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ESSAYS

COURTING DELIBERATION: AN ESSAY ON DELIBERATIVE DEMOCRACY IN THE AMERICAN JUDICIAL SYSTEM

MAYA SEN*

Many legal theorists and political philosophers—among them John Rawls, Ronald Dworkin, Amy Gutmann, Dennis Thompson, and Joshua Cohen—believe that decision making through deliberation is a normative ideal that yields both better laws as well as a positive transformation in its participants. They further have assumed the judiciary is perhaps best equipped to realize this kind of "deliberative democracy," and that the courts can effectively provide an example for other, less deliberative branches of government to follow. This Essay argues, however, that judicial deliberation is both more complicated than is assumed by these theorists and also embodies a kind of deliberation different in nature than the one we would expect in a deliberative model. Indeed, contributions from social science suggest that judges are strategic (and oftentimes political) actors, and that their "deliberations" are more akin to bargaining than reasoned exchanges. In addition, the products of judicial decision making—the courts' opinions—often fail to reflect true deliberative reasoning. Thus, the judiciary might in many ways be less deliberative than its sister branches. This is not to say that judicial processes cannot be modified to become more deliberative—and therefore more normatively desirable—but it does suggest that the assumption that the courts provide a deliberative model for other decision makers to follow might be based on a romanticized view of judicial processes, rather than on the way judges actually behave. This conclusion has, moreover, strong

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implications for the feasibility of deliberation as a decision-making mechanism.

Introduction

Life at the U.S. Supreme Court has always had an air of intellectual debate and rigor. Contemporary portrayals of the Court conjure images of feisty oral arguments, complete with nimble lawyering, lively debate, and vigorous discussions between Justices and litigants. Historians and biographers have only provided us with glimpses, but these discussions appear to continue once public attention has subsided. Indeed, Justices' private papers and memoirs have left us with romantic reflections of what might be happening behind chambers doors—hours of debate and dialogue, followed by copious letter writing and opinion drafting as the Justices grapple with the deepest moral and legal issues of their times.

These images of honest deliberation and of intellectual exchange have prompted some political philosophers and legal theorists to cite the judiciary as an example for other branches to follow. These theorists—among them John Rawls, Ronald Dworkin, Amy Gutmann, Dennis Thompson, and Joshua Cohen—contend that deliberation is a desirable attribute and that decision making through deliberation is a normative ideal that yields both better laws as well as a positive transformation in its participants. They further have assumed the judiciary is best equipped to realize a deliberative ideal, and that it can provide an example for less deliberative branches of government to follow.[1]

This Essay will argue, however, that judicial deliberation is both more complicated than is assumed by these theorists and also embodies a kind of deliberation different in nature than the one we would expect in a deliberative model. Indeed, contributions both from social sciences and from doctrinal scholarship suggest that judges are strategic (and oftentimes political) actors, and that their "deliberations" might be more similar to *quid pro quo* bargaining than to reasoned intellectual exchanges. Even when courts do address issues of moral importance in a straightforward manner—for example, in cases involving constitutionally protected rights—their standards of deliberation often fall short.

1. *See, e.g.*, Amy Gutmann & Dennis Thompson, Democracy and Disagreement 45 (1996) ("Many constitutional democrats focus on the importance of extensive moral deliberation within one of our democratic institutions—the Supreme Court. They argue that judges cannot interpret constitutional principles without engaging in deliberation, not least for the purpose of constructing a coherent view out of the many moral values that our constitutional tradition expresses.").

This is not to say that judicial processes cannot be modified to become more deliberative, but it does suggest that the structure and composition of the courts present serious institutional impediments to deliberative democracy. This conclusion has, moreover, strong implications for the feasibility of deliberative democracy as a practical concept, rather than as a normative ideal.

Parts I and II of this Essay will begin by exploring the concept of deliberative democracy, and examine along the way the reasons why many legal and political theorists believe that the courts—the Supreme Court in particular[2]—are the most deliberative of governmental bodies. Part III will examine why these arguments might be flawed. It will both highlight the ways in which the judiciary's protocol forecloses true deliberation and will also examine the nature and content of selected Supreme Court opinions through a deliberative lens. Part IV will conclude by noting the implications of the argument for deliberative democracy.

I. The Idea of Deliberative Democracy

A brief sketch of what deliberative democracy is, and is not, is a useful starting point and provides context for the rest of this Essay. The idea is quite simple. Deliberative democracy revolves around "questions of collective political will—about what should be done. It is about arriving at views that represent collective, informed consent."[3] At the heart of deliberative democracy is the idea that when free and equal people come together and discuss important decisions jointly—justifying their reasons publicly on the basis of generally understood principles—then the resulting policy will be both better for society and better for the participants themselves. Indeed, not simply a form of politics, democracy, on the deliberative view, is a framework of social and institutional conditions that facilitates free discussion among equal citizens—by providing favorable conditions for participation, association, and expression.[4] To this extent, "the idea that democracy revolves around the transformation rather than sim-

2. This Essay focuses (as most legal theorists and political philosophers do) on the Supreme Court, but these arguments apply with equal force to many other federal and state courts.

3. James S. Fishkin, When the People Speak: Deliberative Democracy & Public Consultation 34 (2009).

4. *See* Joshua Cohen, *Democracy and Liberty*, *in* Deliberative Democracy 185, 186 (Jon Elster ed., 1998).

ply the aggregation of preferences has become one of the major positions in democratic theory."[5]

While the concept is simple and intuitive, there is no universally agreed-upon single definition of deliberative democracy. Three broad principles undergird the concept.[6] The first attribute of a deliberative democracy is the importance of public incorporation into the decision-making process. A democracy grounded in deliberation requires that "[p]ersons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives."[7] Consider the judiciary. For courts to fully embrace deliberative democracy (as many theorists believe they do), then actions and decisions must demonstrate respect for members of the public, and their opinions must be justified to all. Those who are bound by court decisions should not feel like subjects ruled by an inaccessible system; to the contrary, they should feel that they themselves are part of the process that led to the binding decision. Ultimately, "[a]ll [theorists] agree . . . that the notion [of deliberative democracy] includes collective decision making with the participation of all who will be affected by the decision or their representatives: this is the democratic part."[8]

A second guiding principle concerns the nature of the deliberation itself. In a truly deliberative regime, the participants must be on equal footing so that all voices can be heard.[9] The same participants must also "be open to the facts, arguments, and proposals that come to their attention and must share a general willingness to learn from their colleagues and others."[10] Those engaging in deliberation, in other words, must not possess fixed, inalienable preferences; they cannot be unwilling to

5. Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY, *supra* note 4, at 1, 1.

6. For more on what constitutes a deliberative democracy see AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3–8 (2004).

7. *Id.* at 3.

8. Elster, *supra* note 5, at 1, 8.

9. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 143, 162 (Robert E. Goodin & Philip Pettit eds., 2006) ("In ideal deliberation parties are both formally and substantively equal. They are formally equal in that the rules regulating the procedure do not single out individuals. Everyone with the deliberative capacities has equal standing at each stage of the deliberative process. Each can put issues on the agenda, propose solutions, and offer reasons in support of or in criticism of proposals.").

10. JOSEPH BESSETTEE, THE Mild Voice of Reason: Deliberative Democracy and American National Government 46 (1994).

change their viewpoints, and their relative positions cannot be so disparate that competing voices are drowned out. To the contrary, those embarking on a deliberative enterprise must be willing to consider seriously opposing viewpoints and to incorporate those viewpoints into their worldview. Deliberative democracy at its core "requires that participants sincerely weigh the issues on their merits."[11]

The third most important principle is that decision makers provide reasoned justifications. As noted by Elster, "[d]eliberative democracy rests on argumentation, not only in the sense that it proceeds by argument, but also in the sense that it must be justified by argument."[12] To fulfill this promise, justifications must be both procedurally *and* substantively "accessible." Justifications and reasons provided by the decision makers must therefore be made public, and reasoning must not take place exclusively in the "privacy of one's mind."[13] Deliberative democracy values transparency and regimes that obfuscate or engage in secretive deliberations behind closed doors would stand squarely in contrast. "Substantive accessibility" is perhaps more elusive—but equally as (if not more) important. As Gutmann and Thompson note, a "deliberative justification does not even get started if those to whom it is addressed cannot understand its essential content."[14] To this extent, the proffered explanation—as well as the public record of the decision-making process—should not be crouched in language that is impossible for the general public to understand. Also, most justifications must not be based on technicalities or minutiae.

What are the benefits of such a democratic system? Theorists have cited multiple advantages,[15] and they group roughly into three general categories. First, many believe that a deliberative form of democratic decision making results in better laws

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11. FISHKIN, *supra* note 3, at 35.

12. Elster, *supra* note 5, at 1, 9.

13. GUTMANN & THOMPSON, *supra* note 6, at 4.

14. *Id.*

15. Elster's summary on point actually finds at least nine advantages:

> [D]iscussion is (or can be) good because (or to the extent that) it reveals private information, lessens or overcomes the impact of bounded rationality, forces or induces a particular mode of justifying demands, legitimizes the ultimate choice, is desirable for its own sake, makes for Pareto-superior decisions, makes for better decisions in terms of distributive justice, makes for a larger consensus, improves the moral or intellectual qualities of the participants.

Elster, *supra* note 5, at 1, 11; *see also* James D. Fearon, *Deliberation as Discussion*, *in* DELIBERATIVE DEMOCRACY, *supra* note 4, at 44, 43–44 (identifying six benefits to deliberative democracy).

and better political processes. Gutmann and Thompson, for example, support the view that deliberation "promote[s] mutually respectful processes of decision-making"[16] and that it "help[s] correct the[ ] mistakes" that citizens make when they take collective actions.[17] Second, many believe that deliberation can have a positive transformative impact on its participants.[18] In this regard, deliberation not only makes participants more attuned to the viewpoints of others, but it also makes them more aware about their own preferences—including the moral and factual strengths and weaknesses of their positions.[19] Along these lines, deliberation—with its emphasis on collective discussion and individual introspection—also encourages individuals to recognize their civic potential as fully informed citizens. Ackerman and Fishkin, for example, argue that the use of deliberative forms of polling shows that "[o]rdinary men and women can function successfully as citizens."[20]

A third benefit is that deliberation confers a certain amount of legitimacy upon the decision-making process. If citizens believe that a law was born out of genuine participation—guided by reasoned deliberation—they will be more likely to accept it. As Benhabib has argued, "legitimacy in complex democratic societies must be thought to result from the free and unconstrained public deliberation of all about matters of common concern."[21] Accordingly, "a public sphere of deliberation about matters of mutual concern is essential to the legitimacy of democratic institutions."[22] The legitimacy conferred by deliberation is particularly important when resources are scarce and are to be divided unequally. "The hard choices that public officials have to make

16. GUTMANN & THOMPSON, *supra* note 6, at 11.

17. *Id.* at 11–12.

18. *But see* James D. Fearon, *Deliberation as Discussion*, *in* DELIBERATIVE DEMOCRACY, *supra* note 4, at 44, 59–60 (finding this argument "backhanded," as "[i]t would be strange to discuss matters purely for the sake of improving ourselves morally and intellectually if we had no expectation that discussion would have any positive effect on the quality of the collective choice").

19. *See, e.g.*, BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 181 (2004) ("By airing competing arguments about [contested facts], deliberation permits their reexamination—opening up the possibility of opinion change after due reflection."); GUTMANN & THOMPSON, *supra* note 6, at 12 (arguing that, when citizens "deliberate, they can expand their knowledge, including both their self-understanding and their collective understanding of what will best serve their fellow citizens").

20. ACKERMAN & FISHKIN, *supra* note 19, at 5 (emphasis omitted).

21. Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 67, 68 (Seyla Benhabib ed., 1996).

22. *Id.*

should be more acceptable, even to those who receive less than they deserve, if everyone's claims have been considered on the merits, rather than on the basis of the party's bargaining power."[23]

Frankly, not all of deliberative democracy's backers agree on its definition or on its benefits. What they do agree on, however, is what deliberative democracy is *not*. Deliberative democracy is not simply an aggregate model of democracy, or the kind that operates by taking citizens' preferences as fixed and then adding them together in some fashion.[24] Consider, for example, votes in Congress. This aggregative process takes members' preferences as given and yields no reasoned justification at the end of the decision-making process. The public is rarely privy to the back-room ruminations and communications that led to the decision, and seldom are nuances of the intellectual path to the congressional vote provided (particularly for minor pieces of legislation). The end result is a decision-making process where preferences "as such do not need to be justified" and little importance is placed on "the reasons that citizens or their representatives give or fail to give."[25]

Deliberative democracy can also be distinguished from *quid pro quo* bargaining. By one definition, such bargaining is akin to "sequential 'divide-a-dollar' games in which the parties make successive offers and counteroffers."[26] A decision made under this form of bargaining "is determined by the bargaining mechanism and the bargaining power of the parties—that is, the resources that enable them to make credible threats and promises."[27] Gutmann and Thompson refer to this type of bargaining as "self-interested" bargaining, and it can be thought of as the type of bargaining that rational actors with fixed preferences play in theoretical game situations. It is also to a large extent the type of decision making that routinely happens both within Congress and in the back and forth between Congress and the President.

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23. GUTMANN & THOMPSON, *supra* note 6, at 10.

24. *See, e.g.*, FISHKIN, *supra* note 3, at 85–88 (discussing the nuances behind consensual versus aggregative forms of deliberation and suggesting deliberative polling as a sort of middle ground).

25. GUTMANN & THOMPSON, *supra* note 6, at 15; *see also* Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 CONSTELLATIONS 26, 29 (1994) ("A mere aggregation of majority preferences could not claim legitimacy because the basis on which the preferences of the minority were discounted could not be stated.").

26. Elster, *supra* note 5, at 1, 6.

27. *Id.*

II. The Courts as Exemplifying Deliberative Democracy

The discussion so far has extended primarily to deliberative democracy in theory. The question of how deliberative democracy operates *in practice* is significantly less well-developed in the literature.[28] When it comes to the courts, a number of theorists have argued or assumed that the judiciary operates as a deliberative institution, or, at the very least, as an institution more deliberative than its counterparts in the legislative and executive branches. This in turn has led many theorists to hold the courts up as examples for other branches to follow. After all, if the courts embrace more fully the principles of deliberative democracy, then their decision making ought to be more well reasoned and citizens should feel more incorporated into the process. In addition, we would expect some additional legitimacy to attach to judicial decision making.

The existing scholarship on the issue has, however, made this assumption largely without delving deeply into either the structure of the courts or into doctrinal considerations. The end result has been a persistent belief among many scholars that judges deliberate more than they do, and that the judiciary fundamentally differs from the other branches of government in its adherence to the tenets of deliberative democracy. Political and legal philosophers, in other words, have a tendency to trust in the courts more than in other branches of government.

To be fair to these theorists, there *are* good reasons to believe that the courts do indeed embrace the kind of deliberation endorsed by deliberative democrats, and that judicial decision making is preferable to legislative or executive decision making. First, the composition and structure of the judiciary lends itself well to deliberation. The federal courts, for example, employ a relatively small group of individuals. The Supreme Court has nine Justices, and each appellate court has between seven (in the First Circuit) and twenty-nine (in the Ninth Cir-

28. An increasing number of empirical and experimental studies have, however, examined deliberation in the context of "deliberative polling," as well as in small-government settings. For more on deliberative polling see Fishkin, *supra* note 3; James S. Fishkin, *Toward Deliberative Democracy: Experimenting with an Ideal*, *in* Citizen Competence and Democratic Institutions 279, 279–90 (Stephen L. Elkin & Karol Edward Soltan eds., 1999). For more on deliberative democracy in a small-government setting see Designing Deliberative Democracy: The British Columbia Citizens' Assembly (Mark E. Warren & Hilary Pearse eds., 2008); Simone Chambers, *Deliberative Democratic Theory*, 6 Ann. Rev. Pol. Sci. 307 (2003). But see Lynn M. Sanders, *Against Deliberation*, 25 Pol. Theory 347 (1997), for a strong critique of the feasibility of deliberative democracy in general, and in the context of jury deliberation in particular.

cuit) active judges—a small number compared to the 435 members of the House of Representatives, or even the hundred members of the Senate. Judges are, moreover, known to operate with small staffs, and with minimal interruptions and scheduled events. Representatives and senators, on the other hand, employ dozens of staff members to handle legislative drafting and inter-office communication. Contrasted with their congressional counterparts, we would naturally expect judges to engage in more intimate deliberation; after all, deliberation is easier if the participants know and interact with each other on a regular basis and especially if they are unencumbered by staff members, press interviews, and political appearances.

In addition, although the federal judiciary as a whole operates as a strictly hierarchical system—the Supreme Court at the top, appellate and trial courts below—each individual court operates on an egalitarian basis. The Supreme Court Justices, for example, appear to treat each other as equals, and we have anecdotal evidence of long-standing friendships even among intellectual adversaries.[29] Judges sitting at the trial or appellate level similarly seem to have collegial relationships. Even chief judges have approximately the same responsibilities as their non-chief colleagues, and all voices count equally once any judge has been assigned to a panel. By contrast, Congress is undoubtedly a hierarchical place. Even though each vote counts equally once a bill reaches the floor, few would label congressional procedure as a back and forth of "free and equal individuals" given the power wielded by senior committee members or by members well established within their party's hierarchy.

The courts also employ a variety of institutional mechanisms that have a distinctively deliberative shine. Oral arguments, for example, actually mimic somewhat the back and forth of a deliberative discussion: each side has a chance to speak, and judges are quick to question and probe the weaknesses of each viewpoint. Equally deliberative are the briefs submitted by litigants. All briefs (including those submitted by the parties and by *amici*) are publicly available, and adversaries have a chance to respond explicitly to claims made by their opponents—a debate in written form. Other institutional mechanisms with deliberative characteristics include the post-argument conferences that judges have with each other, as well as the intra-chambers meetings between

29. *See, e.g.*, Joan Biskupic, *Justices Strike a Balance*, USA TODAY, Dec. 26, 2007, at 1D ("The friendship of [Justices] Ginsburg and Scalia, unlike that of any other pair of justices in recent times, has intrigued—and mystified—observers for nearly three decades.").

judges and their law clerks. Judges, quite simply, appear to deliberate a lot—with the litigating parties, with each other, and with their staffs.[30] As Judge Edwards warmly puts it, "judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[31]

But by far the most important factor that gives the courts a deliberative aura is the opinion that accompanies each decision. Not only are opinions publicly available the instant they are filed (satisfying to a significant extent Gutmann and Thompson's "accessibility" requirement) but, unlike, say, congressional representatives, judges provide a lengthy written justification of a court decision. Unsurprisingly, then, legal theorists have focused specifically on the judicial opinion as the primary source of the courts' deliberative promise, and have identified this as the key component distinguishing the courts from the legislative and executive branches. Rawls, for example, emphasized the deliberative concept of "public reason," and he consistently referred to courts as "exemplars" of this public reason[32] due to their reasoned justification:

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30. On this general point, see Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1964 (2009) ("Judges deliberate when they raise questions during oral argument to alert their colleagues to their concerns. Judges deliberate in conference and continue to deliberate after conference when they raise issues uncovered in their research. Judges deliberate when they circulate draft opinions, receive their colleagues' responses, and negotiate resolutions to any differences.").

31. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

32. To some extent, the concept of "public reason" is distinguishable from the principles underlying deliberative democracy. Rawls explained public reason as being

> the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution. . . . This means that political values alone are to settle such fundamental questions as: who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property.

JOHN RAWLS, POLITICAL LIBERALISM 214 (expanded ed. 2005). See Benhabib, *supra* note 21, at 67, 74–75, for a discussion of the distinctions between deliberative democracy and Rawls's "public reason." These include that (1) "Rawls restricts the exercise of public reason to deliberation about a specific subject matter," (2) "public reason is best viewed not as a *process* of reasoning among citizens but as a regulative *principle* imposing limits upon how individuals, institutions, and agencies *ought to reason about public matters*," (3) "for Rawls the social spaces within which public reason is exercised are also restricted."

> [Public reason] applies . . . in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. Since acts of the legislative and the executive need not be justified in this way, the court's special role makes it the exemplar of public reason.[33]

Importantly, Rawls believed that these opinions must discuss in plain language the important moral principles central to deliberative democracy:

> The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason.[34]

To this extent, reasons provided must be more than simply a collection of judges' own personal opinions. Neither should the proffered justifications be based on a particular religion or an idiosyncratic worldview. Justifications reflected through judicial opinions should be written in a way that people from all walks of life can understand.

Rawls also argued that the influence of a written opinion could actually extend beyond its four corners; in fact, the "court's role as exemplar of public reason has a[nother] aspect: to give public reason vividness and vitality in the public forum . . . ."[35] For Rawls, a court achieves this effect through its authoritative judgments on fundamental political questions. It fulfills this role when it clearly and effectively interprets the constitution in a reasonable way; and when it fails to do this, as ours often has, it stands at the center of a political controversy the terms of the settlement of which are public values.[36]

For Rawls, then, the Supreme Court's exemplary status is rooted first and foremost in the public reasoning in which the Justices engage. But the Court's status as a deliberative institu-

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33. John Rawls, *The Idea of Public Reason*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 95 (James Bohman & William Rehg eds., 1997).

34. RAWLS, *supra* note 32, at 236.

35. John Rawls, *supra* note 33, at 93, 112.

36. RAWLS, *supra* note 32, at 236–39.

tion is further buttressed by its ability to invigorate and galvanize public discussion, even at times when the Court's own reasoning might itself fall short. Rawls is not alone in thinking that the courts have a deliberative potential unmatched by other branches of government. In thinking about the institution of judicial review, Dworkin places paramount importance on the reasoning contained in the opinion. He argues:

> Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself. That is important beyond the importance of the actual decisions reached in courts so charged.[37]

For Dworkin, then, the central importance of the Court lies in its unique ability to confront issues on the basis of reasoned deliberation rather than "political power alone."[38] To this extent, the judiciary differs markedly from its legislative counterparts, which must enact decisions by wielding political power and which simply cannot adequately debate matters of political morality. Indeed, Dworkin posits that "[j]udicial review is a distinctive feature of our political life, envied and increasingly copied elsewhere. It is a pervasive feature, because it forces political debate to include argument over principle, not only when a case comes to the Court but also long before and long after."[39]

Eisgruber, like Rawls and Dworkin, argues that the judiciary is fundamentally different from the legislature. His focus is, however, on the fact that legislators are elected officials, whereas judges—at least those at the federal level—are not. This, Eisgruber contends, is the key difference that allows judges to base their decisions on principled reasoning:

> Judges are supposed to respond to reasons, not preferences. The structure of federal judicial institutions, and especially of the Supreme Court, makes it likely that judges will be disinterested and hence capable of acting on the basis of reasons rather than interests. Legislators, by contrast, are supposed to respond to preferences as well as reasons. The need to stand for reelection guarantees that they will be sensitive to preferences. As a result, analyzing Supreme Court decisions *depends upon assessing the quality of*

37. RONALD DWORKIN, A MATTER OF PRINCIPLE 70 (1985).
38. *Id.*
39. *Id.*

> *reasons*, whereas analyzing political decisions often amounts to counting heads.[40]

Though rooted in an electoral justification, Eisgruber's position dovetails with those of Rawls and Dworkin: what distinguishes the judiciary from other branches is the judicial opinion, which engages seriously with publicly held moral principles. Where Eisgruber extends the argument is in positing that it is the unelected nature of judicial officers that allows them to put forth these kinds of reasoned justifications. It is because judges are free from the burden of voter preferences that they are free to engage in principled reasoning. Elected representatives, by contrast, must pander to their political constituents, thus lowering the bar for reasoned discussion to press releases and *quid pro quo* bargaining.[41]

III. Judicial Deliberation in Practice

We have so far seen that deliberative democracy brings with it powerful intrinsic and instrumental benefits—among these better decision making, a more involved citizenry, and, perhaps, increased institutional legitimacy. We have also seen that many legal theorists believe that the courts—more than other political branches—best epitomize the promise behind deliberative democracy. But do courts actually behave this way? Do judges behave differently from legislators or executives? Are the reasons provided by judges in their opinions the kind of reasons that we would consider adequate justifications for purposes of deliberative democracy? The descriptive inquiry about these questions can be divided into two areas: political (or procedural) and legal (or substantive). Political issues concern the institutional mechanisms at the court—specifically whether we actually believe that the institutional framework of the judiciary facilitates the kind of

40. Christopher L. Eisgruber, Constitutional Self-Government 98 (2001) (emphasis added).

41. It is important to note that thinking about the courts as inherently deliberative bodies provides a thoughtful rejoinder to the counter-majoritarian critique. After all, assuming that courts do satisfy the deliberative tenets more so than the other branches—a point on which Rawls, Dworkin, and Eisgruber (and perhaps Elster, Cohen, and Gutmann and Thompson) would likely agree—then their role in American democracy is normatively desirable. Why? The courts legitimize their own existence—and resolve to some extent their "difficult" counter-majoritarian nature—by employing a different type of decision making, one that is actually better, more inclusive, and more transformative than those of other branches. *See, e.g.*, Christopher F. Zurn, Deliberative Democracy and the Institutions of Judicial Review (2007); *see also* Christopher F. Zurn, *Deliberative Democracy & Constitutional Review*, 21 Law & Phil. 467 (2002).

deliberation required. Legal issues, on the other hand, concern the justification proffered by the Court—i.e., this inquiry takes the opinions issued by judges at face value and moves forward by analyzing these opinions.

A. *Political (Procedural) Issues*

Prior thinking into the deliberation of the courts has, as Gutmann and Thompson have argued, relied on a sort of "deductive institutionalism."[42] This logic assumes that because judges produce crafted opinions that appear to rely on thoughtful justification, reasoned deliberation led to that decision. Of course, no one would assume the same thing of legislators, who are assumed beholden to their constituents. "[But] [b]ecause of the incentives built into the judicial role (such as the need for professional respect), judges [are assumed to] have more regard for well-reasoned principles that are capable of discounting morally suspect preferences."[43] Reasoning backwards from the opinion therefore has the effect of ignoring the incentives that the judges themselves have, and it ignores any possible ulterior motives, deeply held beliefs, or immutable personal characteristics that they might possess. A better inquiry into judicial deliberation would employ forward, not backwards, induction, and it is here that social science research sheds some clarity.

Using "forward induction," the judicial process starts shedding some of its deliberative patina from the moment of nomination. One of the tenets of deliberative democracy is the participation of individuals with free and open minds—ready to engage with, and be accommodating to, opposing viewpoints. But there is strong evidence that Presidents do not appoint judges for their ability to engage in nuanced deliberation; neither do Presidents appoint judges based on their willingness to consider conflicting viewpoints. Indeed, the prevailing view is that Presidents select nominees largely on the basis of like-minded—and somewhat fixed—political ideology.[44] Scholarship on the Supreme Court, for example, suggests that Presidents appoint judges who not only share their opinion but also tend to

42. GUTMANN & THOMPSON, *supra* note 1, at 45.

43. *Id.*

44. *See, e.g.*, Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 624–26 (2003) ("No one seems to deny that it is completely appropriate for the President to consider ideology in making appointments. Presidents, of course, always have done so."); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 6 (2006) ("In the modern era, at least, presidents are usually interested in ensuring that judicial appointees are of a certain stripe.").

vote exclusively in accord with their positions.[45] Take, for example, the recent nominations to the Court—John Roberts, Samuel Alito, Sonia Sotomayor, and Elena Kagan. With the exception of Kagan, all have long, well-developed records of their ideological profiles. Justice Alito, for example, as an applicant to a federal government position, wrote early in his career that he always has "been a conservative and an adherent to the same philosophical views that I believe are central to [the Reagan] Administration."[46] He continued in the same essay:

> I believe very strongly in limited government, federalism, free enterprise, and the supremacy of the elected branches of government, responsible to the electorate . . . . Most recently, it has been an honor and source of personal satisfaction for me to serve . . . President Reagan's administration and to help advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion.[47]

Little in Alito's application suggests a willingness to engage seriously with viewpoints in favor of abortion rights, affirmative action, or a welfare state. To the contrary, this document displays a certain amount of recalcitrance toward, and perhaps hostility to, opposing viewpoints, and Alito admits to taking "personal satisfaction" in defeats sustained by abortion advocates and affirmative action supporters.[48] Justices can indeed change their minds,[49] but Alito's statement purposefully signals adherence to a particular worldview[50] and his record on the Court—

45. *See, e.g.*, Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 610, 620 (2008) (employing statistical analysis and finding that "the ideology of the Presidents and their nominees is rather closely associated" and that the importance of ideology in appointments "seems to be increasing with time").

46. Samuel A. Alito, Assistant Attorney General Application (Nov. 15, 1985) (unpublished job application), *available at* http://www.reagan.utexas.edu/alito/8105.pdf.

47. *Id.*

48. *Id.*

49. Indeed, several Justices—among them Earl Warren, Harry Blackmun, and, more recently, David Souter—have surprised appointing Presidents by adopting new ideologies. *See, e.g.*, LEE EPSTEIN & JEFFREY ALLAN SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 119–20 (2005).

50. An admittedly partisan viewpoint is provided by Harry Reid, Statement on Confirmation of Samuel Alito (Jan. 31, 2006) ("I do not oppose the Alito nomination on the basis of a 20-year-old job application. Instead, I view

along with those of Roberts and Sotomayor—has so far borne out the expectations of his appointing President.

This is not to say that nominations such as these are inappropriate—nor is it to say that Alito should be faulted for having or sharing strong views. Judges, like legislators or executives, are strong-willed, opinionated individuals, and it would be natural to expect that strongly held political views are precisely what led them to a career in public service.[51] Similarly, Presidents would be silly not to appoint those individuals most likely to implement their long-term ideological agendas. The problem does not lie in Presidents appointing judges with strong, fixed opinions; the problem lies in the expectation that judges ought to somehow be different than Congressmen or Presidents and that they should be somehow more willing to seriously entertain positions that they have for years steadfastly opposed. Unfortunately, deliberative democracy does require participants to be willing to engage seriously with opposing viewpoints, and this contrasts markedly with what is seen in practice. This aspect also raises questions about deliberative democracy's ability to work in a context where partisan players remain the main participants.

There are, moreover, other institutional constraints specific to the courts that should concern deliberative theorists. Deliberative democrats take seriously the notion that decision-making processes should be open and visible to the public. Transparency, incorporation, and accessibility are elements key to any deliberative enterprise. Judged by these standards, decision making in the courts is rarely transparent, inclusive, or accessible—especially when compared to congressional or executive decision making. The most public of judges, Supreme Court Justices, in all instances keep low profiles and make few public appearances—a fact that contrasts significantly with their more political peers.[52] Those appearances that Justices do make are generally

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that document as a roadmap to Judge Alito's subsequent judicial opinions and speeches. Judge Alito's judicial opinions have been largely consistent with the ideological signals he sent in the 1985 job application . . . .").

51. Alito, *supra* note 46 ("In college . . . I discovered the writings of Alexander Bickel advocating judicial restraint, and it was largely for this reason that I decided to go to Yale Law School.").

52. *See, e.g.*, Tony Mauro, *How to Open Up Our Court*, USA TODAY, Apr. 23, 2008, at 11A ("[W]e see a lot of the justices when they are nominated and again when they leave the court. But in between, when they are doing the public's business, they drop out of sight—unless they have a book to sell."); Fernanda Santos, *Who's That Guy? Without Robes, Grand Marshal Is Mystery*, N.Y. TIMES, Oct. 11, 2005, at B3 ("Despite Justice Scalia's prominence, few paradegoers recognized him, a reflection perhaps of Supreme Court justices' long tradition of limiting their public appearances.").

at elite institutions—mostly at top-flight law schools—and on topics of general interest (e.g., career forums or moot courts), not specifically on the moral questions before the Court. Members of the media are often barred or closely monitored.[53] To be fair to the Justices, there is a logic to this privacy. Judges are naturally loath to appear biased, lest they be called upon to recuse themselves at a later point, a concern that seldom troubles legislators. And quite a few of them are simply shy and prefer to be left alone to their work.[54] While these choices are understandable—rational, even, from the judges' standpoint—they undermine the principles of deliberative democracy, which demand transparency, incorporation, and accessibility in the decision-making process.

The inaccessible nature of the courts extends directly into their handling of cases. Oral arguments in the nation's federal courts have never been recorded or televised, and no photography is allowed.[55] The limited seating available in the Supreme Court courtroom is generally reserved for the parties and their lawyers, for members of the Supreme Court Bar, and for select members of the press. Only a fraction of seats is made available for public seating, and those who want to witness the Court in action are admitted on a first come, first served basis. If the case being heard is particularly newsworthy, members of the public must queue up hours, even days, before the Supreme Court begins its session.[56]

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53. For a comical take, see Adam Liptak, *You Can Quote Me, Next Week*, N.Y. TIMES, Nov. 11, 2009, at A1 (reporting on Justice Kennedy's visit to a local school and noting that Kennedy's office "insisted on approving any article" written about the visit by the school's newspaper staff).

54. *See, e.g.*, Gina Holland, *David Souter: The Justice Is Still a Mystery Man After 14 Years in Capital*, THE DAILY JEFFERSONIAN, May 5, 2004, http://daily-jeff.com/local%20news/2004/05/06/david-souter-the-justice-is-still-a-mystery-man-after-14-years-in-capital (quoting Justice Souter in a 1996 letter as saying that "[i]n a perfect world, I would never give another speech, address, talk, lecture or whatever as long as I live ").

55. Former Senator Arlen Specter introduced several propositions that would have forced the Supreme Court to televise proceedings, measures the Justices have publicly opposed. *See, e.g.*, Robert Barnes, *A Renewed Call to Televise High Court*, WASH. POST, Feb. 12, 2007. Public opinion appears situated solidly against the Justices. *See, e.g.*, *New C-SPAN/Penn, Schoen and Berland Associates Poll: What Americans Know About the U.S. Supreme Court and Want Changed About the Court*, C-SPAN (Sept. 24, 2009), *available at* http://supremecourt.c-span.org/assets/pdf/CSPANSupremeCourtPollSept242009.pdf [hereinafter *C-SPAN Supreme Court Poll*] (reporting that 65% of respondents agreed that "the U.S. Supreme Court should allow television coverage of its oral arguments").

56. *See, e.g.*, Adam Liptak, *Tailgating Outside the Supreme Court, Without the Cars*, N.Y. TIMES, Mar. 3, 2010, at A14 (chronicling the misadventures of people waiting all night for a chance to see Supreme Court oral arguments and noting

The normative implication here is that the Supreme Court operates without attracting much public attention, and the public as a consequence knows little about the Supreme Court and its decision making. A 2006 public opinion poll revealed that 77% of Americans could identify two out of the Seven Dwarfs in *Snow White*, but only 24% of Americans could identify at least two Supreme Court Justices,[57] while another poll found that only 1% could name all nine Justices.[58] A more recent poll found that only 49% of Americans could name *any* U.S. Supreme Court case, with 84% of those individuals pointing to *Roe v. Wade*.[59] By contrast, only 9% of these individuals were able to identify *Brown v. Board of Education*.[60] This consistent lack of public knowledge is masked by—and militated through—the fact that the public "approves" of the Court more than it does of Congress.[61] From a deliberative perspective, however, "approval" is far less desirable than incorporation. Indeed, approval is important—and it no doubt dovetails somewhat with a sense of legitimacy—but if the approval stems from lack of familiarity, then it is meaningless from a deliberative perspective.

Perhaps the most troubling from a deliberative perspective is the fact that the norm of judicial privacy extends to inter-chambers deliberation. These conferences—where any reasoned discussion would take place, where conflicting viewpoints would be debated, and where compromises would be reached—are strictly off-limits to anyone but judges themselves. Prevented by norms of privacy from direct observation, recent scholarship has used somewhat indirect methods in trying to unpack the underlying

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that "the number of seats set aside for members of the public who want to see entire arguments can be as few as 50" and that "[t]here is a separate line for those interested in getting a three-minute glimpse").

57. *New National Poll Finds: More Americans Know Snow White's Dwarfs Than Supreme Court Judges, Homer Simpson Than Homer's Odyssey, and Harry Potter Than Tony Blair*, BUSINESS WIRE (Aug. 14, 2006). By contrast, 69% of respondents in a separate 2007 poll could identify the U.S. Vice President, and another 66% could identify their state's governor. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, WHAT AMERICANS KNOW 1989–2007 (2007), *available at* http://people-press.org/reports/pdf/319.pdf.

58. Kimberly Atkins, *Commentary: Anonymous Justices*, LAWYERS USA, June 2, 2010, http://lawyersusaonline.com/dcdicta/2010/06/02/anonymous-justices.

59. *C-SPAN Supreme Court Poll*, *supra* note 55.

60. *Id.*

61. *See, e.g.*, KARLYN H. BOWMAN & ANDREW RUGG, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, PUBLIC OPINION ON THE SUPREME COURT (2010), *available at* http://www.aei.org/files/2010/06/28/BowmanPOSSupremeCourt.pdf. Approval of the Supreme Court hovers between 50% and 60%, while support for Congress generally hovers around 20% to 25%.

mechanisms of judicial deliberation. The preliminary conclusion of this research is that, if anything, judicial decision making might be more similar to legislative bargaining than to a truly deliberative model. Consider the decision-making rule used by the Court: a simple majority vote where five out of nine judges is enough to constitute a majority. A longstanding principle in economic and social choice theory is that these kinds of voting structures are driven by the existence (and importance) of a median voter—the person with half of the other decision makers ideologically to his/her "right" and half ideologically to his/her "left" on a particular issue.[62] The middle position allows the median voter to have an inordinate amount of influence on the decision-making process. Although most frequently invoked in the literature on Congress and elections,[63] this "Median Voter Theorem" has increasingly been applied to judicial decision making by the Supreme Court.[64] From a legal or political science perspective, the significance of the "median Justice" (like his median voter counterpart) is that his position "will prevail under majority rule and various voting procedures."[65] From a deliberative perspective, however, the significance of the "median Justice" is that it analogizes the Court to a legislative body where one member holds unique (if not absolute) power by virtue of his or her central position on an ideological spectrum.[66] The end result, quite

62. This idea is called the "Median Voter Theorem." *See, e.g.*, Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23 (1948); *see also* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

63. For applications of the Median Voter Theorem in the congressional context see Black, *supra* note 62, at 23–24; Keith T. Poole & R. Steven Daniels, *Ideology, Party, and Voting in the U.S. Congress, 1959–1980*, 79 AM. POL. SCI. REV. 373 (1985). For applications of the Median Voter Theorem in the context of elections see DOWNS, *supra* note 62.

64. Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005); Bernard Grofman & Timothy J. Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of "Natural Courts" 1953–1991*, 112 PUB. CHOICE 55 (2002); *see also* Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 4 (1999); Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008).

65. Martin et al., *supra* note 64, at 1281. Martin et al. find that the identity of the median Justice fluctuates over time and that this fluctuation represents a coherent ideological portrait of any given natural court.

66. The coverage on this is voluminous. *See, e.g.*, Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST, May 13, 2007, at A01 ("[Justice] Kennedy holds enormous power in pivoting between the left and right, legal experts say. He stands alone in the middle—and that enhances his importance."); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A2 ("The [Court's recent rulings] underscore what case after case demonstrated as the term unfolded: Justice

naturally, is that the median Justice becomes the target of bargaining, lobbying, and cajoling efforts. Litigants have accordingly directed their arguments toward the current median, Justice Kennedy,[67] and we must also assume that the other Justices do the same once in chambers.

The mathematical existence of a median Justice brings to the forefront the role that very *un*-deliberative (i.e., strategic) tactics can play in practice. On this point, Epstein and Knight's analysis of Supreme Court decision making provides a good illustration.[68] Their empirical (and historical) analysis presents the Justices as political actors, strategically leveraging their votes to further their own interests—more akin to legislators bargaining amongst themselves, and less like the deliberative democrats that we might imagine. How does this kind of bargaining take place? First, the Justices generally communicate between, not among, themselves—i.e., memos are circulated privately, between the individual Justices and the presumptive writing Justice, and not to the entire Court. And, second, the memos themselves represent a straightforward *quid pro quo* bargain: the Justice writing the memo is doing so to bring attention to language that is preventing him or her from joining in the opinion. This kind of bargaining—where one party threatens to withhold a vote unless certain specific changes are made—bears a surprisingly strong resemblance to what happens in Congress, and the evidence on this point is startling: "[I]n more than two-thirds of the most important cases of the 1970s and 1980s, at least one justice attempted to bargain with the opinion writer—with a good deal of the negotiation done through private memos."[69] This phenomenon has become widespread: "Of nine landmark cases

Kennedy's role in the position that Justice Sandra Day O'Connor once held at the [C]ourt's center of gravity.").

67. *See, e.g.*, Kevin T. McGuire et al., Targeting the Median Justice: A Content Analysis of Legal Arguments and Judicial Opinions (May 24, 2009) (unpublished manuscript) (finding that litigants are more likely to include arguments that appeal to the median Justice); *see also* Press Release, Am. Civil Liberties Union, Supreme Court Ends Term by Striking Down Military Tribunals at Guantanamo Bay: Justice Kennedy Emerges As Critical Swing Vote on the Roberts Court (June 29, 2006), *available at* http://www.aclu.org/national-security/supreme-court-ends-term-striking-down-military-tribunals-guantanamo-bay (quoting ACLU national legal director Steven R. Shapiro in saying "the votes [by Justices Roberts and Alito] may be less important on a range of critical issues than Justice Kennedy, who now holds the balance of power on a closely divided Court").

68. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

69. *Id.* at 73 (emphasis added). For example, one memo from Justice Rehnquist to Justices Burger, Powell, and O'Connor reads: "I have been negotiating with John Stevens for considerable time in order to produce a fifth vote in

handed down during the first term of the Rehnquist Court, eight generated at least one bargaining statement."[70] In addition, "in several of those, the opinion writer was confronted with the task of negotiating with more than one justice at the same time."[71] What this correspondence suggests, then, is that the Justices engage in serious bargaining behind closed doors and that this bargaining is closer to a simple zero-sum, *quid pro quo* bargaining than to the kind of nuanced give-and-take that forms the backbone of true deliberation. Justices, it appears, behave more like congressional representatives trading votes over a bill rather than the transformed deliberators many would hope them to be.

B. *Substantive (Doctrinal) Issues*

We are still left to ponder the fact that judges frequently issue nuanced opinions, and that these decisions could reflect the kind of reasoning expected from a deliberative regime. On this point, we can infer from these thoughtful opinions that either true deliberation *is* taking place in judicial chambers, or move forward admitting that the process might not be as deliberative as we had originally hoped, but that the end result is, quite happily, deliberative.[72] The reasons outlined above make the first assumption somewhat difficult to swallow. But the second consideration is interesting in its own right. Some of the benefits of deliberative democracy could still attach from having a decision grounded in a strong and nuanced discussion of moral principles. And accepting that the opinions themselves reflect some reasoned deliberation would allow the courts to retain some of the deliberative promise envisioned by Rawls, Dworkin, and others.

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my *Bildisco* opinion. I have agreed to make the following changes in the currently circulating draft, and he has agreed to join if I do." *Id.* at 74.

70. *Id.*

71. *Id.*

72. On the specific *consequences* of court opinions, this Essay is fairly agnostic. Some have posited that the courts are defenders of those very things that facilitate deliberation more broadly and, thus, sole focus on whether the courts are deliberative is by itself misguided. *See generally* Corey Brettschneider, *Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review*, 53 POL. STUD. 423, 439 (2005) ("Although political scientists and political theorists have often defined democracy in terms of institutions and procedures, my own view suggests why it is impossible to understand democracy's value independent of specific policy controversies."). Although courts' decisions are no doubt important, a complication of this viewpoint is that we have no way to assess how much the courts' decisions would change if the judicial process was more deliberative.

This discussion implies, obviously, that we should pay close attention to the nature of judicial opinions, taking at face value the reasoning they contain. To this extent, judicial opinions need to have both accessible language *and* accessible content. After all, "deliberative justification does not even get started if those to whom it is addressed cannot understand its essential content."[73] On this point, however, few would dispute that the judiciary stumbles with alarming frequency. Reporters are rife with gummy opinions whose substance is obscured by a variety of prongs, rules, exceptions, standards, and procedural issues, topped with the occasional dollop of Latin. Sentences are at times so thickly punctuated with citations that ascertaining points and arguments can be difficult, and even relatively straightforward opinions are frequently prefaced by dense procedural discussions that add little to the moral considerations involved.[74] From a deliberative perspective, this leaves open the key question of to whom opinions are addressed. The public? Litigants? Lower courts? The answer, like the opinions themselves, is unclear.[75]

Let us assume for the sake of discussion that cases *are* written lucidly and clearly. It is then the second requirement—that the substantive contents of any opinion reflect reasoned deliberation—that presents a stumbling block. As Zurn and others have observed,[76] judicial opinions—both at the Supreme Court and lower court levels—are in some instances extremely narrow in their reasoning and focus on minor technicalities rather than significant moral dimensions. And judicial obsession with a case's procedural posture makes it so that judges can frequently avoid questions of general concern or moral principles, opting instead for easier, quicker, technical answers that will attract less attention. In this regard, there are dozens of examples, a recent instance being *Elk Grove Unified School District v. Newdow*.[77] The issue in that case involved the constitutionality of the Pledge of

73. GUTMANN & THOMPSON, *supra* note 6, at 4.

74. Christopher Zurn has, for example, done a case-by-case analysis of several important Supreme Court opinions, trying to discern whether the language employed by the Court is one of generally understood moral principles—as opposed to more narrowly construed holdings based on legal technicalities. His conclusion is that the Justices for the most part "are rightly engrossed with the technicalia of the rule of law, not with arguments about fundamental moral and political principles." ZURN, *supra* note 41, at 188.

75. No systematic study (to the author's knowledge) has looked at the public's ability to comprehend or analytically synthesize the content of contemporary Supreme Court opinions.

76. *See* ZURN, *supra* note 41, at 184–220.

77. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

Allegiance under the First Amendment's Establishment Clause. As the case involved religion, public life, and parental rights, *Newdow* represented precisely the kind of situation where a broadly written opinion—one seriously engaged with moral principles and written with a public audience in mind—would have been particularly appropriate. What happened was actually quite different. The Court's well-publicized opinion dodged the constitutional questions at the heart of the case, instead reversing the appellate court's decision on the ground that the plaintiff, a non-custodial parent, lacked the necessary legal standing to proceed with his case. The end result, as many bitterly observed, is that the Court avoided any discussion of the important moral principles underlying the arguments and, "after agreeing to carry out its democratic tasks of exemplifying, representing, or communicating in the people's moral-political reason, the Court switched to its preferred legalistic language and found a way of shirking its civic duties."[78]

An obvious counter is that the Court's hand was forced—had it decided the case on the basis of the substantive issues involved, it might have made a glaring legal mistake in handling the plaintiff's non-custodial status (i.e., his standing to seek relief). To that extent, the Court would have exposed itself to legitimate attacks from elites within the legal community—perhaps future judges or Justices, law professors, or practitioners.

This argument is fair: no one, not even Supreme Court Justices, wants to leave themselves open to an attack further down the road, and no one wants to look bad in the eyes of their peers. But acting rationally does not shake the deliberative critique, and by structuring the opinion in a manner that so blatantly avoided the constitutional question, the Court effectively postponed the resolution of the issue to a later time—and in so doing left a palpable void in public discourse. Does the Pledge of Allegiance violate the First Amendment? Should children have to voice their moral allegiance to a country "under God"? What are the considerations on both sides of that debate? These are exactly the kinds of questions that deliberative democracy demands be addressed by transparent, reasoned decision making.

Along with the political question doctrine and the doctrine of constitutional avoidance, doctrines like standing are one way that courts can dodge difficult questions using the cloak of legal propriety. But it could be there is a simpler, perhaps more controversial, mechanism at work here: basic reliance on legal precedent and prior case law. Of course, there are many good reasons

78. ZURN, *supra* note 41, at 188.

for the courts' historical reliance on precedent: having a consistent legal framework for non-legal actors to follow, creating a permanent body of law for all judges to apply, etc. No one can dispute these public policy considerations. But stepping outside of this schema, and viewing the system from a deliberative framework, having a large body of precedent allows judges to avoid addressing difficult moral questions in a comprehensive fashion. Rather than having to explain each important holding on the basis of moral principles, judges in many instances can simply apply or distinguish prior cases on point—a significantly easier task. Previous case law is decided on the basis of even older precedent, linking cases back to each other in a kind of circular logic—a logic where morally grounded reasoning is neither required nor particularly welcome. Some areas of Anglo-American common law, established originally by cases that once did employ reasoned deliberation, have been reduced to the quick application of somewhat obscure and occasionally illogical rules and doctrines (e.g., the rule against perpetuities) that even trained lawyers have difficulty explaining. Going back to the example in *Newdow*, at some point a nuanced, carefully considered explanation emerged as support for the standing doctrine. But its harsh application to the *Newdow* facts—effectively shutting down reasoned debate on the real issues involved—severed the connection between standing and its justification. No longer grounded by a thoughtful debate about the appropriate role of the courts, standing is now simply understood as a tool often used by the courts to avoid tough constitutional questions.

This is indeed a bold assertion: after all, reliance on precedent forms the bedrock of the Anglo-American legal system. To that end, let us step back from the ledge for a moment and admit two key facts. First, reliance on precedent is obviously an important institutional mechanism, and a precedent-free system would quickly devolve into an inconsistent patchwork of case law, strongly undermining the predictability of laws and legal enforcement. We might want judges to decide each case on the basis of moral principles, but it would result in an intractable, unpredictable mess, both for judges and for litigants. Second, and perhaps more importantly, not all precedent serves to constrain the participation of the courts in contemporary moral debates. Since the 1940s, vast areas of case law have expanded the courts' reach into publicly salient topics, and many would argue that, if anything, the courts have vastly increased the range of important issues that they participate in. A case in point—and certainly the most controversial of doctrinal expansions—is the idea of substantive due process, under which individual citizens are

accorded certain inalienable rights (among these the right to raise one's children according to the dictates of one's conscience,[79] the right to marry,[80] the right to make end-of-life decisions,[81] and the right to privacy in intimate relationships[82]) that are unmentioned, but nonetheless constitutionally protected. For the purposes of this discussion, the public nature of these "fundamental" rights, their salience in contemporary public dialogue, and their importance in citizens' day-to-day lives means that this is a prime area for the courts to engage in the kind of public reasoning required by deliberative democracy. After all, the public understands with agonizing clarity what it means to be denied privacy in their sexual and reproductive lives, and they understand what it means to not be able to marry the person they love.

The Court's gay-rights jurisprudence is a good example. The rise of the LGBT movement, the debate over same-sex marriage, and the increasing prominence of gays and lesbians in politics, finance, and the media have made the public discussion of gay and lesbian rights imperative; and the Court has (again, to its credit) not shied away. But—and this is a key point—does the deliberation on display in these cases meet deliberative democracy's standards? Consider *Bowers v. Hardwick*, which upheld a controversial anti-sodomy statute and was a blow to gay and lesbian rights.[83] The primary motivation behind the majority opinion was that the "constitutional right of homosexuals to engage in acts of sodomy" was neither rooted in American "history and tradition" nor "implicit in the concept of ordered liberty."[84] Indeed, for Justice White, it was clear that

> [p]roscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. . . . Against this background, to claim that a right to engage in such conduct is "deeply

79. *E.g.*, Troxel v. Granville, 530 U.S. 57 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

80. *E.g.*, Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

81. *E.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997); Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990).

82. *E.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Poe v. Ullman, 367 U.S. 497 (1961).

83. Bowers v. Hardwick, 478 U.S. 186 (1986).

84. *Id.* at 191–95.

> rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.[85]

The precedent on Justice White's point is quite clear. To be recognized as a fundamental right for purposes of the Due Process Clause, any presumptive rights or liberties (including the right to "homosexual sodomy") must be "deeply rooted in this Nation's history and tradition"[86] or "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[87] So, for the *Bowers* majority, that a group (gays and lesbians, in this case) had long been denied certain rights was reason enough for the denial to continue.

Leaving aside the implications of the opinion, substantive due process cases like *Bowers* illustrate two intertwined deliberative critiques. First, even commendable attempts to address contemporary moral debates—for example, case law in the substantive due process tradition—tend to operate on a strongly path-dependent basis, one governed in large part by what has happened before. What is a fundamental right? Again, according to the Court's substantive due process jurisprudence, a fundamental right is one that is deeply rooted in this nation's "history and tradition." From a purely descriptive perspective, rights that are deeply rooted in the nation's history and tradition are by nature those that *already enjoy some measure of protection* under laws and legal precedent. And from a normative deliberative perspective, the path dependence generated by looking only to "history and tradition" effectively allows the Court to sidestep contemporary debates by permitting Justices to leverage sheer inertia to reach legal conclusions—much like reliance on precedent permits the courts to evade important constitutional issues. The end results are opinions that consistently fail in capturing contemporary public debates.

This first critique dovetails with a second deliberative critique, which is that it remains unclear just how the discussions in cases like *Bowers* (and also its successor, *Lawrence v. Texas*)[88] illuminate or reflect current moral discourse. *Bowers* cited historical laws and customs unfavorable to gays and lesbians—an obvious instance of confirmation bias (e.g., "cherry picking").[89] Confir-

85. *Id.* at 192–94.

86. Moore v. E. Cleveland, 431 U.S. 494, 503 (1977).

87. Palko v. Connecticut, 302 U.S. 319, 325–26 (1937).

88. Lawrence v. Texas, 539 U.S. 558 (2003).

89. Commentary on this point is well-developed. *See, e.g.*, William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193 (2009); John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172, 194

mation bias works both ways, and *Bowers*' successor, *Lawrence*, was guilty of the same thing—pointing to existing laws and practices favorable to gays and lesbians in its overruling of *Bowers*. The problem with this kind of decision making is not only that it fails in capturing the public debate, but also that it allows the courts to effectuate deeply held views about the morality of homosexuality through the lens of ostensibly reasoned justification. This aspect highlights a key norm of contemporary judicial thinking: judges are not "supposed" to have opinions; they are simply "supposed" to interpret. The unfortunate outcome is, however, that most people (*especially* public officials) have deeply held opinions on these issues; forcing judges to invoke precedent, history, or tradition to support these prior beliefs merely drives the discussion away from moral principles that citizens can understand and toward the generalization of prior laws and legal precedent on the basis of one's prior personal beliefs. Ironically, this is removed from Rawls' insistence that the Supreme Court Justices "cannot . . . invoke their own personal morality, nor the ideals and virtues of morality generally" or "cite political values without restriction."[90]

IV. Further Thoughts & Conclusions

Where does this discussion leave us? Are the courts hopelessly un-deliberative? Maybe. For the courts to realize their deliberative potential outlined by Rawls and Dworkin, the judiciary would have to undergo significant, perhaps unwelcome, changes. True deliberation requires transparent deliberation. Oral arguments would have to be televised in real time and closely analyzed, debated, and discussed in public forums. Judges' correspondences regarding cases would also have to be made publicly available, if not while the proceedings are happening, then certainly following the filing of the opinion. And judges themselves would have to be more publicly accessible and more available to interact with the public on issues at the heart of public debate. Accountability and dynamism—including the willingness of participants to engage with members of the public with regard to issues before the courts—are important attributes of the deliberative framework and cannot be denied.

(2009) ("[T]he deep roots test does a poor job of eliminating moral-political judgments from the substantive due process framework because judges are free to 'cherry-pick' from history to support their preconceived opinions [and] judges have discretion in characterizing the relevant tradition . . . .").

90. Rawls, *supra* note 32, at 236.

Other necessary changes might, however, be even more difficult, if not impossible, to enact. Deliberation at its bare minimum requires that participants enter the process with an open mind, ready and willing to consider seriously the merits of opposing viewpoints. Unhappily, judges today are appointed (or elected) largely on the basis of their ideological consistencies, and the strategic impulses behind these strategic actions would be impossible to change. Presidents, understandably, want no surprises, and they have every incentive to appoint individuals who will predictably vote in one way, and one way only. Executives appointing individuals who exercise independent thought will reap no rewards, and there is even less of an incentive to appoint jurists who entertain with any gravity opposing viewpoints. Changing this aspect of the judiciary, and of the confirmation process, would entail reforming at a fundamental level the separation-of-powers structure establishing federal judiciary, an all but impossible task.

In terms of deliberative *substance* (i.e., reasoned justification), the nature of Supreme Court opinions, and the institution of precedent, represents a second inexorable difficulty. Do we want to move away from a precedent-based legal system? Would we be at ease with a regime where judges engage in moral deliberation and address each case *de novo*? If we were perfectly honest with ourselves, the answer would probably be no. To allow judges the kind of power to address moral questions without the constant invocation of existing laws and legal precedent would undermine significantly the existing legal system, and adjudication would become significantly less predictable—both for litigants and for the public. Legal life would truly become snarled and conflicted if we expected jurists to evaluate each case before them solely on the basis of the moral considerations presented therein.

The issues raised in this Essay ultimately leave us with two implications. First, deliberative democracy is undoubtedly very appealing—bringing with it inherent benefits (transformed and energized citizens) as well as instrumental benefits (better laws and increased institutional legitimacy). On the other hand, if judicial deliberation falls short of the standard set by deliberative democrats, then we should not be surprised if these benefits also fail to materialize. Accordingly, if we believe, as Gutmann, Thompson, and Fishkin do, that deliberative democracy brings with it a transformed and more sophisticated citizenry, then we should not be surprised that only 24% of the public can name two or more Supreme Court Justices and that only 1% can name all nine. Similarly, if we believe, like Benhabib and Rawls do,

that reasoned deliberation brings with it increased legitimacy, then we should not be surprised at the vitriolic rhetoric leveled against "activist" judges and the "unelected" judiciary. Neither should we be surprised when the Supreme Court's legitimacy is called into question following cases like *Bush v. Gore*[91] and *National Federation of Independent Business v. Sebelius*.[92]

Second, the discussion suggests that deliberative democracy at an institutional level might be an untenable ideal. There are, of course, opportunities for deliberative democracy to thrive in a small government context, or within a deliberative polling exercise,[93] but as this Essay has argued, it is something else entirely to think that deliberative democracy can operate at a national level. To be sure, the more involved participants are in politics, and the more they rise to a level of national prominence, then the more inclined they will be to hold firm, fixed opinions—thus making them less likely to be the kinds of individuals ideally situated to deliberate genuinely. And for the judiciary specifically, judges and lawyers are quite simply trained to argue on the basis of precedent, not on the basis of widely understood moral principles. Taken together, these considerations suggest that deliberative democracy in the U.S. courts currently remains a normative ideal, rather than as anything approaching a realized concept.

91. Bush v. Gore, 531 U.S. 98 (2000).
92. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).
93. *See* Edwards, *supra* note 31.