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Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist

LAURENCE H. TRIBE*

The author analyzes the role of litigation in a pluralistic society through his discussion of the "pluralist's fallacies," seven characteristic errors underlying much opposition to judicial activism. He advocates a large and active role for the adversary process in order to ensure that less established groups have a forum in which to protect their interests.

No one would urge litigation as a universal solvent for social problems in a pluralistic democracy. The real question is whether the virtues and vices of such a democracy are consistent with assigning a large and active role to the adversary process, as opposed to a minor or passive one. In addressing this subject, we must of course deal with specifics; but we must ultimately come to terms with the general question of whether we should assume a welcoming or a hostile attitude toward adversary resolution and judicial activism.

Democratic pluralism¹ is a distinctly American amalgam of liberalism and conservatism, of Locke and Burke, of Hayek and Comte, of individualism and communitarianism, of anarchy and totalitarianism. It seeks to overcome both the alienation of liberal individualism and the tyranny of a thoroughly organic community. Its central premise is that, by political bargaining and compromise among a plurality of semi-autonomous groups, institutions and interests such as labor, religion and business, we can arrive within a federal structure at a just and reasonably stable division of the burdens and benefits of social and economic life.

Over time we have learned a great deal about how interest group politics in fact tend to operate. In theory, all groups and interests are created equal. But some, it turns out, are very much more equal than others. Justice Rehnquist is correct to remind us that the adversary process is not well calculated to win friends and influence people.² But we would make a great mistake to forget that some people can get "a little help from their friends" more easily than others.³

* Professor of Law, Harvard University. This article is adapted from remarks made during a public discussion with Justice Rehnquist and Judge Friendly at the University of Miami School of Law on February 2, 1978.

1. See R. DAHL, *WHO GOVERNS?* (1961).

2. Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1, 15 (1978).

3. To counteract the stronger influence that established interest groups may have in the

In a recent column in *The Washington Star*, Mary McGrory described the farmers who had descended on Washington, D.C. by the hundreds, blocked traffic and occupied buildings to protest current agricultural policy.⁴ One of the protestors, standing on what amounted to a picket line in front of the White House, recalled how it used to make him sick to see the kids marching and protesting the Viet Nam War. But, he chuckled knowingly, now he understood a little better how they felt. That was a touching display of retroactive empathy. But it missed a very basic point about our political life. In our pluralistic system, established groups rarely feel forced to march or demonstrate. When they do, they almost never find themselves being beaten up or arrested. It was called "disruption" or "sabotage" when groups of blacks and Indians and so-called "peaceniks" tried it. It is called "effective lobbying" when more established interest groups or cohesive voting blocks make the effort. To put it in a metaphor, flour producers and flower children occupy very different roles in a pluralistic democracy.

To put it more generally so as to understand the role of litigation in a pluralistic democracy, it can be said that the legacy of liberal individualism is tolerance—that is, tolerance for established, even if rather unusual, organized interest groups. However, the legacy of social integration and communal cohesion within the same pluralistic democracy is often intolerance of groups not yet assimilated into the governing coalitions, and an unwillingness to recognize that the unorganized, ununionized, unbureaucratized emerging interests are also legitimate and deserve weight within the system.⁵

Thus, at least two limitations inherent in democratic pluralism give rise to a need for an active judicial role. First, there are perennial outsiders who lack effective input into the bureaucracy; there is a bias for those already "in." Second, and even more fundamental, the byplay of interest groups within democratic pluralism is inherently incapable of addressing certain basic questions that underlie the division of burdens and benefits among society's various groups.

Those underlying questions—what values should be ranked as fundamental in our society? What rights deserve special protection

political process, courts have recognized that insular minorities may need judicial protection against majority rule. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

4. McGrory, *Protesting Farmers Develop Some Sympathy for Peaceniks*, *Wash. Star*, Jan. 27, 1978, at A-3, col. 1.

5. Compare *Reynolds v. United States*, 98 U.S. 145 (1878) with *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). It is interesting to speculate how the monogamy laws upheld in *Reynolds* would have been treated if the Mormons were as organized and accepted by society in 1878 as were the Jehovah's Witnesses in 1943.

against all political bargains, however structured? Who has a right to take part in what kind of choice? What are to be the starting points from which bargaining will proceed?—are logically and morally prior to the struggles of pluralistic politics, however wide the opportunity to partake in those struggles. Such questions cannot be answered simply by allowing various interest groups to strike political bargains. Without answers to these questions, bargaining is indistinguishable from warfare.

Now of course the initial definition of values and rights may be arrived at through a kind of plebiscite. After all, the initial legitimacy of our Bill of Rights depends in part on the fact that it received a degree of popular sanction and was not simply dictated autonomously from on high. But if one looks closely at the groups who were denied any voice in approving even this basic charter,⁶ it becomes clear that the legitimacy of such a catalog of rights cannot turn simply on the fact that more people favored than opposed the values it expressed. And this is as it must be. For the legitimacy of any starting point of basic values or basic rights must rest in the persuasiveness of the reasons that can be adduced for them. As Hegel stated in *Philosophy of Right*, “[a] constitution is not just something manufactured; it is the work of centuries, . . . the consciousness of rationality so far as that consciousness is developed in a particular nation. No constitution, . . . is *just* the creation of its subjects.”⁷

Thus, when CBS conducts a telephone poll to uncover attitudes about certain basic concepts embodied in the Bill of Rights and learns that the majority of adults in the United States seem willing to restrict some of the basic freedoms constitutionally guaranteed by the Bill of Rights,⁸ we should not interpret this as undermining the legitimacy of those underlying rights. Rather, we should be reminded that processes far more subtle than those of pluralistic politics are required to legitimate a pluralistic democracy. In fact, the legitimacy of our system of government requires relatively unimpeded access to litigation to do two distinct things: first, to articulate the underlying framework of rights within which pluralist bar-

6. The Constitution was not submitted to the populace for direct ratification. Instead, voters selected delegates for state ratifying conventions. While it is impossible to determine exactly how many persons were excluded from voting, it is safe to say that a significant proportion of the population was not permitted to participate. Only adult white males were extended suffrage, and their numbers were reduced by property qualifications. See C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 239-42 (1935).

7. G. HEGEL, *PHILOSOPHY OF RIGHT* 286-87 (T. M. Knox trans. 1967) (emphasis added).

8. CBS News Poll Report (Mar. 20, 1970) (report based on a national random telephone sample of 1,136 adults, conducted during March 10-12, 1970).

gaining is to occur; and second, to provide an avenue of participation for those individuals and groups that have not yet been effectively absorbed into the mainstream coalitions of pluralist politics. Thus, a welcoming attitude toward adjudication is not a threat to the integrity of our form of government. In fact, such an attitude, properly understood, is indispensable to its legitimacy.

Justice Rehnquist has cited Edmund Burke for the proposition that society is more than an implied contract between citizens and their current government.⁹ True enough. But in his famous letter to Charles James Fox, Edmund Burke wrote: "People crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws."¹⁰ The choice is not between authority and anarchy, but rather between forms of authority which are either effectively closed to certain groups and unstructured by a principled adjudication of values, and forms of authority which have an open adversary system at their core.

Against this general background, it is worth asking what characteristic forms the opposition to judicial activism has taken. I would identify seven characteristic errors which constitute what one may call the "pluralist's fallacies." These seven errors have induced exaggerated fears of adjudication and an understated appreciation of what it can contribute to the legitimacy of our system of government.

The first of those fallacies may be called the fallacy of *generality*. It is the error of supposing that matters which affect large numbers of citizens and which are general in their impact can be left safely to resolution by interest group politics. A good illustration, though by no means a unique one, is *United States v. Richardson*.¹¹ In *Richardson*, citizens and taxpayers were denied standing to raise the claim that "certain provisions . . . under the Central Intelligence Agency Act" violate the article I, § 9 requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."¹² Since no one seriously contended that Congress was free to keep secret a major portion of the federal budget, the sole question was not the merits, but whether plaintiffs could be heard at all in an article III court. The Supreme Court held that they could not.

In his concurring opinion, Justice Powell stressed that "taxpayer or citizen advocacy, given its potentially broad base, is

9. Rehnquist, *supra* note 2, at 19.

10. 3 THE CORRESPONDENCE OF EDMUND BURKE 387 (T. Copeland ed. 1958).

11. 418 U.S. 166 (1974).

12. *Id.* at 167 (quoting U.S. CONST. art. I, § 9, cl. 7).

precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes.”¹³ Justice Powell reasoned that judicial access is not necessary when an abuse has such broad impact that citizens can simply rise up in a body and demand change. This view aptly illustrates the fallacy of generality inasmuch as it fails to ask whether the abuse at issue is a self-insulating one—that is, whether the abuse is structurally immune to meaningful political challenge.

In the context of the *Richardson* case, there was good reason to believe that the abuse—a violation of the statement and account clause—was indeed immune. For the very secrecy of which the citizen-taxpayer litigants complained rendered it impossible for them to mount anything but the most generalized and abstract attack in the political arena. Specific expenditures could not be identified as abuses because citizens were denied the only existing information about what those expenditures were. In short, the system was structured to deflect change through the political process; to forget this, and to assume that simply because the impact was widespread there is no need for judicial enforcement, is to make a grave mistake. The problem is reminiscent of the well-known reapportionment cases, in which one could be quite confident that legislators were reluctant to draw district lines which would result in their own exclusion from office.¹⁴

More broadly, the judiciary cannot simply rely on the *generality* of an impact to assume that the political process will yield a meaningful alternative to adjudication. Whenever there exists no group of victims with a substantial personal stake in challenging a practice, its generality alone may not suffice to generate political pressure. In particular, a court should inquire whether the *nature* of the particular injury, however widely inflicted, is such as to impede the effective operation of majoritarian processes—either because the injury is diffuse or intangible or because its very character deprives opponents of an effective political strategy.

The second source of undue fear of adjudication in a pluralistic democracy might be called the fallacy of *internal fairness*. Its error is that of assuming, without any real inquiry, that the internal processes of the groups to which litigants are remitted will give fair consideration to the interests and rights of such litigants.

13. *Id.* at 189.

14. In *Baker v. Carr*, 369 U.S. 186 (1962), the political process was systematically thwarted. Although it remained possible in the *Richardson* context for Congress to remedy the secrecy of CIA accounting procedures, the challenged practice itself created obvious deterrents to such political action.

A striking example of this second fallacy is *Warth v. Seldin*,¹⁵ wherein the inner-city poor of Rochester, New York, claimed that exclusionary zoning by the suburbs denied them equal protection of the law. The Supreme Court held that the inner-city poor did not have standing, relying on the rather attenuated ground that plaintiffs could not show that they would be able to *live* in the suburbs in the absence of the exclusionary zoning they challenged.¹⁶ Of course, they could have recast their complaint by contending that they did not seek to show that they were being denied *housing*, but merely that they were being denied an *equal opportunity* to purchase housing. Under several Supreme Court precedents, that should have sufficed to confer standing.¹⁷ But *Warth* seems to have reflected a deeper concern, one revealed in a footnote to the majority opinion. There the Court expressed an underlying philosophy with which one may sympathize but which seems to have been misapplied: "[C]itizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process."¹⁸ This is true enough—sometimes. In this case, however, the urban poor were being remitted to the political process of the suburbs, a process in which they had absolutely no vote. To tell the inner-city poor that they must not overlook the political process of a system not structured to give them any access at all, let alone fairly to reflect their interests, is simply unresponsive to the nature of their claim.

This unresponsiveness well illustrates the fallacy of internal

15. 422 U.S. 490 (1975).

16. Although the majority conceded that "the plaintiff who challenges a zoning ordinance or zoning practices [need not] have a present contractual interest in a particular project," *id.* at 508 n.18, it required essentially as much by treating allegations of prior fruitless efforts to locate housing as insufficient, *id.* at 503-04 & n.14, and by attributing to "the economics of the area housing market, rather than . . . respondents' assertedly illegal acts," *id.* at 506, the undisputed inability of named complainants to purchase housing in the zoned area.

17. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (owner of home subject to challenged zoning restriction not required to aver that specific lessees would lease the house but for the restriction); *James v. Valtierra*, 402 U.S. 137 (1971) (citizens eligible for low cost public housing permitted to challenge state's referendum requirement as a prerequisite to local housing authorities' application for federal assistance despite the fact that there was: (1) no proof that detailed plans would have been developed had the referendum succeeded; (2) no claim that federal assistance would be forthcoming; and (3) no allegation that any plaintiff would be able to occupy the new housing if it were built); *Hunter v. Erickson*, 393 U.S. 385 (1969) (plaintiff who had averred only that a real estate agent had refused to show plaintiff "whites only" listings was not denied standing despite the fact that no claim was made that plaintiff could have purchased a house); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (owner of tract subject to challenged zoning scheme permitted to refer generally to unidentified prospective buyers deterred from buying land by the zoning provisions). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 92-97 (1978).

18. 422 U.S. 490, 508 n.18.

fairness. As Justice Rehnquist rightly observes,¹⁹ respect for the autonomy of various groups—such as families, labor unions and religious organizations—compels a cautious approach to judicial intervention into the internal lives of these groups. A neutral magistrate must keep in mind that the price of such intervention might be disturbance of the internal harmony and cohesion of those groups.²⁰ But the resulting caution need not, and indeed must not, spell automatic deference to the decisions of all groups as though they are all capable of fairly reflecting the rights of their members.²¹ Thus, although we must respect the autonomy of the family, intervention against child abuse is nonetheless essential.²² And, although we delegate great power to labor unions, we impose upon them obligations of fair representation of the many interests that are affected by their binding decisions.²³

An especially illuminating illustration of the fallacy of internal fairness is the case of *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*,²⁴ wherein the Supreme Court held that the Illinois state courts had violated the free exercise clause by injecting themselves into a religious dispute at the behest of an ousted bishop.²⁵ As Justice Rehnquist has reminded us in his current praise of the decision,²⁶ there is a great deal to be said for the Supreme Court's holding, which placed the value of religious autonomy above that of the neutral adjudication of disputes.²⁷ But there is much more to the case than that alone. Despite his current position, Justice Rehnquist, joined by Justice Stevens, *dissented* from the majority's holding,²⁸ arguing that "blind deference" to church decisions can leave members helpless against "brute force" and "arbitrary lawlessness." Whether right or wrong on the facts of

19. Rehnquist, *supra* note 2, at 14.

20. See H. LASKI, *FOUNDATIONS OF SOVEREIGNTY* 238-43 (1921); Chafee, *The Internal Affairs of Associations Not For Profit*, 43 *HARV. L. REV.* 993, 1027-29 (1930); *Developments in the Law: Judicial Control of Actions of Private Associations*, 76 *HARV. L. REV.* 983, 986-91 (1963).

21. *Cf. Carolene Prod. Co. v. United States*, 304 U.S. 144, 152 n.4 (1938) (insular minorities may need judicial protection against majority rule).

22. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), for example, the Court held that the government may protect children from burdensome and exploitative labor at the hands of their religiously motivated elders.

23. See 28 U.S.C. § 1337 (1976). In *Vaca v. Sipes*, 386 U.S. 171 (1967), an employee with a poor medical history who was discharged from a job requiring heavy work was permitted to bring an action against his union for refusing to take his case to arbitration.

24. 426 U.S. 696 (1976).

25. *Id.* at 720-21.

26. See Rehnquist, *supra* note 2, at 5.

27. 426 U.S. at 724-25.

28. *Id.* at 725-35.

the case before them,²⁹ the dissenters did well to highlight the inescapable conflict between the religious community which is furthered by governmental disentanglement from decisions of a religious organization, and the religious autonomy which may be compromised if such disentanglement subjects individuals to unbounded domination by oppressive religious authorities. Even when we are dealing with religious freedom, where the argument for deferring to the internal autonomy of private groups is perhaps strongest, there remains a clear need—as Justice Rehnquist himself recognized in his *Serbian Orthodox* dissent—for a neutral judicial forum to protect persons against the complete disregard of their rights by an organization in whose internal structure they have not received a fair opportunity to make their case.

If any general lesson is to be derived from this illustration, it is that the adversary process is needed in order to maintain the delicate balance between undue intrusion into the internal lives of various autonomous groups and undue delegation to those groups of potentially tyrannical authority over their members. The fallacy of internal fairness overlooks the need for that balance and proceeds as though the need for group autonomy in and of itself eliminates the need for judicial vigilance.

The third fallacy is that of *simplicity*. It is the error of supposing that the fulfillment of constitutional rights in complex political systems can be secured if judges limit themselves to rather simple forms of “one-shot” relief directed against individual instances of deliberate violations of constitutional rights. A leading illustration is the case of *Rizzo v. Goode*.³⁰ In *Rizzo*, a federal judge issued a decree mandating an improved procedure for processing complaints concerning police brutality in Philadelphia. The record contained evidence of over forty cases of such brutality, and the Supreme Court was willing to assume that some sixteen of them involved deprivations of constitutional rights.³¹ The district court judge found that the deprivations were neither rare nor insulated.³² A negotiated decree was ultimately shaped to the satisfaction of both the police and the citizens who had filed a class action in the federal district court. The Supreme Court, however, ultimately reversed the unanimous judgment of the Third Circuit affirming that decree, holding that the district court was without authority to enter it.³³

29. See L. TRIBE, *supra* note 17, at 879-80.

30. 423 U.S. 362 (1976).

31. *Id.* at 368.

32. 357 F. Supp. 1289 (E.D. Pa. 1973).

33. 423 U.S. at 366.

The ultimate reason for the Supreme Court's holding seems to have been that plaintiffs made no showing that the named defendants (the mayor and the police commissioner) had deliberately set out to violate the plaintiffs' rights. To be sure, no such showing was made—perhaps because plaintiffs realized the hopelessness of working toward a negotiated decree with officials against whom they would allege such bad faith.

Do we truly believe, however, that constitutional rights cannot be violated by officials who knowingly leave in place, after repeated complaints, a system that predictably and repeatedly results in the indisputable violation of constitutional rights? An affirmative answer is possible only if we believe that *systemic* violations of the Constitution are unimportant. To hold that those at the very top must be found to have deliberately set out to violate the rights of the plaintiffs frustrates the possibility of any systemic reform through litigation. Indeed, this may be precisely the purpose of the Court's requirement. Yet how likely is it that state courts within a given system will find that those who run the system have been guilty of deliberate violation? Even federal district court judges, protected by some distance from the authorities who are subject to their adjudication, are wise to avoid that kind of explicit and insulting condemnation. The officials with whom a judge must work in enforcing a complex decree are unlikely to be cooperative if the judge has held that those officials are deliberate, flagrant and intentional violators of constitutional rights. To compel that kind of finding as a precondition of systemic relief is to make judicial prodding of system-wide relief extremely difficult.

The Supreme Court's willingness to achieve precisely this result cannot reflect simply a conviction that federal courts ought to avoid essentially managerial roles. The Court's refusal to permit federal judicial relief has extended to the stark situation in which a federal court has been asked to correct an individual constitutional violation by a state officer.³⁴ This posture may reflect a fourth fallacy, that of *consistency*. It is the error of supposing that state courts can simply be relied upon to be reasonably consistent in applying their common law, statutory law and constitutional safeguards to all cases of individual violations by state officers. It will often be the case that the applicable state law is unobjectionable, creating on its face a seemingly ample cause of action against overzealous state officers. To assume, however, that a federal court therefore has no

34. See, e.g., *Ingraham v. Wright*, 430 U.S. 651 (1977); *Paul v. Davis*, 424 U.S. 693 (1976); L. TRIBE, *supra* note 17, at 927 n.33, 1162.

role in holding that procedural due process requires more than this in connection with injuries being inflicted by state officers is to assume that what the law says, and how it works, will always be congruent. *Ingraham v. Wright*,³⁵ which involved excessively severe corporal punishment in a public school, and *Paul v. Davis*,³⁶ which involved the erroneous distribution of a photograph in the form of a mug shot, illustrate the truth that such congruence may well be absent. In both of those cases, the injured litigants argued that the Constitution required "some kind of hearing," to use Judge Friendly's felicitous phrase,³⁷ in connection with the injury that was being inflicted. In *Ingraham*, a child so severely beaten by school teachers that he could not return to school or use his arms for days argued that he should have been heard at the school level in connection with that discipline.³⁸ In *Paul*, an adult whose photograph was erroneously spread throughout the community as that of a "known shoplifter" argued that the police department should have heard his side of the case.³⁹ On both occasions, the Supreme Court responded by asking, in essence, "Why make a federal case out of it?" The injured litigant in *Paul* was told to go back to a Kentucky state court, where there might be a cause of action in tort for defamation.⁴⁰ The injured litigant in *Ingraham* was told to seek help from the state courts of Florida, where there was a cause of action for excessive brutality by school teachers.⁴¹ There were indeed such causes of action. But there were also devastating defenses: in Kentucky, the defense of sovereign immunity;⁴² in Florida, the defense of good faith.⁴³ To assume that the theoretical availability of a state remedy will satisfy the state's obligation to provide a procedurally fair means of protecting personal interests is to make the mistake of consistency: to suppose that the law will always be applied in a manner consistent with its idealized expression. In a pluralistic federal system, any such supposition is wholly unrealistic.

The fifth fallacy is that of *undue modesty*. There is of course some truth in the conventional wisdom that judges inherently lack the factfinding capacity and remedial flexibility of legislatures or of administrative agencies. It is a fundamental mistake, though, to

35. 430 U.S. 651 (1977).

36. 424 U.S. 693 (1976).

37. See Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

38. 430 U.S. at 657.

39. 424 U.S. at 696.

40. *Id.* at 711-12.

41. 430 U.S. at 655 (construing FLA. STAT. § 232.27 (1977)).

42. See 424 U.S. at 715 (Brennan, J., dissenting).

43. See 430 U.S. at 693-94 (White, J., dissenting).

assume that the courts are much less representative or much less capable of utilizing expert analysis than are the processes to which people are remanded when judicial doors are shut. Such assumptions are unduly modest concerning the comparative capacities of judges. The history of the last half century provides more than ample evidence to rebut the stereotypes of the incompetent court and the omnipotent legislature or bureaucrat.⁴⁴ As Judge Friendly correctly points out,⁴⁵ courts need not have the severe limitations usually attributed to them. Devices such as special masters,⁴⁶ court appointed experts,⁴⁷ intervention by affected groups⁴⁸ and the notice and comment procedure⁴⁹ can overcome many of the initial institutional handicaps under which courts work.

At the same time, courts have a number of virtues which are not sufficiently appreciated. Most important, because they are not overly bureaucratic, courts are more accessible to those who remain "outsiders" vis-à-vis the bureaucracy. To assume that the often cumbersome processes to which denied litigants are remanded are open to these groups is thus to underestimate the uniqueness of adjudication.

The sixth fallacy, closely related to the fifth, is that of *elitism*. This is the error of supposing that change which is initiated through litigation is inherently less democratic than change in which legislative or administrative bodies take the dominant role. Archibald Cox recently wrote:

I should be no less irked than Judge Hand if the Supreme Court were to void an ordinance adopted in the open Town Meeting in the New England town in which I live—a meeting in which all citizens can participate—but I should have little such feeling about a statute enacted by the Massachusetts legislature in the normal political pattern, and none about a law made in that normal pattern by the Congress of the United States. . . . [I]t appears to me that modern government is simply too large and too remote, and too few issues are fought out in elections, for a citizen to feel much more sense of participation in the legislative process than the judicial. Nor does the Supreme Court's interven-

44. See, e.g., *Turner v. United States*, 396 U.S. 398 (1970); *Boynton v. Virginia*, 364 U.S. 454 (1960); *Brown v. Board of Educ.*, 347 U.S. 483, 493-96 (1954); *Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1962).

45. Friendly, *Courts and Social Policy: Substance and Procedure*, 33 U. MIAAMI L. REV. 21, 40-41 (1978).

46. FED. R. CIV. P. 53.

47. *Id.*

48. FED. R. CIV. P. 24.

49. 5 U.S.C. § 553 (1976).

tion lessen my sense that we are all engaged in a common adventure.⁵⁰

Now it may be that Mr. Cox went a bit too far. To suggest that we should attach *no* special weight to the fact that a duly elected, even if remote, legislature has reached a judgment is to put all one's eggs in a very small basket. As Justice Rehnquist properly indicates,⁵¹ important values of order and authority, of continuity with the past and connection with the future, are slighted when the duly formulated position of a community's elected representatives is lightly dismissed as reflecting just another point of view.

In another sense, though, Mr. Cox may not have gone far enough. For the praise he awarded the town meeting ignores the danger of small-town oppression that the framers so particularly wished to avoid.⁵² Those who most feared the domination of the tightly-knit community knew well that the comparison between change through litigation and change through legislation is a complex one. It is simply too much to assume that the virtues of continuity, of stability, of generational reverence or of representation, automatically attach to the collectively formulated judgment even of the small community or are automatically disrupted by judicial intervention.

In any case, ours is not an "either-or" choice. At stake is a dialogue among the various components of the political system, not a selection among political alternatives. The question is whether we should be distressed when courts are given a large voice in that dialogue. My own emphatic answer is *no*. A large judicial voice is consistent with the basic tenets both of citizen participation and of continuity, especially when we are dealing with persons and problems for which there are no more effective forums than those of the judicial branch.

The seventh and last fallacy, and in some ways the most seductive, is that of *institutionalism*. Its error is that of believing that one can reach broad institutional conclusions by extrapolating from particular institutional excesses. A common manifestation of this fallacy is the belief that excesses of judicial intervention, whether in the era of the much lamented decision in *Lochner v. New York*⁵³ or in some other period, demonstrate the unsuitability of courts as major institutions for social change and thus establish the wisdom of delegating to the political arena all important matters of sub-

50. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 116 (1976).

51. Rehnquist, *supra* note 2, at 12.

52. *THE FEDERALIST* No. 10 (J. Madison).

53. 198 U.S. 45 (1905) (invalidating a state maximum-hours law for bakers).

stance. Unless we are prepared to argue that the fourteenth amendment protects no substantive liberty at all, not even liberty of speech or belief, we are committed to the position that part of the Supreme Court's proper role is defining the substantive content of human freedom. Moreover, this substantive content cannot rightly exclude economic concerns. The Constitution itself evidences the clearest concern with property and contract,⁵⁴ as the Court not long ago reminded us with its resurrection of the contract clause.⁵⁵

The mistake of the Justices of the *Lochner* era was not that they attempted to protect economic freedom as an aspect of substantive liberty, but that they dramatically misunderstood what meaningful economic freedom required in the modern industrial state. They confused the freedom to toil endless hours with real economic liberty. True, the *Lochner* error does indicate that judges will sometimes gravely misconceive what "liberty" requires in a particular time or place. But so will legislators and administrators: nothing in the *Lochner* experience permits the frequently drawn institutional inference that we would be better off trusting our liberties to judicially unsupervised agents.

*Roe v. Wade*⁵⁶ provides a more recent example of the temptation to draw unwarranted institutional conclusions. The Supreme Court there attempted to resolve directly the conflict between the rights of the unborn and those of the women involved, rather than relegating the conflict to the political arena and to the vagaries of majority rule or of interest group pluralist politics. Justice Rehnquist, dissenting, argued that the conflict was one properly resolved by the state legislatures.⁵⁷ He did venture the opinion, however, that perhaps the Court should have the power to reverse a legislature which went so far as to ban *all* abortions, including those required to save a mother's life. Concede this, and it's all over: judicial authority to reject a legislature's accommodation of conflicting values is no less substantive because its exercise is justified by "extreme" cases, or because it is invoked in the name of rationality. A judicial order that a mother's *life* is to be valued above that of a not-yet-

54. U.S. CONST. art. I, § 10, cl. 1.

55. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (invalidating the retroactive 1974 repeal of a 1962 bi-state agreement which had limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated Port Authority bonds).

56. 410 U.S. 13 (1973). I am not concerned here with evaluating the merits of the Court's holding. I have tried elsewhere to show that much can be said in its defense, although it is perhaps the most problematic decision of the modern Court. See L. TRIBE, *supra* note 17, at 929-34.

57. 410 U.S. 113, 171 (Rehnquist, J., dissenting).

viable fetus represents as much an imposition of a hierarchy of values upon the majority as does a judicial order that a mother's *liberty* is to be valued above that of a not-yet-viable fetus. In one case Justice Rehnquist deplored, and in the other he applauded, a court's override of the majority will. And why not? In accommodating the rights of women and fetuses, why should adjudication be deemed *less* appropriate than the counting of votes or the striking of political bargains? Neither the often impecunious women involved nor the fetuses whose survival is at stake, are likely to have much voice at the polls or at the bargaining table of politics.

The issues are ones of principle: When in our society is an entity entitled to be protected against a decision by another to terminate its life? When in our society should a person be protected against a decision by another which mandates a full-term pregnancy? These basic questions of principle are surely not amenable to resolution through pluralist politics. This becomes even clearer when one considers the criticism leveled at the Supreme Court by the most passionate right-to-life advocates. They cannot argue that the Court was without authority to resolve the abortion issue—that the issue should have been relegated to the political arena. For such an argument would mean compromising the rights of the unborn in ways which right-to-life advocates can hardly accept. Instead, the right-to-life advocates must embrace a solution like that adopted by the highest constitutional court of the Federal Republic of Germany, which held that the state has a constitutional duty to protect the unborn and, therefore, that the liberalized abortion laws of Germany were unconstitutional.⁵⁸ In any case, it is simply not persuasive to argue that fundamental issues of life and liberty should be resolved by political processes from which judicial articulations of basic rights and principles are excluded.

The institutional fallacy—supposing that if a court erred, then it follows that the court was in the wrong business—simply repeats the mistake of the other objections to judicial activism I have described above.⁵⁹ That mistake is to ask *whether* the courts should decide various substantive issues, when the appropriate question is *how* those issues ought to be resolved. The courts must stand ready to intervene when no other forum is available for the vindication of

58. 39 BVerfGE p. 1 (1975). See also 9 J.Mar.J. of Prac. & Proc. 605-84 (1976) (English translation of the German Court's decision, including the dissent).

59. See *Sherlock v. Stillwater Clinic*, ___ Minn. ___, 260 N.W.2d 169 (1977) (wherein a state court recognized a cause of action for wrongful birth). One may criticize the decision on its merits, as Justice Rehnquist has done (see Rehnquist, *supra* note 2, at 12), but would recognition of the cause of action by the Minnesota Legislature have been any sounder?

fundamental rights—this is the high mission of the American judiciary. To create courts for such an end, but then to close their doors in the service of the fallacies here analyzed, is to extend “a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper’s will.”⁶⁰

60. *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).