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The Practice of Dissent in the Supreme Court

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The United States Supreme Court's connection to the ideal of the rule of law is often taken to be the principal basis of the Court's political legitimacy.[1] In the Supreme Court's practices, however, the ideal of the rule of law and the Court's political legitimacy do not always coincide. This Note argues that the ideal of the rule of law and the Court's legitimacy part company with respect to the Court's practice of dissent. Specifically, this Note aims to demonstrate that the practice of dissent—the tradition of Justices publishing their differences with the judgment or the reasoning of their peers[2]—cannot be justified on the basis of an appeal to the ideal of the rule of law, but that other bases of the Court's political legitimacy provide a justification for this practice.

The Note thus has two aspirations. First, it seeks to provide a justification for the practice of dissent in the Supreme Court. Second, in pursuit of that

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1. *See, e.g.*, Earl M. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357, 402 (1982); *cf.* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORGANIZATION 81, 86 (1985) ("A consistent strain of our constitutional politics asserts that legitimacy flows from 'the rule of law.'").

The Supreme Court's own discussion of the relation between the Court's association with the ideal of the rule of law and the Court's legitimacy in the joint opinion in Planned Parenthood v. Casey, 505 U.S. 833, 864–69 (1992) (O'Connor, Kennedy, and Souter, JJ.), may also support this view of the Court's legitimacy. In *Casey*, the plurality opinion reasoned that overruling Roe v. Wade, 410 U.S. 113 (1973), would be inconsistent with the commitment to the rule of law and would threaten the Court's legitimacy. "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Casey*, 505 U.S. at 869. It is not entirely clear, however, whether this claimed convergence between the commitment to the rule of law and the Court's legitimacy results from the view that the Court's legitimacy principally is a product of its connection with the rule of law, *see id.* at 865–66, or the view that the Court's connection to the ideal of the rule of law is a necessary condition of the Court's legitimacy.

2. The practice of "dissent," as I use the term, includes concurring opinions that offer reasoning different from the reasoning of the Court's majority opinion. *See, e.g.*, CBS v. Democratic Nat'l Comm., 412 U.S. 94, 148 (1973) (Douglas, J., concurring). For a similar definition of dissenting opinions, see Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 33.

The practice of the highest judicial tribunal permitting the public statement of dissent from its members is far from universal. In many of the civil law countries of continental Europe, particularly those influenced by French judicial practice, courts almost always proceed without public dissent from their members. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 121–22 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1189 (1992); Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMP. L. 415, 422–29 (1959). For a discussion of the French practice, see JOHN P. DAWSON, THE ORACLES OF THE LAW 406 (1968). "It is improper, and a violation of the oath of judicial office, for a member of the court to disclose the votes or the divergent reasons of individual judges," Dawson writes. "All doubts, hesitations or preferences for alternative forms of statement disappear in the single voice with which the courts speak." *Id.*

justification, it strives to make a more general point about the relation between the rule of law and the Court's legitimacy. If the ideal of the rule of law cannot justify an element of the Court's practice that contributes to its legitimacy, then that legitimacy must be more than a product of the Court's connection to the rule of law. Part I attempts to show that the ideal of the rule of law cannot justify the practice of dissent. It examines two approaches to establishing a principled connection between the Supreme Court and the ideal of the rule of law, and argues that they both fail to account for the practice of dissent. Part II presents a justification for the practice of dissent through consideration of the constitutional commitment to the ideal of deliberative democracy. The basic argument is that the Supreme Court's legitimacy depends in part upon the Court reaching its judgments through a deliberative process,[3] just as Congress's legitimacy depends in part on its members enacting legislation through such a process. Given the secrecy of the Court during the formation of its judgments, the practice of dissent is necessary to manifest the deliberative character of the process through which the Court reaches its decisions.

In furnishing a justification for the practice of dissent, this Note has primarily conceptual concerns; it provides little discussion of the content of dissenting opinions or the reasons why a Justice might choose to dissent in a particular case.[4] Rather, the proposed justification of dissent provides a framework within which to assess these issues, and in so doing, begins the task of accommodating this enduring aspect of the Supreme Court's practice within constitutional theory.

I. THE RULE OF LAW AND THE PROBLEM OF DISSENT

One aim of constitutional theory is to establish a principled connection between the practices, opinions, and judgments of the Supreme Court, and the ideal of the rule of law. The extraordinary powers of the Court make this project both compelling and difficult. When the Court strikes down acts of legislatures, the Court threatens to advance not the rule of law, but rather that of the particular individuals on its bench. The Court's own shifts in opinion, particularly shifts that accompany changes in its membership, similarly threaten the Court's connection to the rule of law. For the Court to serve successfully

3. For the characterization of deliberative process, see *infra* text accompanying notes 80–93.

4. For discussion of these aspects of the practice of dissent in the Supreme Court, see generally ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT (1974) (commenting on dissenting opinions later adopted by Court majority); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429–31, 436–38 (1986) (discussing reasons to dissent and to repeat dissent); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227 (focusing on practice of repeated dissent); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (commenting on reasons to dissent and tone of dissents).

as the guardian of the rule of law, there must be a principled connection between it and this ideal.

The question of whether the ideal of the rule of law can provide a justification for the practice of dissent requires examining the Court's connection to this ideal. For dissent is an element of the Supreme Court's institutional practice, and as such, it cannot be justified independently from a conception of the Court's link to the rule of law. That is, any justification of dissent based on an appeal to the ideal of the rule of law would have to be part of a conception of the Court's association with that ideal.

In this part, I investigate two approaches to establishing a connection between the Court and the ideal of the rule of law, and argue that the practice of dissent challenges both of them. The first, which I call the *institutional approach*, emphasizes the ways in which the institutional voice of the Court discourages an appearance of conflict with the ideal of the rule of law. I take my depiction of this approach from the recent work of Paul Kahn.[5] The second, which I call the *interpretive approach*, constructs a conception of objectivity or determinacy in adjudication; the application of such a conception to the Court recommends its consistency with the rule of law.[6] For this approach, I examine the theory of judicial interpretation that Ronald Dworkin presents in *Law's Empire*.[7] These two approaches correspond to what I take to be two principal aspects of the ideal of the rule of law. The interpretive approach addresses the requirement of the rule of law that legal decisions stand in a certain sort of justificatory relation to legal principles that themselves have an established political pedigree. The institutional approach attends to the requirement that legal decisions not appear to be relative to the particular individuals who make them. The institutional and interpretive approaches thus emphasize different features of the Court's practice as well as these different aspects of the ideal of the rule of law.

Neither of these approaches can accommodate the practice of dissent. The institutional approach depends upon suppressing precisely that which dissent makes apparent: that behind the "opinion of the Court" is a majority of the Justices.[8] Within the terms of the institutional approach, dissent is something to be hidden, not justified. Dissent is also a problem for the interpretive approach. A dissenting Justice's articulation of an alternative legal regime

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5. *See* PAUL W. KAHN, Forthcoming Book on the Rule of Law (forthcoming 1996) (manuscript on file with Yale University Press) (especially Chapter Five, "The Rule of Law and the Suppression of the Subject").

6. The institutional and interpretive approaches ultimately cannot be kept apart because a complete theory of the Supreme Court's connection to the ideal of the rule of law would have to attend to the Court's interpretive task within the context of its institutional existence (and likewise understand its institutional life in relation to its interpretive task). But this ultimate overlap does not undermine the usefulness of holding them apart for the purpose of examining the relation between the practice of dissent and the Court's connection to the ideal of the rule of law.

7. RONALD DWORKIN, LAW'S EMPIRE (1986).

8. *See* KAHN, *supra* note 5, at V-6 to V-7.

challenges the association of the "opinion of the Court" with legal determinacy. Given that a justification of dissent based on an appeal to the rule of law would have to be part of a conception of the Court's association with the rule of law, the failure of institutional and interpretive approaches to account for the practice of dissent provides grounds for the conclusion that the rule of law cannot justify this practice.[9] That these approaches cannot accommodate dissent does not necessarily imply, however, that there is an incompatibility between the practice of dissent and the commitment of a legal system to the ideal of the rule of law. The argument (and the problem of dissent) is rather that the rule of law is inadequate to justify this practice.

A. *The Institutional Approach*

For an institutionalist, the connection between the Court and the rule of law depends centrally on the Court's public statements not appearing to be the statements of individual Justices. On this view, the project of linking the Court with the rule of law is the same as the project of distancing the voice of the Court from the voices of its individual members. This particular approach derives from a negative claim about the ideal of the rule of law: "[T]he rule of law *is not* the rule of men."[10]

The institutional approach to the Court would not be possible had Chief Justice Marshall not introduced the practice of announcing a single authoritative "opinion of the Court." For most of the Court's first decade, it followed the practice of the King's Bench: Each of the Justices delivered a separate opinion stating his own view of how the case should be decided.[11] Marshall abandoned the practice of delivering seriatim opinions in the first case decided after he became Chief Justice.[12] In that case, and in many that

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9. Of course, a complete theory of the Supreme Court's connection to the rule of law would have to attend to the Court's interpretive task within the context of its institutional existence. But the ultimate interconnections between the Court's institutional life and interpretive task do not undermine the usefulness of holding them apart for the heuristic purpose of examining the relation between the practice of dissent and the Court's connection to the ideal of the rule of law.

10. *Id.* at V-6; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("[O]urs is a government of laws, not of men . . . ."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

11. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192–93 (1959); *see, e.g.*, Georgia v. Brailsfors, 2 U.S. (2 Dall.) 402 (1792). For a historical account of the contribution of law reporters of the Supreme Court to the institutional transformation of the Court under Chief Justice Marshall, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985). For a concise account of law reporting in the United States in the first few decades after independence, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571–84 (1993).

12. ZoBell, *supra* note 11, at 193. The case was Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 25 (1801). For a historical account of the delivery of individual and collective opinions in the early Supreme Court, see also Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2070–82 (1995).

followed, instead of the opinions of the five Justices then on the bench,[13] a single opinion was announced, with the heading: "MARSHALL, Ch. J. delivered the opinion of the court."[14] Marshall's introduction of the "opinion of the Court" gave the Court an institutional voice, a voice over and above that of its individual members.[15]

For the institutional approach, it is critical that the position of the Justice who delivers the "opinion of the Court" differs from that of a Justice who speaks or writes on his or her own behalf. On this view, the Justice who delivers the opinion of the Court takes the role of reporter; he or she functions as a message carrier, or at most a reconstructive voice for the decision and reasoning of the institution. The opinion, as Paul Kahn suggests, does not announce the authorship of a particular Justice but "[i]nstead . . . locates its origin and authority wholly in the institution."[16] So while an author has a privileged perspective on the meaning of his or her own work, the Justice who delivers the opinion of the Court has no special interpretive position in relationship to its meaning. The opinion is the opinion of the Supreme Court of the United States, not that of an isolated Justice; once it is announced, each Justice has as good a claim on its meaning as the Justice who delivered it.[17]

Viewed in this way, the introduction of the "opinion of the Court" creates a division between the individual members of the Court and the Court as a corporate body. This division furnishes an institutional connection between the Court and the rule of law. For once the "opinion of the Court" is disconnected from the individual Justices comprising the Court's membership, it follows from the institutionalist's own terms that the Court represents the rule of law. After all, what matters to the institutionalist view is that the rule of law *is not* the rule of men. The separation between the individual Justices and the "opinion of the Court" thus can associate the Court and the rule of law. As

13. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 2 (7th ed. 1993).

14. *Talbot*, 5 U.S. at 25. Similar language had been used in a few brief memoranda before Marshall became Chief Justice. ZoBell, *supra* note 11, at 193 n.41.

15. At the time, this new institutional appearance of the Court raised suspicions. For instance, Thomas Jefferson bitterly attacked the use of the opinion of the Court and its originator. In an often-quoted letter, Jefferson wrote: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning." Letter from Thomas Jefferson to Thomas Richie (Dec. 25, 1820), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 1816–1826, at 169, 171 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1899).

16. KAHN, *supra* note 5, at V-8.

17. *See id.* at V-12 to V-13. The Court occasionally acknowledges the author of the Court's opinion as if that Justice did have a special claim on its meaning. For instance, in Hudgens v. NLRB, 424 U.S. 507 (1976), Justice Stewart, for the Court, wrote: "There were three dissenting opinions in the *Logan Valley* case, one of them by the author of the Court's opinion in *Marsh*, Mr. Justice Black." *Id.* at 516 (citing Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), and Marsh v. Alabama, 326 U.S. 501 (1946)). Since *Logan Valley* had relied upon a reading of *Marsh*, Stewart pointed to Justice Black as a dissenter in *Logan Valley* to reinforce the Court's decision in *Hudgens* to overrule *Logan Valley*. Mentioning Justice Black's dissent with respect to the Court's subsequent reading of *Marsh* was only relevant if Justice Black, as author of the opinion, had a special claim upon its meaning and scope.

Kahn puts it, "Since the opinion is not a possession of the individual judge, it can appear to be the possession of all."[18]

The practice of dissent thwarts this approach to the Court's predicament by challenging the separation of the Court as an institution, with its own voice and authority, from the individual Justices who populate the bench. The practice of dissent draws attention to the fact that the "opinion of the Court" involves an abstraction. The presence of a dissenting Justice demonstrates that behind the word "Court" in the "opinion of the Court" sit individual Justices, with only the fact that they constitute a majority of the Court's membership separating them from their predecessors who filed seriatim opinions. Dissent exposes the individuality that the institutional approach depends upon suppressing. A dissent is an authored text, and if "[t]here is no formal place under the rule of law for giving simultaneous recognition to authority and authorship,"[19] dissent is a threat, something to be hidden, not a subject of justification. Thus, if the ideal of the rule of law is to furnish a justification for the practice of dissent, it will not derive from the institutional approach.

B. *The Interpretive Approach*

Contemporary legal scholars have devoted considerable energy to the idea that adjudication is a process of interpretation in which there are determinate or objective legal outcomes.[20] An account of the Supreme Court's own adjudication that explained how its outcomes were legally determinate or objective would establish a stable connection between the Court and the ideal of the rule of law.[21]

But for a theory of objective or determinate interpretation to establish a principled link between the Court and the rule of law, the theory must be something other than the formalist idea that law consists in a complete set of self-applying rules. Under the formalist view of law, as Margaret Radin comments, "a unique answer in a particular case can be 'deduced' from a rule,

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18. KAHN, *supra* note 5, at V-31. In Kahn's own view, the separation of the opinion of the Court from the authorship of individual Justices is a necessary but not a sufficient condition for the Court's connection with the rule of law. *See id.* at VIII-28.

19. *Id.* at V-12.

20. *See, e.g.*, DWORKIN, *supra* note 7, at 266; Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

21. Some writers would object to invoking a theory of determinacy in legal interpretation, such as Dworkin's, to construct a connection between the Court and the rule of law. For instance, Christopher Kutz argues that the kind of rational justification required by the rule of law does not require determinacy, and so judicial disagreement is compatible with the rule of law. *See* Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 999–1020 (1994). I do not dispute Kutz's argument that rational justification is compatible with indeterminacy. My difference with Kutz concerns whether such a conception of rational justification is better accommodated within the ideal of the rule of law or the political commitment to deliberation discussed in Part II.

or [the] application of a rule to a particular is 'analytical.'"[22] On such a view, the role of the judge is simply "to juxtapose the rule and the particular so the formal connection [between them] can be declared."[23] This view of the law has few contemporary proponents.[24] Scholars as well as judges recognize that objectivity or determinacy in all cases, and clearly with regard to the sweeping clauses of the Constitution, cannot be obtained merely from the formal application of legal rules.

In *Law's Empire*, Ronald Dworkin provides a more sophisticated theory of judicial interpretation that defends the idea that there are uniquely right answers in legal disputes, even in hard cases.[25] Dworkin's interpretive theory provides a basis to establish a principled connection between the Supreme Court and the ideal of the rule of law.[26] Dworkin challenges the conception of adjudication that he calls *conventionalism*, in which judges must exercise a strong form of discretion to decide hard cases.[27] On this view, to reach decisions in hard cases, judges have to appeal to sources that the conventionalist may consider extralegal,[28] such as a conception of justice or the general welfare.[29] This necessity of appealing to sources beyond the law, beyond "consistency with decisions made in the past,"[30] implies that judges have "legislative responsibilities" that they should candidly admit.[31] The application of this view of adjudication to the Supreme Court poses precisely the problem this part has taken as the problem of the rule of law: How can judges, in particular the members of the Supreme Court, give law ultimate authority if they have final and discretionary say over what the law is?

Dworkin's objections to the conventionalist conception of adjudication as a description and justification of our legal practice are part of what motivate him to offer an alternative account of adjudication, which he calls *law as integrity*. Dworkin commends the idea that adjudication as well as legislation should be governed by a political principle he calls "integrity." The principle of integrity "requires government to speak with one voice, to act in a

22. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 793 (1989).

23. *Id.* (footnote omitted).

24. *See* Kutz, *supra* note 21, at 1017.

25. *See* DWORKIN, *supra* note 7, at 266.

26. Dworkin uses the phrase "the rule of law" to refer to what he takes to be the basic concept of a legal system about which different conceptions can be offered. *See id.* at 93–94. For Dworkin, the concept of law, or the "rule" of law, "insists that force not be used or withheld . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified." *Id.* at 93. This definition closely parallels the justificatory aspect of the ideal of the rule of law identified above. *See supra* text accompanying notes 7–8.

27. *See id.* at 115.

28. As Dworkin acknowledges, for some versions of conventionalism, principles of morality are not necessarily extralegal sources. *See id.* at 125, 431 n.4. For explication of such a view, see Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982), *reprinted in* JULES L. COLEMAN, MARKETS, MORALS & THE LAW 3 (1988).

29. DWORKIN, *supra* note 7, at 117, 128–29.

30. *Id.* at 115.

31. *Id.* at 129.

principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some."[32] The central demand of integrity, whether in legislation or in adjudication, is that state actors create and interpret law to render it consistent and coherent in principle.[33] For legislators, integrity insists that they resist the political convenience of adopting laws that must be justified by principles that themselves must be rejected to justify other laws—what Dworkin calls "checkerboard" laws.[34] In the legislature, if there must be a compromise, "then the compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than adopting a compromised scheme of justice."[35] For example, the legislature would lack integrity if "it were redistributive one week, but libertarian the next."[36]

Integrity similarly constrains and guides judicial interpretation. Integrity instructs judges to see the law as if it were "created by a single author—the community personified—expressing a coherent conception of justice and fairness."[37] It insists that law "contains not only the narrow explicit content of these [past] decisions but also, more broadly, the scheme of principles necessary to justify them."[38] The task of the judge is to decide cases on the basis of a constructive interpretation of the community's past decisions that renders the principles those cases invoke most consistent and coherent.[39] Dworkin describes these interpretive commitments of law as integrity in terms of two interconnected dimensions of interpretation that the judge must satisfy: fit and justification.[40] Along the dimension of fit, the judge must ask whether his or her interpretation follows from past decisions on the questions presented, and whether it is compatible with "the bulk of legal practice more generally."[41] With respect to the community's legal practice, fit is a matter of the interpretation's respecting "the brute facts of legal history."[42]

When a community's past decisions on a question are divergent, and so two or more interpretations have an equal claim to offering the best account of the principles invoked in those decisions—that is, in hard cases—law as integrity does not simply offer a judge discretion to appeal to extralegal resources. Rather, the dimension of justification in law as integrity requires that "[the judge] must choose between eligible interpretations by asking which

32. *Id.* at 165.
33. *Id.* at 167.
34. *See id.* at 179–84.
35. *Id.* at 179.
36. Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 70 (1989) (interpreting Dworkin).
37. DWORKIN, *supra* note 7, at 225.
38. *Id.* at 227.
39. *Id.* at 223–28.
40. *Id.* at 239.
41. *Id.* at 245.
42. *Id.* at 255.

shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality."[43] On this view of law, the community's principles of political morality are taken to be legitimate legal sources, not extralegal sources as they are for conventionalism.[44] The determination of which interpretations are best from the standpoint of political morality principally involves assessment of what Dworkin takes to be "the two constituent virtues of political morality . . . : justice and fairness."[45] But even at this level of justification, interpretation is not free from the demands of fit; any remaining "infelicities of fit" will continue to count against an interpretation.[46] In the reflective interaction between the dimensions of fit and justification, law as integrity does not abandon judges to the discretion to appeal beyond the law, but forces them to carry their interpretive judgments to higher and higher levels. For law as integrity, judges have no choices unconstrained by the requirements of interpretation.

This conception of adjudication has the resources necessary to establish a connection between the Supreme Court and the ideal of the rule of law. If the interpretive theory of law as integrity could be applied to the Supreme Court, the Court's adjudication would have a stable association with the political community's past decisions and their justifying principles. For, employing Dworkin's view of adjudication, the Justices would not decide hard cases by making their own discretionary judgments, but rather through a process of interpretation in which they construct a consistent and coherent account of the principles that underlie the community's past decisions and political morality. The basic idea is that, through the process of judicial interpretation, with Justices never free from the interpretive requirements of justification and fit, the Justices' judgments could be legally determinate. The Court would be connected to the rule of law through the Justices individually engaging in the practice of interpretation endorsed by law as integrity. Thus the account of the relation between the Supreme Court and the ideal of the rule of law drawn from Dworkin's conception of adjudication does not depend, in the same way that the institutional approach does, upon suppressing the appearance of the individual Justices. Instead, it relies upon a characterization of the individual Justices as operating within the interpretive constraints of law as integrity. For this interpretive approach, it is the interpretive relation between the individual Justice and sources of law that would establish the Court's connection to the rule of law.

The practice of dissent, however, is a problem for the use of law as integrity to connect the Supreme Court and the ideal of the rule of law. If that

43. *Id.* at 256.
44. *See supra* note 28.
45. DWORKIN, *supra* note 7, at 249.
46. *Id.* at 256.

connection depends upon explaining how the Court's decisions are legally determinate, then the fact that Justices regularly express their legal disagreements with one another brings into doubt the idea that the Court's decisions are uniquely right. Dworkin, however, clearly does not think that disagreement among judges, what he calls "the fact of controversiality,"[47] poses an objection to law as integrity. To begin with, Dworkin's theory offers an account of theoretical disagreement in law from a judge's perspective;[48] one hardly could give an account of the nature of judicial disagreement and neglect the practice of dissent, which plays such an important role in bringing that disagreement to light. More importantly, as Dworkin explicates his account of law as integrity, he is unconcerned by the prospect of judges arriving at different interpretations of the law. Dworkin writes that the fact that the decision of a bare majority of judges on a panel will be accepted as final over the disagreement of the minority of judges does not count as an objection to law as integrity.[49] For, Dworkin responds in an important passage, even

> when judges disagree, at least in detail, about the best interpretation of the community's political order . . . each judge still confirms and reinforces the principled character of our association by striving, in spite of the disagreement, to reach his own opinion instead of turning to the usually simpler task of fresh legislation.[50]

As Dworkin sees it, if dissent were to take the form of principled disagreement about the community's basic principles, that disagreement would support his idea that adjudication is a matter of constructing the best interpretation, in terms of both fit and justification, of the principles invoked in past political decisions.

For a theoretical conception of judicial interpretation, this response adequately accounts for the public statement of dissent among judges. The fact that judges disagree about matters of interpretation, and often publicly express that disagreement, does not pose an objection to the claim that, in principle, judicial interpretation can be determinate. Dworkin's response, however, does not adequately address the particular application of law as integrity at issue here, namely, the usefulness of law as integrity in tracing a connection between the Supreme Court and the ideal of the rule of law. If law as integrity is to provide the grounds to bind the Court and the ideal of the rule of law, it must have something more to say in the face of interpretive disagreement among judges than that those disagreements confirm the principled character of the community.[51] If dissenting opinions are principled and interpretive, then they

47. *Id.* at 264.
48. *See id.* at 11–15.
49. *Id.* at 264.
50. *Id.*
51. *Id.*

may help to confirm law as integrity as a description of the way in which judges understand their interpretive tasks. But dissent shows that the Court's judgments are judicially (and interpretively) controversial, and for an interpretive approach to the Supreme Court's relation to the rule of law, that controversiality matters. As the bearers of judicial disagreement, dissents cast doubt on the determinacy of the Court's judgments, and thus on the use of law as integrity to provide a principled connection between the Court and the rule of law. Hence, if the rule of law is to provide a justification for the practice of dissent, it is not forthcoming from the interpretive approach drawn from Dworkin's theory of law as integrity.

Indeed, even when law as integrity is examined on its own terms, the theory is inadequate to provide a justification for the practice of dissent. The inability of law as integrity to justify this institutional practice results from Dworkin's use of an imaginary superhuman judge, Hercules, to explicate the kind of legal interpretation that law as integrity involves. Dworkin indicates that the interpretive demands of law as integrity bind judges individually,[52] rather than binding an entire multimember court, but he develops his theory through Hercules in order to abstract away from the practical demands on actual judges, such as "the press of time and docket," as well as incentives to compromise their positions in order to gain the votes of other judges.[53] Distance from those practical issues may be necessary to articulate an account of judicial interpretation with the richness that Dworkin provides. But the failure to return from that abstraction has crucial consequences for consideration of the institutional elements of our legal practice. With Hercules neither an actual judge nor the embodiment of an entire court, law as integrity operates outside the institutions of legal practice; it fails to attend, as Frank Michelman points out, "to what seems the most universal and striking institutional characteristic of the appellate bench, its plurality,"[54] and, accordingly, to the institutional practice of dissent. Dworkin's theory fails as an interpretation of legal practice insofar as it disregards the enduring institutional elements of our legal system. The lesson here is that a theory of interpretation capable of incorporation into a constitutional theory must not neglect, as Dworkin's theory does, the institutional life of the Supreme Court.

Given that a justification of the practice of dissent based on the ideal of the rule of law must be part of a conception of the Court's connection to this

52. "Law as integrity," Dworkin writes, "requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community." *Id.* at 245.

53. *Id.* at 380–81.

54. Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76 (1986) [hereinafter Michelman, *Traces*]; *see also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1625 (1986) ("The rules and principles that locate authoritative voices for the purposes of action point to the defect in a model of judicial interpretation that centers around a single coherent and consistent mind at work. . . . [W]henever any judge sits on the court of last resort on a significant legal issue, that judge does not sit alone.").

ideal, the failure of both the institutional and interpretive approaches to accommodate the practice of dissent suggests that the ideal of the rule of law is not adequate to justify this element of the Supreme Court's practice. From the perspective of the rule of law, the practice of dissent is a problem.

II. POLITICAL LEGITIMACY AND THE JUSTIFICATION OF DISSENT

The inadequacy of ideal of the rule of law to justify dissent is not sufficient grounds upon which to condemn the practice.[55] We cannot reach that conclusion unless (or until) we have exhausted the possibilities for justifying this enduring aspect of the Supreme Court's institutional life. This part offers a justification for the practice of dissent. My claim is that the political legitimacy of the Supreme Court depends in part on the practice of dissent for reasons other than the fact that dissent is an established part of the Court's practice.[56] To provide this justification, I take as a working assumption that the political legitimacy of the Court depends upon its consistency with democratic rule. With this broadly accepted starting point, the familiar question of constitutional theory is, then, how to establish a connection between the Court and a conception of democracy. Building upon a suggestion of Frank Michelman, I argue that the consistency of the Court with our democratic commitments, and accordingly its political legitimacy, depends in part on the Court reaching its judgments through a deliberative process. That dependence, combined with the fact that the Court reaches its decisions in secrecy, grounds the justification for dissent. Simply put, given the secrecy of the process through which the Court forms its judgments, dissent is necessary to expose the deliberative character of the Court's decisionmaking.

The aim of this justification requires immediate clarification. This defense of dissent is not the idea that a dissenting opinion, in any given case, commends the opinion of the majority. It would be strange indeed if, in any given case, the argument of a Justice who disagreed with the reasoning of the

55. For criticism of the practice of dissent, see, e.g., LEARNED HAND, THE BILL OF RIGHTS 72 (1958) ("[The lack of unanimity] cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."); Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255, 258–60 (1991) (arguing that current levels of use of dissent drain dissent of force and neglect rule-of-law virtues); R. Dean Moorhead, *Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 821 (1952) (noting that dissenting opinions are criticized as undermining "public confidence in the certainty of the law"). For discussion of such criticism, see Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643, 649–52 (1992). For two defenses (from very different perspectives) of the practice of dissent in the face of the uncertainty it generates, see Lawrence Douglas, *Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review*, *in* THE RHETORIC OF LAW 225, 257–60 (Austin Sarat & Thomas R. Kearns eds., 1994); William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 104–07 (1948).

56. The Court's legitimacy undoubtedly depends in part on the practice of dissent by virtue of the fact that dissent is an established element of the Court's institutional life; as such, eliminating dissent would undermine the Court's legitimacy. My argument is that the Court's legitimacy depends in part on the practice of dissent for other reasons.

majority would actually enhance the legitimacy of the majority's result. Published disagreement in any particular case normally detracts from the force of the judgment, and unanimity (or even near unanimity) does just the opposite.[57] My claim is not, however, about the influence of dissenting opinions viewed individually. Rather, I argue that the Court's political legitimacy depends on *the practice* of dissent—the enduring tradition of Justices publishing their differences with the judgment or reasoning of their peers.

So even if the argument is successful, it will not necessarily yield much insight into the question of whether, given the established practice of dissent, a Justice should file his own dissent in a particular case. The second-order reasons that justify the practice as a whole are not necessarily the same reasons that would motivate a Justice to file a dissenting opinion in a particular case. But the possible divergence between the reasons a Justice chooses to dissent—which presumably have to do with the merits of the instant case and the reasoning of the other Justices, among other considerations—and the reasons that justify the practice as a whole should not trouble us. For the critical stance from which we attempt to make sense of the Court need not be the same as the perspective of the Justice.

A. *Deliberative Democracy and the Court*

The idea that the political legitimacy of the Supreme Court depends in part on its consistency with democratic rule is a core assumption—perhaps *the* fundamental assumption—of dominant contemporary constitutional theories. More than a generation of constitutional scholars, from Alexander M. Bickel to John Hart Ely and Bruce Ackerman, have accepted a version of this view.[58]

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57. "There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgment," Charles Evans Hughes writes. "Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence." CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS 67 (1928). To choose a well-worn example, the unanimity of the decision in Brown v. Board of Education, 347 U.S. 483 (1954), is generally viewed as important to the force of the judgment. *See, e.g.*, Brennan, *supra* note 4, at 432; Scalia, *supra* note 2, at 35.

58. That Bickel, Ely, and Ackerman all take the political legitimacy of the Court to depend on its consistency with democracy is apparent from their theories of judicial review. Each of these scholars views the problem of justifying the legitimate exercise of judicial review as the problem of rendering it consistent with a conception of democracy. With the idea "that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy," Bickel writes, "judicial review must achieve some measure of consonance." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 27 (1962). Following Bickel, Ely charges that "the central function . . . is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like." JOHN HART ELY, DEMOCRACY AND DISTRUST 4–5 (1980). And Ackerman too, while denying the conception of American democratic principles that Bickel and Ely share, still strives to link the Court with democracy. With the legitimate exercise of judicial review, Ackerman writes, "[r]ather than threatening democracy by frustrating the statutory demands of the political elite in Washington, the courts serve democracy by protecting the hard-won principles of

These and other scholars differ, however, about what consistency with democracy requires. One approach, which takes different forms in Bickel's and Ackerman's writings, insists that the Court's consistency with democracy depends on the connection between the content of its decisions and the will of a majority of citizens.[59] An alternative approach, developed in Ely's theory of judicial review, emphasizes that the Court should defend those principles that protect the democratic political process.[60] These approaches do not, however, exhaust the ways in which the Supreme Court's practice might be consistent with democracy. In particular, they never reach the question of the character of the Court's own collective decisionmaking process. They fail to address "the commitment of judges to the process of their own self-government,"[61] a commitment Michelman urges us to consider,[62] in evaluating the Court's consistency with democratic rule.

Michelman's own turn to the character of the Court's decisionmaking process is shaped by two related points of skepticism. First, Michelman is not optimistic about the Court's possible connection to the will of the popular majority. For Michelman, "however Bickel's [countermajoritarian] difficulty may or may not be resolved, the Court is, vis-a-vis the people, irredeemably

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a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations." 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10 (1991).

59. Bickel and Ackerman have different views about what is the relevant majority. For Bickel, the Court should vindicate those principles that will gain acceptance by the present majority. This position is apparent from Bickel's comments on the legitimacy of government. Bickel writes:

> Legitimacy, being the stability of a good government over time, is the fruit of consent to specific actions or to the authority to act; the consent to the exercise of authority, whether or not approved in each instance, of as unified a population as possible, but most importantly, of a present majority.

BICKEL, *supra* note 58, at 30. If judicial review, and thus the Court, are to be legitimate, the Court must defend principles that the present majority will accept. Simply put, "the Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent." *Id.* at 239.

While Ackerman shares the idea that the legitimacy of the Court, and its exercise of judicial review, depend on its connection to the will of a majority, he believes that the relevant majority is the majority that prevails during periods of successful constitutional transformation. *See* 1 ACKERMAN, *supra* note 58, at 6–19. For Ackerman, the crucial question for the exercise of judicial review is whether it *preserves* those constitutional principles that the mobilized citizens succeeded in making into higher law. *See id.* at 9–10. Specifically, according to Ackerman, insofar as the Court preserves the principles adopted by those past majorities—namely, the people during the Founding, Reconstruction, and the New Deal—it acts consistently with American democratic principles. *See id.* at 58–80.

60. Ely urges the Court to defend, among other things, conditions of the democratic process, such as freedom of expression, freedom of association, voting rights, and a revived nondelegation doctrine, which would prohibit legislators from abdicating important policy questions to unelected administrators. *See* ELY, *supra* note 58, at 105, 117, 131–33. These rights and processes must be protected, Ely argues, because "they are critical to the functioning of an open and an effective democratic process." *Id.* at 105. In particular, without strong protections of freedom of speech and freedom of association, without universal suffrage and equal weight of votes, and without legislative accountability for policy, representative democracy falters. Ely aims to establish a connection between the Court and democracy, then, by identifying a class of principles that the Court can vindicate while remaining consistent with the basic principles of democracy.

61. Michelman, *Traces*, *supra* note 54, at 75.

62. *See id.* at 76–77.

an undemocratic institution."[63] In this sense, Michelman departs from both Bickel and Ackerman. Second, Michelman argues that there are few practical possibilities for citizens to exercise self-government in our constitutional system. "[T]he question of where to find self-government under 'this Constitution,'" Michelman writes, "is undeniably baffling (not to say wistful), because the document so obviously charters not a participatory democracy but a sovereign authority of governors—representatives—distinct from the governed."[64] This position sets Michelman's approach apart from Ely's and Ackerman's: It only makes sense to focus on the Court's role in clearing the paths of democratic politics, as Ely recommends, or to emphasize the Court's role in preserving principles enacted by the mobilized citizenry, as Ackerman suggests, if one holds a positive view of the practical possibilities of self-government that those politics can involve. Having set aside an appeal to the citizenry as a viable source of the Court's connection to democracy, Michelman turns to the Court's own process of self-government: "[I]f the Justices have any way to further the cause of our self-government," Michelman claims, "it lies through the exercise of their own."[65] Michelman's provocative turn to the Court's process of judgment can be followed without embracing the position that the Court's decisionmaking process is the only source of its connection to democratic rule. All that the justification of dissent requires is that the Court's consistency with democracy depends in part on the character of the Justices' decisionmaking process.

The argument that I pursue for the relevance of the Court's own decisionmaking process to its consistency with democracy (in a sense that contributes to its legitimacy) derives from the particular American commitment to a deliberative conception of democracy, that is, to a *deliberative democracy*.[66] The ideal of deliberative democracy has a well-established pedigree in American constitutionalism.[67] It has proved particularly helpful in explicating the character of the constitutional prescription of rule through representatives, such as the members of the two Houses of Congress, and

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63. *Id.* at 16.

64. *Id.* at 57 (citation omitted); *see also id.* at 75.

65. *Id.* at 17.

66. For an early use of the term "deliberative democracy" in the contemporary discussion, see Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980) [hereinafter Bessette, *Deliberative Democracy*].

67. *See* 1 ACKERMAN, *supra* note 58, at 197–98; JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994) [hereinafter BESSETTE, MILD VOICE]; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) [hereinafter SUNSTEIN, PARTIAL CONSTITUTION]; Bessette, *Deliberative Democracy*, *supra* note 66; Michelman, *Traces*, *supra* note 54, at 17–55; Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Republican Revival*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*].

furnishing a conception of democracy that is consistent with that prescription.[68] The basic idea is that the architects of the Constitution chartered government through representatives, and critically through an assembly of representatives, so that the representatives would deliberate together toward a determination of the common good.[69] On this view, as Cass Sunstein writes, "[t]he role of representatives is to deliberate rather than to respond mechanically to constituent pressures."[70] Representatives are not merely a logistical necessity, allowing one government to span a vast territory and population; nor are representatives mere vehicles for the current preferences and views of the majority of citizens. Rather, representatives are to shape and guide popular preferences and views through their own process of collective reasoning and argument. "In the particular type of deliberative democracy fashioned by the American framers," Joseph Bessette comments, "the citizenry would reason, or deliberate, *through* their representatives; on most issues the deliberative sense of the community would emerge not so much through debate and persuasion among the citizens themselves as through the functioning of their governing institutions."[71] The collective reasoning of representatives thus promotes the rule of reflective and informed views of the citizen majority, not the rule of uninformed and spontaneous popular sentiment.[72] The electoral dependence of the representatives ultimately ensures that they identify the considered views of the citizen majority.[73]

Scholars of the deliberative view of American democracy generally garner support for this conception, and its constitutional status, from the writings of the Federalists, particularly *The Federalist Papers*. They point, for instance, to James Madison's declaration in *The Federalist* No. 10 that the effect of chartering a government through representatives is "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[74] Thus the "chosen body of citizens" is not merely to implement the passions and views of the citizenry, but rather "to

68. *See, e.g.*, BESSETTE, MILD VOICE, *supra* note 67, at 1–2, 41–46; Bessette, *Deliberative Democracy*, *supra* note 66, at 104–06; Sunstein, *Interest Groups*, *supra* note 67, at 40–43; *see also* 1 ACKERMAN, *supra* note 58, at 181–88.

69. *See* Sunstein, *Interest Groups*, *supra* note 67, at 41.

70. Sunstein, *Naked Preferences*, *supra* note 67, at 1694.

71. BESSETTE, MILD VOICE, *supra* note 67, at 1–2.

72. *See id.* at 35.

73. *See id.*; THE FEDERALIST No. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) ("As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the . . . [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people."); THE FEDERALIST No. 63, at 383–84 (James Madison) (Clinton Rossiter ed., 1961) (discussing connection between six-year election terms of Senators and rule of "the cool and deliberate sense of the community").

74. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961); *see* BESSETTE, MILD VOICE, *supra* note 67, at 3, 36 (citing Madison); Sunstein, *Interest Groups*, *supra* note 67, at 41 (same).

refine and enlarge" them. With the rule of representatives, as Madison continues, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."[75] For representatives "to refine and enlarge public views," the proponents of this view rightly point out, the representatives must be open to "the mild voice of reason, pleading the cause of an enlarged and permanent interest,"[76] even when that means resisting the current preferences of citizens. "When occasions present themselves in which the interest of people are at variance with their inclinations," Hamilton writes, "it is the duty of persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection."[77] In this view of democracy, deliberation should check untoward popular sentiments. Still, when deliberation resists the people's momentary desires, that resistance should serve the rule of "the deliberate sense of the community."[78]

In the contemporary elaboration of this deliberative theory of democracy, particular attention has been paid to the conception of interaction among representatives upon which the theory relies. This conception is often explained in terms of a distinction between deliberative politics and strategic (or bargaining) politics.[79] "*Deliberative* politics," Michelman writes, "connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect, jointly directed by them towards arriving at a reasonable answer to some question of public ordering . . . ."[80] Deliberation in this context "refers to a certain *attitude* toward social

75. THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

76. THE FEDERALIST No. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961); *see* BESSETTE, MILD VOICE, *supra* note 67, at 3 (citing Madison).

77. THE FEDERALIST No. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see* BESSETTE, MILD VOICE, *supra* note 67, at 3, 34 (citing Hamilton); Sunstein, *Interest Groups*, *supra* note 67, at 46 (same); *see also* THE FEDERALIST No. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse . . . .").

78. THE FEDERALIST No. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see* BESSETTE, MILD VOICE, *supra* note 67, at 3.

79. *See, e.g.*, David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/ Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993); David Gauthier, *Constituting Democracy*, *in* THE IDEA OF DEMOCRACY 314 (David Copp et al. eds., 1993); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 293 (1989) [hereinafter Michelman, *Conceptions*]; Sunstein, *Interest Groups*, *supra* note 67, at 31–35; Sunstein, *Naked Preferences*, *supra* note 67, at 1690–95. For a more theoretical discussion of this distinction, see Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* FOUNDATIONS OF SOCIAL CHOICE THEORY 103 (Jon Elster & Aanund Hylland eds., 1986); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (1987). For criticism of the turn in contemporary constitutional theory to the idea of discursive community, see PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 171–223 (1992) [hereinafter KAHN, LEGITIMACY AND HISTORY].

80. Michelman, *Conceptions*, *supra* note 79, at 293.

cooperation, namely, that of openness to persuasion by reasons referring to the claims of others as well as one's own."[81] In this mode of politics, "a vote, if any vote is taken, represents a pooling of judgments."[82] In contrast, in *strategic* interaction, individuals ultimately consider "no one's interest but their own. Its medium is bargain, not argument."[83] A vote in this mode of political interaction "represents not a collective judgment of reason but a vector sum in a field of forces."[84] Since both strategic and deliberative politics treat participants as equals, the willingness of participants in deliberative politics to modify their antecedent preferences and views through reasoned exchange concerning the merits of an issue is central to the distinction between deliberative and strategic politics. In strategic politics, the process of collective decisionmaking does not itself alter individuals' antecedent preferences and views; the outcome of strategic politics is some aggregation of these exogenous inputs, not a collective decision achieved through argument and persuasion.[85]

These understandings of political interaction thus value the process of political choice in a very different way. For strategic politics, beyond treating people as equals, the process through which a collective choice is reached is only significant insofar as it relates to the outcome. In contrast, an element of deliberative politics is its commitment to resolving questions of collective choice through a particular kind of process, namely, an argumentative

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* While a strategic mode of politics is clearly consistent with either a simple majority or a unanimity voting rule, *see* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 96 (1962), there is some disagreement about whether the deliberative view requires unanimity. Joshua Cohen, Jon Elster, and David Gauthier all make consensus a condition for deliberative democratic process. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 23 (Alan Hamlin & Philip Pettit eds., 1989); Elster, *supra* note 79, at 103, 112 (interpreting Habermas); Gauthier, *supra* note 79, at 320. In contrast, Manin argues that unanimity is not a condition for deliberation, *see* Manin, *supra* note 79, at 359, and Sunstein assumes that majority rule is consistent with deliberative democracy. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 67, at 134–35. To be sure, a requirement of unanimity would help to encourage the participants in the decisionmaking process to convince one another through the exchange of reasons. But the fact that the conclusion of a process of political choice will be a vote in which the majority prevails does not eliminate the possibility of persuasion through the exchange of reasons, as opposed to bargaining, preceding the vote. *See* Cohen, *supra*, at 23. As long as an exchange of reasons and argument takes place in advance of the vote, so that the vote represents, in Michelman's phrase, a "pooling of judgments," Michelman, *Conceptions*, *supra* note 79, at 293, deliberative democracy is consistent with a majority voting rule.

85. *See* Sunstein, *Interest Groups*, *supra* note 67, at 32. The strategic and deliberative views of politics rely on different conceptions of rationality. The strategic view relies on an instrumental conception of rationality, in which reasoning is concerned with the means to fixed ends, whereas the deliberative view relies on a conception of rationality in which ends are also taken to be objects of rational consideration. For discussion of the distinction between these two conceptions of rationality, see MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS 102, 296–97 (1986); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE 60–66 (1990); *see also* DAVID WIGGINS, *Deliberation and Practical Reason*, *in* ESSAYS ON ARISTOTLE'S ETHICS 221 (Amélie Oksenberg Rorty ed., 1980).

interchange among individuals of equal decisionmaking authority.[86] As Sunstein comments, "One of the distinctive features of this approach is that the outcome of the legislative process becomes secondary. What is important is whether it is deliberation—undistorted by private power—that gave rise to that outcome."[87] Indeed, this commitment to representatives' reaching decisions through a deliberative process, not a bargaining one, as Sunstein argues, may help to explain why "[t]he core demand of the equal protection and due process clauses . . . is that measures taken by legislatures or administrators must be 'rational.'"[88] To be sure, the commitment to deliberative process is not the whole of the ideal of deliberative democracy,[89] for it is critical to this ideal that representatives' collective reasoning lead them to enact statutes that actually reflect the considered views of the majority of citizens. Rather, the idea here is that making collective choices through a deliberative process is a necessary commitment of deliberative democracy. It is this commitment to a deliberative process of governance that grounds the idea that the Court's own consistency with our conception of democratic rule depends in part on the process of the Court's own decisionmaking.

If the American commitment to democracy were only a commitment to strategic democracy, with politics as a means "to aggregate private preferences, or to achieve an equilibrium among contending forces,"[90] it would make little sense to suggest that the process by which the Supreme Court reaches its judgments is relevant to the Court's consistency with our democratic commitments. Under this view, beyond the requirement of equality in voting, the Court's consistency with democratic rule would not depend upon the process of its decisionmaking. Moreover, since the Court's isolation from the electorate makes it a poor vehicle for the preferences and views of the popular majority, under the strategic view of American democracy, the Court is at best a guardian of those fundamental rights that are ill served by the majoritarian will as well as a policer of the democratic process in society,[91] and at worst a specter of countermajoritarianism.[92] However, insofar as the Constitution charters a deliberative democracy and thus involves a commitment to making collective choices through a process of a certain sort, the character of the

86. *See* BESSETTE, MILD VOICE, *supra* note 67, at 218 ("This [legislators'] deliberative imperative, this duty to deliberate, is an intrinsic element of the American constitutional order.").

87. Sunstein, *Interest Groups*, *supra* note 67, at 58.

88. *Id.* at 49.

89. Nor is this ideal capable of furnishing a complete explanation of constitutional doctrine. *See id.* at 56. As Sunstein writes, "[t]he Constitution creates a shield of 'rights' on which government may not intrude even if the legislative process is genuinely deliberative." *Id.* Rather, the deliberation is "a necessary though not a sufficient condition for validity." *Id.*

90. Sunstein, *Republican Revival*, *supra* note 67, at 1548.

91. *See* ELY, *supra* note 58, at 73–77.

92. *See* BICKEL, *supra* note 58, at 16–17.

Court's own collective decisionmaking process is salient to its consistency with democratic rule.[93]

The Court's institutional attributes recommend that its own decisionmaking process comes within the procedural commitment to deliberation demanded of Congress (among others).[94] No less than Congress, the Court is a collegial body in which members of roughly equal rank make authoritative determinations backed by coercive force in the name of our government.[95] With these institutional characteristics, the Court's lack of an electoral connection does not put it outside the commitments of deliberative democracy. Rather, if the Court reaches its judgments through a deliberative process, its power of judicial review will share a basis with the power of representatives in Congress to resist the preferences of citizens—the commitment to making social choices through a deliberative interchange among equals. Put another way, with deliberative process in the Court, the power that the Court can exercise over congressional acts has an analogous justification to the power that Congress can exercise over popular preferences.

In this vision of our constitutional system, the presentation of an issue to the Court, including one that calls upon the Court's power of judicial review, does not move decision on the issue beyond the requirements of deliberative process that ground the discretion of congressional representatives. The members of the Court may appeal to, and share certain views about, the objective legal foundations of their decisions, but the decision itself must arise out of deliberative interaction among the Justices.[96] The appeal to objective legal foundations begins, rather than exhausts, the Court's coming to judgment: Decisions in the Court, as in Congress, should be the products of the exchange and the acceptance of reasons among equals.[97] This view thus emphasizes and makes a virtue of a feature of appellate judging that Dworkin seeks to abstract away: that actual judges must interact with one another.[98] The view does not require, however, that Dworkin's rich conception of judicial interpretation be cast aside; instead, that conception of interpretation can be positioned within

93. Sunstein notes that the deliberative conception of representation has a close parallel to the justification of the Supreme Court's power of judicial review as providing "a disinterested second look at legislation," and then cites Bickel's *The Least Dangerous Branch*, *supra* note 58. *See* Sunstein, *Interest Groups*, *supra* note 67, at 46 n.73. My aim here is to make explicit a connection between the view of representation employed in the deliberative conception of democracy and a ground of the Supreme Court's legitimacy, including the legitimacy of judicial review. In contrast to Bickel, my focus is on the *deliberative process* of the Supreme Court's decisionmaking, not simply on its outcomes having a principled character.

94. Sunstein also considers the importance of deliberation in administrative law. *See* Sunstein, *Interest Groups*, *supra* note 67, at 59–68.

95. *Cf.* BESSETTE, MILD VOICE, *supra* note 67, at 31 ("[D]eliberation calls for a collegial institution in which those of roughly equal rank voice a variety of contrasting views as they argue and reason together to identify and promote common interests.").

96. *See* Estlund, *supra* note 79, at 1469.

97. For a defense of the contemporary Congress as a deliberative institution in important respects, see BESSETTE, MILD VOICE, *supra* note 67, at 67–181.

98. *See* DWORKIN, *supra* note 7, at 380–81.

the Court's deliberative process of judgment.[99] The Justices can take on Hercules's interpretive approach, but for the Justices, in contrast to Hercules, the construction of their own interpretations commences, rather than completes, the formation of the Court's judgment. Their own constructive interpretations are subject to modification through confrontation and debate with their peers. The interpretation that carries the day is thus, as we might expect, an endogenous product of the Justices' dialogue.

This deliberative conception of the Supreme Court suggests grounds for revisiting the Court's association with the ideal of the rule of law. Neither the institutional approach nor the interpretive approach adequately attends to the plurality of the Court's membership, which the practice of dissent makes apparent. But once the plurality of the Court's members, and their dialogue with one another, are seen as sources of the Court's legitimacy, another approach to linking the Court to the rule of law comes into view. This manner of attention to the Court's plurality provides grounds to emphasize that the opinion of the Court, while not always the opinion of all, represents and results from the deliberation of all, and in this sense is a collective decision, if not a unanimous one.[100] Thus the deliberative view might recommend that a revised conception of the Court's connection to the ideal of the rule of law begin with the idea that legal interpretation is, for the Court, a matter of collective reasoning. But consideration of interpretation as a task of collective reasoning could only be the beginning of a revised view of the Court's association with the rule of law.[101]

This limitation also applies to the guiding idea here that the Supreme Court's own decisionmaking process comes within the commitments of the deliberative conception of democracy, and, accordingly, that the Court's legitimacy depends in part on its making its judgments through a deliberative process. That idea does not reach Bickel's and Ackerman's concerns about the representation of the majority will, whether past or present, nor Ely's concerns about defending the democratic process. However optimistic one's view about the virtues of deliberation, it is always possible that the Court could be a model of deliberative process while being a horror with respect to the interpretive principles that Bickel, Ackerman, or Ely recommends. Thus my argument is only that deliberative process is a necessary but not sufficient condition of the Court's consistency with democracy (even on the deliberative view) as well as of the Court's legitimacy. Nothing said here closes the larger constitutional question of what, all things considered, is involved in the Court's legitimacy. For the present purpose of providing a justification for the practice

99. *See* Michelman, *Traces*, *supra* note 54, at 76.

100. *Cf.* Manin, *supra* note 79, at 352. Discussing public deliberation, Manin writes, "a legitimate decision does not represent the *will* of all, but is one that results from the *deliberation of all*." *Id.*

101. *Cf.* KAHN, LEGITIMACY AND HISTORY, *supra* note 79, at 179–84 (criticizing judicial dialogue as source of Court's legitimacy).

of dissent, we need not side with Bickel, Ackerman, Ely, or Michelman, among others, on that larger question. It is enough for these limited purposes that the Court's legitimacy depends in part on the Justices' reaching their decisions through a deliberative process.

B. *Dissent and the Court*

With the Court's legitimacy linked to its process of judgment in this way, the difference between the publicity of the decisionmaking process in the Congress and that in the Court reveals the place (and promised justification) for the practice of dissent. As a rule, the process by which Congress arrives at its collective decisions takes place in public view. The galleries of the House and Senate are open for the press and members of the public to observe and critique the dialogue of the members of Congress, and long before a bill reaches the floor, the public has access to the debates in the committees and subcommittees of both Houses. In contrast, it is a longstanding tradition in the Supreme Court that only the Justices attend the conferences in which cases are discussed and the votes are taken.[102] Perhaps even more importantly, the exchange of draft opinions, and the dialogue and adjustment of views that accompany that exchange, are also kept secret by the Court.[103]

The secrecy of the Court's collective decisionmaking casts dissent in a critical role. In view of the Court's confidentiality, the practice of dissent is necessary to reveal the deliberative character of the Court's decisionmaking process; it gives us our primary view into the Justices' process of judgment.[104] While announcing which Justices join the opinion of the Court might be adequate to reveal that the Court's judgments are the products of majority rule, that alone does not give an indication that the Justices reach their positions through a deliberative process. In contrast, the practice of publishing dissenting opinions alongside the opinion of the Court, with notation of which Justices join these opinions, exposes the deliberative character of the Court's decisionmaking. The practice of dissent shows that the formation of the Court's judgment involves not merely a principled extension

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102. *See* STERN ET AL., *supra* note 13, at 6–7 & n.22; Tom C. Clark, The Supreme Court Conference, *reprinted in* 19 F.R.D. 303, 305 (1956) ("Only the Justices are present at conference. There are no clerks, no stenographers, no secretaries, no pages."); Lewis F. Powell, *What Really Goes on at the Supreme Court*, 66 A.B.A. J. 721, 722 (1980) (stating same); Byron R. White, *The Work of the Supreme Court*, 54 N.Y. ST. B.J. 346, 383 (1982) (stating same).

103. *See* Powell, *supra* note 103, at 722.

104. Occasionally, the number of opinions that the Justices have written for a particular sitting of the Court combined with the timing of the issuing of the opinions can suggest to a careful observer of the Court that there has been a shift in the views of a Justice in the opinion-writing process, *see* Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1547–48 (1996), but without the practice of dissent, attention to these facts would provide only the barest view into the process by which the Court reaches its judgments; alone they certainly would not expose its deliberative character.

of its previous decisions, but an "argumentative interchange" among its current members.[105] The publication of a single opinion could be sufficient to demonstrate that the Court's judgment is based on reasons, but the practice of only delivering a single opinion would not demonstrate that the Court's judgment is the product of a reasoned dialogue among the Justices. The publicity of dissenting opinions and the indication of Justices' individual endorsements of particular opinions reveal that the Justices do confront each other with their disagreements about matters of principle through the exchange of opinions and the conversation that surrounds them, if not also in their formal conferences. In this way, the practice of dissent manifests the exchange of reasons among the Justices that characterizes their process of decisionmaking; without this practice, those of us outside the Court would have no way to see the Court as embodying a deliberative process of judgment.

The practice of dissent also has implications for the deliberative character of the Court's decisionmaking through time. Dissenting opinions preserve the dialogue of previous Courts concerning questions of law. If only the majority opinion were public, future judges could only consider the Court's reasons for a judgment. The addition of the practice of dissent gives judges access to the conversation that produced the particular reasons for a judgment. Dissenting opinions are thus valuable not only if they capture the majority of a future court;[106] dissenting opinions are also valuable as carriers of judicial conversation through time; they connect the dialogue of generations of Justices and judges with one another. These opinions enable the Justices and other judges to participate in an intertemporal conversation that may be a defining feature of the judiciary.[107]

From the perspective of institutional design, the secrecy of the Court's decisionmaking process, together with its practice of dissent, has a particular excellence not only in showing the institution at its most deliberative, but also in promoting the quality of that deliberation. In the time between oral argument and the announcement of an opinion, the Justices can exhibit the kind of behavior that accompanies careful thought, such as expression of indecision, conflict, worry, and shifts in view, without attention to audiences other than the other Justices (and their staffs). In that deliberative time, there is no public audience for posturing or puffery. This distance from the public eye during the formation of the Court's judgment would seem to encourage

105. Michelman, *Conceptions*, *supra* note 79, at 293.

106. *Cf.* HUGHES, *supra* note 57, at 68 ("A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

107. For a conceptual explication of the implications of the temporality of the state for constitutional theory, see KAHN, LEGITIMACY AND HISTORY, *supra* note 79.

robust, incautious, and undistracted reasoning about the merits of a case.[108] In other words, secrecy during the process of decisionmaking may contribute to the deliberative character of that process. This idea that publicity can threaten deliberative decisionmaking provides a basis for the secrecy of modern jury deliberations before the verdict is announced,[109] and, as Bessette argues, helps to explain the deleterious effects on deliberative choice in Congress resulting from the institutional reforms in the 1960s and 1970s that increased the publicity of the legislative process.[110] The secrecy in which the Supreme Court forms its judgments addresses the threat that publicity can pose to deliberative decisionmaking.

In light of the Court's secrecy, a distinctive virtue of a colloquy of opinions for presenting the Court at its most deliberative comes into focus. As a means of exposing the Court's deliberative character, final opinions do not (indeed, cannot) threaten the Court's deliberations about that case, for these opinions are themselves the outcome and completion of the Court's decisionmaking. A colloquy of opinions thus accomplishes a task that the ultimate products of legislatures and juries do not. Neither a statute nor a verdict manifests that the process that produced it was deliberative. In contrast, as statements of reasons and argument, a conversation of published opinions at once exposes the deliberative character of the Court's decisionmaking process and constitutes the ultimate product of that process. In this way, the conversation of opinions generated by the practice of dissent both manifests and constitutes the Court's deliberative character; they show the Court at its most deliberative.

CONCLUSION

The institutional and interpretive approaches to the Supreme Court's connection with the ideal of the rule of law cannot accommodate the practice of dissent. Dissenting opinions undermine the clarity of the Court's institutional voice and bring into question the relation between the Court's judgments and legal determinacy. However, once the Court is seen as within a deliberative conception of democracy, the practice of dissent that is a problem from the perspective of the ideal of the rule of law becomes a source

108. *See* Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 946 (1978) (Stevens, J., separate opinion respecting denial of certiorari) ("The traditional view, which I happen to share, is that confidentiality makes a valuable contribution to the full and frank exchange of views during the decisional process."); Powell, *supra* note 103, at 722 ("There must be candid discussion, a willingness to consider arguments advanced by other justices, and a continuing examination and re-examination of one's views. The confidentiality of this process assures that we will review carefully the soundness of our judgments.").

109. For a recent discussion of the secrecy of jury deliberations, see Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295 ("It is now assumed that jurors must deliberate in secret so that they may communicate freely with one another . . . .").

110. *See* BESSETTE, MILD VOICE, *supra* note 67, at 221–27.

of the Court's legitimacy. The very dialogue that threatens the Court's unified institutional appearance, and casts doubt on the legal determinacy of its judgments, can be seen as central to the Court's task. The practice of dissent then takes on the critical role of revealing the Court's consistency with the constitutional commitment to deliberative democracy: Dissenting opinions manifest and constitute the deliberative interaction among Justices that produces opinions and decisions of the Court. With this justification linking dissent to the Court's legitimacy, the inadequacy of the ideal of the rule of law to justify this practice illustrates a more general point. The Court's association with the rule of law, while likely to be necessary, is not a sufficient basis of the Court's legitimacy.

The deliberative-democratic justification for the practice of dissent approaches the practice from a standpoint outside the Justice's own. However, it still may provide some insight into the first-order questions of when, and in what manner, Justices should express their disagreement with their peers on the bench. The answer to these first-order questions will ultimately depend on the particulars, for example, the reasoning of the other Justices and the merits of the instant case. But recognizing the connection between the practice of dissent and the Court's deliberative character furnishes a normative context within which to assess these particulars.

The evaluative universe of a guardian of the rule of law has different characteristics than that of a responsibility-bearing agent in a democratic dialogue. Within the frame of the rule of law, each Justice is beholden, like Dworkin's Hercules, to his own view of the law. From this perspective, the Justices look to the law, but not to one another. In contrast, the vision of the Court as engaged in its own (and our) democratic dialogue commends the Justices for acting as legal democrats: arguing, responding, and engaging with one another with respect to their legal disagreements. It urges a Justice, whether writing her own opinion or writing the opinion of the Court, to acknowledge and address the arguments presented by her peers;[111] it hopes for each Justice to approach the docket with a willingness to modify her views on the basis of the reasoning of the other Justices; and it reproves the Justice who consistently silences her principled disagreements with her peers. For deliberative-democratic Justices, dialogue matters; it is ultimately part of their task and a source of the Court's legitimacy.

111. *See* Michelman, *Traces*, *supra* note 54, at 36–37.