

Designing Collegial Courts<sup>1</sup>  
by  
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1. Introduction

Normative theories of adjudication pose a puzzle. On the one hand, adjudication exhibits functionally common elements across jurisdictions. A very abstract and general theory thus seems appropriate. Such a theory articulates how a judge *should* decide cases in any jurisdiction. On the other hand, the great variety of actual adjudicatory institutions argues for more particular theories that state how a judge in a *particular* legal system *should* decide cases. Indeed, theories of adjudication are often proffered as both explanations of and normative standards for sitting judges.

Contemporary theorists have offered general theories of adjudication. These theories have two components: (1) a (doctrinal) theory of law that identifies “grounds of law” and (2) a theory of legal reasoning that determines how one proceeds from the grounds of law to the rights and obligations of the parties before the court.<sup>3</sup> These theories are propositional theories as they make no reference to the institutions within which adjudication occurs.<sup>4</sup>

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<sup>3</sup>A normative theory of adjudication need not distinguish sharply between these two parts. Indeed, Dworkin derives his doctrinal concept of law from his theory of how judges reason. In other theories, such as Hart’s, however, the two parts of the theory are distinct.

<sup>4</sup>The theories ignore aspects of adjudicatory institutions that, empirically, are widespread. Virtually every judicial system, for example, has a hierarchical structure. Similarly, most appellate courts are collegial. Of course, if all court systems share these structures and these structures themselves have uniform substructures, a non-positional theory of adjudication will serve. In fact, however, the relations between tiers in the judicial hierarchy varies across

These general theories, however, seem too abstract to guide judges in particular legal systems. An actual judge would have to apply the general theory of law to her own legal system to determine the grounds of law she faces and then apply the abstract theory of legal reasoning to these concrete grounds to determine the legal rights and duties of the parties before her. These tasks may prove difficult for a judge situated in a complex institutional structure.

The most successful theory of adjudication in Anglo-American jurisprudence makes a small concession to “particularism.” Dworkin’s theory rests centrally, not on an institutional fact, but on a human one: mortality. This concession in fact greatly advanced our understanding both of what judges ought to do and of how they in fact decide cases.

In this essay, I argue that theories of adjudication must take into account elements of institutional structure and practice; what judges should do depends on the structure of the judicial system. This dependence not only implies that judicial obligation varies *across* legal systems but also that judicial obligation varies *within* a given legal system. The obligation of the trial judge who sits alone and must find facts as well as apply law differs from the obligation of the appellate judge who, sitting with other judges, corrects legal error or makes law. What judges should do depends both on the structure of the adjudicatory system and *where* in the structure that judge sits.

A complete normative theory of adjudication must not only specify how judges within given institutions should act but also what judicial institutions we should have. This second aim does not imply that there is one best judicial system. The judicial system one should have may depend on the overall structure of the political system as well as general social and economic

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jurisdictions and collegial courts in different systems have adopted different decision procedures.

conditions. It may also be possible that a variety of different structures are equally acceptable within a particular political system. Nonetheless, attention to the structural part of a normative theory of adjudication reveals the extent to which such theories are questions of *design* and not solely of philosophical concern. We may choose the obligations that judges have. Specifically, we might design institutions that favor formalist reasoning<sup>5</sup> or we might design institutions that moralize judicial reasoning.<sup>6</sup> Phrased differently, normative theories of adjudication should be viewed as partial, imperfect and inadequate theories of the design of adjudicatory institutions.

As each theory ignores the structure of the judicial system, both Hart's and Dworkin's theories of adjudication are what I shall call "non-positional". Phrased differently, each assumes that judicial obligation does not vary with the position of the judge within the judicial system. Non-positional theories of adjudication are plausible in unstructured and undifferentiated judicial systems. In an unstructured judicial system, each judge decides cases within a common environment. In an undifferentiated judicial system judges have common functions and they share both a the legal grounds and the logic of judicial decision..

Most judicial systems, however, are neither undifferentiated nor unstructured. Different judges will thus be subject to different obligations. A normative theory of adjudication that acknowledges the complexity of judicial structures will thus be positional, rather than non-

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<sup>5</sup>The structure of the French legal system provides an example. Moreover, one can argue that the revolutionary and Napoleonic creators of the system in fact *intended* this style of adjudication.

<sup>6</sup>The US system may illustrate this style of reasoning but it is less clear that the Founders had this intention.

positional. Judicial obligation will therefore depend on the position of the judge within the judicial system.<sup>7</sup>

This conclusion has important consequences. First, Dworkin's theory of adjudication at best characterizes judicial obligation in Anglo-American legal systems incompletely. As I shall argue, judges on collegial courts should not act as Hercules, Dworkin's prototypical judge, acts. Hercules sits alone; appellate judges in Anglo-American systems sit together and render judgment as a court. The collective nature of the appellate judge's endeavor has substantial implications for her obligations. Second, and related, a positional theory of adjudication cannot rest, as Dworkin's theory does, its doctrinal concept of law, on the logic of judicial decision.

In this essay, I defend these claims through an examination of judicial obligation on a collegial court, one in which individual cases are decided by several judges sitting together. Virtually every appellate decision in every legal system in the world has collegial courts. These courts, however, vary greatly in their structure. Judges on different courts should thus be understood to have different obligations.

The discussion is organized as follows. In section 2, I provide a brief characterization of the relation between a theory of law and a theory of adjudication. Section 3 sets out the abstract structure of a theory of adjudication and consequently the abstract structure of the argument of the paper. Section 4 introduces collegiality; one judge decides each case with other judges. Collegial courts differ greatly in their procedures and structures. This section discusses the gap between a theory of law and a theory of adjudication within three paradigmatic collegial

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<sup>7</sup> The division of a normative theory of adjudication into two parts suggests that, in a positional theory, the normative theory of adjudication might prescribe different *grounds* to judges in different positions or it might prescribe different logics of decision to judges in different positions.

structures: courts that issue opinions *seriatim*, courts that issue *per curiam* opinions, and courts that (generally) issue majority opinions as well as dissents and concurrences. Section 5 briefly raises some points about design of court institutions.

## 2. Theories of Law, Theories of Adjudication

This essay investigates the logical relation between a theory of law and a theory of adjudication. At the outset, I must thus offer some conception of the nature and structure of each class of theories.

The debate over the concept of law is long, intense, and intricate. It is useful to distinguish two distinct concepts of law that might be at issue: a *sociological* concept of law and a *doctrinal* concept of law.<sup>8</sup> A sociological concept of law would further our understanding of the structure, emergence, development, and stability of society. Such a concept would identify which practices and which norms in a given society were legal ones as opposed to moral, economic, or (purely) political ones.<sup>9</sup> Hart suggested that he sought a descriptive and

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<sup>8</sup>Both Dworkin, *Justice in Robes* at 223 (HUP 2006) and Kornhauser, Lewis, "The Economic Analysis of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/fall2011/entries/legal-econanalysis/>, revising the fall, 2006 addition which also made the distinction.. These concepts are not exhaustive: Dworkin identifies two others a taxonomic concept and an aspirational one while Kornhauser identifies an evaluative concept that more or less corresponds to Dworkin's aspirational concept.

It is not clear that either taxonomy captures the concept of law that derives from a conceptual analysis of "our" concept of law as ordinary usage (or perhaps "folk sociology of law") may not correspond to either a sociological concept of law or a doctrinal one.

<sup>9</sup>Note first that social science might not require a concept of law in this sense. On this issue, see Kornhauser, "Governance Structures, Legal Systems, and the Concept of Law," 79 *Chicago Kent Law Review* 355 (2004). Note second that the definition of the sociological concept of law used here encompasses Dworkin's taxonomic concept as well as his sociological one.

explanatory concept of law; he phrased the central question as “What is the nature of law?”<sup>10</sup> A doctrinal concept of law, by contrast, asks, “what makes a proposition of law true?”<sup>11</sup>

The sociological concept of law requires a concept that is general in the sense that, when applied to any social system, it will identify the legal phenomena, if any, within that social structure. Indeed, Hart’s pursuit of the nature of law has this same general ambition; a theory of law in this sense thus abstracts from the particulars of specific legal systems; it identifies elements or structures that characterize every legal system.

The doctrinal concept of law might apply to a specific legal system. After all, in any legal systems, judges and lawyers must determine what rights and obligations apply to the parties before the court; indeed, citizens must determine what rights and obligations attach to the courses of conduct that they may pursue. Everyone within the system thus must understand what makes a legal proposition in that system true.

A general doctrinal concept of law would identify truth conditions that necessarily hold in every legal system. A general doctrinal concept of law understood this way might not exist if we had a (taxonomic) concept of law that classified law on grounds other than truth conditions. After all, it is not obvious that, even abstractly understood, the truth conditions for a proposition of law in France share common features with the truth conditions for a proposition of law in the United States. This argument suggests that a general theory of adjudication would have to be quite “thin,” identifying only some few necessary conditions for truth that hold in every legal system. Alternatively one might simply identify legal propositions in a society as those

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<sup>10</sup>See *The Concept of Law* at pages ??

<sup>11</sup>See for example Dworkin, *Law’s Empire* or Murphy

propositions the truth of which must satisfy truth conditions of a certain type.<sup>12</sup> On this account, the truth conditions for propositions constitute the nature of law. Again, such a general theory would likely be very thin.

A normative theory of adjudication, as noted in the introduction, prescribe how judges ought to decide cases. A theory of adjudication, as a theory of law, may be either specific or general. It may prescribe, that is, how judges in a specific legal system should decide cases; or it may identify procedures or conditions that apply to judicial decision in every legal system.

Again, *ex ante*, it seems unlikely that any *general* theory could be thick.

What is the relation between a theory of adjudication and a doctrinal concept of law? Clearly, the two must be closely intertwined. Indeed, as we typically think that courts enforce the legal rights and obligations of the parties, a special theory of adjudication would apparently be subsumed in the corresponding special doctrinal concept of law. How could a judicial ruling pursuant to the prescribed logic of adjudication fail to satisfy the truth conditions for a proposition of law within the given legal system?

### 3. An Abstract Account of Adjudication

Theories of law and theories of adjudication are complex objects. Understanding may benefit from some simplification and abstraction. I here sketch simple abstract versions of Hart's and Dworkin's theories. I hope to clarify the theories and identify ambiguities in them.

In what follows, I focus on two aspects of adjudication: its collegial structure and the process (and output) of judicial decision. A theory of adjudication must answer several

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<sup>12</sup>Dworkin might be understood to adopt this approach. It is not clear however whether he is offering necessary conditions or necessary and sufficient conditions. Clearly, not all interpretive practices are legal practices. Perhaps all interpretive practices that realize or strive for integrity, the value of legality, are legal practices.

questions. First, what is the law at time  $t$ ? Second, at any time  $t$ , how is the law determined? Third, what is the content of a judicial decision? Fourth, what consequences attach to the content? Specifically, what aspect of a judicial decision at  $t$  influences the law at  $t+1$ ?

The theory of adjudication of exclusive positivism is straightforward. It consists of the legal rules and decisions that, via the rule of recognition, are valid. At each time  $t$ , there is a body of “rules”  $T_t$  that includes all the valid legal rules within the jurisdiction. The judge applies these rules to the case at hand and renders a decision  $D_t$  that includes a disposition  $d_t$  that determines which party prevails, possibly a description of the facts of the case, possibly a rule or principle that governs future cases, and possibly a justification of the disposition and the choice of rule or principles. Complexity arises in the content and consequences of  $D$ , which presumably are defined by the rule of recognition.

The stark description above serves to capture a Hartian theory of adjudication. Dworkin’s theory is more complex. Recall that Dworkin considers a sequence of judges  $J$ , each of whom decides alone. According to Dworkin, the law (understood as all those legal rights enforceable in court) at time  $t$  – denoted  $L_t$  – is simply the best interpretation of the past political decisions of the community. Denote the past political decisions of the community at time  $t$  by  $T_{t-1}$ . The judge’s decision  $D_t$  at time  $t$  thus depends on  $L_t$  (constructed by the judge from  $T_{t-1}$ ) and on the facts  $F_t$  of the case.

This notation does not yet quite capture Dworkin’s theory. Dworkin aims to explain how theoretical disagreement in law is possible. For Dworkin, theoretical disagreement derives from disagreement over the grounds of law. One might interpret  $T$  as the grounds of law; such an interpretation suits the positivist well. But it is less compelling for Dworkin as the grounds of law as well as the legal rights that one has flow from the interpretation.

To capture the grounds of law we might introduce another object  $G_t$  that represents the grounds of law at  $t$ .  $G$  contains all the legal rules and principles within the legal system that themselves result from the interpretation of  $T$ . The judge further interprets  $G$  to arrive at the legal rights  $L$  that prevail. Formally, we might write that  $G_t = (T_{t-1}, F_t) = L_t$ , the law at  $t$ .

To implement the theory, we need to understand more clearly what past political decisions constitute  $T_{t-1}$  as well as the content of the decision  $D_t$ . Dworkin's exposition leaves open the content and consequently the effects of a decision  $D$  by judge  $J$ . The content of  $D$  refers to what the judge includes in the decision. The effect of  $D$  refers to those aspects of  $D$  that become part of  $T$ . Presumably  $D_t$  includes the facts  $F_T$  of the case before the court,  $G_t$ , the grounds of the law derived from (aspects of) the past political decisions of the community  $T_{t-1}$ <sup>13</sup>, and the disposition  $d_t$  of the case before the court. It also includes other past political decisions, presumably those embodied in the jurisdiction's constitution (if any), its statutes, and, at least some of its administrative decision.

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<sup>13</sup> $T$  itself is a complex object. Dworkin describes a pre-interpretive phase in which the judge adopts a naïve attitude towards legal materials with which she begins her interpretation. Over the course of the interpretation, however, her understanding of what materials require interpretation might evolve. That is, the content of  $T_t$  might differ from the content  $T_{t-1}$ ; for example, the judge at  $t$  might believe that only the dispositions of previously decided cases require interpretation while the judge at  $t-1$  believed that both the disposition and rules announced in prior decision are relevant for the determination of entitlements at  $t$ . This difference might entail that the law at  $t-1$  would have been different had  $J_t$ , the judge deciding at time  $t$ , rather than  $J_{t-1}$ , the actual judge at  $t-1$ .

Regulations issued by administrative agencies are clearly past political decisions of the community. The government however also provides numerous services. To provide these services bureaucracy must make myriad bureaucratic decisions each day that might be considered political decisions; most obviously the allocation of resources across individuals or communities. --how to allocate schools and teachers across neighborhoods, the frequency and intensity of police patrols in different neighborhoods, etc.

Adjudicatory practices in the United States give rise to another set of arguably political decisions. Criminal juries typically render verdict with little or no judicial supervision. Constitutionally, acquittals are unreviewable. Were acquittals in prosecutions for refusal of induction during the Vietnam war, political decisions?

Any interpretivist theory must identify what aspects of  $D$  are relevant to  $T$ . Clearly, to make sense of the disposition,  $T_t$  must include at least a statement of some facts, the ones that the judge at  $t$  thought relevant to the disposition of the case.<sup>14</sup> As noted earlier,  $D$  may also announce a rule or a set of principles that dictated the disposition. In addition,  $D$  may include a justification for the choice of rule or principles.

Which parts of the opinion constitute or contribute to  $T_t$  determines in part the extent to which this interpretivist theory of law can serve as a theory of adjudication.<sup>15</sup> The more aspects of a decision that  $T_t$  incorporated, the more difficult the task of the interpreter. This difficulty has both retrospective and prospective aspects. Retrospectively, a more expansive conception of  $T_t$  that incorporates more aspects of each  $D_{t'}$  for  $t' < t$ , will make it more difficult to rationalize the past political decisions of the community as more data increases the likelihood and extent of contradictions among the various decisions. Prospectively, it alters the power relation between the current judge and future judges.

Dworkin considered a single judge Hercules in a chain of judges. In this context, both  $L$  and  $T$  develop in a reasonably straightforward manner. Hercules does indeed appear to engage in the same philosophical enterprise as the jurisprude. Hercules <sub>$t$</sub>  seeks the best interpretation of

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<sup>14</sup> The availability of the facts underlying the dispute and of any reasoning that accompanies the facts bears on the “Protestantism” of the law and its associated theory. In the early common law, the yearbooks recorded only the title of the case and the disposition. [confirm]. The small size of the bench and the bar, however, created an initiated priesthood, those who in fact knew, from personal experience, or through discussion, the facts associated with these decisions. When the practice expands beyond a small community, the reporting practices of that community become important.

Notice that the “facts”  $f$  included in  $T$  are a subset of the facts  $F$  of the case which in turn depend on the evidence  $E$  presented at trial.

<sup>15</sup> Each judge’s interpretation of the past political practice of the community will determine in part which aspects of the judicial output contribute to  $T$ , the body of “political decisions” that require interpretation. Thus judges may disagree about the content of  $T$  as well as about the interpretation of an agreed upon “text”.

the past political decisions  $T_t$ . Of course  $\text{Hercules}_t$  may err and decide wrongly in the sense that he misinterprets  $T_t$  and consequently wrongly determines the rights and responsibilities created by  $L_t$ . Regardless  $\text{Hercules}_{t+1}$  may disagree with  $\text{Hercules}_t$  in the sense that  $\text{Hercules}_{t+1}$  may believe  $L'_t$  describes the rights and duties of individuals rather than  $L_t$ . For each, however, no conflict exists between his conception of the law and her decision.

On a collegial court, by contrast, at time  $t$  each judge may have a different interpretation of the prior political decisions  $T_{t-1}$  of the community. Suppose for example that there are three judges  $X$ ,  $Y$ , and  $Z$ . Each judge  $k$  sitting alone would render a decision  $D_{k,t}$  with disposition  $d_{k,t}$ . Though these decisions may differ both in disposition, rule, and reason, the court, nevertheless, needs to decide the case and produce both a disposition  $d_t$  and a decision  $D_t$ , parts of which will contribute to  $T_t$  which must be interpreted to decide cases at time  $t+1$ .

Further reflection on this abstract setting may provide insight into the problems faced by each judge. At each stage  $t$ , the court must provide a coherent interpretation of the prior political decisions  $T_{t-1}$  of the community. We must identify which interpretation of the past political decisions of the community are coherent interpretations. We must also identify the best interpretation of each judge  $k$ . Denote judge  $k$ 's best interpretation (at  $t$ ) of  $T_{t-1}$  by  $^{Le k^*}(T_{t-1})$ .

Now consider coherence. Let  $\mathcal{F}(T_{t-1}) = \mathcal{F}$  be the set of all possible interpretations of the past political decisions  $T_{t-1}$ <sup>16</sup> of the community. The set  $\mathbb{I}_t^k(T_{t-1})$  of judge  $k$ 's coherent interpretations of  $T_{t-1}$  is a proper subset of  $\mathcal{F}$ .<sup>17</sup>

<sup>16</sup> $\mathcal{F}$  is, in effect, the set of all possible allocations of entitlements in the society; i.e., the set of all possible  $L$ . This set does not vary with  $T_{t-1}$ ; any allocation of entitlements is possible at time  $t$  though many if not most will be implausible interpretations.

<sup>17</sup>Note first that  $\mathbb{I}_t^k(T_{t-1})$  does vary with  $T_{t-1}$ . Second, for some texts  $T_t$ , the judge at  $t$  may have no coherent interpretation  $L_t$  of the past political decisions of the community. This just implies that  $^{Le k^*}(T_{t-1}) \not\subseteq \mathbb{I}_t^k(T_{t-1})$ .

“I” may be interpreted as “coherence” or as “with integrity”. The only restriction made on this relation is that not every history can have integrity. (Perhaps more strictly, I require that

A few simple observations now follow immediately. It is easy to see that, when the intersection over all judges of the conceptions of coherence  $\mathbb{I}_t^k(T_{t-l})$  is empty, there is no legal rule that all judges will find coherent.<sup>18</sup> Similarly, when the intersection of the complements of the coherence sets of each judge is non-empty, there are some interpretations of the prior political decisions of the community that each judge thinks incoherent. The more stringent and dissimilar judicial conceptions of coherence are, the more likely either of these conditions holds.

Of course, even if there exist legal interpretations of the prior political decisions of the community that each judge finds coherent, the court may not find these coherent interpretations. More specifically, when the set  $\mathbb{I}_t^C(T_{t-l})$  of interpretations that *all* judges on the court consider coherent is non-empty, it may nonetheless be true that the best interpretation of one or more (or all) judges may not belong to this set. In these circumstances, it is not clear how a court staffed with Dworkinian judges can or should proceed. If the court issues one or more collective opinions, one or more judges may have to endorse an interpretation of the past political decisions that she herself does not consider the best interpretation of them.

This decision environment drives a wedge between the theory of law and the theory of adjudication. The exact way in which this discrepancy emerges varies critically with the institutional structure and practices of the collegial court. In the next section, I shall consider three different protocols: the seriatim opinion practice of the English courts, the *per curiam* opinion of the French civil courts, and the “majoritarian” opinion practice of the United States.

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there exists a  $t'$ , such that for all  $t > t'$ , not every subset of  $t$  is coherent..

One might argue that integrity or coherence is a fuzzy or vague predicate.  $T$  may have more or less coherence rather than be coherent or incoherent. The argument in the text can be extended to this context; one could construct sequences of decisions for which the best interpretation becomes increasingly less coherent.

<sup>18</sup>Let  $\mathbb{I}_t^C(T_{t-l}) = \cap_k \mathbb{I}_t^k(T_{t-l})$

In this section I offer abstract characterizations of the problem; in subsequent sections I consider some examples.

#### 4. Judicial Obligation through the Lens of the Collegial Judge

This section examines how the institutional context in which judges decide structures the theory of adjudication. I shall consider three classes of institutional structures, *seriatim* practice in which the decision of the court consists of the decision of each member of the court; *per curiam* practice in which the court issues a single decision;<sup>19</sup> and what I shall call *majoritarian* practice, in which the court strives for and generally issues a decision endorsed by a majority of the members of the court. Each class of judicial structure may be instantiated in a variety of ways in that the procedures for adopting and announcing the opinions of the court may vary. I shall generally rely on the actual realizations of these structures.

Courts in Britain and the British Commonwealth have traditionally used, and to a large extent, continue to adopt a *seriatim* practice. Civil law jurisdictions have typically adopted a particular form of *per curiam* practice in which a single judge, serving as the reporter, plays an important role in structuring the decision process that leads to the *per curiam* opinion.. This *rappporteur* has the obligation to summarize the facts of the case, to characterize the legal issues presented, and to offer one or more proposed solutions to these issues. Appellate courts in the United States follow a majoritarian practice though the procedures for generating the majority opinion may vary across courts.

We may view the practices of *seriatim* opinions and of *per curiam* opinions as polar

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<sup>19</sup>The United States Supreme Court sometimes issues an opinion *per curiam*. The *per curiam* practice in the text, however, does NOT refer to this practice as the issuance of a *per curiam* opinion does not foreclose an individual justice from issuing a separate opinion. For purposes of this paper, in a *per curiam* practice, only one opinion is issued.

approximations to the practice of the solitary judge who has animated prior normative theories of adjudication. In the practice of *seriatim* opinions, each judge apparently undertakes the same task the solitary judge faces; she must decide the case before her. In the practice of *per curiam* opinions, the *court* stands in for the solitary judge; subsequent decision makers face a set of prior decisions that approximates the set of prior opinions a chain of solitary judges would have left. Practice on a majoritarian court more obviously deviates from the practice of a solitary judge; the majority opinion speaks for several judges who may have disparate views and prior precedent may reflect such disagreements. This section argues that the judge on a collegial court whether at the polar extremes or somewhere in the middle cannot follow the decision protocol of the solitary judge. Collective decision making greatly complicates the normative situation of the judge.

Reflection on these three institutional structures identifies several features of collective decision making that raise questions about judicial obligation. First, should the judges deliberate? If so how should such deliberations be conducted? Not all collective bodies deliberate. Juries in classical Athens, for instance, did not; they simply voted.<sup>20</sup> Judges in many sports such as figure skating, gymnastics, and diving do not deliberate. In *seriatim* practices, the question of whether to deliberate at all arises at the outset.

If deliberation is permitted, how should it be structured? How is the agenda determined and how is debate structured on that agenda? Collegial courts rarely, if ever, adopt the deliberative process common in legislatures in which a motion on the floor may be amended as indefinitely with discussion and votes proceeding on an amendment by amendment basis. On many civilian courts, one judge serves as the “reporter” who analyzes the case for the court and

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<sup>20</sup>Citation

offers one or more resolutions of the case. This procedure presents a number of questions for the normative theorist of adjudication: What obligations does the reporting judge have? What obligations do the other judges have? <sup>21</sup> Under majoritarian practice, deliberation proceeds in still a different manner. On the United States Supreme Court, a justice in the dispositional majority is designated to draft an opinion; that opinion circulates and prompts suggestions for revision and other concurring and dissenting opinions.

Second, after (and perhaps during) deliberation, what decision process does the court use to resolve any conflicts among judges as the appropriate disposition of the case and over the appropriate rationale for that disposition. A court might proceed by consensus or through some other procedure. Do they vote explicitly? If so, what voting rule is employed? Majority rule? Unanimity? Alternatively the court might follow some procedure designed to reach consensus. Again, different procedures will impose different obligations on each judge.

Finally, how transparent should court processes be? As Pasquale Pasquino has observed,<sup>22</sup> a collegial court and a judge within a collegial court has two different audiences: an “internal” audience and an external one. In each instance, the vote of a judge might be disclosed or undisclosed. This yields a 2x2 matrix as follows:

		Outside Court	
		Disclosed	Undisclosed

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<sup>21</sup>The reporter thus sets the agenda. Discussion might then be organized in a number of different ways.

<sup>22</sup>Citation

Within Court	Disclosed	<i>Seriatim</i> opinions	<i>Per curiam</i> opinions
	Undisclosed	Not Possible	Secret (Not realized)

As Pasquino note, this typology applies to both the votes of the judges and to their reasoning. The civilian procedure conceals votes and (many) reasons from the public but reveals them internally. A normative theory of civilian adjudication needs to justify this structure.

a. *Seriatim* Practices.

To begin, consider the English practice of *seriatim* opinions. This practice is closest to that of single-judge courts. Does a judge on a collegial English court face the same obligations as an English judge sitting independently? Most normative theories of adjudication do not differentiate judicial obligation across courts; they answer this question yes. I shall argue to the contrary.

To understand judicial obligation on a collegial court using *seriatim* opinions, contrast the  $n$  judges on the collegial court deciding  $n$  cases to a sequence of  $n$  judges deciding the  $n$  cases in sequence.

Begin with  $n$  Hartian judges. Easy cases, ones that fall within the clear scope of a rule identified by the first part of the theory adjudication, present no problems for either the collegial courts deciding the  $n$  cases or a sequence of  $n$  cases each decided by a different judge, sitting alone. As each case is easy, each judge reaches the same decision; the panel of  $n$  judges will be dispositionally unanimous and each judge, speaking *seriatim*, will offer identical grounds for her disposition. These identical grounds will articulate the relevant rule that will govern future

cases.

Hard cases, by contrast, reveal how collegiality influences judicial obligation. Each judge in the sequence legislates on the case before her. That case may render a subsequent case easy or it may change the next judge's view of the appropriate way to legislate on the next case. Each judge, however, can act unilaterally. Her unilateral action—the disposition and the rule that she announces -- settles the law, regardless of her attitude toward future judges. She may legislate without regard to how future judges will respond to her decision. Or she may legislate in light of the anticipated decisions of these future judges. In either case, her decision will clarify and extend the law.<sup>23</sup>

In the collegial case, by contrast, on each case, the  $n$  judges must legislate *together*. Suppose each judge has a different view of the appropriate legislation for the first case before them. Each judge's view of the appropriate rule to govern the instant case will, of course, dictate a specific disposition of that case. If the theory of adjudication is non-positional, then, on a court that uses *seriatim* procedures, each judge simply announces her view of appropriate legislation and the disposition dictated by her preferred rule. These  $n$  announcements are likely to endorse conflicting rules and hence leave the rule governing the first case unresolved.<sup>24</sup> Phrased differently, cases similar to the first case will remain hard cases. Collegial adjudication thus presents difficulties not encountered in an institutional structure that envisions a sequence of

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<sup>23</sup> When a judge considers the decisions of future judges she may adopt a different rule than the one she would adopt were she to decide all future cases. The current judge may want to curb the discretion of future judges, for instance, and thus legislate more broadly. Or she may believe that future judges will be less resolute than she and be unwilling to adhere to the rule that she thinks best because, in some instances, the rule leads to adverse outcomes.

<sup>24</sup> The conflicting rules may, of course, dictate the identical disposition so that the disposition of the case is clear. Or the conflicting rules may dictate different dispositions; as long as  $n$  is odd, however, a majority disposition will always exist and dictate the disposition of the instant case.

solitary judges. Moreover, any normative view that values certainty in the law should thus lead each judge sitting together to take into account the views of her colleagues; she will try to coordinate her *seriatim* announcement with the *seriatim* announcement of her colleagues. The pressure will be strongest when the value of certainty and clarity in the law is highest. Criminal cases will present particularly important instances in which the judges will strive to make their collective legislation clearer.<sup>25</sup>

Now compare a sequence of Dworkinian judges to a panel of such judges. The analysis here is a bit more complex but the conclusion does not change. Dworkin's theory in fact imagines Hercules as a judge who sits after a sequence of similar judges who decided before him and precedes a sequence of judges who will decide after him. According to Dworkin, Hercules should "make the law the best it can be". He should interpret the past political decisions of the community in such a way as to make the law (morally) best. Each judge's interpretation, of course, will reflect that judge's own moral and political views.<sup>26</sup> Call the "rule" that results from this Dworkinian process, the ideal interpretation of the judge. Each interpretation, of course, dictates a disposition in the instant case. Clearly, the sequential hypothetical is unproblematic;

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<sup>25</sup> Cross suggests that English judges in fact respond to this pressure and mitigate their differences.

<sup>26</sup>Earlier I identified the outcome of a judicial decision as disposition and a rule. As Dworkin's theory makes clear, indeed emphasizes, the judicial decision also includes reasons that support the rule and the associated disposition. In fact, it is not clear how to fit Dworkin's account into the framework here. In one sense, Hercules's decision presents the best account of the *law*, comprehensively understood. Dworkin, however, does not believe that the law consists of rules (or at least solely of rules) so that Hercules might not announce a rule. Moreover, in the next case Hercules (or Hercules') will start from scratch and interpret all the past political decisions of his community. If Hercules decided case  $C_0$  and now also decides  $C_1$  then his decision in  $C_1$  should report the same understanding of the law as his decision in  $C_0$ . But if a new judge Hercules<sub>1</sub> decides  $C_1$  then the conception of law embodied in the decision at time 1 may differ from the conception of law embodied in the decision at time 0 so that the legal "rule" or, more correctly, the law will have changed.

the first Herculean judge H1 renders judgment according to her ideal interpretation of the past political decisions of the community (and announces that conception of law). The next Herculean judge H2 does the same thing though the decisions rendered by H1 constitute part of the past political decisions of the community which she must interpret. Similarly, for H3. As the set of past political decisions expands it may grow increasingly difficult to interpret them with integrity. I shall argue subsequently that, at least theoretically, integrity may be compromised but, for purposes of argument let us suppose that each judge successfully integrates the past political decisions of the community into an integrous view of law.

Suppose now that, at each point in time, each judge sits with two other judges. These judges are not situated precisely like Hercules. Consider a judge Themis on a panel. Though both Hercules and Themis look back on a body of precedent and statute law, that is on the past political decisions of the community, it is the panel collectively, not Themis or Hercules individually, that renders judgment. The disposition and any rule or interpretation announced by the court depends on the views of all (or at least a majority) of the judges.<sup>27</sup>

Suppose Themis sits with two other judges, Liza and Henry. What happens if each follows the Herculean procedure so that each adheres to her ideal interpretation? Each judge endorses the disposition that she would endorse were she deciding alone. I shall say that she casts a *dispositionally sincere* vote. She also endorses her ideal conception of the law. This ideal conception satisfies a number of criteria. It will be logically consistent and *coherent* in the

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<sup>27</sup> Or should we interpret Dworkin's theory to require the Court, deciding together, to make the law the best in can be? I.e. to offer an interpretation of all past political decisions that yields the law that resolves the instant case. How should the Court accomplish this task in the face of individual disagreement over the best interpretation of the past political decisions? The more we demand of the Court as whole, the less plausible Dworkin's theory becomes as a model of obligation of the court as broader agreement among individuals with conflicting interpretations is more difficult than narrow agreements.

sense that it meets criteria of simplicity and unity.

We must ask, however, not whether the decision of each judge is consistent and coherent (or promotes integrity); we must ask whether the decision of the court does so. Our answer will depend on what constitutes the decision of the court. More specifically, what residue does the decision of the court leave that future courts must rationalize or interpret?

Dworkin might argue that, on his theory of adjudication, only the disposition of the court matters. After all, each judge must interpret the past political decisions of the community. What constitutes the past political decisions of the community? Or, rather, what aspect of the complex residue left by *seriatim* opinions must Hercules interpret? Dworkin can plausibly argue that, in fact, the disposition that results from the *seriatim* opinions constitutes the only *political* decision of the community. The disposition is the only aspect of the adjudicatory event that is a collective decision, one rendered by the court. Thus, it is dispositions and not rationales that Hercules must interpret.

On this bare account of the residue of a prior court decision, one might believe that the evolution of the law would follow the same pattern as it does when there is a sequence of judges. The decision of the court, and hence the contribution to the past political decisions of the community consists only of the facts of the case, as recited by each of the judges in her opinion and the disposition of the court, presumably the disposition that attracts a majority of the judges.<sup>28</sup>

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<sup>28</sup>One problem might arise in a hierarchical system. Suppose, for example, that, on the interpretation of Themis, the court should reverse, while on the interpretation of Liza, the court should affirm, and on the interpretation of Henry, the court should reverse and remand. On Henry's interpretation, one requires facts not raised in the court below and hence the case must be remanded for further proceedings. In this instance, the disposition of the *court* is unclear or perhaps undefined.

When we consider the development of the law over time, however, we see that this argument fails. Assume that Themis, Liza and Henry are immortal and, sitting together, hear all subsequent cases. Each has a coherent, ideal conception of the law that each consistently uses in rendering judgment in a case. Unfortunately, their court may produce a body of law that is not coherent.<sup>29</sup>

Does Themis now have reason to reconsider her decision? Ought she to adjust her view of the law in order to produce a coherent body of law, one that can be justified within the set of principles current in the community? Suppose that each judge adheres to her initial ideal rule. Notice that, on the assumptions made thus far, the law in the jurisdiction is perfectly predictable. All citizens know the ideal rule of each judge on the court so they can predict the outcome of any case. But on Dworkin's account, the community's law might lack integrity.

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<sup>29</sup>This claim was first made in Kornhauser and Sager, "Unpacking the Court," *Yale Law Journal* (1986). Lax, "Constructing Legal Rules on Appellate Courts," 101 *American Political Science Review* (2007) offers a simple model in which each judge votes according to her ideal rule. This procedure yields a collegial rule that is stable when each judge's ideal rule is separable in cases. Separability here means that the judge's view of the appropriate resolution of a case is independent of the resolution of other cases. Separability insures that the collegial is stable; the court will uphold its prior decision of the case arises again. Unfortunately, the resulting collegial rule may lack some desirable properties that the rule of each individual judge has. Lax considers a simple, formal property he calls "properness" that is not inherited by the collegial rule. This argument strongly suggests the incoherence of the collegial rule

Of course separability is an implausible assumption. Dworkin's decision protocol rejects the assumption, at least implicitly. Dworkin's theory assumes that, generally, an interpretation is sensitive to the prior past political decisions of the jurisdiction. As the decisions change, so does the interpretation.

Landa and Lax "Legal Doctrine on Collegial Courts," 71 *Journal of Politics* (2009) have provided a formal model that does not rely on the separability assumption. The model identifies conditions under which a form of incoherence will result. Specifically they characterize a *principled* rules and then show that the majority aggregation of these rules need not be principled.

Collegiality is not necessary for this result as . Kornhauser, "Modeling Collegial Courts I: Path Dependence" 8 *IRLE* (1992) has a similar result for a sequence of single judge courts. In addition, Kornhauser shows that, if each judge adheres to a rule of strict *stare decisis*, then the separability assumption can be abandoned.

We might ask that whether Themis should anticipate this collegial incoherence and alter her initial judgment to forestall it.<sup>30</sup> What she should do, however, is unclear. She must modify

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<sup>30</sup> The problem confronting Themis in fact parallels the problem confronting Hercules over time. For Hercules too does not make law alone. He makes it in conjunction with other past and future judges. He need not, of course, anticipate the decisions of past judges but perhaps he should consider the reaction of future judges to his decisions.

At some point then each judge must adjust her ideal rule in order to produce a community body of law that has integrity. That is after some number  $n$  of cases, the body of precedent cannot be rationalized by any coherent rule. So, at least at the time case  $n+1$  comes to the court, each judge will have to change her ideal rule. But why isn't she under an obligation to foresee the impending incoherence at time 0? After all, from her own perspective, Themis might do better overall by making accommodations at time 0 than at time  $n+1$ ? How big an accommodation should Themis make? Is she restricted to decisions that yield a dispositionally sincere outcome? Or may she issue a decision that endorses a disposition different from her the dispositionally sincere disposition? Dworkin's theory seems to suggest the latter; integrity concerns the shape of the law as a whole and not the outcome in a particular case. The parties, that is, are entitled not to a particular outcome but to the outcome dictated by the best interpretation of the community's past political history.

If one accepts that Themis, sitting on a collegial court, has an obligation to look forward in offering an interpretation of the law, we must reconsider the obligations facing Hercules. Perhaps the two judges do have the same obligation and we have misunderstood the obligation under which Hercules labors.

Our discussion has perhaps uncovered an ambiguity in Dworkin's formulation of the interpretive task that Hercules faces. Hercules must provide the best interpretation. Dworkin apparently interprets that as "the best interpretation on the assumption that Hercules decides all future cases." Unfortunately, though he sits alone, the law does not result from Hercules' efforts alone. It has been developed in part by past judges and it will be developed further by future judges. Perhaps "the best interpretation of the law" requires Hercules to look forward, to anticipate the decisions that future judges might make and to provide the best interpretation going forward. Recall Dworkin's analogy to the chain novel. Suppose Faulkner has written chapter 1; now Hercules must write chapter 2. Should Hercules write the same chapter when he knows Saul Bellow will write chapter 3 as the chapter he writes when he knows that Elmore Leonard will write chapter 3?

Just as Themis' colleagues may introduce incoherence into the law, Hercules' successors may develop the law in ways that are predictably bad from Hercules' perspective. There are two possibilities. In some future, some successor of Hercules will be unable to provide a coherent account of the law. If that is so, Hercules is in the same position as Themis. Alternatively, every successive decision has integrity but, from Hercules' point of view, the law, though coherent, is less good. Imagine, for example, a series of first amendment cases that concern the scope of application of the first amendment. Hercules believes that the best account of the body of precedent endorses restricting first amendment protection to political speech, broadly understood. But he believes that such a decision will lead future judges to expand the scope of first amendment protection farther and farther. Overall, then, he thinks that a rule that restricts

her interpretation in some way that renders the Court's decisions coherent. She might do this by endorsing the opinion of another judge on the court. Or she might modify her own opinion to render it more compatible with the opinions of her colleagues.<sup>31</sup> For courts to make law, each judge must, in some way respect, or at least attend to, precedent. Obviously, a lower court judge must respect the precedent of a superior court; but making law imposes some obligations of respect of precedent on the superior (or announcing) court as well. After all, if the announcing court is not bound by its own precedent, a lower court (and the citizens acting in reliance on the law) will have less confidence that the announcing court will adhere to its decision; the law is less certain or less predictable. When judges write *seriatim* opinions, it is harder to determine the legal rule for which the decision stands. Indeed, the practice of *seriatim* opinions has prompted a complex literature on this very question.<sup>32</sup> Indeed, though one might identify a holding for each *judge* on the panel, there may be no holding of the court.. Each judge may have articulated a distinct rule based on distinct reasons.

From this observation, one might conclude that precedent should play no role in the

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first amendment protections to political speech narrowly construed is better because future judges are less likely to expand the scope of protection.

Of course, Hercules does not know the jurisprudential, moral or political views of the judges who will succeed him. This ignorance, however, does not eliminate the problem. Nonetheless, perhaps he ought to consider the different paths that the law might take after him. Ought he to assume the best? That future judges will develop the law as he would? Or should he assume the worst, that future judges will make bad decisions? Or should his decision rest on his beliefs about "average" behavior? (Kornhauser modeling collegial courts I suggested these three strategies.) Dworkin implicitly assumes that Hercules should be optimistic.

<sup>31</sup> We might ask whether it is appropriate for Themis to adopt an opinion that endorses a disposition different from her ideal disposition. (Does it matter whether Themis is in the dispositional majority or minority? When Themis is in the dispositional minority we might argue that she is under no obligation to alter her opinion in a given case because her opinion is not determining the law of the case. On the other hand, within the framework of Lax's model, the judge must alter some dispositional votes in order to alter her rule; after a rule is equivalent to the set of outcomes in every possible case.

<sup>32</sup>See e.g. Goodhardt and Cross

decision of a case. When we consider the obligations imposed by precedent, however, we must be careful to specify what aspect of the previously decided cases should have authority. Three different aspects suggest themselves: the *result* (or the disposition), the *rule*, or the *reasons*.<sup>33</sup> The practice of *seriatim* opinions suggests that adherence to the rule of a prior case or the reasons offered for it may be self-defeating.<sup>34</sup>

The bare account of the precedential impact and content of a decision of a court, however, has some unappealing features. Each judge expends much effort rendering and justifying her decision. The judgment of the court, however, has little consequence beyond the resolution of the dispute between the parties. The decision provides little guidance to public officials seeking or to private citizens trying to conform their conduct to legal requirements.

In fact, when only the court disposition of the case is relevant to the development of the law, it is unclear why each judge publicly articulates the grounds for her disposition that she endorses.<sup>35</sup> On the other hand, if future justices must rationalize more than the court disposition, disagreement over the disposition or over the grounds of the disposition may only confuse future interpreters. Indeed, when the future interpreter must integrate the disparate views of each judge into a coherent whole, the future judge may be unable to produce a coherent interpretation. Consider first the decision in the instant case. Incoherence results because, though a majority

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<sup>33</sup>The literature on the *ratio decidendi* of a case equivocates on whether judicial obligation attaches to the rule of the case or the reasons for it.

<sup>34</sup>See for example MacCormick, "Why cases have *rationes* and what they are," in Laurence Goldstein (ed), *Precedent in Law* 155- 182 (1987): ". . . in an appellate court of several judges there may be several *rationes*, and there will be if different judges take different lines even in favour of the same actual decision *inter partes*. Hence, except in cases where it is possible to construct as it were a single composite ruling as some kind of logical product of the several *rationes* of the judges, or where several judges concur in a single majority opinion, there will be no single *ration* of a case decided by a multi-judge court as an appellate court."

<sup>35</sup>We might wonder further why each judge must report her dispositional vote if all that matters to the subsequent court is the disposition of the court and not of each judge individually.

may agree on a disposition, they may disagree quite radically on the grounds that dictate recovery.<sup>36</sup>

Instances of the doctrinal paradox provide common instances of this phenomenon. Perhaps the most startling illustration occurred in *National Mutual Insurance v. Tidewater Transfer Co.*<sup>37</sup> In that case, a debt action was brought in federal court under diversity jurisdiction. One party resided in the District of Columbia; the second in Maryland. The defendant challenged the jurisdiction of the court. The Supreme Court considered two grounds for jurisdiction in federal court. First, the Court asked whether the District of Columbia was a “state” within the meaning of the text of Article III of the US Constitution. Second, the Court asked whether Congress could grant power to Article III courts to hear cases not permitted by that Article. The views on the Court split as follows:

Justice	Art. I Ct. OK	DC a “state”	Case Outcome
Black	Y	N	Y
Burton	Y	N	Y
Jackson	Y	N	Y
Murphy	N	Y	Y
Rutledge	N	Y	Y
Douglas	N	N	N
Frankfurter	N	N	N
Reed	N	N	N
Vinson	N	N	N
Issue by Issue	N	N	N/Y

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<sup>36</sup> In the Supreme Court of the United States, for example, roughly 30% of cases that are dispositionally unanimous produce more than one opinion. So even on a majoritarian court that favors a pronouncement of the Court, unanimity on the rule is not easily achieved. Indeed, a high proportion of majority opinion coalitions are not joined by everyone in the dispositional majority. For a statistical portrait of the joining behavior of justices in a dispositional majority see Beim, Cameron and Kornhauser

<sup>37</sup> 337 US 58 2 (1949) This decision was rendered by a majoritarian court but the pattern of views could have resulted from a set of seriatim opinions. .

The Court thus held that the District of Columbia was not a state within the meaning of Article III and that Congress did not have the power to give Article III Courts supplementary jurisdiction. Yet the plaintiff prevailed 5-4 in the case! This pattern of decision is *prima facie* incoherent. Perhaps a future judge would develop a third ground on which to base the jurisdiction of the district court that would provide a principled rationale of the issue-by-issue and case-by-case dispositions of *Tidewater*.

Such cases occur in *seriatim* practice as well as the majoritarian practice of the United States as *Chaplin v. Boys*<sup>38</sup> illustrates. In this case, two British soldiers stationed in Malta were in a motorcycle accident in which the Plaintiff suffered significant injuries. Maltese law, however, permitted only damages for lost wages; it prohibited damages for pain and suffering. Plaintiff sued in the British courts. A five member panel of the House of Lords voted unanimously to sustain the lower court award of £53 pecuniary damages and £2248 in damages for pain and suffering. The five justices, however, offered three different rationales. One justice held that English law generally and the English law of damages in particular applied. Two justices held that, though Maltese substantive law applied, the damage rule awarding pain and suffering was procedural and hence governed by English Law. The final two justices held that, though Maltese law generally applied, given the significance ties of the parties to Britain, the English damage rules should apply. No majority rationale prevailed and the conflict posed difficult questions of interpretation for subsequent courts.

b. *Per curiam* Practices

Courts that follow a *per curiam* practice typically issue a single, unsigned opinion.<sup>39</sup>

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<sup>38</sup> [1971] A.C. 356

<sup>39</sup>The Supreme Court of the United States from time to time issues a *per curiam* opinion. Though it is unsigned, it may be accompanied by one or more signed opinions, including

Neither the public nor the parties thus observes any disagreement within the court concerning either the disposition or the grounds of the decision. Moreover, the decision procedure used by the court to reach its collective decision is generally also hidden from the public. I shall consider two classes of decision procedures for reaching a decision on the disposition of the court and on any rationale offered: *consensus* procedures and *non-consensus* procedures. In a consensus procedure, all participants endorse the collective decision. In non-consensus procedures, one or more parties disagrees with the collective decision.<sup>40</sup>

As noted earlier, a judicial decision has several components: a statement of the facts, a disposition, often a rule that dictates that disposition, and sometimes a justification of the applicability or desirability of the applied rule rather than some other rule. I shall argue first that a theory of adjudication for a judge on a collegial court that follows a consensus *per curiam* practice cannot simply direct her to announce the disposition that she believes the law requires. The theory of adjudication must also elaborate her obligation in the face of disagreement.

The argument is most straightforward when one assumes that the court need only make a collective decision on the disposition. I shall assume further that the dispositional decision is dichotomous.

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dissents. *Furman v Georgia* 408 US 238 (1972), for example is *per curiam* but each judge in the majority wrote an opinion as did each member of the dispositional minority. For similar oddities see, the Pentagon papers case (NYT v. US 403 US 713 (1971) which also consists of a *per curiam* opinion and nine separate ones and *Buckley v. Valeo* 424 1 (1976) in which each justice chose various parts to join or dissent from and in which five of the eight justices deciding the case wrote separate opinions.

A *per curiam* opinion of the US Supreme Court, however, is not part of a *per curiam* practice; rather it is a form that a decision within a majoritarian practice may take.

<sup>40</sup>In a consensus procedure the agent endorses the substantive decision (as well as the procedure). A judge dissenting from the collective decision in a majoritarian practice would, presumably, endorse the court's decision in the sense that she would recognize the propriety of the court adopting the view endorsed by a majority of the court rather than some other view.

I begin with the decision procedure. At the outset recall that the court generally will both resolve the case and at least minimally justify its chosen resolution. Clearly, consensus will be harder to achieve if it must extend both to the disposition and to the justification. Moreover, the deeper the justification on which consensus is required, the greater the difficulty the court will have in reaching it.

To understand the difficulty faced by a consensus procedure, we may usefully compare a collegial court using a consensus *per curiam* practice to a criminal jury in the federal system of the United States. Such juries render only a verdict; they provide neither a discussion of the evidence underlying that verdict nor a rationale or explanation of how the inferences were drawn from the evidence. Moreover, the verdict must be unanimous. Similarly, a collegial appellate court must either uphold the lower court or reverse it. If the jury does not achieve unanimity, however, it is “hung” and no outcome is reached. Collegial courts, by contrast, do not have this third, “no-decision” outcome available.<sup>41</sup>

A second difference between the two institutions is relevant. On criminal juries, the standard of proof for a conviction is very high. It introduces an asymmetry between the two decisions that biases “compromise” towards acquittal. On a collegial court, though dispositions are dichotomous, no one disposition is favored or distinguished in any way. Phrased differently, a juror can switch her vote to acquittal not because she believes that the defendant did not commit the crime charged but because the degree of the juror’s conviction has wavered

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<sup>41</sup>The availability of a no-decision outcome may depend in part on the procedures of the court. The United States Supreme Court, for example, has several no-decision devices. Some of these devices are procedural but others are substantive. On the procedural side, it may dismiss the case by ruling that certiorari was improvidently granted. Or it may invoke various rules concerning standing or mootness. More substantively, it might rule that the court lacks jurisdiction to hear the case or that the decision is within the domain of another branch of government.

sufficiently to render her belief less certain. A judge, by contrast, must alter her view of the case; she must conclude either that the lower court erred or that it did not.<sup>42</sup>

Finally, jury decisions leave no residue. A jury does not, indeed should not, pay attention to the decisions of prior juries, even on similar cases. Nor does or should the decision of jury play any role in the decisions of future juries.

These three differences render a consensus procedure more problematic on a collegial court than on a jury. Deliberation on the jury may more easily shake the conviction of the conscientious juror than judicial deliberation can undermine the resolution of the conscientious judge. And if conscientious jurors cannot reach agreement then they may legitimately “hang” while the conscientious judges must, despite their deep disagreements, still render judgment.

Two conscientious judges who follow either a Hartian or a Dworkinian theory of adjudication may reach conflicting dispositional judgments. One concludes that law requires affirmance; the other that the law requires reversal. A theory of adjudication must specify how the judge (or the court) should resolve this conflict.

The burden on consensus procedures obviously increases if the court must agree not only on a disposition but also on the statement of the underlying facts and the rule under which the court affirms or more strongly still on the reasons that endorse that rule.<sup>43</sup> The burden grows because many rules may dictate the same disposition; agreement on a disposition thus does not

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<sup>42</sup>At least in most instances. In some instances, reversal requires that the error of the lower court be sufficiently important to merit reversal.

<sup>43</sup>Notice that juries are not required to justify either verdict; they need not agree on an account of the events in question though this requirement too appears to have an asymmetry. When the jury acquits, each individual can vote for acquittal for her own reason. She may reject the reason of each of the other jurors. Case law appears to require some agreement on the facts when the jury votes to convict. See *Richardson v. United States* 526 US 813 (1999) which held that, under the relevant statute, the jury must agree on the series of illegal acts the defendants committed.

determine the rule. Similarly, many different reasons may justify the same rule; the judges, that is, may reach an “overlapping consensus” on the rule without agreeing on the reasons for that rule. The opportunity for disagreement thus increases.

We can see immediately that neither the Hartian nor the Herculean protocol for judicial decision making can provide a normative standard for a judge on a court with this opinion practice. While in a *seriatim* practice, a judge can imagine that she decides alone; in a practice of unanimity, the judge clearly does not render judgment or make law alone. She must consider her colleagues on the bench. Unless a majority of the bench shares her interpretation that “makes the law best it can be,” then, at some point, she must compromise. The extent and nature of that compromise will depend critically on both the role of courts in the political system and on the specific practices that the Court adopts to govern its internal decision making.

To begin, I consider the decision on the disposition. If the court proceeds by majority rule, any plausible normative theory of adjudication for the solitary judge must require each judge to vote for the disposition required by her best understanding of the law. The normative theory might require the judges to deliberate and to reflect seriously on the views and supporting reasons of her fellow judges. At the end of the deliberative process, however, each judge must reach a final judgment on what disposition the law, on her best understanding of it, requires. As only two outcomes, affirm and reverse, are possible, one will surely receive a majority. The judge on a collegial court may thus adhere to the Dworkinian protocol at least when the court need decide the disposition only and proceeds by majority rule.

If, on the other hand, the internal proceedings of the court require a supra-majority or consensus, then, even on this dispositional decision, the Herculean protocol may not apply. Unanimity is a very demanding standard; in many hard cases, judges will have significant

disagreements about the appropriate disposition of the case. These disagreements are unlikely to be resolved by continued deliberation. Moreover, unlike in jury deliberations, the court does not have the luxury of reaching a “hung disposition”. They are required to decide the case.

Turn now to the opinion or justification of the disposition. Regardless of the voting method – majority rule or supra-majority, a Herculean protocol will not work. Suppose the court operates by majority rule. For simplicity, assume initially that the judges agree on the disposition of the case; they only disagree about the appropriate rule to be applied to the case. The judges may still disagree dramatically about the rule and rationale for the disposition. More than one provision of the code and set of facts may yield the same disposition. How should the judge proceed here?

We now have two questions. First, how should the court choose among multiple rationales? Second, how should each judge choose among multiple rationales? Normative theories of adjudication generally focus on the second question; they generally ignore the first question, a question that, on its face, is one of design and hence will vary with institutional aims.

Briefly consider the first question. A court might follow a vast number of different procedures. Each procedure must include at least (1) a deliberative procedure that determines both the content of the agenda and the path through it and (2) an aggregation method. Deliberative bodies use a wide variety of methods to develop and manage an agenda. In Congress, someone submits a bill that is then subject to intensive scrutiny first in committee and then, if necessary, on the floor of the chamber. Proposals generally take the form of proffered amendments that are considered according to Robert’s Rules of Order. Call this the “open rule method.”

As far as we know courts do not operate in this fashion. In the Cour de Cassation, one

judge is designated as the reporting judge who prepares a dossier on the case. That dossier includes arguments for and against and, often, several opinions for the court to consider<sup>44</sup>. It is not clear whether, during deliberations, the court chooses solely from the set of opinions proposed by the reporting judge, whether other judges may propose additional alternatives, or whether amendments to the proposed opinions are admitted. Call this the “close rule method.”<sup>45</sup>

Under an open rule method, judicial obligations will be symmetric. A normative theory of adjudication will characterize when a judge should make a proposal, what she should propose, and how she should vote on any given agenda. Under a closed rule method, by contrast, judicial obligations will be asymmetric. The normative theory of adjudication will specify the obligation of the reporting judge – what proposals she should make while it will specify how the rest of the panel should respond to those proposals. In either case, however, judicial obligation must differ from the obligation of the judge sitting alone.

Collegiality may appear unproblematic to the Hartian judge. In easy cases, judges will agree on both disposition and rule. In hard cases, the Hartian theory of adjudication directs the judge to legislate. “Legislate” here, however, refers to a process in which the judge refers to her own moral and policy views to resolve the open question. It does not guide the judge in

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<sup>45</sup>The open rule and closed rule methods correspond to the two regimes under which the US Congress considers legislation on the floor. Under an open rule, members may propose amendments to the bill; under a closed rule the floor debates the bill but no amendments are possible. Congress chooses between the bill and the status quo.

The procedure on the Cour de Cassation appears to be somewhat more elaborate as the reporting judge may offer a number of possible opinions. In each case, the Cour must resolve each of the legal grounds for reversal raised by the appellant. Suppose there are  $n$  such grounds, each of which can be resolved either for appellant or against. The reporting judge must prepare a judgment for each of the  $2^n$  possible resolutions of these  $n$  issues. Obviously, when  $n$  is large, this burden would be very onerous. The procedure is nonetheless closed to the extent the panel can consider *only* the opinions proposed by the rapporteur.

proposing or choosing among proposed opinions.

Nor is it clear how to extend the Hartian protocol to the collegial context. Consider first proposals. It will be useful to name the opinion that the Hartian judge would issue were she sitting alone her “ideal opinion”. Should the Hartian judge propose only her ideal opinion? Or may she propose an opinion that differs from her ideal opinion?

The situation might differ under open rule and closed rule situations. Under an open rule, her ideal opinion is unlikely to garner a majority. Indeed, under an open rule, if each judge proposes her ideal opinion, each would presumably vote for that opinion. With sufficient disagreement over the ideal rule, no rule will garner a majority. The theory certainly provides no indication how the judges should break this impasse.

Under the closed rule, the reporting judge faces equal if not greater difficulties. As she is acting for the court, she must presumably act impartially. Impartiality will have different senses under different protocols. In each protocol, she must provide a fair statement of the facts and the arguments for each possible resolution. The protocol that obligates her to produce an opinion for each possible resolution will be normatively unproblematic if she has no discretion in formulating each of these opinions. On the other hand, a protocol that permits the reporting judge to provide only one opinion raises complex normative questions.

Suppose, for example, that the ideal position of the reporting judge is in the dispositional minority. May the judge offer that opinion and that only? Under some normative schemes and in some factual instances, such an opinion might garner a majority of votes.<sup>46</sup> For purposes of this discussion, only the normative question is of interest. Normatively, a non-reporting judge

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<sup>46</sup>For the relevant factual circumstances see Cameron and Kornhauser, “Modeling Collegial Courts 3: Adjudication Equilibria,” NYU working paper 26 September 2010.

must be permitted to endorse an opinion that dictates a disposition different from the one dictated by her ideal. Any normative theory of adjudication for a solitary judge would not permit this.

The appropriateness of this behavior is less clear on a collegial courts. If there are only two opinions, one might think it clear that the judge should choose the opinion she thinks provides a better statement of the law. Suppose, however, that the opinion that Judge Liza thinks better states the law dictates a disposition contrary to the disposition dictated by Liza's best understanding of the law? Should she accept a less cogent statement of the law in order to endorse the disposition that she believes correct? Or should she abandon her considered view of the correct disposition in order to endorse a better statement of the law? Our answer to this question will depend on our understanding of the role of courts. In this instance, Liza must compromise either her dispute resolution function or her managerial function.<sup>47</sup>

c. Majoritarian Practices.

The federal appellate courts of the United States have adopted a practice intermediate to *seriatim* and *per curiam* practices.<sup>48</sup> Federal collegial courts strive, in each case, for an opinion endorsed by a majority of the judges on the panel. In the Supreme Court of the United States, a decided case may give rise not only to a majority opinion but also to one or more dissenting opinions and possibly one or more concurring opinions. Usually, in the intermediate courts of

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<sup>47</sup>The opinions of the court guide the lower courts in their resolution of disputes. Liza might prefer a clear, but less accurate, formulation of a rule because she thinks that lower courts will on the whole render better decisions under the clearer formulation.

<sup>48</sup>Practice on the U.S. Supreme Court has evolved over time. Initially, the Court adhered to a practice of *seriatim* opinions. Shortly after John Marshall became Chief Justice in 1801, however he managed to impose unanimity on the court. During his tenure, the Court thus generally issued a signed unanimous opinion. Occasionally, a Justice registered a dissent. Citations.

appeal, the opinion is unanimous though occasionally a judge will dissent or concur.<sup>49</sup>

The Supreme Court of the United State strives to issue a *majority* opinion, one that attracts the endorsement of at least a majority of the Justices.<sup>50</sup> there is usually an opinion of the Court though, in exceptional circumstances, no opinion may attract a majority of the justices.<sup>51</sup>

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<sup>49</sup>As discussed below, sometimes an intermediate court of appeal announces a unanimous opinion that also attracts a concurrence, occasionally written by the author of the majority opinion. This peculiar practice is well-established in the D.C. Circuit. *In re Sealed Case*, 552 F.3d 841 (D.C. Cir. 2009); *Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484 (D.C. Cir. 1996)(Edwards concurring in his own majority opinions); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006); *American Bus Ass'n v. Slater*, 231 F.3d 1 (D.C. Cir. 2000); *U.S. v. Lugg*, 892 F.2d 101 (D.C. Cir. 1989)(Sentelle concurring in his own majority opinions); *Burka v. U.S. Dept. of Health and Human Servs.*, 142 F.3d 1286 (D.C. Cir. 1998); *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997); *National Wildlife Fed. v. Lujan*, 928 F.2d 453 (D.C. Cir. 1991)(Wald concurring in her own majority opinions); *Emergency Coalition to Defend Educational Travel v. U.S. Dept. Treasury*, 545 F.3d 4 (D.C. Cir. 2008); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Dellums v. U.S. Nuclear Regulatory Com'n*, 863 F.2d 968 (D.C. Cir. 1988)(Silberman concurring in his own majority opinions); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000)(Tatel concurring in his own majority opinion).

This practice highlights the compromises that the writer of the majority opinion must make. Consider, for example, *U.S. v. Lugg*, 892 F.2d 101 (D.C. Cir. 1989) in which Sentelle's concurrence states that the majority opinion discusses an issue that it did not need to reach to dispose of the case. Of course, Sentelle wrote the majority; he must have included it because, absent the discussion, one or both of the other judges on the panel would not have joined his opinion. Clearly, Sentelle's considered the value of unanimity greater than the value of an opinion that stated his sincere view.

Of course, Sentelle did manage to express a view closer to his ideal by concurring in his own majority opinion. But, a practice in which each judge who joins the majority also expresses her reservations and emendations to that opinion would undermine the value of having a majority opinion. The modified practice would approximate a *seriatim* practice.

<sup>50</sup>The decision procedure is roughly as follows. After the Court accepts the case, it (often) hears oral argument. After each week's oral argument, the Justices meet in secret conference during which each Justice may express briefly her view of the case and then a dispositional vote is taken. The senior judge in the dispositional majority then designates a member of the dispositional majority to draft an opinion. Call her "the author". The author will draft an opinion, perhaps communicating with other justices. That draft will circulate, attract comments, and perhaps provoke concurrences and dissents. At a subsequent conference, a final dispositional vote and joins are confirmed.

<sup>51</sup>Notice that, on the dimension of transparency defined in section a above, majoritarian practice lies somewhere between that of *seriatim* and *per curiam* opinions. The practice discloses the dispositional votes and join decisions of each justice. The join decision, however, is less

In addition there may be one or more dissents and one or more concurrences.<sup>52</sup>

This practice poses several questions for a normative theory of adjudication. Such a theory must address the various roles that a Justice may play and the complex set of decisions that each must render. Under current US Supreme Court practice, each judge plays several roles. She must cast an initial dispositional vote that will determine the provisional dispositional majority. The senior justice in that provisional majority must designate an opinion writer. The Designated opinion writer must then circulate a draft opinion that, ideally, will attract joins from a majority of the court. The justices not designated to write the initial draft must decide whether to join the draft opinion, to write separately, or to join a separate opinion, either concurring or dissenting, of those justices who choose to write.

I shall put to one side questions concerning the appropriate exercise of the assignment power to focus on the rendering of judgment and the related decisions of writing and joining opinions.<sup>53</sup> First, what opinion ought the judge assigned to write the majority opinion (“the

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revealing than the issuance of an opinion in a *seriatim* practice. An opinion issued in a *seriatim* is more likely to represent the ideal opinion of the issuing judge than the majority, concurring, or dissenting opinion that judge joins. Finally, notice that deliberations in both *seriatim* and majoritarian practice remain undisclosed. We might design a *seriatim* practice in which the panel discussed the case prior to each judge issuing her opinion or a practice in which each judge announces her opinion without any prior consultation of her colleagues.

<sup>52</sup>On occasion the Court apparently mimics the unsigned, unanimous opinion when it issues a *per curiam* opinion. But this *per curiam* practice is at best a corrupt version of the unanimity protocol. Consider, for example *Furman v. Georgia*.

<sup>53</sup>At least two issues arise here. First, to whom should the most senior justice assign the opinion? She might assign to maximize the number of joins that the opinion will attract. She might assign to the justice who will write an opinion that best approximates her own views. She might assign to the justice likely to write the most “centrist” opinion. (There are two competing understandings of centrist: the center of the dispositional majority and the center of the court). Such an opinion, on a polarized court or dispositional majority might not correspond to the opinion that attracts the most joins. Of course, which opinion attracts which joins will depend on the joining behavior of the justices.

Second, a theory must determine the appropriateness of a strategic provisional dispositional vote by the Chief Justice (and perhaps other senior Justices). The Chief Justice is,

author”) draft? The author might draft her ideal opinion, the opinion “closest” to her ideal opinion that attracted a bare majority of joins, or an opinion that maximized the number of joins. Second, under what circumstances ought a non-writing justice join the opinion of the court? Clearly if the opinion of the court corresponded to her own ideal opinion, she should join. Most majority opinions, however, will not correspond to the ideal opinion of any or, at least, most justices; how close to the justice’s ideal opinion must the majority opinion be for the justice to have an obligation to join? Third, under what conditions should a justice write separately? Notice that one might join the majority opinion yet decide to write separately as well. Thus, though one might say that a decision not to join the majority opinion entails an obligation to write separately on the grounds that a judge ought to announce his reasons for his decision,<sup>54</sup> a judge who joins the majority must still decide whether also to write separately. Is such behavior normatively appropriate. Finally, and related to each of the prior decisions, how ought a judge to vote on the disposition of the case?

The analysis of the *per curiam* court revealed the difficulties faced by both Hartian and Dworkinian judges in both drafting an opinion and in choosing to join it. These difficulties recur on a majoritarian court. After all, for analytic purposes we may treat the dispositional majority as a “court” that seeks, though it does not require, a *per curiam* opinion. The author,

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*ex officio*, the most senior member of the Court. Thus, when in the majority he will assign the opinion. A self-interested Chief Justice, seeking to promote his own views, would always vote in the dispositional majority as she could then exercise to her benefit the power to designate the opinion writer .

<sup>54</sup>As Dyzenhaus and Taggart, “Reasoned Decisions and Legal Theory,” in Douglas Edlin (ed.), *Common Law Theory* 134 (2007) document common law judges had, and to a large extent, still do not have any legal obligation to provide reasons for their judgments. In French civil law, by contrast, the court is required to give a reason for its judgment. The Cour de Cassation interprets that requirement as one that dictates the identification of the rule from which, given the facts of the case, the announced disposition follows

say Themis, must draft an opinion that attracts a majority of the Justices. In a court composed of Justices with diverse views, her ideal opinion will not attract a majority. What compromises should she make? Should she make further compromises to extend the majority from 5 to 6 or 7 justices?

A non-writing Justice, say Hercules, faces a similar problem. The draft opinion is unlikely to mirror her ideal opinion. What compromises should Hercules make? Does it matter how many other justices have already joined Themis' opinion? Should Hercules endorse a non-ideal disposition to increase the majority? A glance at actual practice may indicate how difficult these normative issues are to resolve.

To begin, consider the complexities presented by the link between the dispositional vote and the justification of the decision.

Consider a case that failed to yield a majority opinion.<sup>55</sup> In *Pennsylvania v. Union Gas*<sup>56</sup> the Court addressed the constitutionality of the amendments to the Comprehensive Environmental Response and Liability Act of 1980 ("CERCLA). These amendments, known by the acronym "SARA" (for the "Superfund Amendment and Reauthorization Act of 198), lifted the Eleventh Amendment immunity from suit of the states. The resolution of the case required the resolution of two issues: A. Did Congress have the power under the Commerce Clause to lift the immunity from suit provided by the Eleventh Amendment? and B. Had Congress exercised that Power? Table 2 presents the distribution of views of the disposition of each issue

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<sup>55</sup>Kornhauser and Sager "The One and the Many" *California Law Review* 1 (1993) discusses this case and *Arizona v. Fulminante* 499 US279 (1991) at length. That article addresses the appropriate aggregation procedure that the court should use to resolve the conflict between case-by-case and issue-by-issue aggregation methods.

<sup>56</sup> 491 US 1 (1989)

among the justices in *Union Gas*.<sup>57</sup> A majority of the Court agreed on the resolution and the justification of the second issue concerning Congressional exercise of its power. On the first issue, no justification received majority support. Four justices – Blackmun, Brennan, Marshall and Stevens, endorsed one justification while the fifth White endorsed a second.

Table 2  
 Pennsylvania v. Union Gas

Justice	Power to Abrogate	Exercised In This Statute	*Can Pennsylvania Be Sued Here*	
			Case	Issue
Blackmun	Y	Y	Y	Y
Brennan	Y	Y	Y	Y
Marshall	Y	Y	Y	Y
Stevens	Y	Y	Y	Y
<b>White</b>	<b>Y</b>	<b>N</b>	<b>N</b>	<b>Y</b>
Kennedy	N	N	N	N
O'Connor	N	N	N	N
Rehnquist	N	N	N	N
<b>Scalia</b>	<b>N</b>	<b>Y</b>	<b>N</b>	<b>Y</b>

<sup>57</sup>Four justices – Brennan, White, Scalia, O'Connor – issue opinions. Brennan's opinion on the issue of Congressional exercise of power attracts a majority of the court – Brennan, Blackmun, Marshall, Stevens and White. His opinion that endorses the view that Congress has the power to abrogate the 11<sup>th</sup> amendment attracts only three joins, those of Blackmun, Marshall and Stevens. White endorses the same dispositional view on this issue but for different reasons which he expresses in his own opinion, an opinion which also dissents from the claim that Congress exercised its power in enacting SARA. Justices Kennedy, O'Connor, and Rehnquist concur in White's opinion on the question of whether Congress exercised its power. Justice Scalia, though he agrees with Justice Brennan's disposition and rationale on the issue of Congressional exercise of its power, writes a dissent that supports the view that Congress had no power. Justices Kennedy, O'Connor, and Rehnquist join this part of Scalia's reasoning. Justice Stevens, though he joins Brennan's opinion in full writes an extensive, separate concurrence to Brennan's opinion on Congressional power. Justice O'Connor writes a non-substantive opinion concurring in Scalia's view of the reasons for the disposition on the issue of congressional power and concurring in Justice White's view on the reasons for concluding that Congress exercised its power.

Members of the Court thus identify four different policy positions.

Y (5-4)

Y (5-4)

N(5-4) Y(6-3)

As this case produced multiple, we might think it more likely that those opinions closely approximated the ideal views of the authors and those who joined. On the other hand, the final result in the case differs from the one we might expect.

Consider, in *Union Gas*, the decisions of Justice White. Justice White concluded that Congress had the power to abrogate state immunity from monetary damages under the 11th Amendment but that Congress had not exercised that power in enacting SARA. Thus, Justice White sitting alone would have dismissed the action against Pennsylvania on the grounds of Eleventh Amendment immunity. Sitting on a collegial court, however, he cast the deciding dispositional vote in favor of permitting Union Gas's action against Pennsylvania. To justify his dispositional vote, White noted he was bound by the majority ruling that Congress had exercised its power. In rendering judgment on the *case*, White thus ceded his judgment on this issue to the majority<sup>58</sup>

Scalia, the only justice situated symmetrically to White, voted differently. Scalia, sitting alone, would have ruled that Congress had no power to abrogate Eleventh Amendment immunity

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<sup>58</sup>Several questions, discussed in the text, arise about the legitimacy of White's actions. Two other points, however, are worth noting in the margin. First, we might ask how should White have behaved under a *seriatim* practice? Presumably he would have announced judgment for Pennsylvania rather than against as he would have defended both his view that Congress had the power under the Commerce Clause to abrogate the 11<sup>th</sup> Amendment and his view that, in enacting SARA, Congress had not exercised that power. After all, unless he were the last of the justices to announce his opinion, White would not have known how the court lined up on any issue. Moreover, it seems implausible that a normative theory of adjudication in a *seriatim* practice would condition the obligations of a judge on where in the order of announcement the judge found herself.

Second, ask what aspect of the past political practice of the community must Hercules interpret. Must he consider only the judgment in the case? The court's disposition on each issue? The disposition of each judge on each issue? As we expand the set of judgments that a future judge must rationalize, the task becomes increasingly difficulty.

but it had tried to exercise such a power. Consequently, he would have dismissed Union Gas's suit against Pennsylvania. He renders the same dispositional vote on the Supreme Court of the United States. He does not take himself as bound by the majority view that Congress had the power to abrogate.<sup>59</sup>

White and Scalia, both of whom would decide for Pennsylvania were each sitting alone, thus take opposing views of their dispositional obligations that lead to disagreement over the final disposition of the case.<sup>60</sup> A normative theory of adjudication has three options. It can impose an obligation to vote issue by issue as White did; it can impose an obligation to render the disposition dictated by the judge's own views on each issue, as Scalia did; or it can permit the judge to adopt either protocol.

Either mandatory protocol might be supported, though White's protocol may in fact have stronger support. The permissive protocol that endorses the behavior of both Scalia and White is harder to defend. I consider each in turn.

Scalia votes dispositionally as Hercules would, without attention to the dispositional votes of his colleagues. We have seen in our discussion of the *seriatim* protocol, that the pursuit of a Dworkinian protocol by each judge is self-defeating. Consequently, the normative theory of adjudication must permit each judge to compromise to some extent on her best interpretation of the law. That compromise, however, cannot extend to compromising her dispositional vote on the case. Scalia has acted properly.

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<sup>59</sup>If each member of the Court, in making her vote on the disposition, considered herself bound by the majority dispositional view on each issue, the court would be dispositionally unanimous.

<sup>60</sup>Notice that Justice Scalia could have ensured that the Court reached its ideal disposition simply by refraining to express his view on the question of whether Congress had exercised its power to abrogate in SARA. After all, he did not believe that Congress had such a power. If he had remained silent, Justice White would not have felt himself bound by the majority decision on that issue.

White, by contrast, takes the dispositional votes of his colleagues seriously. White's normative theory of collegial adjudication thus requires that each judge render a sincere vote on each issue.<sup>61</sup> Each judge then considers the views of her colleagues on each issue and endorses the disposition of the case that is dictated by the issue-by-issue majorities. The court should unanimously endorse the disposition of each issue in the case and the case as a whole. Of course, no judge might be able to rationalize the court's disposition.

White's protocol seems particularly congenial to a Hartian judge as we imagine a legislative procedure that implements judicial commitment to the prior votes on the "bill" before the house. On the other hand, White's protocol might encourage strategic voting on the underlying issues. Scalia, for instance, would have an incentive, under White's protocol, to change his vote on the exercise issue. Had Scalia voted No on this issue, the issue majority would be No and the court would be forced to a unanimous final disposition in favor of Pennsylvania.<sup>62</sup>

The Justices must also draft and join opinions that articulate rules that lead to the disposition of the case and reasons that justify those rules. For a solitary judge, opinions are normatively straightforward. The judge simply represents the rule according to which he decided the case and the reasons that, on the judge's account, justify that rule. In Dworkin's terms, the judge offers her best interpretation of the past political decisions of the community.

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<sup>61</sup>White's protocol thus might support a practice of *per curiam* opinions. The protocol would yield a unanimous disposition without necessarily yielding a rule or justification. If, on a each issue, a majority agreed on a justification, the court might use the union of these issue justifications as the justification of the court.

<sup>62</sup>Scalia should (prudentially) do this if the court reports only a final disposition. If it also reports justifications, the prudential action is unclear. Scalia's votes indicate that he thinks that the best interpretation of the law is (N,Y). If he switches his second vote to N, the pair (N,N) will prevail which is worse for Scalia unless he values the correct case disposition sufficiently highly.

On a collegial court, the identification and endorsement of opinions, rules and reasons poses complex normative issues, particularly on a majoritarian court. As noted earlier, the author of the majority opinion must accommodate the diverse views of a majority of the court; to do so she must in some ways compromise her own best interpretation of the law. In addition, other judges must decide whether to join the majority opinion and, in addition, whether to write separately, either in dissent or in concurrence.

The examination of practice in a few actual cases may help illuminate some of these issues. To begin, consider *McKoy v. North Carolina*, a capital punishment case decided in 1990.<sup>63</sup> In *McKoy*, the defendant challenged a North Carolina statute that apparently required the jury to consider in the penalty phase of a capital case only those mitigating factors on which it had unanimously agreed. Justice Marshall wrote an opinion joined by four other Justices, two of whom White and Blackmun, also wrote concurrences. Justice Kennedy concurred in the result. Justice Scalia wrote a dissent joined by two other justices.

Note first that Justice Marshall's opinion struck down the statute on grounds that acknowledged the constitutionality of some procedures for the penalty phase in capital cases. He thus wrote an opinion at odds with his understanding of the law. Marshall, as well as Brennan, had systematically maintained for over fifteen years that the death penalty was unconstitutional *per se*. They voiced this view of the law in dissents, concurrences, and dissents to denials of certiorari both before and after *McKoy*. In *McKoy*, therefore, Marshall compromised his view of the law in order to garner a majority for his opinion.

Did Marshall act properly in this instance? Plausibly yes. His view that the death penalty is unconstitutional *per se* would not attract sufficient joins to create a majority. As a

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<sup>63</sup>494 US 433 (1990)

consequence, either there would have been no opinion of the Court or that opinion might have been narrower and more permissive of the death penalty.<sup>64</sup> His actual opinion, on the other hand, had one and possibly two virtues. First, a decision accompanied by an opinion of the court provides clearer guidance to lower courts about how to assess statutes comparable to the North Carolina statute at issue than a decision without an opinion of the court. Second, Marshall's opinion may have been more broadly protective of defendants possibly facing the death penalty; thus Marshall may have achieved a better rule than if he had not written this way.

On Dworkin's view, by contrast, Marshall may have acted illegitimately. Recall the bare account of the content of past political decisions of the community that Hercules must interpret. On that account, only the facts and the disposition of the case matter for the development of the law. Given the limited consequence of a decision, one might argue that Marshall should not compromise his reasons for rejecting the death penalty in the case before him. The bare account apparently sees no virtue in the existence of an opinion of the Court.<sup>65</sup>

Consider now the three concurrences. Kennedy concurs without joining the majority because he objects to a substantial part of the rationale Marshall offers. Marshall and Kennedy

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<sup>64</sup>Presumably Brennan would have joined Marshall's *per se* unconstitutional opinion and not joined a more restrictive opinion. The majority would then have divided at best 4-2 over rationales for the result. But perhaps a four person member of the majority would have drafted a narrower opinion that attracted a justice in the dispositional minority. Or more radically, perhaps Scalia could have drafted a narrower opinion for the dispositional minority that attracted two members of the dispositional majority, reversing the case outcome. These hypotheticals, of course, assume that a justice may legitimately endorse an opinion that dictates a disposition different from her sincere dispositional vote.

<sup>65</sup>This claim is perhaps too strong. An opinion of the court has no consequence for future judges of that court. It might have consequences for judges on courts below. But Dworkin's theory is non-positional; lower court judges should decide using the same procedures as Supreme Court justices; they too should consider only the facts and disposition of the case. Phrased differently, on this bare account, Dworkin's theory does not consider the guidance of lower courts (or of private individuals) as a reason for a judge.

agree that an immediately prior case, *Mills v. Maryland*<sup>66</sup> governs and they agree that the arbitrary nature of the unanimity requirement raised in each justifies reversing the judgment below.<sup>67</sup> Kennedy, however, rejects Marshall's argument that the result in *McKoy* flows from two other cases, *Lockett v. Ohio*<sup>68</sup> and *Eddings v. Oklahoma*.<sup>69</sup> Kennedy perhaps wants to limit the reach of the prior case law.

Kennedy's concurrence reveals some of the complexity behind normative evaluation of the authoring and joining decision. As a majority has endorsed *an* opinion, Kennedy perhaps more leeway to refuse to join and to write separately. Concomitantly, of course, Marshall has perhaps more leeway to write broadly because the broader opinion did in fact attract of majority of justices. On the other hand, we might ask whether it would be better if Kennedy joined the majority and awaited an appropriate case in which to express his divergent view of the correct scope of the prior case law, that is, a case in which his understanding of the law yields a different disposition than the understanding articulated in Marshall's opinion.

Consider now White's concurrence. White writes simply to clarify the majority opinion. He asserts simply that the opinion strikes down the unanimity requirement; it does not bear on the standard of proof the juror must apply. This clarification seems uncontroversial but, again, one wonders whether White needed to have expressed this view now. A normative view that places great value on the guidance of future conduct is more apt to normatively require or at least permit this additional concurrence.

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<sup>66</sup>486 US 367 (1988)

<sup>67</sup>Both *Mills* and *McKoy* consider the consequences of the doctrinal paradox as they might occur in the sentencing phase of a capital trial. In each case, the court concludes that, in effect, each juror must render judgment case by case rather than issue by issue.

<sup>68</sup>438 US 586 (1978)

<sup>69</sup>455 US 104 (19 )

Finally, consider Blackmun's concurrence. Blackmun agrees completely with Marshall. He devotes his opinion to a refutation of Scalia's dissent. Blackmun and Scalia engage the logic of each other's argument and, in the course of the debate, clarify the argument of each and, to some extent, Marshall's opinion. This clarification seems normatively desirable.

As a final example, consider the short line of cases from which emerged the intermediate standard of review under the Equal Protection Clause. The behavior of Justice Brennan is of particular interest. Burger writes the first opinion that addresses the legitimacy under the Equal Protection Clause of sex as a statutory classification. In *Reed v. Reed*, Chief Justice Burger, unanimously held unconstitutional an Idaho statute that gave fathers priority over mothers in the appointment of executors of estates. The terse opinion characterized the unequal treatment as arbitrary and hence failing a rational basis test.

In *Frontiero v. Richardson*, Brennan, writing for a four-person plurality opinion (in an 8-1 dispositional majority) treats sex as a suspect classification; only a compelling state interest permits the use of the classification. The other four persons in the majority chose to decide the case without articulating a clear standard of review.

Shortly thereafter, in a case addressing the constitutionality of mandatory pregnancy leave for women employees, Brennan endorses the majority opinion of Justice Stewart who reverts to the fundamental rights/irrebuttable presumption rationale of *Stanley*. Justice Powell by contrast did not join the opinion; rather he argued that equal protection analysis was appropriate. He found the statute arbitrary and refused again to endorse the suspect classification analysis articulated by Brennan. It seems likely however, that Justice Brennan had not abandoned his view that the past political decisions of the community required that sex be treated as a suspect classification.

Then in *Stanton v. Stanton*, Justice Blackmun writing for an 8 person coalition that includes Brennan strikes down a Utah child support statute on equal protection grounds. Blackmun explicitly refuses to reach the question of what degree of inquiry is required to sustain a gender based classificatory scheme, stating merely that *Reed v. Reed*, the initial case in the sequence, controls.

In *Craig v. Boren* 429 US 190 (1976), Brennan again writes the majority opinion. Again he abandons the plurality rationale he offered in *Frontiero v. Richardson* in order to enunciate the standard: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." This standard results in a different allocation of rights and duties than the compelling state interest standard. What justifies Brennan's retreat from the compelling state interest standard to the intermediate standard he announced?

#### 5. The Design Perspective

Explicit normative theories of adjudication generally adopt a philosophical perspective. Theorists pose and answer a general question about the nature of legal reasoning or a general question of how judges ought to decide cases. Dworkin's theory of adjudication serves as a paradigmatic example of this approach.

This essay argues, to the contrary, that normative theories of adjudication must be special not general. The ostensibly general part of current theories of adjudication apply only to judges implicitly situated in an "ideal" institutional setting, one in which a solitary judge decides case. Judges in extant legal systems do not adjudicate in isolation. A judge sits in a hierarchy of courts and often deliberates and decides with other judges on a panel. Both circumstances influence the obligations a judge faces.

Two questions emerge from the argument.. First, what room, if any, remains for a general theory of adjudication? Second, what is the nature of the alternative approach, *the design* perspective, to adjudication that I propose?

a. The Scope of a General theory of Adjudication

At the outset, I suggested that a theory of adjudication divides into three parts: one that identifies the content of the “law,” the materials or grounds from which a judge reasons; a second that identifies the process of reasoning from these grounds to the adjudicatory conclusion; and a third part that characterizes desirable adjudicatory institutions. I have suggested further that the content of the first two parts of a theory of adjudication is conditional on the third part.

The first part of a theory of adjudication corresponds roughly to a concept of law.<sup>70</sup> Philosophers have long debated the concept of law though we might doubt that the central issue in this long debate concerns the identification of the grounds of judicial argument. In any case, these theories are, of necessity, very abstract. A concept of law must identify the common essence of legal systems across time and space.

One might argue then that a similarly abstract theory applies to the second part of a theory of adjudication. On this account, every adjudicatory structure must share some common processes of reasoning. For this theory to be interesting, however, judicial reasoning must differ in some interesting way from ordinary reasoning governed by the rules of deductive and inductive logic that govern rational argument generally.

b. The Design Perspective

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<sup>70</sup>The structure of the argument here poses the question whether the materials identified as argumentative grounds for adjudication are equivalent to the grounds appropriate for those who execute the laws. In principle they might differ and thus yield a differentiated concept of “law.”

The design perspective adopts the stance of a constitutional designer who structures the political institutions of a society. Courts (may) constitute one part of that political structure; the decision protocol of judges – the nature of the reasoning they should follow – constitutes one feature in the design of a court system.

The design perspective, like the philosophical one, is normative, but more modestly so. Jurisprudential accounts of adjudication are usually framed as general theories, applicable to each judge in every legal system. Design, by contrast, is instrumental and functional; the designer seeks to implement the “principal’s” goals through its institutional design.<sup>71</sup> The principal’s ends thus provide a normative aspect to the designer’s task. The normative ambition of the designer, however, is hedged and limited in several respects. First, different principals may have different aims which consequently lead to different institutional structures. Second, the design of a decision protocol for judges is only a (small) portion of the designer’s task. The designer may assign “courts” and “judges” dramatically different tasks in different political structures. Judicial reasoning should then vary with the specific tasks assigned to the courts. Third, even for a specific political structure, the functions assigned to courts might be realized in multiple ways. From the design perspective, we may expect a multitude of theories of adjudication.<sup>72</sup>

Indeed, we may distinguish several inquiries that we might pursue from the design perspective. We might ask, for a specific society with specific goals and history, how ought we to design its political institutions? As noted above, the answer to this question might have

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<sup>71</sup>Of course, identifying the “principal” and its goals may be problematic when the principal is a collection of individuals or a group rather than an individual.

<sup>72</sup>Alexander and Sherwin and Schauer also adopt a design perspective though not wholeheartedly. On their accounts, the function of courts is straightforward and invariant across political structures.

multiple answers as the ideal might be realizable in multiple ways. We might call this the ideal, global question. This question itself gives rise to a number of subsidiary questions about the structure of adjudication within ideal political institutions.. How would judges reason in the ideal court institutions embedded in an ideal political structure? We might also ask a second-best question: for a society with specific political institutions, how should we structure courts in general and judicial reasoning in particular? Third we might ask given the political and adjudicatory institutions of a particular society, how ought judges to reason? Finally, we might ask the interpretive question; what theory of judicial reasoning provides the best account of the practice of judicial reasoning within an actual legal system? Of course, the answers to these questions may vary widely.

The design perspective, though an instrumental one, is clearly normative. It asks what obligations judges should have to best promote our aims. As our aims vary, so will our normative theory of adjudication. Even if we agree on a set of adjudicatory functions, we may disagree on how courts ought to balance these distinct functions.

Explanatory accounts of courts and judicial reasoning may adopt a different perspective. After all, our court systems are not designed or at least not fully designed. They are the product of a complex history. The United States, for example, inherited many practices from Britain at the time of the founding but today's practice has emerged from a complex mixture of explicit choices and evolutionary change that results from tacit behaviors and decisions of multiple judges. The explicit choices may have resulted from political calculation at odds with the goals the design perspective might impute to the principal while the evolutionary changes in the decentralized practice result from ill-understood social phenomena. The design perspective, however, might provide at least a partial explanation because our explanation of our adjudicatory

practices might be a functional one; and such a functional explanation would be linked to the design perspective.

A shift from the philosophical to the design perspective has radical implications for our understanding of adjudication and its role in our theories of law. First, the shift from the philosophic to the design perspective alters our projects in several important ways. As noted earlier, the philosophic perspective is too broad; it offers a set of timeless and context free obligations. The design perspective, by contrast, is much narrower; theories of adjudication are specific not general. Judicial reasoning in the federal courts in the United States need not (and indeed may not) be the same as judicial reasoning in the civil courts of France. Indeed, judicial reasoning within the courts of California might not be the same as judicial reasoning within the federal courts of the United States. For that matter, judicial obligation in the Court of Appeals of the United States may differ from judicial obligation on the Supreme court of the United States.<sup>73</sup>

In fact, given the division of labor across judicial tiers, it is likely that judicial obligation at the trial level where the task of fact-finding is paramount may differ from judicial obligation at the intermediate appellate level where we might think that error correction is paramount; these obligations may differ from obligation at the court of last resort where law creation might be paramount.<sup>74</sup> Similarly, judicial reasoning within the administrative courts of France may differ

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<sup>73</sup>Indeed we might ask whether judicial obligation on the Ninth Circuit with its numerous judges spread over a vast geographic area and with complex *en banc* rules differs from judicial obligation on the DC Circuit with its small bench, all of whom have chambers in the same building in Washington D.C.

<sup>74</sup>The variation in judicial obligation may be more refined. Consider a judge of the United States District Court. Does this judge have the same obligations in a jury trial as in a bench trial? In the bench trial, the judge must find the facts, so she must have an obligation to find the facts correctly or as accurately as she can. She must also articulate the legal requirements differently in her opinion on the law than in her instructions to the jury in a jury trial.

from that of the French civil courts. This plethora of theories of adjudication transforms the debate over the role of morality in judicial decision.

On the other hand, the design perspective is broader because it directs attention to two questions that the philosophic perspective ignores. As, from the design perspective, judicial obligation varies with institutional detail, the design perspective demands that we have a normative theory of institutional structure. How should courts be organized? How many tiers should they have? Should judges sit in panels or *en banc*? What is the legal status of precedent, the body of previously decided case law? Should judges issue seriatim? Should the court, instead, issue a unanimous opinion? Or should it issue a majority opinion with concurrences and dissents?

The design perspective also poses an implementation problem that is not considered from the philosophic perspective. The design perspective is instrumental. It asks how should judges decide cases to best promote the system's aims. Normative theories ask how ought judge X decide? A design perspective asks in addition: what institutional structure will lead judges to decide as they ought? What ought the criteria of appointment be? How should judges be trained? What incentives ought they face?

The design perspective has a second implication: from a practical point of view, the institutional specificity of theories of adjudication confirms the difficulty of legal transplants from one judicial system to another.

Finally, the plethora of theories of adjudication implies that any general theory of law must differ from a theory of adjudication. Dworkin offered his theory of adjudication as an answer to the question: on what grounds should judges decide cases? He claimed that these obligatory grounds of decision counted as law.

## 6. Concluding Remarks

Theories of adjudication implicitly characterize law as a solitary activity. Judges, however, act collectively to make and interpret law. As in other economic, political and social contexts, collective action raises difficulties both to our understanding and our normative aspirations.

Dworkin's theory of adjudication, and with it his theory of law, cleverly attempts to circumvent the collective nature of adjudication. Dworkin's theory of adjudication relies on an *interpretive* account of collective rationality. A judge makes sense of the collective decisions of her political community through an interpretive effort, thus converting the prior acts of many individuals into a single conception of law.<sup>75</sup>

Unfortunately, judges do not act alone. They sit on panels that render a collective decision or, perhaps, a collective *interpretation*. Collective interpretation, however, is subject to the same obstacles and deficiencies that beset collective judgment and collective interest. Judges on collegial courts cannot and should not judge as Dworkin's theory of adjudication recommends if they hope to realize the political virtue that his theory enshrines.

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<sup>75</sup>Further discussion of Dworkin's concept of collective rationality see Kornhauser and Sager, "The Many as One: Integrity and Group Choice in Paradoxical Cases" 32 *Philosophy and Public Affairs* 249-76 (2004) and Kornhauser, "Aggregate Rationality in Adjudication and Legislation," 7 *Politics, Philosophy, & Economics* 5-27 (2007)

