asian Pacific Americans	26.3

Poverty *[On] assistance to the poor, are we spending too much, too little, or about the right amount on it?* (Percentage responding "too little")	
Blacks	89.8
Whites	60.6
Latinos	70.6
Asian Pacific Americans	72.5

2. *Isolating the Impact of Race/Ethnicity*

Evidence like the GSS results reported above suggests a correlation between race and views on issues like abortion. But it may be that we are simply seeing the aggregate impact of other differences between racial/ethnic groups; variables such as economic class, religion, and gender have all been shown to have significant impact on views about these issues. It turns out that controlling for other demographic variables does help to diminish the differences between different racial and ethnic groups on political-moral issues. At the same time, further investigation shows that racial differences are complex and cannot simply be chalked up to class or religious differences. I discuss social science studies regarding racial differences in views on abortion, capital punishment, assisted suicide, gay rights, and government obligations to the poor below.

a. Abortion

A debate over racial differences in attitudes toward abortion began in the 1980s, when two groups of social scientists came to different conclusions about black-white differences over abortion.[59] Each group investigated GSS results from the 1970s and early 1980s, which showed that blacks were consistently less supportive of abortion rights than whites.[60] Michael Combs and Susan Welch concluded that differences in religion, education, income, and regional origin (linking blacks to the southern United States) were the primary drivers of racial differences, while acknowledging that after controls "race still has a small, but significant, effect."[61] In 1986, Elaine Hall and Myra Marx Ferree challenged these conclusions, suggesting that the "demographic and attitudinal roots" of abortion views might differ between blacks and whites, producing "differences of attitude structure" in the two groups.[62] Hall and Ferree noted two important differences: Attitudes toward premarital sex had a much stronger effect on whites' support for abortion than on blacks' support for abortion, and age had opposite effects on blacks' and whites' views.[63] Further, income and education (proxies for class) were significant predictors of white views, but not of black views; gender was a significant predictor of black views but not of white views, after controlling for feminist attitudes.[64]

Hall and Ferree also focused on an even more interesting aspect of racial differences in support for abortion: the degree to which blacks and whites differed over acceptable reasons for abortion. Among those who mildly opposed abortion, whites and blacks showed different attitudinal patterns toward what were termed "soft" reasons for abortion: e.g., a single mother, a mother who cannot afford more children, or a mother who does not want more children. Whites varied little in their acceptance of these three reasons, while blacks distinguished between the reasons, varying from 13% support for allowing abortion for single mothers, to 34% support for allowing abortion for mothers who cannot afford any more children.[65] Even among strong opponents of abortion, blacks were more likely than

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[59] Michael W. Combs & Susan Welch, *Blacks, Whites, and Attitudes Toward Abortion*, 46 PUB. OPINION Q. 510 (1982); Elaine J. Hall & Myra Marx Ferree, *Race Differences in Abortion Attitudes*, 50 PUB. OPINION Q. 193, 193–96 (1986).

[60] Combs & Welch, *supra* note 59, at 510–12; Hall & Ferree, *supra* note 59, at 193–96.

[61] Combs & Welch, *supra* note 59, at 514–17.

[62] Hall & Ferree, *supra* note 59, at 194–95.

[63] *Id.* at 202.

[64] *Id.*

[65] *Id.* at 203.

whites to accept some of these "soft" reasons.[66] The researchers concluded that "among blacks, social reasons, especially economic need, are perceived as 'harder' or more legitimate than whites see them."[67]

More recent studies have continued to find that race affects attitudes regarding abortion. In 1990, again using GSS data, Clyde Wilcox reported that controlling for measures of religiosity and biblical literalism erased the significance of race as a predictor of abortion attitudes.[68] But once Wilcox disaggregated the data further, he found significant gender differences by race, even controlling for religion: Black men were less supportive of abortion than white men, and black women were more supportive of abortion than white women (at least with respect to the "soft" reasons for abortion).[69] Further investigations of gender differences in support for abortion across races suggested that white and black women's support for abortion flowed from different attitudinal variables, and that age played a significant part in distinguishing support for abortion among women of different races. Focusing on women only, Karen Dugger found that black and white women's attitudes toward sex, family, and gender issues appeared to have different effects on their abortion attitudes.[70] Dugger concluded that "the abortion issue does not appear to hold the same symbolic or political significance for Black women as it does for White women."[71] John Lynxwiler and David Gay found that support for abortion did not vary between black and white women of childbearing age, but only between older black and white women, and between men of different races.[72] They theorized that these patterns were formed through different life experiences based on race.[73] Using GSS data through 1996, Lynxwiler and Gay also reported in a separate study that religious variables had a different effect on blacks and whites, finding that among Protestant frequent churchgoers and Biblical literalists, blacks were more supportive of abortion than whites.[74]

In some of these studies, researchers did find that controlling for other demographic variables caused race to lose its correlation with

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66 *Id.* at 204.

67 *Id.*

68 Clyde Wilcox, *Race Differences in Abortion Attitudes: Some Additional Evidence*, 54 PUB. OPINION Q. 248, 248–49, 252 (1990).

69 *Id.* at 252–54.

70 Karen Dugger, *Race Differences in the Determinants of Support for Legalized Abortion*, 72 SOC. SCI. Q. 570, 582 (1991).

71 *Id.* at 583.

72 John Lynxwiler & David Gay, *Reconsidering Race Differences in Abortion Attitudes*, 75 SOC. SCI. Q. 67, 77–78 (1994).

73 *Id.* at 79–81.

74 David Gay & John Lynxwiler, *The Impact of Religiosity on Race Variations in Abortion Attitudes*, 19 SOC. SPECTRUM 359, 359, 371 (1999).

abortion attitudes. But even then, in instances when researchers examined the data more closely, they often found that variables like class, religion, age, or gender affected blacks' and whites' abortion attitudes in significantly different ways.[75] This is important, because it suggests that the patterns of reasoning and beliefs that support particular abortion attitudes vary by race.

b. Capital Punishment

For views on capital punishment, it appears that demographic variables are even less likely to explain away black-white differences in views than in the case of abortion. Moreover, the determinants of capital punishment beliefs also seem to vary greatly by race. Robert Young found that whites were significantly more likely to support the death penalty than blacks, after controlling for sex, age, education, region, political conservatism, and religion.[76] He also found differential effects for religious variables, concluding that "the role of religion in shaping attitudes toward the death penalty is quite different for blacks and whites."[77] In a separate study, Young examined respondents' views on the causes of crime and the fairness of the criminal justice system.[78] Young found that whites' views on the causes of crime had a significant effect on their support for the death penalty, but that the same was not true for blacks. On the other hand, blacks' perceptions of the police were significantly related to their support for the death penalty, but this was not true of whites.[79]

c. Assisted Suicide

Beliefs about assisted suicide show a similar racial divide. Sociologist William MacDonald found that blacks express significantly less support than whites for legalizing physician-assisted suicide, after controlling for gender, age, education, and income.[80] Others have found

[75] A recent study examining Latino abortion attitudes concluded that religiosity, feminism, and demographic variables influence Latino abortion attitudes in the same way they influence non-Latinos. Sean M. Bolks et al., *Core Beliefs and Abortion Attitudes: A Look at Latinos*, 81 SOC. SCI. Q. 253, 256 (2000). These results are interesting but difficult to interpret because Bolks et al. do not include a controlled comparison of Latinos' and non-Latinos' attitudes. Nor do they examine whether the determinants of Latinos' abortion attitudes vary in significant ways from the determinants of non-Latinos' attitudes.

[76] Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. SCI. STUDY RELIGION 76, 82 (1992).

[77] *Id.* at 84.

[78] Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 SOC. PSYCH. Q. 67 (1991).

[79] *Id.* at 71–72.

[80] William L. MacDonald, *The Difference Between Blacks' and Whites' Attitudes Toward Voluntary Euthanasia*, 37 J. SCI. STUDY RELIGION 411, 420 (1998). Using a smaller

similar results. Using GSS data through 1991 and controlling for age, sex, education, income, religion, and moral conservatism, Patricia Jennings and Clarence Talley found that race was a significant predictor of attitudes toward euthanasia and reported that education and gender had differential effects on blacks' and whites' support for euthanasia.[81] Education was a significant predictor of blacks' attitudes toward euthanasia but not of whites', while gender was a significant predictor of whites' attitudes toward euthanasia but not of blacks'.[82]

d. Gay Rights

Homosexuality and gay rights laws are additional areas of difference among races that cannot be explained solely by religion or other variables. Aggregating the results of thirty-one national surveys between 1973 and 2000, Gregory Lewis found that "blacks appear to be more likely than whites both to see homosexuality as wrong and to favor gay rights laws."[83] After controlling for religious and educational differences, the racial gap in condemnation of homosexuality shrank, but the gap in support of gay rights grew larger.[84] Lewis also compared the effects of various demographic variables on black and white respondents' attitudes; he concluded that "religion, education, age, and gender all appear to have less impact on black attitudes than on white attitudes."[85] Another study similarly found differences in the influence of education, age, income, and political ideology on blacks' and whites' attitudes toward gay individuals, concluding that "the sources of Black heterosexuals' attitudes toward homosexuality are different from those of Whites."[86] A study that compared Latinos' attitudes to those of blacks and whites found that blacks were more conservative than both Latinos and whites on the morality of

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data set, he found that racial differences in assisted suicide views disappeared once two aspects were held constant: a belief that "life belongs to God" and a fear of giving others the power to end one's life. *Id.* MacDonald cautioned that the latter results were preliminary because of insufficient data. *Id.* at 423.

[81] Patricia K. Jennings & Clarence R. Talley, *A Good Death?: White Privilege and Public Opinion*, 10 RACE, GENDER & CLASS 42, 50, 54, 60 (2003).

[82] *Id.* at 60.

[83] Gregory B. Lewis, *Black-White Differences in Attitudes Toward Homosexuality and Gay Rights*, 67 PUB. OPINION Q. 59, 66. The surveys showed that blacks were 11% more likely than whites to say that homosexual relations were always wrong, while blacks favored antidiscrimination laws to protect gays' employment rights by a 10% margin over whites. *Id.* at 63, 66.

[84] *Id.* at 68–69.

[85] *Id.* at 73.

[86] Gregory M. Herek & John P. Capitanio, *Black Heterosexuals' Attitudes Toward Lesbians and Gay Men in the United States*, 32 J. SEX RES. 95, 104 (1995).

homosexuality, but Latinos were less liberal than both blacks and whites on gay civil liberties.[87]

e. Government Obligations to the Poor

Finally, blacks and whites have different views on society's responsibility to alleviate poverty; differences which do not seem to be explicable solely on the basis of class. Donald Kinder and Nicholas Winter found that controlling for class reduced the black-white divide on social welfare issues, but did not eliminate it. More importantly, they found that controlling for principles (in this case, views on equal opportunity and the value of limited government) produced "dramatic alterations"—nearly half of the gap between the groups on social welfare policy was erased once principles were held constant.[88] A 1985 study similarly found that "income groups [among blacks] differed little in their attitudes" toward social welfare spending.[89]

C. *How Differences in Views Might Affect Judges*

The survey research described in the last section is not meant to give a definitive description of the content of political-moral views in the United States; still less can it provide a good understanding of the particular ways in which race and ethnicity shape such views. Instead, the research findings are presented as crude but suggestive evidence that race influences our beliefs about political morality across a broad range of issues.

What can this tell us about judges of different races? Segregation and difference of views across racial and ethnic groups might imply two things about judges. First, in the aggregate, there may be systematic differences in moral views among judges of different racial and ethnic backgrounds. Second, judges of different racial and ethnic backgrounds are likely to be more familiar with the reasoning and experiences underlying views commonly held within their particular communities.[90] Even when they do not themselves share a particular

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[87] Louis Bonilla & Judith Porter, *A Comparison of Latino, Black, and Non-Hispanic White Attitudes Toward Homosexuality*, 12 HISP. J. BEHAV. SCI. 437, 446–47 (1990).

[88] Donald R. Kinder & Nicholas Winter, *Exploring the Racial Divide: Blacks, Whites, and Opinion on National Policy*, 45 AM. J. POL. SCI. 439, 448 (2001).

[89] Susan Welch & Michael W. Combs, *Intra-Racial Differences in Attitudes of Blacks: Class Cleavages or Consensus?*, 46 PHYLON 91, 95 (1985).

[90] Iris Marion Young describes individuals within social groups as sharing "social perspective" or "a set of questions, kinds of experiences, and assumptions with which reasoning begins, rather than the conclusions drawn." Iris Marion Young, *Difference as a Resource for Democratic Communication*, *in* DELIBERATIVE DEMOCRACY 383, 395 (James Bohman & William Rehg eds., 1997). While sharing a perspective does not imply that two individuals will come to the same conclusions regarding what they see, Young argues that

view, they may be better equipped to understand the merits of those views, and thus better able to judge how well those views map onto a particular legal principle, or cohere within the legal framework.

In the remainder of the Note, I rely on the second implication to argue that judicial diversity should lead to better legal outcomes. Because I have chosen to argue from a model of jurisprudence that asks judges to set their own moral views aside, it is less important that judges of different races may themselves systematically differ in their political-moral beliefs. If judges are asked to reason through potential solutions to political-moral dilemmas based on legal and moral criteria, I argue that the ability of judges of different backgrounds to understand and take seriously alternative moral views is what matters. Judicial diversity is important because it furthers judicial openness.

II
How Our Legal System Deals with Disagreements over Political Morality

The public disagrees over many issues of political morality, including whether and when abortion should be legal, whether the state should ever execute convicted criminals, whether and to what extent the law should protect homosexuals from discrimination, whether a terminally ill person has a right to end her life, and what sort of aid the state should give to the poor. While these questions are not the bread and butter issues of the judiciary,[91] judges do confront them as issues to be decided.[92] Most often, judges must apply broadly worded laws, such as the famously underdetermined clauses of the Constitution that require "due process of law" and "the equal protection of the laws," in order to come to any conclusion.[93]

"each is likely to have an affinity with the other's way of describing what he experiences, an affinity that those differently situated do not experience." *Id.* Individuals who do not share a social perspective can still understand these differently situated descriptions of reality, but it requires additional work on their part. *Id.* Young acknowledges that individuals, because of membership in a number of social groups, possess multiple, potentially conflicting perspectives. *Id.* at 397–98.

[91] Judge Patricia Wald, for instance, wrote of the D.C. Circuit's administrative law-heavy docket:

> A large proportion of our cases (particularly administrative law cases) have no apparent ideology to support or reject at all—the judges are tasked simply with plowing through volumes of complex data and reams of statistical evidence to see if the agency has substantial evidence to back its findings or has acted in an arbitrary and capricious way.

Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 237 (1999).

[92] *See supra* note 3 and accompanying text.

[93] *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

How does public disagreement over issues of political morality relate to the work a judge must do in adjudicating cases? Further, how does disagreement across racial and ethnic groups have any connection to how judges approach a political-moral issue within a case? I first describe why an ideal judge would consider a range of alternative conceptions of morality in deciding a difficult legal case involving political morality. I then consider the degree to which actual judges do so, and the likelihood that a more diverse group of judges will consider a broader range of moral views in adjudication. I conclude by describing the ways in which our legal system allows the broad diffusion of different legal resolutions, through dialogue between courts and within judicial panels.

A. How an Ideal Judge Decides Questions of Political Morality

I begin with two important assumptions: that there are truly ambiguous cases, in which positive law does not provide any clear resolution, and that at the same time, judges in these cases must reason in a way that is distinct from the way a legislator might approach the issue.[94]

The first assumption is widely accepted. This acceptance is due in large part to the legal realists of the early twentieth century, who pressed the point that "rules of law do not compel judges to decide cases one way rather than another."[95] The purest form of legal formalist thinking, which proposed that all legal disputes could be resolved within a contained system of preexisting legal rules,[96] has largely been discarded.[97]

Theorists disagree on how judges ought to proceed in hard cases—the cases in which positive laws do not appear to require any particular result. Legal realists, critical legal theorists, and critical race

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[94] I rely on Ronald Dworkin's thinking for this model. *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 7; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7. *See also infra* notes 101–06 and accompanying text.

[95] John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 85 (1995).

[96] On legal formalism, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

[97] This is not to say that formalism has been excised from legal thought, see *id.* at 39–50 (describing modern attacks on Langdellian formalism but arguing that formalist categories still shape legal thought); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 468 (1988) (writing that modern legal scholars seek "to create a new foundation for legal principles and decisions to replace the discredited foundations of formalism. They . . . attempt to recreate, to some extent, the idea of an objective standpoint that judges can use to adjudicate complex legal issues"). Originalism and textualism are familiar modern variants of formalism.

theorists suggest that judges' own ideologies inevitably shape judicial decisionmaking.[98] For them, the relevant struggle is mainly over which substantive policy goals judges ought to pursue. In contrast, much of the public and many legal practitioners cling to the idea that judges do, and should, function differently than elected political representatives.[99] The very idea of impartiality contained in the judicial oath suggests that judges are not meant simply to follow their own preferences, or those of any political majority.[100] Instead, we expect judges to reason independently. But in cases involving political morality, it is unlikely that a judge can derive answers solely from legal rules. It is reasonable to assume that a judge must think deeply about certain broad political values; this thinking cannot be guided solely by doctrinal legal reasoning.

Legal philosopher Ronald Dworkin offers an account of how an ideal judge would go about deciding a particular case in a principled manner. According to Dworkin, she would essentially develop a unified theory to weave together and justify all applicable law, including constitutional provisions, statutes, and common law precedents, relying on political philosophy and institutional detail as aids to understanding.[101] Using this broad reasoning, the judge should be able to identify a governing principle for the case before her. She must then winnow the principle down to a concrete legal right, moving from a broad concept of a political value to a particular conception.[102] This stage of the process is where a judge's work becomes controversial, because she must frequently choose among differing conceptions of particular concepts.[103] To do so, she examines community morality as manifested in the "institutional record"—precedent, institutional design, and legislative actions.[104]

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[98] *See* Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1191–92 (2004); Jeremy Paul, *CLS 2001*, 22 CARDOZO L. REV. 701, 703–04 (2001); Singer, *supra* note 97, at 470–71.

[99] *See, e.g.*, Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 838 ("[I]n my view, most judges still share a belief that principled decisionmaking *is* the essence of the judicial function.").

[100] Federal judges swear or affirm that "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. 28 U.S.C. § 453 (2000). *See also* MODEL CODE OF JUDICIAL CONDUCT Terminology at 428 (2004) (defining impartiality to include "maintaining an open mind in considering issues that may come before the judge").

[101] DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 107, 116–17, 119.

[102] *Id.* at 107, 126–28.

[103] *See supra* notes 19–21 and accompanying text.

[104] Adjudication under Dworkin's scheme takes "community morality as decisive of legal issues" and "community morality is the political morality presupposed by the laws

Controversy will result, Dworkin acknowledges, "whenever institutional history must be justified by appeal to some contested political concept, like fairness or liberality or equality, but it is not sufficiently detailed so that it can be justified by only one among different conceptions of that concept."[105] He asserts that the judge is obliged to choose one from among many conceptions. Her choice of conception should reflect her best understanding of the concept, drawn from the clear cases governed by the concept and from the "deep morality that gives the concept value."[106]

For purposes of my argument, the importance of Dworkin's model is that it gives content to the idea that there is a mode of principled legal reasoning in hard cases.[107] This model provides a framework for thinking about the judiciary that is premised on requiring judges to think independently and to consider carefully all the alternative ways of applying political morality on their merits.

B. How an Actual Judge Decides Questions of Political Morality

Even if all judges conscientiously followed this model, inevitably many would disagree about the proper way to apply broad political values. Whether actual judges do achieve any level of independent reasoning is too difficult an empirical question to be considered fully here. Academics have produced evidence that judges' political affiliations are predictive of their votes in some categories of cases.[108] But the research suggests only that political preferences play a limited role in determining outcomes, not that they fully determine them.[109] It is

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and institutions of the community." DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 126.

105 *Id.* at 126–27.

106 *Id.* at 128.

107 Dworkin's model has been abundantly criticized. *See, e.g.*, Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 27–28 (2003) (noting that Dworkin's theory has been criticized on grounds that "it renders unintelligible the law's claim to authority, it has no way of discriminating between legally binding and extra-legal references to morality by officials, and it reifies judicial rhetoric about 'discovering' the right answer in hard cases, while missing the lawyer's commonplace that judges exercise discretion in hard cases").

108 *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 226–29 (1993) (finding that classification by media as liberal or conservative can be used to predict Justices' votes in civil liberties cases with fair amount of accuracy); Jeffrey A. Segal et al., *Decision Making on the U.S. Courts of Appeals*, *in* CONTEMPLATING COURTS 227, 241 (Lee Epstein ed., 1995) (finding this effect with regard to search and seizure cases); *see also* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1497–1514 (2003) (testing empirical support for various theories of judicial decisionmaking in circuit courts, including attitudinal/political model and formal legal model).

109 *See, e.g.*, Cross, *supra* note 108, at 1515 (finding that model incorporating effects of legal rules and political preferences explained less than 20% of variance in case outcomes);

enough for the purposes of my argument that many judges aspire to independent reasoning and are minimally open to alternative ways of understanding political morality.[110]

In fact, there is evidence that judges' behavior changes upon deliberation with other judges. Research on "panel effects" suggests that judges are affected by arguments from alternative viewpoints. Several studies have noted that in three-judge panels, individual judges seem to vote differently depending on whether they find themselves with judges of similar ideology or not. Cass Sunstein finds that "Democrats who are surrounded by two Republicans are more likely to vote in the stereotypically conservative fashion than are Republicans who are surrounded by two Democrats."[111] At the same time, judges on like-minded panels appear to vote far less moderately than judges on divided panels.[112] Research across various categories of law has found these sorts of effects in, for example, administrative law cases[113] and environmental law cases.[114] These results support the idea that judges within panels may learn from one another's ideas and worldviews. There are also more cynical interpretations—for instance, that vote-trading occurs, or that judges wish to avoid writing

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Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 Nw. U. L. Rev. 743, 771 (2005) (noting that in review of empirical studies of judges' voting behavior, "even when focusing upon politically-charged legal categories, ideology explained only a fraction of the modeled behavior" (referring to Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 Just. Sys. J. 219 (1999))).

110 Judges' own accounts of their behavior suggest that they attempt to be open-minded. *See, e.g.*, Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 Va. L. Rev. 1335, 1361 (1998) ("Collegiality means only that we discuss each other's views seriously and respectfully, and that we listen with open minds. That modest goal I think we achieve nearly all the time."). Although judges may naturally have incentives to cast themselves in the best light, such accounts imply at a minimum that they see this quality of open-mindedness as a normative goal.

111 Cass R. Sunstein, Why Societies Need Dissent 169 (2003). Sunstein uses the political party of the President appointing the judge as a proxy for the judge's personal politics.

112 Sunstein identifies just two exceptions: abortion and capital punishment cases. *Id.* at 183.

113 Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155, 2168–72 (1998) (examining instances of *Chevron* deference in D.C. Circuit Court of Appeals and reporting that panels including both Democratic and Republican appointees were significantly more likely than uniformly Democratic or uniformly Republican panels to defer to agency statutory interpretations when those interpretations opposed judicial preferences).

114 Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717, 1765–66 (1997) (finding that "Democratic judges 'vote as Democrats' only when there are at least two Democrats on the panel" and finding similar effect with regard to Republicans).

dissents[115]—but there seems to be a real potential that at least some votes are affected by dialogue.

C. *Diversity and Consideration of Alternative Viewpoints*

Ideally, all judges would seriously consider the full range of conceptions of political morality held by the public. While this may not occur in actuality, and individual judges may be predisposed to certain viewpoints, they also seem to be affected by interacting with colleagues of differing viewpoints.

Diversity of viewpoint, then, might be a first-best goal for the judiciary. If we included judges from a range of ideological backgrounds, and ensured that they deliberated together on appellate panels, we might expect a high level of openness to alternative conceptions of political morality.

But there are several reasons to think that we are unlikely to achieve openness by seeking viewpoint diversity directly. First, it runs counter to our aspirational model of adjudication: We want to select judges not for their predetermined beliefs, but for their ability to critically and impartially distinguish between different beliefs, ultimately selecting those that cohere best with the legal framework. Even if many judges fall short of this ideal, it would seem counterproductive to create a selection process that might reinforce their commitments to particular beliefs. Second, it would be extremely difficult to use this criterion in selecting individual judges. For the federal system, a President interested in creating viewpoint diversity would need an accurate portrait of the current spectrum of views among judges, as well as a thorough understanding of the views of potential appointees. But candidates would have an incentive to disguise their actual views, and sitting judges would likely resist any attempt to catalogue their personal beliefs for reasons of judicial independence and privacy. The logistics of producing viewpoint diversity in this way seem infeasible.[116] Third, the mention of the presidential role highlights the most obvious problem within the federal appointments process: No President wants viewpoint diversity. A President wants federal judges that share his own viewpoints; while presidential preferences may be

[115] Revesz suggests both a "dissent hypothesis" (that judges try to avoid writing dissents) and a "deliberation hypothesis" (that judges listen seriously to views expressed by colleagues in deliberation) to account for panel effects, and finds that although there is support for both hypotheses, his empirical results do not definitively point to one or the other. *Id.* at 1732–34, 1768–69.

[116] Proposals have been made, however, to select judges of varied political affiliation for each appellate panel. *See* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216 (1999).

moderated by the Senate's role in approving nominees, presidential selection still shapes the judiciary.[117]

Given these difficulties, it makes sense to use other attributes to shape a diverse judiciary. Choosing a racially and ethnically diverse judiciary is not the same thing as choosing a judiciary of diverse viewpoints. But there are particular reasons to think that a racially and ethnically diverse judiciary is better than a homogenous judiciary at recognizing the full range of potential resolutions for political-moral questions. It is also a more feasible goal, as both major political parties have at least some incentive to seek such diversity.[118]

This argument works only at the aggregate level: It involves reasoning about the way in which the institutional output of the judiciary as a whole might change if we increased the overall number of minority judges and sought to include substantial numbers from all racial and ethnic groups. The argument does not work as well at the level of individual judges for the simple reason that we cannot make accurate predictions about any particular judge of one or another racial or ethnic background.[119]

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[117] For a study measuring presidential success in meeting this goal, see Jeffrey A. Segal et al., *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557, 568–69 (2000) (finding that ideological agreement between appointing President and Justices is substantial but diminishes with time).

[118] *See, e.g.*, Dan Schnur, *Why Latinos Are Walking Out on the Democrats*, L.A. TIMES, June 6, 2005, at B11 (arguing that "a Bush appointment of [Attorney General Alberto] Gonzalez [to the Supreme Court] would continue and accelerate the movement of Latinos toward the GOP").

[119] Diversity should diffuse alternative political moralities into the body of judicial work through judicial openness and inter-judge communication. For that reason, the fact that individual judges have conservative views, radical views, or views that are rejected by much of their community is not a problem for the argument. Individuals of all racial groups will have outlooks that are far from the "average" within their group. The argument rests on the idea that in the aggregate, increasing the number of minorities will increase the overall receptiveness of the judiciary to alternative worldviews. Even minority judges with views radically different from much of their community often have lived experiences that are also radically different from those of a white judge of the same political classification. For instance, Justice Clarence Thomas is often used as an example of the untoward consequences of thinking that judges' race will be a predictor of their rulings. But Justice Thomas clearly expresses a philosophical viewpoint that is shaped by his life as a black man. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting) ("In every culture, certain things acquire meaning well beyond what outsiders can comprehend. . . . [C]ross burning is the paradigmatic example . . . ."); Grutter v. Bollinger, 539 U.S. 306, 349, 371–74 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that affirmative action is unconstitutional racial discrimination and "contest[ing] the notion that the Law School's discrimination [the affirmative action policy] benefits those admitted as a result of it"). Thomas's presence on the Court means that a particular viewpoint—that of a black individual, even though his particular opinions are unpopular in the black community—is heard. *See also* Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 948 (2005) (rooting Thomas's jurisprudence in tradition of black conservative

Part I argued that there is substantial racial and ethnic segregation within the United States, and systematic variation in views on political morality across different racial and ethnic communities. Given segregation and differences in views, it seems reasonable to expect that judges from any particular racial/ethnic background may be less familiar with views more commonly held in other communities. Consider capital punishment: There are many white judges who personally oppose capital punishment and many black judges who support it. But white judges may not be as well equipped to understand the bases for opposition to capital punishment in the black community as black judges might. The thinking and social experiences behind a moral conception matter, particularly in instances when legal questions are nuanced: If capital punishment is allowed at all, different understandings might allow it in different circumstances, depending on the relevant moral views that are at stake. For example, an approach that sees the morality of capital punishment as undermined by systematic police misconduct might dictate habeas rules far more solicitous to pro se petitioners, assuming that poor criminal defendants are those most vulnerable to police misconduct and are most likely to be innocent.

As a matter of statistical probability, it seems fair to say that a judiciary composed of people with a variety of racial and ethnic backgrounds will be more likely to contain judges who have lived among people of varied social experiences, ways of thinking, and moral visions. Of course, judges become part of an elite, and often have already spent considerable time in elite institutions of one sort or another.[120] The bias for judges of particular educational and professional backgrounds may mitigate the degree to which even a racially and ethnically diverse judiciary will actually be familiar with or open to alternative ways of thinking, but it is unlikely to erase all the gains from diversity.[121]

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thought as distinguished from white conservative thought); Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 How. L.J. 323, 323 (2004) (discussing Thomas's black nationalism and individualism). One can also argue that Thomas is likely to be receptive to at least some legal arguments that neither a white conservative nor a black liberal jurist would accept, broadening the scope of deliberation.

[120] *See* Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 Harv. J.L. & Pub. Pol'y 835, 839 (1998) (describing results of survey of federal judges and their educational and class backgrounds—eighteen percent of judges surveyed attended Ivy League universities). For an older study examining the socialization of new federal district court judges, see Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. Pub. L. 359 (1972).

[121] It also speaks to the desirability of seeking judges from a wider range of backgrounds than the top twenty national law schools, major corporate law firms, etc.

D. *Dialogue Among Judges*

A more diverse judiciary should increase the possibility that all viable conceptions of political morality are given serious consideration. Increased attention to alternative views should result not only because a judge who sees merit in a particular moral conception can advocate for it within an appellate panel or write her decision into law as a trial judge, but increased openness should also arise from the design of our legal system, which allows multiple conceptions of political morality to diffuse throughout the system and to be tested and compared at different sites.

Within judicial panels, collegial deliberation allows alternative conceptions to be aired and passed from judge to judge.[122] As judicial panels vary over time, this allows further diffusion. On a larger scale, the creation of new precedents upholding alternative conceptions of equality or fairness alters the legal framework itself and transmits new conceptions to other judges. At an informal level, judges may share their views on political morality via conversation at conferences and commentary in legal journals.

The legal system is also constructed so as to allow judges to test and compare different legal resolutions to particular problems. In the federal system for example, over six hundred district court judges rule on legal issues in the first instance.[123] Appealed rulings are reviewed within a regionally organized pool of cases,[124] by three-member panels drawn from among the subset of appellate judges sitting within the relevant region of the country.[125] A low percentage of those panel decisions are reheard en banc by a larger portion of the appellate

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[122] Judge Edwards of the Court of Appeals for the D.C. Circuit describes judicial deliberation: "[W]e do spend a great deal of time listening to each other's views and considering arguments each of us makes. . . . This opportunity for deliberation is particularly helpful, because the different areas of experience and expertise each judge brings to the table help the other judges . . . ." Edwards, *supra* note 110, at 1360; *see also* Wald, *supra* note 91, at 253 ("When one judge does succeed in persuading one or both of his other two colleagues . . . it is likely to be with a cogent analogy, an unexpected citation, a startling and unforeseen consequence, or a novel way of looking at the case.").

[123] 28 U.S.C. § 133 (2000). Federal magistrate judges perform a number of functions that district court judges also perform, including presiding over civil actions with the parties' consent; however, they do not have the power to rule on dispositive motions such as motions for summary judgment. 28 U.S.C. § 636 (2000).

[124] The First through Eleventh Circuits and the D.C. Circuit are organized by region. 28 U.S.C. § 41 (2000). The Federal Circuit has nationwide jurisdiction over appeals concerning certain subject matters and appeals from specialized courts such as the U.S. Court of International Trade and the U.S. Court of Federal Claims. 28 U.S.C. § 1295 (2000).

[125] *See* Wald, *supra* note 91, at 252 (regarding assignment of judges to panels on D.C. Circuit, "[t]he current random system of assignment . . . ensures a diversity of viewpoint on each panel").

judges belonging to that circuit.[126] Finally, a very small number of panel and en banc rulings are reviewed by the nine Justices of the Supreme Court.[127] There is also a parallel universe of interpretations of federal law within the state courts.[128] This system is capable of producing a variety of legal answers, which are sifted through at each appellate level; if an issue is important enough, the Supreme Court may eventually resolve it.

As different answers are generated by judges, each subsequent judge has an expanded array of legal options. At each stage, a decisionmaker examining a hard case sifts through a range of proposed resolutions: those suggested by litigants (and sometimes amici) before her; the prior decisions of courts above, below, and parallel to her; and those she can identify by reasoning through the law on her own. If she is on a panel, she and the other judges may pool their resources by discussing their perceptions of the possible resolutions.

This process feeds upon diversity. In one sense, the appeals process is meant to make law uniform, by resolving differences in interpretations of federal law among district courts, and among circuit courts. The goal of achieving uniform law is meant to make legal outcomes fairer, by ensuring that individuals are subject to the same laws across the board. In another sense, though, it is a system that thrives on what Heather Gerken has called "second-order diversity"[129]—the diversity of outcomes that results from having different decisionmaking bodies working in parallel. By allowing judges the opportunity to compare various answers, the system helps judges produce better answers.

There is a short-term cost of allowing multiple resolutions to legal dilemmas to exist side by side, which is the unfairness of treating simi-

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126 *See* 28 U.S.C. § 46(c) (2000); *see also* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 214 (1999) (fewer than one percent of cases are decided en banc in circuit courts).

127 28 U.S.C. §§ 1254, 1257 (2000) (regulating Supreme Court review upon writ of certiorari). During a recent twelve month period, 27,354 appeals were terminated on the merits in the circuit courts, while in the Supreme Court's October 2004 term the Court issued just 85 full opinions and 818 memorandum orders. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 26 tbl.B-5 (2005), *available at* http://www.uscourts.gov/caseload2005/tables/B05mar05.pdf; *The Statistics*, 119 HARV. L. REV. 415, 426 tbl.II(D) & n.k (2005).

128 Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1473 (2005) ("[T]he vast majority of particular adjudications of federal constitutional rights take place in state courts, with most of those found when one or more of the protections in the Bill of Rights are at issue in state criminal proceedings.").

129 Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102–03 (2005) ("Second-order diversity involves variation among decisionmaking bodies, not within them.").

larly situated litigants differently.[130] This cost is a serious concern for the rule of law, for which uniformity is an important value. But while it may be desirable to improve the capacity of the system to provide long-term uniformity,[131] political morality is one of the areas of the law in which predictability is less important than achieving the right result.[132] Although it is difficult to ever be sure of the right result, experimenting with alternative conceptions allows us to identify better answers.

In the last Part of this Note, I explain in more detail why considering a broader range of moral conceptions should improve legal outcomes.

III
How Diversity Can Improve the Law: The Functional Value of Openness to Disparate Answers

Part I presented evidence that there is substantial segregation of people of different racial and ethnic backgrounds in the United States, and that race is linked in significant (though complex) ways to political-moral views. It suggested that in the aggregate, judges of different races are likely to have different moral attitudes and to vary in

130 One reaction to the existence of enduring circuit splits has been to propose greater organization of appellate review by subject matter. Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1155–56 (1985) (reviewing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)) (criticizing Judge Posner's objections to specialization by subject matter as exaggerated; asserting specialization would not necessarily make judgeships unattractive to qualified candidates or promote factional approaches to decisionmaking); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 624–30 (1989) (proposing categories of cases suitable for non-regional appellate forum, where decisions could be rendered with nationwide precedential effect); Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REFORM 471, 475–85 (1983) (discussing subject matter organization as antidote to dilution of judicial process or unpredictable, non-uniform application of law in large intermediate appellate courts); Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255, 282–85 (1975) (reviewing creation of separate intermediate courts along subject matter lines, e.g., civil and criminal, to expedite appellate business in courts of first review, e.g., state supreme courts); *see also* Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 117–28 (2001) (discussing how to evaluate persistence and seriousness of circuit splits).

131 *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 741–42 (2001) (reviewing past proposals for national court of appeals to relieve Supreme Court's docket and resolve circuit splits).

132 *Cf.* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 725 (1984) (arguing only certain intercircuit conflicts require speedy resolution, and identifying splits causing forum-shopping and planning problems as most critical).

their openness to particular moral views. Part II asserted that judges must choose among different conceptions of political morality. It further argued that increasing the racial and ethnic diversity of judges increases the likelihood that courts will seriously consider alternative conceptions of political morality.

But if creating a more diverse judiciary in fact leads to a broader range of resolutions to difficult legal problems, does this automatically give us a better chance of reaching the best answer to those problems? It depends on whether any of these newly introduced resolutions is actually likely to be the best answer. And this is the difficulty: Although as a society we commonly believe that there are better and worse answers to questions about legal rights, we are not especially good at immediately identifying the better answers—in fact, we cannot even agree on the correct way of identifying such answers. Despite this, there are at least four grounds for thinking that judicial diversity is likely to produce better answers.

First, if one believes that there are means of identifying the "best" answer, it is possible that one of these newly introduced answers will be the best answer, and so it is important to consider all of them. At a minimum, democracy prevents us from ignoring or discarding answers out of hand. Second, it is possible that registering answers from diverse parts of the population may illuminate cultural fault lines that educate us about what is really at stake in the legal problem. Third, fuller communication may lead to construction of a compromise answer. Finally, by living under different answers, we may discover the "best" answer through lived experience.

Below, I elaborate on each of these mechanisms. Because it is largely impossible to identify a particular moral vision as emanating from a specific ethnic community, my examples are generalist examples of cases in which competing visions of political morality are at work.

A. Democracy Requires That We Consider (Almost) All Answers

Several authors have pointed out that when judges interpret broad constitutional values, democracy requires that they consider minority viewpoints.[133] The critical idea is that democracy requires equal consideration of all; there is no valid reason to discount a

[133] *See* RONALD DWORKIN, FREEDOM'S LAW 24–25 (1996) (stating that "each person must have an opportunity to make a difference in the collective decisions" of the community); Lazos Vargas, *Democracy and Inclusion*, *supra* note 9, at 207 ("Pluralist communicative democracy, as applied to the problem of majority-minority constitutional adjudication, treats as primary the values of including all members of the polity and treating them as equal, coparticipants in constructing the fundamental values of the polity.").

minority conception of political morality out of hand. This is partly rooted in a proceduralist norm: If we value individuals equally regardless of their majority or minority status, we cannot throw out an opinion merely because it is held by a minority. While this seems like a valid principle for democratic deliberation more generally, it has special weight in the context of adjudication because of the underlying goals of legal interpretation.

In adjudication conceived along Dworkinian lines, considering minority viewpoints also serves the substantive goal of improving the quality of legal decisions. Because interpretation of governing principles is based on reasoning toward a more coherent legal framework, interpretation will not necessarily lead to a majoritarian result. Upon careful consideration and study, it may well become apparent that a minority viewpoint best fits the relevant legal institutional framework.[134] Thus, the norm of equal consideration goes beyond procedural values: In the adjudication context, a minority-held political-moral conception may in fact offer the best resolution to a particular legal problem.

B. Fault Lines May Illuminate the Problem

When disagreement over a constitutional issue falls along racial or ethnic lines, that disagreement is itself instructive. It may illuminate what is at stake, and it may upset settled understandings of constitutional values. Disagreement within a particular group may also be telling.

For instance, the views of black parents toward school vouchers were unmistakably woven into the Supreme Court's decision on the Establishment Clause issue presented in *Zelman v. Simmons-Harris*.[135] In *Zelman*, the Court ruled that allowing parents to use state-funded vouchers to pay private religious schools' tuition did not violate the Establishment Clause;[136] the idea that the voucher program might help to remedy racial inequality in education was a strong subtext in the case. Early in his opinion, Chief Justice Rehnquist referred to the social and racial context of the Cleveland voucher program at issue in the case; just five sentences into his opinion, Rehnquist noted: "The majority of these children [in the Cleveland

[134] Of course, alternative conceptions will not always provide better answers, and may sometimes be clearly unacceptable—for instance, if the proposed legal rule itself violates the principle, such as a view of equality that excludes a vulnerable group from constitutional protections. However, the only way to actually assess alternative conceptions is to consider them on their merits, not based on the identity of those who hold them.

[135] 536 U.S. 639 (2002).

[136] *Id.* at 662–63.

City School District] are from low-income and minority families."[137] Soon thereafter, he implicitly responded to one basis for distrust of religious schools by minorities—the historic use of private schools as a means for white parents to resegregate their children[138]—noting that Ohio law barred participating private schools from discriminating on the basis of race, religion, or ethnic background.[139] Justice Thomas's concurrence further described the potential impact of vouchers on urban minority children.[140] Although the NAACP Legal Defense Fund filed an amicus brief opposing the program,[141] commentators noted strong minority support for vouchers.[142]

In *Zelman*, the Court weighed the goals of achieving equal educational outcomes for minority children and racial integration in the schools alongside the Establishment Clause goal of avoiding state entanglement with religion. Purists might argue that the church-state issue should be understood independently of the racial context. Whatever the appeal of that approach as a formal matter, it would be obtuse for the Court not to recognize the racial dimensions of the voucher issue. Even the dissenters called upon a competing social reality, the increased religious diversity of the United States, to support their position.[143] The recognition that a white parent and a minority parent might understand the church-state issue differently enriches our understanding of the benefits, costs, and complications of the church-state divide.

C. *Syncretic Answers May Emerge*

Recognition of competing conceptions of political morality may lead to new resolutions of familiar problems. Many legal dilemmas do not require a binary answer: The balancing test is one juridical strategy that allows a contingent, complex answer. While a "some-

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137 *Id.* at 644.

138 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 743–44 (1984) (considering black parents' challenge to alleged IRS practice of allowing tax benefits to racially discriminatory private schools, in which plaintiffs alleged that "many racially segregated private schools were created or expanded in their communities at the time the public schools were undergoing desegregation").

139 *Zelman*, 536 U.S. at 645.

140 *Id.* at 681–84 (Thomas, J., concurring).

141 Brief of NAACP Legal Defense and Educational Fund, Inc. and NAACP as Amici Curiae in Support of Respondents, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779).

142 *See, e.g.*, Michael Leo Owens, *Why Blacks Support Vouchers*, N.Y. TIMES, Feb. 26, 2002, at A25 (citing Public Agenda and Joint Center for Political and Economic Studies surveys finding, respectively, that 68% and 60% of blacks supported vouchers in 1999).

143 *Zelman*, 536 U.S. at 717–26 (Breyer, J., dissenting) (arguing against voucher program because of risk it "pose[d] in terms of religiously based social conflict").

thing for everyone" response may sometimes be unprincipled,[144] there are times when principles allow compromise.

For example, in *Washington v. Glucksberg*,[145] the Supreme Court rejected the argument that Washington's ban on assisted suicide facially violated an individual's asserted fundamental liberty interest in controlling the circumstances of his or her death.[146] The concurring Justices, however, preserved the possibility that "a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."[147] Writing for the Court, Chief Justice Rehnquist privileged history in finding that there was no fundamental right to assisted suicide, and then heavily weighted the State's interest in preserving life. The concurrences, however, emphasized the competing value of dignity, arguably preserved by allowing individuals to avoid drawn-out, painful deaths in particular cases.[148] This as-applied resolution did not become law, but it was inserted into the judicial record as a potential compromise.

Glucksberg is thus an example of a legal dilemma which may allow two competing conceptions of respect for human life and dignity to be fused, by first translating the value into a presumptive state ban on assisted suicide, and then creating an exception for those who face great pain in prolonged death. A principled compromise is not necessarily possible in all cases, and certainly not all moral positions are commensurable, but there are instances when competing conceptions of political morality may be bridged.

D. Living Under Different Answers Helps Us to Find the Best Answer

As described above, our judicial system is premised on producing a great variety of answers to legal questions. Some of that diversity persists, and people in different places live under different answers. We test legal outcomes by living with them: The right answer may be the one that triumphs once we thoroughly understand its normative

144 *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 7, at 178–86, 217–18 (critiquing "checkerboard" resolutions of questions of principle).

145 521 U.S. 702 (1997).

146 *Id.* at 728.

147 *Id.* at 736 (O'Connor, J., concurring); *see also id.* at 739–42 (Stevens, J., concurring in judgment) ("[T]here are situations in which an interest in hastening death is legitimate."); *id.* at 791–92 (Breyer, J., concurring in judgment) (noting that situation would be different if statute in question had impact on prevention of "serious and unavoidable physical pain").

148 *See, e.g.*, *id.* at 728–35.

and practical implications. The wrong answer may be the one that we reject after experiencing its full costs.

Brown v. Board of Education[149] is the quintessential decision that society has embraced after living with it. *Brown* was famously criticized by Herbert Wechsler in a 1959 *Harvard Law Review* article,[150] and this criticism engendered an academic debate on the merit of *Brown*'s legal reasoning. Responding to this debate in 1961, legal journalist Anthony Lewis wrote:

> One may wholly agree with the academic critics that the judicial process must be one of reason and principle and yet recognize that a court may reach a proper result without at once being able to agree on a fully satisfying rationalization. There are many areas of the law, especially of constitutional law, in which it has taken years and decades for the Supreme Court to work out all the implications of a doctrine.[151]

It may be that it was necessary for society to implement *Brown*'s principle before it could adequately account for the place of the principle within U.S. constitutional doctrine. Fifty years later, although its constitutional basis has been harshly criticized[152]—and society fought violently over its implementation[153]—a great deal of our moral identity as a nation is premised on *Brown* and the principle of racial equality that it symbolizes.[154] The Court's death penalty decisions barring the execution of juveniles[155] and of the mentally retarded[156] may come to play a similar role in our moral identity. This is especially likely if society comes to see the decisions' basis in what Charles

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149 347 U.S. 483 (1954).

150 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (criticizing Court's reasoning and asserting that segregation is not problem of discrimination but of "the denial by the state of freedom to associate").

151 Anthony Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305, 330 (1961). *See also* Wald, *supra* note 91, at 253 ("[F]or some types of legal questions, the right answer is not always so clear, and the best way of arriving at that answer is through successive approximations and dialogues between different panels and different courts.").

152 Wechsler, *supra* note 150, at 31–34; *see also* LEARNED HAND, THE BILL OF RIGHTS 54–55 (1958) (concluding that *Brown* Court reversed legislative judgment based on its own judgment and behaved as third legislative chamber).

153 *See, e.g.*, MARK TUSHNET, MAKING CIVIL RIGHTS LAW 232–71 (1994) (discussing various forms of resistance to *Brown* from 1955 to 1961); *see generally* J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1986) (describing social conflict in Boston over school integration through personal narratives and historical perspectives).

154 *See, e.g.*, OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 5 (1978) (remarking that "by the late 1960s, *Brown* was viewed as so legitimate that it commonly functioned as an *axiom*—a decision of unquestioned correctness, a starting point for normative reasoning in domains far removed from schools and race").

155 Roper v. Simmons, 543 U.S. 551 (2005).

156 Atkins v. Virginia, 536 U.S. 304 (2002).

Fried terms "a deeper moral case . . . [that] connects up with principles embraced elsewhere in our constitutional jurisprudence."[157]

Introducing greater diversity into the judiciary may increase the likelihood that judges will adopt alternative conceptions of political morality. In different federal circuits, or in different states, we might live for a time under different rules. Such experiences can only be useful, to society and to the courts, in determining which legal answers to our moral dilemmas are the best ones.[158]

CONCLUSION

It is, of course, impossible to prove in any empirical sense that judicial diversity leads to better legal outcomes. The arguments I have presented are intended to show that race matters for political-moral attitudes, and thus is likely to matter in adjudication—not because judges will necessarily vote based on views widely held within their own racial or ethnic groups, but because of the likelihood that they will be positioned to consider such views seriously and sympathetically. Mechanisms of dialogue within the judiciary may then serve to diffuse alternative political-moral conceptions throughout the judiciary.

If judging is in fact a highly constrained and principled activity, one can argue that exposure to a broader range of political-moral conceptions must improve the ultimate results of judging, for the same reasons that we think decisionmaking is improved generally when all the potential options are carefully weighed. One can further look to the paths of dialogue within the judiciary and between the judiciary and other social actors as a basis to believe that considering alternative political-moral conceptions improves legal outcomes.

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157 Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 195 (2002) (arguing that there is such "a deeper moral case—in terms of the proper aim of punishment and the meaning of retributive justice—to be made against the execution of the mentally retarded").

158 Under this view, the idea of a "right answer" could have two meanings. One meaning would equate the "right answer" with the hegemonic answer, the one that the collected powers within our society can live with; this is another version of thinking that the content of the law will inevitably reflect the interests of ruling majorities. Derrick Bell's interest convergence theory is one species of this view. *See* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[I]t is possible to discern in more recent school [segregation] decisions the outline of a principle . . . . [T]his principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."). More optimistically, the right answer might be the one that we choose as normatively right for our society and its ideals. In practice, both forces, interests and ideals, are usually at work.

Judicial dialogue may at times stand in for a wider social dialogue that ought to be taking place among the public. Frank Michelman wrote of Dworkin's model of judging that:

> Dworkin does not appear to explain how it can be that a judge "confirm[s] . . . the principled character of *our association*" by striving each "to reach *his own* opinion." It seems to me the answer finally must sound in virtual representation. The judge, as Dworkin envisions him, represents by his own self-government our missing self-government, by his own practical reason our missing dialogue.[159]

Michelman went on to argue that appellate judging is not the solitary activity that Dworkin described, but a highly plural activity based on exchange with other judges. He concluded, "We ought to consider what that plurality is 'for.' My suggestion is that it is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom."[160] In other words, judicial dialogue is linked to our society's capacity to reason collectively about deep-seated problems of public morality.

I have argued that when such judicial dialogue occurs among judges of different racial and ethic backgrounds, the judges' dialogue may produce new resolutions to political-moral dilemmas, educate society regarding the contours of such problems, or even cause the public to arrive at new conclusions regarding political-moral questions. It is hard not to view those developments as productive ones. This is not to say that judicial dialogue will always lead to consensus, or that there is a teleological path toward these better legal outcomes. But even if increased judicial diversity creates only the potential for improved legal decisionmaking and broader, more informed dialogue regarding political-moral dilemmas, this seems enough reason for us to care about the racial diversity of judges.

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[159] Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 73 (SPECIAL ISSUE) (1986) (*quoting* DWORKIN, LAW'S EMPIRE, *supra* note 7, at 264) (emphasis added in Michelman).

[160] *Id.* at 76–77.