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## REMEDYING JUDICIAL INACTIVISM: OPINIONS AS INFORMATIONAL REGULATION

*Chad M. Oldfather\**

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## I. INTRODUCTION

Concern about so-called “judicial activism” is rampant.<sup>1</sup> Despite a lack of consensus regarding precisely what the term means,<sup>2</sup> those wielding it have in mind judges who overstep the bounds of their role.<sup>3</sup> “Activist”

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1. Searches of the Westlaw “allnews” database conducted on March 31, 2006 revealed 2,571 documents using the phrase “judicial activism” in 2005 alone, and 2,159 using the phrases “activist judge” or “activist judges” in that same time period.

2. See generally Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441 (2004) (identifying five distinct “core meanings” of the term).

3. See, e.g., David B. Sentelle, *Judge Dave & The Rainbow People*, 3 GREEN BAG 61, 61 (1999) (noting conservative “concerns about activist liberal judges who overstep the proper bounds of office and try to be legislators and executives”); Book Note, *A Bold Leap Backward?*, 108 HARV. L. REV. 2047, 2049 (1995) (reviewing MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994) and noting Glendon’s condemnation of “the unprovoked activism of judges who overstep their bounds.”).

judges usurp the authority of the political branches, decide issues not properly before them, and generally do more than is necessary to resolve the disputes they face. Legal scholarship has tended to reflect these concerns, with most of the debate over the proper functions of courts directed toward defining the outer bounds of the judicial power.<sup>4</sup>

In contrast, what might be termed “judicial inactivism”—judges doing *less* than their role requires—receives little systematic attention.<sup>5</sup> This is somewhat curious. A judicial failure to act—such as when a court fails to address one of the claims before it—preserves the status quo, which can be every bit as consequential as the changes to the status quo resulting from judicial action. If it is legitimate to be concerned about judicial action that exceeds proper limits, then it should be equally legitimate to be concerned about improper judicial inaction. Indeed, because a court that fails to act will generally be less obtrusive than a court that does act, perhaps judicial inactivism should receive more attention than judicial activism.

This is not to suggest that law journals are utterly bereft of articles suggesting that courts are doing less than what is (or should be) required of them. The literature concerning the processes of appellate courts, for example, consistently bemoans the fact that the appellate process no longer includes many of the features once thought integral to appellate adjudication.<sup>6</sup> Courts no longer hear oral argument or issue published, precedential opinions in every case, and the opinions they do issue are as much or more the product of law clerks than the judges themselves.<sup>7</sup>

These phenomena, however, are but mere symptoms of the larger problem, which is that caseloads have expanded at a rate far greater than the judiciary itself.<sup>8</sup> Judges consequently have considerably less time to devote to each case than their predecessors. What has resulted might be characterized as involving multiple varieties of judicial inactivism. The systemic failure to accord cases the same level of process as in the past could be viewed as a generalized form of inactivism. At the level of the individual case, the combination of time pressure and reduced judicial engagement might result in inaction flowing from courts’ inability to recognize meritorious issues for what they are. Most dramatically, the

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4. See Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 259 (1990) (noting the tendency to regard “Article III solely as a limitation on the courts, and not as an exhortation to perform certain tasks”); Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1237 (2004) (“Contemporary constitutional law in its quest for judicial restraint, has primarily focused on ‘the how’ of judging—what interpretive methods will constrain the decisionmaker?”).

5. See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 123 n.4 (2005).

6. See *infra* Part III.B-C.

7. See *infra* Part III.C.

8. See *infra* notes 125-26 and accompanying text.

bureaucratization and impersonalization of the process have led to an atmosphere in which it is easy to imagine judges willfully avoiding potentially meritorious issues simply because of a lack of effective mechanisms to prevent them from doing so. Overall, nearly everyone agrees the quality of appellate justice has suffered.<sup>9</sup>

Reform proposals have abounded.<sup>10</sup> Indeed, many of the systemic features now considered part of the problem were themselves reforms. Underlying nearly all of these reforms and proposed reforms is the idea that restoring the quality of appellate justice requires restoring to appellate judges what they no longer enjoy, namely adequate time to devote to their cases.<sup>11</sup> Thus each reform effort seeks to return some of that lost time to judges, such as by directing a portion of the caseload elsewhere<sup>12</sup> or shifting a portion of the process of adjudication to other courts or to non-judicial personnel.<sup>13</sup>

What is largely absent from this prior work is consideration of the asserted problems and proposed reforms in light of a deeper conception of what the appellate process, or adjudication more generally, ought to achieve. This Article seeks to fill that gap. Rather than simply working on the assumption that restoring adjudicative legitimacy requires lessening judicial workloads, it first draws on prominent models of American adjudication to articulate a vision of the “adjudicative duty”—the minimal components of legitimate adjudication.<sup>14</sup> Despite the distinctly different emphases of those models, they share a common conception of courts’ minimum obligations that is rooted primarily in the value each accords to party participation. This conception includes a duty to be at least “weakly responsive” to the parties’ claims, meaning that a judicial decision should squarely confront the parties’ proofs and arguments even if the court concludes the case is more properly resolved on other grounds. It also includes a strong preference for the court to provide full and candid elaboration on the reasons for its decision. None of this, it bears noting, involves a prescription that courts engage in adjudicative conduct that differs substantially from the behavior we intuitively expect from judges. We sense that courts should grapple with the contentions the parties put before them and that judicial opinions should accurately reflect that process. Thus, the value of articulating the adjudicative duty lies not in

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9. *See infra* Part III.C.3.

10. *See infra* notes 182-86 and accompanying text.

11. *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 185 (2d ed. 1996) (“The idea that the nation will suffer if judges do not have as much time for each case as they once did is integral to the ideology of the American legal profession.”).

12. *See infra* notes 171-75 and accompanying text.

13. *See infra* notes 182-86 and accompanying text.

14. *See infra* Part II.

discovering new things that judges ought to be doing, but rather in revealing the theoretical underpinnings for and fundamental nature of those things we have reflexively viewed as part of the judging process.

Having identified the minimal components of legitimate adjudication, the Article next takes up the question of whether current institutional arrangements are up to the task of ensuring that courts routinely act in conformity with the adjudicative duty. The analysis reveals that previous commentators' concerns about the consequences of modifications to the appellate process are legitimate. When appellate adjudication more closely resembled the idealized conception on which most critiques are based, it almost certainly generated consistent compliance with the adjudicative duty. This was not simply because judges had more time. Instead, it resulted from a cluster of informal mechanisms that allowed for more effective monitoring of judicial behavior and otherwise worked to discipline judges to fulfill their obligations.<sup>15</sup> Many of the changes to the appellate process implemented over the last several decades have removed or impeded the effectiveness of these mechanisms.<sup>16</sup> As a result, reductions in workload alone are unlikely to restore much of what has been lost.

Such a realization accordingly invites consideration of different means to reform. This Article focuses on the judicial opinion. Specifically, it takes up an account of the opinion as an example of informational regulation, a term used to describe regulatory processes that operate through the required disclosure of information rather than through more traditional command-and-control mechanisms.<sup>17</sup> The core insight underlying informational regulation is that the audience for the disclosure will, by virtue of being better informed, be better positioned to act in response to the disclosing entity's conduct, and therefore to shape that conduct through either market or political channels. At the same time, to the extent that gathering and preparing the information for disclosure leads the disclosing entity to consider new information or to process in a different way information it already possessed, a disclosure requirement can also have more direct effects on the underlying conduct.

A moment's reflection reveals that, although the connection has never been expressly made, judicial opinions serve as a form of informational regulation of judicial behavior. By disclosing the ostensible justifications for a court's decision, an opinion enables the various audiences to which it is directed to monitor the court's performance and act in response to it.<sup>18</sup> At the same time, the act of writing an opinion disciplines the court to

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15. *See infra* Part II.C.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part IV.B.2.

reach, or at least justify, its decision in a more systematic, logical way than would be the case were judicial decisions rendered in a less formal manner.<sup>19</sup> These points are at least implicit in the literature concerning the forms and functions of opinions. Analysis of opinions in light of the developing literature on informational regulation, however, allows for more refined consideration of how opinions work to shape judicial behavior, and how today's modified appellate process renders them less effective in doing so. That, in turn, provides a basis on which to develop refinements to the opinion device that direct adjudication toward greater compliance with the adjudicative duty.

This Article advocates one such refinement. Specifically, it suggests that the opinion format be modified to include “framing arguments”—party-generated statements of the issues before the court.<sup>20</sup> The inclusion of framing arguments would better harness the informational-regulatory power of the judicial opinion to steer judicial behavior toward greater compliance with the adjudicative duty. Judges required to justify their decisions in the shadow of the parties' characterizations of the dispute before the court would be more likely not only to justify, but also to reach those decisions in an appropriately responsive manner. At the same time, the various audiences to which opinions are directed could more easily monitor the extent to which judicial decisions meet the requirements of the adjudicative duty. In short, while not a cure-all, the use of framing arguments would better align the informational-regulatory aspects of opinions with the overall goals of the regulatory regime.

The balance of this Article proceeds as follows: Part II provides a brief overview of the dominant models of American adjudication, extracts from them a conception of the adjudicative duty, and outlines what the duty demands from judges. Part III explores the traditional constraints that operated to encourage compliance with the adjudicative duty in the appellate context and their demise in the wake of the growth of appellate caseloads and procedural changes undertaken to cope with that growth. Part IV develops a conception of judicial opinions as informational regulation, drawing on the developing literature concerning informational regulation as well as that relating to the forms and functions of judicial opinions. Finally, Part V introduces the concept of framing arguments and outlines how the implementation of such a device would operate to bring adjudication back toward greater compliance with the adjudicative duty.

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19. *See infra* Part IV.B.3.

20. *See infra* Part V.

## II. DEFINING JUDICIAL INACTIVISM: THE ELEMENTS OF THE ADJUDICATIVE DUTY

Any assessment of institutional design and function requires consideration of institutional purpose.<sup>21</sup> In the case of American civil adjudication there are two acknowledged, fundamental purposes. The first is providing a mechanism for the peaceful resolution of disputes.<sup>22</sup> The second is the creation and refinement of legal standards to be used as rules by which disputes are resolved, and by which members of society can align their future conduct.<sup>23</sup> These goals stand in tension with one another. Fulfillment of the dispute resolution function does not require, and may be hindered by, a focus extending beyond the precise dispute before the court. But because our system of precedent obligates a court to resolve future cases in a manner consistent with its resolution of a present case, a court may find it difficult to resolve a given present case in an appropriate manner without undesirably restricting its decisional options in future cases. A court may accordingly face incentives toward what might be characterized as “judicial inactivism.” That is, a court might prefer not to confront a claim the resolution of which it fears might cause future difficulties by creating a troublesome precedent, or as to which it might have to reach a result that it considers distasteful but which is nonetheless compelled by existing law. In these situations the court might, in effect, decide not to decide by attempting to avoid the claim altogether or to recharacterize the dispute between the parties so as to gloss over its troublesome aspects. One can also imagine such a failure to decide having less sinister origins. Judicial inactivism might simply result from inattention or inadvertence. As judges have faced ever-growing caseloads, and consequently have to supervise ever-growing staffs, the opportunities for things to “fall through the cracks” undoubtedly have also increased.

Whether intended or not, such conduct seems incompatible with

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21. As Thomas Baker notes in his comprehensive study of the federal appellate courts:

[T]here is an argument to be made that the most relevant enterprise in court reform is to articulate how the ideal court system would function. . . . This is the essential purpose of theory: to further the understanding of the contemporary reality; to assist in choosing among different futures; to begin to appreciate the uncertainties among the choices; and to come to realize the limits on the power to choose.

THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 27 (1994).

22. See Kenneth E. Scott, *Two Models of the Civil Process*, 27 *STAN. L. REV.* 937, 937-38 (1975); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 303-06 (1989).

23. See Scott, *supra* note 22, at 938-49; Sward, *supra* note 22, at 306-08.



prevailing notions of the judicial role, in which courts are obligated to resolve the matters brought before them regardless of the consequences of doing so.<sup>24</sup> But perhaps these notions are misguided. Perhaps, the public and parties' expectations to the contrary, courts may properly elect not to decide. This Part seeks to address the question whether (and if so, when) courts enjoy an inherent ability to avoid their decisional responsibilities, and, more generally, to determine what those responsibilities are.<sup>25</sup> In undertaking that task I first discuss the dominant theoretical conceptions of American adjudication in an effort to gain a somewhat more refined sense of what adjudication is meant to accomplish and what mechanisms are critical to its doing so. Although these models exhibit important differences both descriptively and normatively, they share significant commonalities which bear on the resolution of these issues. I next draw on these commonalities to articulate what I have called the "adjudicative duty"—the minimal components of legitimate adjudication. Arguably then, "judicial inactivism" consists of the failure to satisfy this duty.

#### A. *An Overview of the Dominant Models of Adjudication*

The tension between the dispute resolution and law declaration functions of courts accounts for much of the variance among the conceptions of adjudication that have been formulated over the years.<sup>26</sup> These conceptions fall into two primary categories. The first is embodied in the "classic" model of adjudication, which places relatively greater emphasis on dispute resolution. The second underlies the "public law" model, which subordinates resolution of the precise dispute before the court to the formulation and implementation of norms in the interest of

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24. Judge Posner recently observed:

I have had the experience—I think all judges have—that sometimes when I start to work on a case I am uncertain how it should be decided—it seems a toss-up. *Yet I have to decide (the duty to decide is the primary judicial duty)*, and the longer I work on the case, the more comfortable I become with my decision.

Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 56 (2005) (emphasis added); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 173 (2d ed. 1986) (noting that courts of general jurisdiction must "resolve all controversies within their jurisdiction, because the alternative is chaos"); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 716, 732 (2001) (suggesting that the federal courts of appeals lack a general ability to avoid adjudicating the claims brought before them).

25. See Oldfather, *supra* note 5.

26. See Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 1-7 (1985) (categorizing theories of adjudication based on the relative prominence each assigns to the dispute resolution and law declaration functions).

society more generally. These differing emphases lead to distinct conceptions of the judicial role. While the classic and public law models are not the only models of adjudication, and cannot fully explain the entire present universe of adjudication,<sup>27</sup> they nonetheless remain the dominant conceptions, and the most fully developed.

### 1. The Classic Model

Perhaps the most prominent formulation of the classic model is Lon Fuller's. In his classic article *The Forms and Limits of Adjudication*,<sup>28</sup> Fuller argues that "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."<sup>29</sup> For Fuller, then, the key to adjudicative legitimacy is enhancing party participation.<sup>30</sup> This necessarily leads not merely to a judicial orientation toward the dispute between the parties, but toward that dispute as the parties have characterized it. This in turn requires not only that judicial decisions must "meet the test of reason,"<sup>31</sup> but also that they should strive to reach those decisions on the grounds argued by the parties.<sup>32</sup> If a court fails to do so, Fuller argues, "then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning."<sup>33</sup> Fuller's emphasis on participation likewise leads him to advocate the issuance of opinions articulating the reasons behind

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27. For example, although mass tort litigation is often treated or characterized as simply a variant of public law litigation, there are significant differences between the two that make the latter a poor template for the former. See Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 426-29 (1999) (identifying seven significant distinctions between mass tort litigation and public law litigation as conceived by the model). For other works articulating alternative models of adjudication, or some portion of the process of litigation, see, for example, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 378-80 (1982); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1016-17 (2004).

28. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Of course, as Robert Bone has pointed out, Fuller's model is not the pure dispute resolution model it is often portrayed to be. See Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995) (arguing not only that Fuller's theory is not an embodiment of the dispute resolution model, but that it more closely resembles the public law model).

29. See Fuller, *supra* note 28, at 364.

30. *Id.* ("Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.").

31. *Id.* at 366-67.

32. *Id.* at 388.

33. *Id.*

the decision, which give the parties assurance that their participation was meaningful to the decision and thus are generally necessary to ensure the parties and the public that the process is functioning as it should.<sup>34</sup>

Melvin Eisenberg suggests that three norms emerge from Fuller's conceptualization.<sup>35</sup> First, courts should "attend to what the parties have to say."<sup>36</sup> Only by gaining an understanding of the parties' arguments can the court fully honor their participation.<sup>37</sup> Second, an adjudicator should "explain his decision in a manner that provides a substantive reply to what the parties have to say."<sup>38</sup> Judicial opinions, on this view, are important primarily because they reassure the parties that their participation was meaningful.<sup>39</sup> Third, a court's decision should "be *strongly responsive* to the parties' proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments."<sup>40</sup> This means not only that judicial decisions should rest, to as great an extent as possible, on the grounds argued by the parties, but also that the judicial role more generally should involve a reactive rather than proactive stance.<sup>41</sup> A proactive judge might form preconceptions about what is important in a case, and thereby reduce the significance of party participation.

## 2. The Public Law Model

The "public law" model was initially introduced by Abram Chayes in his seminal article *The Role of the Judge in Public Law Litigation*.<sup>42</sup> The model grew out of the reality that much of the activity taking place in courts at the time Chayes wrote bore little resemblance to litigation as envisioned by the classic model.<sup>43</sup> Rather than private parties squaring off over the application of private rights, public law litigation in its prototypical sense involves groups of plaintiffs seeking to enforce constitutional or statutory rights against a governmental entity.<sup>44</sup> The paradigm case under the classic model is a tort or contract suit between

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34. *Id.* at 387-88.

35. Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 411-12 (1978).

36. *Id.* at 411.

37. *Id.* at 412.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.* at 412-13.

42. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

43. *Id.* at 1283-84. As Chayes put it, much of this litigation is "recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge." *Id.* at 1302.

44. *Id.* at 1284.

two private parties.<sup>45</sup> Under the public law model, the paradigmatic case involves an effort to reform an institution, such as to desegregate a school system or improve prison conditions.<sup>46</sup> Differences in the very nature of these disputes necessarily lead to operational differences in the judicial role. The inquiry in a typical private dispute under the classic model is focused and retrospective. The questions involve concerns such as what happened, whether the defendant owed the plaintiff a duty, and whether the parties satisfied their contractual obligations. In a public law case, by contrast, the inquiry is more prospective and predictive. Rather than determining the appropriate amount of compensation for a past injury, the court must fashion a remedy to be implemented on an ongoing basis. Such remedies are “forward looking, fashioned ad hoc on flexible and broadly remedial lines,”<sup>47</sup> and consequently require continual judicial involvement over the course of their administration.<sup>48</sup>

Another important distinction between adjudication under the two models lies in the degree to which courts can and should rely on the parties to characterize and limit the contours of the dispute. For instance, if the litigants in a contract dispute should happen to mischaracterize the nature of their dispute or overlook important facts or doctrine, the consequences fall almost entirely on them. In contrast, public law cases often have direct implications for people and entities who may not be parties to the lawsuit. The named plaintiff or plaintiffs may only constitute a portion of those who will be affected by the outcome of the litigation, and some of those affected might have interests and concerns that diverge from the plaintiff’s.<sup>49</sup> Alternatively, the named plaintiff’s view of the problem may lead her to bring the suit against different or fewer defendants than might other potentially affected parties.<sup>50</sup> Either eventuality leads to a situation in which the appropriate interests, conceived of as those that will be affected by the outcome of the litigation, are not before the court. This requires the judge in public law litigation to be more proactive in order to ensure that all relevant viewpoints are represented. It may, for example, require the judge to “construct a broader representational framework” by involving more parties in the litigation, as well as procuring the assistance of special masters and experts.<sup>51</sup> In either case, the judge must depart from

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45. *See id.* at 1285.

46. *Id.* at 1284.

47. *Id.* at 1302.

48. *Id.*

49. *See* Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 25 (1979).

50. *Id.*

51. *Id.* at 26-27. As Chayes described it, “The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel.” Chayes, *supra* note 42, at 1284.

the norm of strong responsiveness to make up for these deficiencies.

B. *The Models' Common Conception of the Adjudicative Duty*

These are very different conceptions of the judicial role, and one might reasonably question whether it is possible to extract from them any consistent vision of courts' adjudicative responsibilities. Indeed, the relationship between the classic and public law models—in both its descriptive and normative senses—is unclear.<sup>52</sup> Yet the debate surrounding the models obscures important commonalities. Despite their differences, the models share a basic understanding of courts' minimal obligations.

The most significant feature of this common ground is the value that each model places on party participation. While Fuller's version of the classic model makes participation its centerpiece,<sup>53</sup> the public law literature's emphasis on the possibility that the parties will often fail to represent (or misrepresent) the interests of everyone who will be affected by litigation<sup>54</sup> obscures the fact that party participation remains critical to the proper functioning of the adjudicative process even under the public law model. This is so for two reasons. First, participation has significant

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52. There are at least three possibilities. The first is that the models relate to distinct phenomena. See Oldfather, *supra* note 5, at 149-50. On this view, the classic model may still represent the ideal in the context of traditional disputes between private parties over private rights, with the modifications to the adjudicative role associated with the public law model being appropriate in cases sharing some or all of the key features of institutional reform litigation. *Id.* at 150. If this is so, then the answer to the question of whether a particular feature of adjudication is normatively desirable will often depend on the type of litigation in which the feature is employed. The second possibility is that the emergence of the public law model represented not merely a limited evolution of the adjudicative mechanism to account for discrete types of litigation, but rather was symptomatic of a more fundamental shift in the nature of the judicial role. *Id.* at 150-51. Whether in connection with a generalized increase in the role of government in society, see Chayes, *supra* note 42, at 1288, or a more nuanced appreciation of the effects of litigation on non-parties, the orientation of the judicial role might have changed to require a focus extending well beyond the immediate parties even in what appear to be purely private disputes. Indeed, Owen Fiss, who was as instrumental as Chayes in the articulation and development of the public law model, insists that was always accurate as an account of adjudication's aims. See Fiss, *supra* note 49, at 29. As he puts it: "[C]ourts exist to give meaning to our public values, not to resolve disputes." *Id.* Under this view, the classic model would be at worst a relic of an earlier time, and at best something of an emasculated default model, whose prescriptions would hold only where not supplanted by the public law position to which the system has evolved. A third possibility is that both the models and the features of adjudication they describe are interrelated. Oldfather, *supra* note 5, at 151-52. Neither, standing alone, may fully capture the essential nature of adjudication so much as highlight its alternative, conflicting aspects. As Meir Dan-Cohen puts this view: "Far from being descriptive or normative alternatives, the two models are complementary, representing adjudication as a Janus-faced institution. In conjunction, the two models reflect a view of the judicial process as ridden with tension." Dan-Cohen, *supra* note 26, at 5.

53. See *supra* note 30 and accompanying text.

54. See *supra* notes 49-50 and accompanying text.

instrumental value. The parties, simply because they want to win, have an incentive to present the strongest case they can, and will typically be in the best position to bring developed arguments and pertinent information to the court.<sup>55</sup> While the representational deficiencies inherent in public law litigation may render these arguments and information incomplete, the parties nonetheless remain best situated to provide the court with the inputs it needs. An adjudicative process that consistently fails to credit this participation will not only discourage those in the best position to provide information from doing so, but may ultimately result in the demise of the adjudicative mechanism itself by leading those who would otherwise bring suit to seek redress through alternative channels, or perhaps to abandon their grievances entirely. Second, participation may have inherent or symbolic value. As Chayes suggests, participation may stand as a good in its own right by helping to justify judicial, as opposed to political, involvement in public law matters.<sup>56</sup>

Consideration of the models' commonalities in light of the larger dispute resolution and law declaration functions of adjudication allows for formulation of the basic contours of the adjudicative duty. Briefly stated, courts must (at a minimum) decide the claims presented by the parties in a "weakly responsive" manner. Recall that Eisenberg characterizes Fuller's model as calling for "strongly responsive" decisions, meaning decisions that "proceed from and [are] congruent with [the parties'] proofs and arguments."<sup>57</sup> "Weak responsiveness, in contrast," describes an obligation

to attend to the parties' proofs and arguments—to gain an understanding of them and to bear them in mind during the decisional process—but [does] not preclude the consideration of other information. A weakly responsive court could thus decide a case on grounds of its own formulation, and its obligation to the parties would be satisfied by giving due consideration to the parties' arguments and reaching a reasoned conclusion that those arguments do not provide an appropriate basis for resolution.<sup>58</sup>

A court that is weakly responsive honors and rewards party participation in accordance with the prescriptions of both the classic and public law models. Moreover, it must come to a full understanding of the dispute between the parties as they perceive it. Thus, weak responsiveness

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55. See Fiss, *supra* note 49, at 29-30; Chayes, *supra* note 42, at 1308.

56. See Chayes, *supra* note 42, at 1308-09.

57. Eisenberg, *supra* note 35, at 412.

58. Oldfather, *supra* note 5, at 168.

preserves the crucial elements of the dispute resolution function.<sup>59</sup> At the same time, weak responsiveness facilitates lawmaking at least insofar as the court's reasoning is reflected in an opinion. Even if a court concludes that the parties have mischaracterized their dispute or have failed to fully represent the full array of interests and considerations properly to be considered in resolving the issues presented, a court's public engagement with the parties' arguments enhances understanding of what the law is by providing information regarding what the law is not.<sup>60</sup> Put differently, a court's responsiveness to parties who the court concludes have missed the point has value from a lawmaking perspective because, for example, it signals to future litigants that they should likewise not view their similar dispute in the same way that the present parties incorrectly did.

### C. *Justification and Elaboration*

Of course, it is one thing to say that courts should go about the process of adjudication in a certain way, and another to ensure that they actually do so. Much of adjudication involves processes that are purely mental, and thus hidden from scrutiny. Because we cannot directly monitor or control an important component of the adjudicative process, we must rely on secondary mechanisms to shape judicial conduct. Some of these are informal. As the next Part explores, traditionally a combination of structural and other institutional features has operated to produce at least rough compliance with the adjudicative duty. Other constraints are more formal, including the most prominent device for monitoring courts—the judicial opinion.<sup>61</sup>

Nearly all of the information available to the public concerning the workings of the judicial process comes in the form of judicial opinions.<sup>62</sup> This has a number of implications for the formulation of the adjudicative duty.<sup>63</sup> First, it suggests that the fact that a court has reached its decision in a weakly responsive fashion may not be enough. In most cases, courts should provide public elaboration on the reasoning behind their decisional

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59. One could argue that adjudication is necessarily weakly responsive (and never strongly responsive) in this sense. That is, the parties will almost never share the same conception of the precise nature of the dispute between them (otherwise they would likely not be before the court). Most cases will thus present situations in which “the claims which compete for judicial endorsement cannot . . . be commensurated without recharacterizing them in a way that alters their essential meaning for the parties involved.” ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 340 (1993). In these situations, strong responsiveness may represent only an unachievable ideal simply because it would be impossible for a court's decision to proceed from the proofs and arguments of both parties.

60. See Oldfather, *supra* note 5, at 173.

61. See *id.* at 175.

62. *Id.*

63. See *id.* at 175-80.

processes.<sup>64</sup> Only then can the parties be certain that their participation was meaningful, in the sense that the court's decision was at least weakly responsive to their arguments.<sup>65</sup> Elaboration is likewise strongly preferred under the public law model's conception of adjudication as extending to matters beyond the simple resolution of a dispute between the parties before the court.<sup>66</sup> Whether the paramount aim is to guide the development of the law, give meaning to public values, or govern ongoing relations between a class of plaintiffs and a governmental institution, some elaboration on the justifications for a court's decision is critical to fulfillment of the judicial function.<sup>67</sup> Second, it suggests the need for judicial candor. That is, when courts do provide such elaboration, the reasons they give for their decisions should, to as great an extent as is practicable, be the "real" reasons for the decision.<sup>68</sup> Even aside from the basic ethical point that lying is bad, and perhaps particularly so when engaged in by the branch of government responsible for interpreting the law,<sup>69</sup> there are instrumental justifications for a candor requirement. Effective monitoring of the judiciary and effective maintenance of the system of precedent depend on knowing why courts act as they do. Only with this knowledge can the public and other branches of government assess the appropriateness of the courts' reasoning, and take appropriate steps in response.<sup>70</sup> The ability of private actors to structure their affairs in accordance with the law likewise depends on knowing that courts will resolve disputes in accordance with publicly stated legal standards rather than some other unarticulated criteria.

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64. *See id.* at 175-77.

65. Fuller suggests that elaboration is a preferred, though not essential, component of adjudication for this reason. *See Fuller, supra* note 28, at 387-88; *see also Oldfather, supra* note 5, at 176 (discussing the implications of the classic model for the elaboration component of the adjudicative duty).

66. *See Oldfather, supra* note 5, at 176.

67. *See id.* at 176-77.

68. *See id.* at 155-60, 180. For more comprehensive discussions of judicial candor, see generally Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995) (rejecting a strict requirement of candor in support of judicial discretion in order to ultimately preserve institutional legitimacy); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (discussing the relationship between scholarship and adjudication which leads to the justification of less judicial candor to promote other goals).

69. *See* Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 401-02 (1989) ("[T]he unspoken premise for almost all of the prior calls for candor, is that deception in judging undermines the integrity of the judiciary. The almost universal condemnation of lying suggests that those who call for judicial candor have staked out the moral high ground." (footnotes omitted)).

70. *See Oldfather, supra* note 5, at 155-56.



### D. *The Adjudicative Duty Summarized*

This brief consideration of the dominant models of adjudication in the American system reveals a common, consistent conception of the minimal components of legitimate adjudication. Courts must honor party participation, but need not be constrained by its limits. While strong responsiveness might be preferred, weak responsiveness is required. A court that failed to confront a claim or that resolved it by glossing over its troublesome aspects has failed to satisfy its adjudicative duty. The duty instead requires the court to engage the parties' arguments, and if it concludes that those arguments do not provide the appropriate basis for decision, it must base that conclusion on appropriate criteria. Absent compelling circumstances, the court must also provide a candid public statement of the reasons behind its decision. Only then will it be even remotely possible for the parties and the public to monitor whether the underlying decisional process is consistent with the duty.

None of this should strike those familiar with the American legal system as revolutionary. The value of elucidating the components of the adjudicative duty stems not from any prescriptions of behavior different from what we intuitively expect courts to do, but rather in providing a theoretical grounding on which to base those intuitions. A court acting in a manner consistent with the adjudicative duty will look like a court doing what we have been conditioned to believe courts should do (and, one presumes, actually do in nearly all their cases).<sup>71</sup> Thus an appellate court faced with six contentions need not address more than one if that is all that is necessary to dispose of the case. Nor, if resolution of all six contentions is necessary, must the court treat each of the six to a lengthy discussion in its opinion. The court should both engage with the parties' arguments and give the appearance of having engaged with the parties' arguments. This is, by and large, how most judicial opinions strive to portray the process, even if we suspect that it is at least occasionally an inaccurate portrayal.

### III. TRADITIONAL CONSTRAINTS ON APPELLATE ADJUDICATION AND THEIR DECLINE

Despite this underlying consistency in our understanding of the minimal components of legitimate adjudication, as we shall soon see there is no body of law that imposes on courts a set of obligations consistent with the adjudicative duty. Perhaps because of the difficulties associated

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71. *See, e.g.*, ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 33 (1941) ("The bar generally and with much reason feel it important that the reasons of every decision of consequence in our highest courts be set forth fully in written opinions, accessible to the profession and the public and that the courts should pronounce definitely upon every point raised by counsel, even if no more than to state it and declare it irrelevant.").

with enforcing such a legal requirement, we have instead relied on a set of procedural and informal constraints to discipline the judicial process. This Part begins by examining the law, such as it is, relating to the adjudicative duty, and considering the enforcement difficulties that render courts' statements regarding their adjudicative obligations largely aspirational if not merely ornamental. It then outlines the traditional constraints arising from institutional design that historically operated to discipline the appellate judicial process toward rough compliance with the adjudicative duty. Finally, it considers how the process has developed away from its traditional forms as appellate courts have struggled to cope with massive increases in their caseloads over the past half-century, and how those changes have affected courts' satisfaction of the adjudicative duty.

#### A. *Legal Standards and the Problems of Enforcement*

Courts tend, perhaps unsurprisingly, to be less than effusive in describing their adjudicative obligations.<sup>72</sup> This is not to suggest that there are no cases in which courts acknowledge the existence of such obligations and speak to their content. There are such cases, although not many, and on the whole they recognize a set of adjudicative goals consistent with what I have outlined above. As we will see, however, these statements are largely aspirational, in significant part because of the lack of effective remedies for denials of the "rights" to which they refer.

What emerges from the relative handful of opinions speaking to the topic of adjudicative obligations can be stated quite simply: Courts must decide cases over which they have jurisdiction.<sup>73</sup> As Chief Justice Marshall put it in *Cohens v. Virginia*:

With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them.<sup>74</sup>

While all of this sounds promising, *Cohens* and cases making similar

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72. See generally Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297 (1982) (discussing courts' general reluctance to impose upon themselves a requirement to provide reasons for their decisions).

73. See ANNOTATED MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(1) (2004) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.").

74. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

statements are more aberrational than they are emblematic of a body of law relating to the adjudicative duty. *Cohens*, for example, is typically cited in support of the “doctrine of necessity” in cases of judicial disqualification rather than as the bedrock of a broadly applicable duty.<sup>75</sup> Further examination reveals that, even if *Cohens* and its progeny are taken to support an adjudicative duty, that duty is rather flexible. It is clear, for example, that appellate courts operate under no obligation to be strongly responsive in Fuller’s sense of generating decisions constrained by the proofs and arguments of the parties.<sup>76</sup> Indeed, any suggestion to the contrary must confront the fact that courts routinely engage in *sua sponte* decision making. In such cases a court might reach a decision based not merely on a different understanding of a claim asserted by the parties, but rather based on a “claim” that the parties did not raise at all.<sup>77</sup>

One can tell a similar story with respect to judicial statements that appear to mandate something akin to weak responsiveness. For example, within the past decade two federal appellate courts have endorsed the proposition that a litigant has a “right to have all issues fully considered

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75. See, e.g., *United States v. Will*, 449 U.S. 200, 213-16 (1980) (discussing the history of the rule of necessity); *Pub. Employees Ret. Sys. v. Hawkins*, 775 So. 2d 101, 104-05 (Miss. 2000) (McRae, J., dissenting) (quoting *Cohens* and surveying cases adopting the rule of necessity); *Betensky v. Opcon Assocs., Inc.*, 738 A.2d 1171, 1176 (Conn. Super. Ct. 1999) (“Given the fact that courts have an institutional obligation to hear and decide the cases brought before them, the common law long ago created what is referred to in judicial disqualification cases as the rule of necessity. Stated succinctly, the rule of necessity is that if everyone is disqualified, no one is disqualified. Thus, in a judicial salary case, where all judges by definition have an interest in the outcome of the case, the judge assigned the case has a duty to hear and decide the case, however disagreeable that task might be.”). There is likewise relatively little case law relating to Canon 3(B)(1) of the Model Code of Judicial Conduct. See ABA, Annotated Model Code, *supra* note 73, at 87-88.

76. See *supra* notes 31-32 and accompanying text. “When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). The Supreme Court has justified this as necessary to ensure that the parties do not have the ability through either inadvertence or collusion to frame the claims in such a way that any opinion strongly responsive to the parties’ arguments would be of dubious legal provenance. See *U.S. Nat’l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993). Such an opinion would not only be of questionable precedential effect, but would also introduce an element of confusion into related bodies of law.

77. For recent overviews and criticisms of this practice, see generally Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions By Appellate Courts*, 69 TENN. L. REV. 245 (2002) (rejecting the use of *sua sponte* decisions because it undermines due process, the adversary process, and constitutes an abuse of judicial discretion); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253 (2002) (discussing the inconsistent manner in which appellate courts raise issues *sua sponte*, and its implications on due process and the adversarial system).

and ruled on by the appellate court” to which the litigant presents them.<sup>78</sup> This may be so, but it seems clear that if it is, the court’s obligation is meant to extend only to the process of making a decision and not the (arguably) distinct process of justifying that decision.<sup>79</sup> Simply put, weak responsiveness is not a universal feature of judicial opinions. Indeed, the Supreme Court has vested the federal courts of appeals with “wide latitude in their decisions of whether or how to write opinions.”<sup>80</sup> As a consequence, not only do the parties to federal litigation have no entitlement to any opinion at all,<sup>81</sup> they have no right to expect that the court will speak to all their arguments in the event it elects to issue an opinion.<sup>82</sup> The picture is largely the same in the state courts of

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78. *United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999); *see also* *Bernklau v. Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002) (quoting *Garza*).

79. *See, e.g.*, RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* 548 (2d ed. 1996) (suggesting that “the judicial resolution of a legal dispute implicates two separate processes: (1) deciding, or the process of discovering the conclusion, and (2) justifying, or the process of public exposition of that conclusion.”). This view is not universally held. *See* David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 *GEO. J. LEGAL ETHICS* 509, 513 (2001) (asserting “that the premise that judicial writing can be divorced from deciding or other aspects of judging is wrong”); *see also* Oldfather, *supra* note 5, at 175-80 (contrasting a view of elaboration as evidence of adjudicative behavior with a view of adjudication as an integral part of adjudicative behavior).

80. *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam).

81. *See* *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983) (“There is no requirement in law that a federal appellate court’s decision be accompanied by a written opinion.”); *see also* DAVID G. KNIBB, *FEDERAL COURT OF APPEALS MANUAL* § 33.2 (4th ed. 2000).

82. One recent case, however, suggests that there is some minimal requirement of responsiveness once a court decides to issue an opinion. *See* *Bright v. Westmoreland County*, 380 F.3d 729, 731-32 (3d Cir. 2004). In *Bright v. Westmoreland County*, the Third Circuit reversed and remanded for reconsideration a district court order and opinion that had been prepared by one of the parties and adopted by the district court with little modification. *See id.* at 731. The court observed that:

[J]udicial opinions are the core work-product of judges. . . . They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party’s proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

*Id.* at 732. The court went on to note that it found the case before it especially troubling given the lack of any evidence that the court’s decision was its own:

In this case, there is no record evidence which would allow us to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment. In fact, the procedure used by the District Court casts doubt on the possibility of such a conclusion.

*Id.* Noting that this, in turn, casts doubt on the legitimacy of the adjudicative process, the court categorically disapproved of the practice. *See also* 21 C.J.S. *Courts* § 174 (2005).

appeals.<sup>83</sup> Although some states by constitution or statute require that their courts provide reasons for their decisions,<sup>84</sup> even such provisions are not interpreted to require exhaustive consideration of all the parties' contentions.<sup>85</sup> All of this is manifest in the courts' output. Appellate courts routinely dispose of cases via truncated "unpublished" decisions or minimalistic judgment orders that merely state the result,<sup>86</sup> and even full opinions frequently conclude with a so-called "cleanup phrase"<sup>87</sup> along the lines of "[w]e have considered the remaining issues raised by [appellant], and find them to be without merit."<sup>88</sup>

The flexibility that courts enjoy in their decisions of whether and how to write opinions underscores a fundamental difficulty with any effort to implement an adjudicative duty rooted in *Cohens* and similar cases—namely, the lack of effective mechanisms for detection of violations and enforcement of the duty.<sup>89</sup> Consider a case in which a party believes that an appellate court failed to satisfy its obligations in its treatment of a case. Although appellate panels can grant rehearings, the panel rehearing device has generally fallen into disuse,<sup>90</sup> and in any event a panel that violated the adjudicative duty is unlikely to be receptive to a petition for rehearing on those grounds. En banc review and the grant of discretionary review by a supreme court are equally unlikely. Both events are so rare that, purely as a statistical matter, the likelihood of intervention by a subsequent judicial

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83. See 21 C.J.S. *Courts* § 171 (2005) ("Except as required by provisions of state constitutions, statutes, or court rules, opinions need not be written by the court or judge, although the matter rests in the judicial discretion, as a result of which opinions will be written when necessary.").

84. See, e.g., *B.E.T., Inc. v. Bd. of Adjustment*, 499 A.2d 811, 811 (Del. 1985) (per curiam) (rejecting a lower court's adoption of the brief of one of the parties as the opinion of the court as contrary to Delaware's requirement that courts provide reasons for their decisions); *People v. Garcia*, 118 Cal. Rptr. 2d 662, 667 (Cal. Ct. App. 2002) (articulating the contours of the California Constitution's requirement "that appellate opinions state the reasons for the disposition").

85. See, e.g., *State ex rel. Sluss v. Appellate Court of Ind.*, 17 N.E.2d 824, 826 (Ind. 1938) (noting that it would not presume that the framers of the Indiana Constitution "intended that this court should be required to exhaust every subject that might be raised on an appeal, without regard to its importance in the determination of the cause").

86. See *infra* notes 149-52 and accompanying text.

87. See RUGGERO J. ALDISERT, *OPINION WRITING* 87-88 (1990).

88. *In re Balfour MacLaine Intern., Ltd.*, 85 F.3d 68, 83 (2d Cir. 1996); see also *United States v. Edmonds*, 52 F.3d 1236, 1248 (3d Cir. 1995).

89. David McGowan, who advocates the adoption of ethical rules requiring judges to write candidly and in such a manner as to resolve the dispute actually before them, recognizes this problem. See McGowan, *supra* note 79, at 599-600. Allowing that such rules would be difficult to enforce, he nonetheless suggests that they would have an effect, offering "a sort of shaming argument—we enact rules so judges will feel guilty and unjudicial if they do not follow them." *Id.* at 600.

90. See BAKER, *supra* note 21, at 157.

body in any given case is small.<sup>91</sup> This would be particularly so in the case of a request based on a violation of the adjudicative duty, where the very basis for the assertion that further review is necessary is not that something was done incorrectly in the prior proceeding but rather that something was not done at all.<sup>92</sup> A justice considering whether to grant discretionary review in the ordinary case can often get a good sense of whether to do so simply from reading the lower court's opinion. If that opinion reflects reasoning that the justice finds troublesome, she will be more likely to vote to review. If, on the other hand, the need for review is alleged to arise from the lower court's failure to address an issue, the justice's task is more difficult. Now she must put herself in the place of the lower court and attempt to replicate its analysis. This is not only difficult, but also something that the justice likely views as outside the core function of her court, which is to oversee the development of the law.<sup>93</sup> A lower court's failure to speak to a claim does not implicate this function. Since it has said nothing on the issue, the lower court's inaction has no impact on the content of the law. A similar analysis holds in the case of en banc review.<sup>94</sup> Consistent with all of this, courts have held themselves entitled to a "presumption of regularity,"<sup>95</sup> pursuant to which judges are to assume that other courts "have properly discharged their official duties"<sup>96</sup> absent clear

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91. See POSNER, *supra* note 11, at 83 n.23 (noting that the Supreme Court granted review in a mere 1.47% of the cases in which petitions for certiorari were filed in 1993); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 214 (1999) ("Circuit courts rarely invoke the en banc procedure; courts of appeals resolve fewer than one percent of their cases en banc."); see also Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 252-53 (1991) (noting the weakness of external constraints on appellate court decision making).

92. See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 166 (noting that, in the case of judgment orders, "[t]he fact that no law was made also makes it unlikely that either the circuit en banc or the Supreme Court will grant review."); cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 357 (William N. Eskridge, Jr., & Philip P. Frickey, eds., The Foundation Press Inc. 1994) (1958) (noting that, in the case of trial court decisions stated only as conclusions, "an appellate court will have trouble in reviewing the decision to decide whether or not it involves error, unless it retraces the whole process of decision *de novo*").

93. See DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 26 (1994).

94. En banc review is used primarily to police doctrinal uniformity within a court. See ROBERT L. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 459-65 (2d ed. 1989) (discussing the use of and practices related to en banc review); Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 808-19 (1993) (discussing the history of en banc review).

95. *Bernklau v. Principi*, 291 F.3d 795, 801 (quoting *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

96. *Butler*, 244 F.3d at 1340.

evidence to the contrary.

Ultimately, then, what at first appear to be statements of a legal duty to go about the process of adjudication in a certain way amount to little more than incantations designed to assure the public, and perhaps the judges themselves, that those responsible for adjudication understand what their obligations entail. Indeed, courts occasionally suggest that their sense of responsibility and awareness of what is at stake provides the most meaningful barrier against the abuses to which the process is subject.<sup>97</sup>

### B. *The Traditional Appellate Process and Informal Constraints on Adjudication*

Despite the lack of formal, legal requirements that courts satisfy the adjudicative duty, appellate courts have historically generated decisions in a manner generally compliant with the duty.<sup>98</sup> This is a product of the informal constraints imposed by the processes and conditions under which appellate adjudication has traditionally taken place. These conditions are reflected in the widely shared understanding of what the idealized

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97. See, e.g., *NLRB v. Amalgamated Clothing Workers*, 430 F.2d 966, 973 (5th Cir. 1970) (“The Court itself must be vigilant. We believe we are sensitive now to the factors which would make application of the Rule [allowing judgment orders in certain circumstances] wrong or unwise or inappropriate. It is the Court’s purpose to heed them and in our own survival assure survival of the system we cherish.”); see also *United States v. Baynes*, 548 F.2d 481, 484 (3d Cir. 1977) (per curiam) (quoting same).

98. I do not want to overstate the empirical claim I make here. I do not mean to suggest that I have established that these informal constraints forced courts to comply with the adjudicative duty in any strict sense, or even that it would be possible to do so. As Judge Posner has noted, it is notoriously difficult to assess whether a judiciary is producing the desired level of justice, even were we able to agree on what such a concept would entail. See RICHARD A. POSNER, *OVERCOMING LAW* 114-15 (1995). As a consequence, we rely on proxies, such as stringent prohibitions against creating even the appearance of bias, *id.*, and on the types of internal monitoring and informal sanctions outlined in this Part, see KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19-51 (1960) (articulating and discussing fourteen “major steadying factors” in the context of appellate adjudication). These proxies and sanctions ultimately result in a process that generates adjudication consistent with the ideal. As Reynolds and Richman explain:

Full appellate procedure produces benefits beyond insuring correct outcomes by providing visibility, accountability, and reviewability in ways that truncated procedures cannot. In particular, oral argument and published opinions reassure litigants, particularly those most inclined to distrust government officials, that the judges themselves have carefully considered their appeals. Moreover, selective distribution of full appellate procedure decreases confidence in the legal system, and it causes many to suspect that the law has in fact become a “respector of persons” and that the judges are not providing equal justice to poor and rich alike.

William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1291-92 (1996) (footnotes omitted).

appellate process looks like. In the archetypal appellate court,<sup>99</sup> each case is resolved only through the direct, intense efforts of the judges responsible for its decision. The judges scrutinize the parties' briefs, test the parties' contentions and their own initial impressions at oral argument, and reach a tentative resolution following a conference among themselves immediately following the argument.<sup>100</sup> Then, one of the judges prepares a draft opinion and circulates it to the others.<sup>101</sup> They in turn review it carefully, offering comments and suggestions which the authoring judge takes into account in preparing a revised draft.<sup>102</sup> This continues until all the judges are in agreement, at which point a final opinion is released for inclusion in the official reporter of the court's decisions.<sup>103</sup>

While this idealized form of adjudication may never have been a generalized reality, it certainly once represented an achievable ideal.<sup>104</sup> This was a world of fewer cases, which in turn meant more time for the sort of contemplation that the model envisions. When every judge on a panel could devote full attention to every case, and when those judges shared a consistent sense of their task,<sup>105</sup> weak responsiveness was effectively guaranteed. What is more, the process incorporated various built-in checkpoints at which the obligation could be reinforced. Consider, for example, oral argument, which under the idealized version of the process occurs in every case, and for as long as is necessary for the parties and the judges to fully explore the issues.<sup>106</sup> The process of argument not only leads occasionally to changed minds and new perspectives, but also provides the parties with another chance to press their view of the dispute on the court. If a judge's thinking about a case has taken a turn away from the parties' conception of the issues, counsel can suggest to the court why

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99. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 278 (1996) (describing what they call "the Learned Hand model" of appellate judging). For similar depictions of an idealized conception of appellate adjudication, see COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 70 (1998) (describing the assumed components of the right to appeal prior to the 1960s); BAKER, *supra* note 21, at 14-17; PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 14-16 (1976) (describing "the appellate process when leisure prevails"). *But see* Posner, *supra* note 24, at 66 (suggesting that appellate adjudication "is not a protracted process unless the judge has difficulty making up his mind, which is a psychological trait rather than an index of conscientiousness").

100. See Richman & Reynolds, *supra* note 99, at 278.

101. *Id.*

102. *Id.*

103. See *id.*

104. See *id.* at 278 n.14 (noting that "[a]lthough this ideal vision may never have been perfectly followed, even on Learned Hand's court, that court did come quite close to the ideal").

105. See *infra* note 116 and accompanying text.

106. See Richman & Reynolds, *supra* note 99, at 279 ("At one time, argument in a single case could last several days.").



that turn is mistaken, and at least has an opportunity to participate relative to this new theory.<sup>107</sup> Perhaps as significant to the argument's contribution to the quality of the decision-making process is the fact that the public nature of the event creates an incentive for judges to come to a full understanding of the case so as not to appear unprepared or incompetent before the public.<sup>108</sup> In addition, the nature of oral argument effectively guarantees that the judges will focus their attention exclusively on the case under consideration for the full period of the argument.<sup>109</sup> And the entire exercise provides the public with an opportunity to witness, and therefore monitor, a portion of the court's decisional process.

Outside of argument, if one judge failed to give appropriate regard to the parties' contentions in either his consideration of the case or in the drafting of an opinion, his fellow judges could be counted on to bring the matter to his attention. The fact that courts were smaller facilitated this dynamic.<sup>110</sup> The judges on these smaller courts interacted frequently with one another, and thereby came to know their colleagues well, both personally and professionally.<sup>111</sup> They could accordingly hold their colleagues more accountable individually, and themselves collectively more accountable as a court.<sup>112</sup> This was also a world of less law, both in the sense that there were fewer cases, statutes, and regulations, and in the sense that there were fewer substantive areas of law.<sup>113</sup> A judge could be expected to have more than a passing familiarity with the law in nearly every case that arose, and to be familiar with the latest cases and other developments. That likewise made it easier for judges on a court to monitor the court's decisional process simply because they were better positioned to spot opinions that failed to comport with applicable standards. The bar could also play a more active role as a constraint, and not only because of the greater opportunities it enjoyed to participate in argument. Just as the existence of fewer cases and less law enabled more effective monitoring by judges, so did it allow the bar to serve as a useful

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107. See BAKER, *supra* note 21, at 112-13 (discussing the "systemic costs of the lost oral argument").

108. See POSNER, *supra* note 11, at 161.

109. See *id.* at 160-62.

110. See *id.* at 42 ("The more judges there are in a court system, the less responsibly each can be expected to exercise his power.").

111. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 29-30 (discussing the advantages of smaller courts); FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 213-29 (1994) (discussing the value of collegiality and the collegiality-inhibiting effects of the increased size of courts).

112. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 29-30; COFFIN, *supra* note 111, at 216.

113. See POSNER, *supra* note 11, at 98-99 (noting the expansion in the number and type of federal rights since the 1960s).

monitor. Lawyers as well could realistically expect to keep abreast of the entirety of a court's output, such that an aberrational result could not be expected to go unnoticed by the legal community.<sup>114</sup>

All of this operated to create a sense of ownership of decisions in both an individual and collective sense. When each judge was personally engaged in the decision-making process throughout its course, from reading the briefs to participating in oral argument to drafting and reviewing opinions, the work emerging from a judge's chambers was unquestionably that judge's work. At the same time, each judge was able to monitor the court's output generally, and to participate in a meaningful way in the decision-making process as to those cases in which she was not the authoring judge.<sup>115</sup> In addition, the fact that it was a decision-making process, as opposed to a mechanism designed to generate decisions with little opportunity for reflection, is significant. As Judge Coffin notes in lauding the virtues of what he calls "graduated decision-making," the idealized appellate process provides at least seven opportunities for a judge to reconsider her thinking on a case.<sup>116</sup> Reflection, reconsideration,

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114. An interesting aspect of the history of unpublished opinions is that members of the bar initially advocated the practice on the grounds that the increasing output of appellate courts made it difficult to stay abreast of the state of the law. See John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate Over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 900-03 (2001).

115. See LLEWELLYN, *supra* note 98, at 31-32 (noting that the process of group decision-making in the context of appellate courts tends to result in decisions with greater perspective and fewer extremes); see also FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 58-59 (1980) (noting the role of collegiality as a constraint on decision-making).

116. In Judge Coffin's words:

One reads a good brief from the appellant; the position seems reasonable. But a good brief from appellee, bolstered perhaps by a trial judge's opinion, seems incontrovertible. Discussion with the law clerks in chambers casts doubt on any tentative position. Any such doubt may be demolished by oral argument, only to give rise to a new bias, which in turn may be shaken by the postargument conference among the judges. As research and writing reveal new problems, the tentative disposition of the panel of judges may appear wrong. The opinion is written and circulated, producing reactions from the other judges, which again change the thrust, the rationale, or even the result. Only when the process has ended can one say that the decision has been made, after as many as seven turns in the road. The guarantee of a judge's impartiality lies not in suspending judgment throughout the process but in recognizing that each successive judgment is tentative, fragile, and likely to be modified or set aside as a consequence of deepened insight. The non-lawyer looks on the judge as a model of decisiveness. The truth is more likely that the appellate judge in a difficult case is committed to the unpleasant state of prolonged indecisiveness.

COFFIN, *supra* note 115, at 63.

and refinement are built into the process. When coupled with judges who are, in Karl Llewellyn's phrasing, "law-conditioned"<sup>117</sup>—that is, trained in law and having long experience in the practice of law, and therefore inclined to approach and resolve problems in a manner consistent with the mores and expectations of the legal culture—the result is likely to be consistent with the ideals that undergird the process.

### C. *The Crisis of Volume and the Weakening of Informal Constraints*

However realistic an account of appellate adjudication the idealized conception might once have been, there is no disputing that it fails as an accurate description of the process today. The primary cause for this is the "crisis of volume" afflicting the appellate courts.<sup>118</sup> The numbers are staggering. The federal courts of appeals in 2003 faced more than fifteen times as many cases as in 1960.<sup>119</sup> While the number of judges has increased over this same period, expansion has not kept pace with the dockets. Appeals per judge have grown by some 450% over this same period.<sup>120</sup> Whatever the historic ability of courts and judges to engage in their work at a leisurely pace, present realities clearly do not allow for unhurried deliberation. Instead, the need to cope with growing caseloads has led not only to more work for each judge, but also to a number of well-documented changes to the appellate process.<sup>121</sup> Many of these changes, coupled with the pressures imposed by the need to keep pace with the docket, have implications for courts' tendency to satisfy the adjudicative duty on a consistent basis.

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117. See LLEWELLYN, *supra* note 98, at 19-25.

118. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 14 ("Over the last 100 years, filings per appellate judgeship have increased by almost a factor of six. By contrast, filings per judgeship in the district courts have not even doubled.").

119. Compare ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2003 23 tbl.B-1 (2003) (showing 60,661 cases commenced in the courts of appeals), available at <http://uscourts.gov/library/statisticsalreports.html>, with DIR. OF ADMIN. OFFICE OF THE U.S. COURTS, 1960 ANNUAL REPORT 210 tbl.B 1 (1961) (showing 3,899 cases commenced in the courts of appeals). The statistics relating to appellate caseloads in the state courts are not as well-developed, but in general the same sort of upward trend is evident. See, e.g., Thomas B. Marvell, *Is There An Appeal from the Caseload Deluge?*, JUDGES' J., Summer 1985, at 34, 36-37 (indicating that on average, state trial court filings are doubling about every fifteen to twenty years, and appeals are doubling each decade).

120. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 14.

121. See generally COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 17-25; BAKER, *supra* note 21, at 106-47; CARRINGTON, ET AL., *supra* note 99, at 13-41.

## 1. Changes Affecting the Decision-Making Process

Among the most significant consequences of the steps courts have taken to conserve judicial time and resources is that judges are less able to act as direct participants throughout the decision-making and opinion-generation process. To a large degree this is simply a function of having more cases and thus less time to devote to each one.<sup>122</sup> Time for leisurely reflection is an assumed component of the idealized conception, along with the notion that more reflection will lead to better results. But leisure is no longer a feature of the appellate judicial process. The fifteen-fold increase in the number of cases on the dockets of the federal courts of appeals since 1960 has not been accompanied by a similar increase in the number of judges.<sup>123</sup> Instead, the number of appellate judges has roughly doubled.<sup>124</sup> The picture is not so uniformly bleak in the state courts, where many states have been able to address the problems of volume by adding an intermediate appellate court to what was previously a two-tier system.<sup>125</sup> But it is certainly true in the federal courts, and largely true in the state courts, that each judge is responsible for considerably more cases than was his counterpart a half-century ago. The average number of published opinions authored by a federal appellate judge increased from thirty-one in 1960 to fifty-four in 1994.<sup>126</sup> During that same period the average number of cases terminated on the merits per active circuit judge increased from 40.6 to 187.9.<sup>127</sup>

As these numbers suggest, the crisis in appellate dockets has long since passed the point where courts merely need to cut down on leisurely reflection. Instead, the process itself has been modified at nearly every stage. Oral argument, once available in all cases and for expansive amounts of time, is now restricted to short time periods in the fifty or sixty percent of cases where it is available at all.<sup>128</sup> This not only deprives the parties of a significant portion of their opportunity to participate, but also

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122. Twenty-five years ago Robert Leflar remarked on the effects of crowded dockets: "Ample time for thoughtful consideration and reconsideration is scarce. All appeals must be decided, and decisions must be turned out by the hundreds. In most, reliance upon past precedent or upon reasonable analogy to the precedent affords the only possible approach." Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 741 (1979).

123. See *supra* note 119 and accompanying text.

124. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 14 tbl.2-3 (noting an increase from 88 judges in 1964 to 179 in 1997).

125. See CARRINGTON, ET AL., *supra* note 99, at 4 (noting the trend in state appellate courts); MEADOR & BERNSTEIN, *supra* note 93, at 16-18. See generally Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282 (1989) (chronicling the growth in state appellate court caseloads and cataloging the varied responses thereto).

126. See POSNER, *supra* note 11, at 74.

127. *Id.*

128. See BAKER, *supra* note 21, at 109-10; Cooper & Berman, *supra* note 24, at 700-01.

removes both an obligation to focus exclusively on each case for a fixed period of time and an incentive to come to a full understanding of a case.<sup>129</sup>

The reduction of the judge's role in the writing of opinions has been even greater. In stark contrast to the idealized conception, initial drafts of appellate opinions today are almost exclusively prepared by law clerks.<sup>130</sup> This transformation of the judge from author to editor has likewise resulted in a reduction in judicial engagement in the fundamental task of decision making. Opinions drafted by clerks tend to be different from those drafted by judges in terms of style, length, candor, level of research and credibility.<sup>131</sup> More fundamentally, the act of writing both requires and engenders a deeper level of engagement with the case.<sup>132</sup> However engaged they might be, it seems indisputable that contemporary judges are less directly engaged with the cases they must decide than their predecessors.

These effects are compounded by the increasing involvement of central court staff in screening cases before they reach the judges.<sup>133</sup> The typical screening mechanism leads to some portion of the docket remaining a candidate for a more traditional process, while the remainder of cases are channeled toward settlement or truncated processes involving no oral argument and memorandum or order opinions, which are often drafted by staff.<sup>134</sup> The cases on this latter track, by design, receive even less judicial attention. Moreover, opinions drafted by staff attorneys are less apt to

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129. *See supra* notes 115-16 and accompanying text. What is more, many appellate courts frequently dispense not only with argument, but also with any sort of conference among the judges in nonargued cases, a practice Judge Posner describes as "insidious" and likely to create a "tendency to sign on the dotted line with little real consideration of the case . . ." POSNER, *supra* note 11, at 162.

130. Judge Posner reports:

Today, most judicial opinions, including many Supreme Court opinions, are ghostwritten by law clerks. Many appellate judges have never actually written a judicial opinion. Some judges do extensive editing of their law clerks' opinion drafts, others not, and this is the pattern in the Supreme Court as well as in the lower courts.

Posner, *supra* note 24, at 61; *see also* BAKER, *supra* note 21, at 139-47; Cooper & Berman, *supra* note 24, at 697-99.

131. POSNER, *supra* note 11, at 145-49.

132. *See* McGowan, *supra* note 79, at 513-14.

133. *See* BAKER, *supra* note 21, at 139-47 (discussing the role of staff attorneys); Reynolds & Richman, *supra* note 98, at 1290-92 (discussing the "truncated procedures" that have resulted from delegating judges' work to staff attorneys).

134. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 22.

approximate the point of view of the judge under whose name they were written as compared to those drafted by the judge's personal law clerks.<sup>135</sup>

Collectively, these developments have increased the distance between the judge and the decisions the judge must make. Preparation for oral argument, participation in oral argument, and the writing of an opinion each represent opportunities for the judge to spend time studying and analyzing the claims presented in a case. Any opportunity to work with a problem is likely to reveal wrinkles that may not have been immediately apparent, and to allow reconsideration of the fit between the problem and one's initial sense of its appropriate resolution.<sup>136</sup> As resource constraints and modified procedures render judges less able to do these things, the process of graduated decision-making becomes more and more a moment of decision made on the basis of a packaged distillation of information prepared by others. As we will see, that in turn decreases the likelihood that courts will consistently satisfy their adjudicative duty.

## 2. Changes Affecting the Ability to Monitor

Just as the crisis of volume and the procedural changes made in its wake have increased the distance between the judge and her own work product, so have they affected her relationship with her colleagues' work product. Indeed, the statistics provided in the preceding section regarding increased workload only tell a portion of the story.<sup>137</sup> The average circuit judge today is not only responsible for considerably more opinions and other dispositions than her predecessor of several decades ago, but also for reviewing and commenting on roughly twice that many opinions written by other members of panels on which she serves, and presumably for a handful of concurrences and dissents. Meanwhile, she must also pay attention to the rest of the opinions issued by her court so as to remain abreast of developments in her jurisdiction, a task that has also dramatically grown in size.

This alone makes it difficult to adequately monitor all that takes place on one's court.<sup>138</sup> But there is another, less quantifiable aspect of the

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135. See POSNER, *supra* note 11, at 152.

136. See *supra* notes 116-17 and accompanying text.

137. See *supra* notes 118-19 and accompanying text.

138. As Thomas Baker puts it:

Stop to consider the implications from workload and the overall impact of the coping mechanisms of intramural reforms. There are approximately 250 working days in a calendar year. In 1990, there were 40,898 appeals decided, a ratio of 247 per judge or nearly one per day. But more significantly these figures yield a ratio of 787 appeals per 3-judge panel or a little more than three appeals "decided" every working day. And there are numerous other demands on a circuit judge that

changes resulting from the crisis of volume. Not only is it the case that increased caseloads have made it more difficult for judges to monitor the output of their colleagues and their court, it may also be that the nature of the monitoring has changed in significant ways. In addition to being less able to scrutinize their colleagues' work, judges may be looking for different things. Although the public aspects of the appellate process typically receive the most attention as constraints on judicial behavior, informal court norms play a substantial role as well.<sup>139</sup> In other words, even if judges are well-positioned to monitor one another, the monitoring will be for violations of court norms, and sanctions will only be applied in the case of such violations. And it may be that the norms themselves have shifted as judges become more comfortable adjudicating large portions of their dockets in a manner that falls short of the idealized conception.

Consider again the changes to the relationship between judges and their decisions explored in the preceding section. Judges have unquestionably become accustomed to delegating substantial portions of what were historically their responsibilities to others, and, in doing so, according a large part of the cases on their dockets a level of adjudication that falls well short of the idealized conception. Having come to expect less of themselves and their colleagues in these cases, there is no reason to conclude they might not have lowered their expectations more generally. Consideration of another change to the process of appellate adjudication helps make the point. Courts have adopted a practice of issuing different types of opinions. While once all appeals were resolved by way of full, published opinions, the present practice is to resolve a substantial portion of appeals—nearly eighty percent in the federal courts<sup>140</sup>—by way of so-called unpublished opinions. Such opinions, which have been the subject

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regularly compete for time and attention. Are there three meaningful votes cast in every federal appeal today? These ratios imply that a great deal of what today passes for a participation on the merits by an individual circuit judge really only amounts to rubber-stamping the work of a colleague, as opposed to the more traditional full participation in collegial decisionmaking.

BAKER, *supra* note 21, at 148.

139. See POSNER, *supra* note 11, at 347. Because appellate courts sit in panels, any single judge's desire to act in a manner inconsistent with prevailing norms will require, at the very least, the indifference of his colleagues in order to be put into effect. Because appellate courts tend to have relatively few judges, any pattern of activity inconsistent with prevailing norms will become known to all judges on the court. See Gulati & McCauliff, *supra* note 92, at 166-67. Moreover, the courts' small size renders informal social sanctions quite effective as constraints on behavior. *Id.* at 167. But there is reason to suspect that this mechanism, too, has become less effective than it might once have been at enforcing the adjudicative duty.

140. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2000 ANNUAL REPORT OF THE DIRECTOR tbl.S-3 (2001), available at <http://www.uscourts.gov/judbususc/judbus.html>.

of a vast amount of commentary in recent years,<sup>141</sup> typically contain less analysis and are often deemed to have less, if any, precedential value.<sup>142</sup> In many cases unpublished opinions are prepared by court staff and effectively “rubber stamped” by the judges.<sup>143</sup> Not infrequently, the courts dispense with opinions altogether, simply issuing an order indicating that the lower court disposition is affirmed.<sup>144</sup>

These devices provide a ready mechanism for the avoidance of difficult or troubling claims, as well as an increased likelihood of the inadvertent overlooking of such claims. A judge (who is, it bears repeating, a mere human) is simply less likely to scrutinize an opinion from the chambers of one of her colleagues that does not constitute precedent and which as a result will never form the basis of arguments the judge must confront in a future case. If that opinion fails to be responsive to the parties’ arguments, the judge is less likely to notice. What I have referred to as the increased distance between a judge and her own decisions is likely to facilitate this dynamic. As Owen Fiss notes in addressing the “bureaucratization” of the judiciary, judges’ increasing reliance on others to perform portions of their tasks leads overall to a lessened sense of responsibility for the outputs of the process.<sup>145</sup> “The judge acts on the assumption that his work is the product of ‘many hands,’ . . . [and that]

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141. See, e.g., Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004) (commenting on the detrimental effect of unpublished opinions on precedent and the resulting unfairness to litigants); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) (decrying the destruction of precedent through unpublished opinions and addressing the power that judges—and by extension, law clerks and staff attorneys—can wield through their use); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002) (examining appellate courts’ nonpublication practices and non-citation rules in light of *Anastasoff v. United States*, an Eighth Circuit case upholding the use of an unpublished opinion as precedent against a taxpayer); Michael B.W. Sinclair, *Anastasoff versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003) (arguing that the constitutionality and wisdom of nonpublication and non-citation rules depends on one’s conception of *stare decisis*, and suggesting the existence of a middle ground).

142. See Cooper & Berman, *supra* note 24, at 702-03 (discussing the varying weight accorded to unpublished opinions by the federal circuits).

143. See Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This! Why We Don’t Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 44 (acknowledging that most of the Ninth Circuit’s unpublished memorandum dispositions are drafted by law clerks or staff attorneys and rarely edited by the judges).

144. For a history and criticism of this practice in the federal courts, see BAKER, *supra* note 21, at 121-25. Most state courts have an analogous procedure. See Kerri L. Klover, “Order Opinions”—*The Public’s Perception of Injustice*, 21 WM. MITCHELL L. REV. 1225, 1244-45 (1996).

145. See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983).



[t]he decision or opinion is not wholly his own.”<sup>146</sup>

The availability of these devices also increases the possibility of more knowing decisional failures. If one judge (or, as Judge Posner posits, even the law clerk of one of the judges) has a strong opinion as to how a case should be resolved, and the other judges are less interested in the case, they are likely to acquiesce to the opinionated judge.<sup>147</sup> Taking a stand in opposition takes time, and may ultimately require drafting a dissenting or concurring opinion, which consumes even more time.<sup>148</sup> This creates a tendency to go along, which may be even greater where the resulting opinion creates no precedent. Indeed, Judge Richard Arnold suggests that the prevalent use of unpublished opinions has negative effects “on the psychology of judging”<sup>149</sup> and creates a temptation for courts to utilize them to “sweep[] the difficulties under the rug” in cases where applicable legal standards appear to require an undesirable result.<sup>150</sup> Judge Posner invokes the same imagery, suggesting that “the unpublished opinion provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty.”<sup>151</sup> Judge Patricia Wald attests that she has seen it happen.<sup>152</sup>

146. *Id.* (footnote omitted).

147. *See* POSNER, *supra* note 98, at 123.

148. And, as Judge Posner reminds us, judges have as much aversion to this sort of “hassle” as anyone else. *Id.* at 124.

149. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999).

150. *Id.* David Law concludes from a statistical analysis of asylum cases decided by the Ninth Circuit that:

[V]oting and publication are, for some judges, strategically intertwined: for example, judges may be prepared to acquiesce in decisions that run contrary to their own preferences, and to vote with the majority, as long as the decision remains unpublished, but can be driven to dissent if the majority insists upon publication.

David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 820 (2005). *See generally* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999) (discussing the normative dimensions of strategic voting).

151. POSNER, *supra* note 11, at 165. Posner does not view this concern as dispositive of the question whether unpublished opinions are, on balance, useful. *Id.* at 168. At least one other judge has used the rug metaphor. *See* Edward A. Adams, *Increased Use of Unpublished Opinions Faulted*, N.Y.L.J., Aug. 2, 1994, at 1, 4 (quoting Judge Wilfred Feinberg). Other judges have acknowledged that strategic considerations at least occasionally play a role in the decision to use an unpublished opinion. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 97 n.84 (2001).

152. She observes:

### 3. Effects on Fulfillment of the Adjudicative Duty

The modified process typical of contemporary appellate adjudication is certainly more conducive to breaches of the adjudicative duty than was the traditional process. Judicial decisions are less likely nowadays to be even weakly responsive to the parties' proofs and arguments simply because there are fewer points at which judges engage directly with those proofs and arguments. In a significant portion of the cases, initial review of the briefs is delegated to clerks or staff, oral argument is not conducted, and opinions are drafted by clerks or staff. For most judges, important components of what are part of the judicial role in the idealized conception are delegated in the remainder of their case load as well. Law clerks perform much of the initial analysis of cases through the review of briefs and preparation of bench memoranda and typically prepare the initial drafts of opinions. This is not to suggest that judges are not engaging in the parties' arguments at all. But in order for this delegation to be useful, it must necessarily be the case that it reduces the judge's workload, which in turn means that it reduces both the quantity and depth of the judge's contact with the parties' contentions.

Indeed, these modifications not only lessen the likelihood of responsiveness by reducing the judge's contact with the parties' arguments, but also introduce occasions for the arguments to be distorted. The judge as consumer of bench memo and editor of an opinion performs his decisional task on what is, in an important sense, a set of secondary documents. If the author of those documents somehow mischaracterizes or overlooks the parties' characterization of the dispute, the judge may not notice simply because doing so would require a return to the briefs to determine whether the issues as presented by the memo or opinion draft accurately reflect the parties' contentions. A similar dynamic holds for the judge as monitor of his colleagues' opinions. Reduced personal engagement with the case at every stage will result in a judge having less fully developed impressions and recollections of the parties' arguments. These more embryonic thoughts are in turn more susceptible to being swayed away from the parties' contentions if the opinion under review

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I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug, though most will not stay put for long.

fails to accurately characterize them, or even omits to include some of them. Thus, whatever the judge's inclination to scrutinize a draft opinion on its own terms, that scrutiny will not necessarily result in greater compliance with the adjudicative duty if the opinion proceeds from a misconceived or incomplete understanding of the dispute.

The conditions of modern appellate adjudication are also considerably more likely to result in opinions that fail to achieve the candor ideal. Even if the judge's decisional process otherwise comports entirely with the idealized conception, the mere fact that the opinion is written by someone else makes it inevitable that it will at best only partially overlap with the judge's reasoning. This line of thought reveals another shortcoming—namely, that in many cases under the modified process, there is a decision, but not a decisional process of the sort contemplated by the idealized conception. Consider a judge who merely signs off on the recommendations of a staff lawyer regarding the disposition of a case. That judge's decision is likely to be the product of half-formed impressions and assessments of the likelihood that this type of case is to present the sort of non-routine issues as to which reliance on staff's recommendation would not be appropriate. Yet if an opinion is issued, it will invariably depict a decision based on a process of traditional legal reasoning. Not only does the opinion in this situation fail to accurately capture the judge's decisional process, but in an important sense there is not actually a decisional process to be described.

Of course, this is all necessarily somewhat speculative. It seems clear that the nature of the modern appellate process is more likely to result in failures to satisfy the adjudicative duty. But that does not mean this happens. The question of whether these changes in the process of appellate adjudication have led to a corresponding increase in courts' failures to satisfy the adjudicative duty is an empirical one. And in an important sense it may be unanswerable. Because so much of the process of judicial decision-making is internal to the judge, there is ultimately no way to determine, for example, whether the judge's decision in a given case is actually responsive to the parties' proofs and arguments. Nor is it possible to tell whether the public justifications offered for a decision in an opinion reflect the real reasons the court decided as it did. This is, indeed, why we rely on informal constraints rather than legal standards to generate compliance with the adjudicative duty.<sup>153</sup>

But just as the existence and operation of the informal constraints provides strong circumstantial evidence that decisions generated by a process subject to those constraints will comply with the adjudicative duty, there is also circumstantial evidence suggesting that decisions generated

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153. *See supra* note 98.

by today's modified appellate process are in fact less likely to comply. Certainly, some members of the practicing bar perceive that courts breach the adjudicative duty with some regularity.<sup>154</sup> In addition, not only academics,<sup>155</sup> but also a large number of judges,<sup>156</sup> have suggested that the increasing demands on judges' time have resulted in a situation in which many cases do not receive the attention they deserve, which implies at the very least that courts are inadvertently breaching the adjudicative duty due simply to a lack of resources.<sup>157</sup> There is statistical evidence to back up this

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154. See Oldfather, *supra* note 5, at 133 n.34 (discussing the evidence of such a perception).

155. See, e.g., Richman & Reynolds, *supra* note 99, at 275 (suggesting that changes to the appellate process from increased caseloads have had an overall negative effect on the quality of courts' output and led to a de facto two-track system where cases that judges perceive as interesting and important continue to receive something close to traditional appellate treatment, while other cases, typically involving less powerful litigants, get less attention). For a somewhat more theoretical treatment of these issues, see Fiss, *supra* note 145, at 1467.

156. Eighth Circuit Judge Donald Lay opined in 1981 that "courts of appeals today may provide in many appeals only an appearance of justice rather than justice itself." Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151, 1155 (1981). Twelve years later Ninth Circuit Judge Stephen Reinhardt noted that "[t]hose who believe we are doing the same quality work that we did in the past are simply fooling themselves. . . . The use of . . . makeshift procedures ensures that many cases do not get the full attention they deserve, and the quality of our work suffers." Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52, 52. The following year Ninth Circuit Judge Mary Schroeder suggested that "today's federal appellate courts are adopting techniques that seemed designed to prevent them from reaching the merits of cases. These formulas permit us to do everything except decide whether the case at bar was rightly decided. This modern jurisprudence, to put it bluntly, illustrates the maxim, 'Don't decide—duck.'" Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas*, 1994 WIS. L. REV. 9, 27; see also Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYUL. REV. 3, 38-40 (recounting the responses of federal appellate judges to a survey question regarding how caseload pressures affect their ability to do their work). Judge Posner is less convinced:

Some might also find a hint of a problem of quality in the rapid fall in the reversal rate, since the less time an appellate court spends on a case the more likely it is simply to affirm the district court or agency, affirmance being the easy way out. But again there are other possibilities.

POSNER, *supra* note 11, at 74-75.

157. Such a phenomenon would be consistent with the teachings of cognitive psychology. The concept of "bounded rationality"—the idea that each of us possesses a limited amount of cognitive resources, which we must ration in order to make our way through the world—suggests that:

[L]aw follows the *principle of unevenness*: The workmanship of rules varies in quality, at least in part, as a function of the disparate amounts of effort that lawmakers choose to devote to different rules. Depending upon how much importance they place on the issue before them, lawmakers either rise—or *sink*—to the occasion.

hypothesis. The reversal rate in the federal courts of appeals has declined from 24.5% of cases terminated on the merits in 1960<sup>158</sup> to 9.4% in 2003.<sup>159</sup> Some, perhaps even most, of this may be attributable to an increase in the proportion of meritless appeals together with a progressive narrowing of the scope of appellate review.<sup>160</sup> But it is also consistent with a situation in which judges who have less time to uncover error consequently find fewer errors.<sup>161</sup> As Judge Posner pointedly notes, “[T]he less time an appellate court spends on a case the more likely it is simply to affirm the district court or agency, affirmance being the easy way out.”<sup>162</sup>

There is also evidence to support the additional assertion that court norms have changed. Mitu Gulati and C.M.A. McCauliff studied the Third Circuit’s use of judgment orders—dispositions accompanied by no or nearly no elaboration—during the period from 1989 to 1996, in which the court disposed of roughly sixty percent of its cases by way of judgment order.<sup>163</sup> They argue that the data are consistent with the development of a norm pursuant to which the court disposed of some of its hardest cases by judgment order despite the existence of internal court rules that expressly prohibited such behavior.<sup>164</sup> This is problematic. As Karl Llewellyn notes, “However sound this approach to an overloaded calendar, it does remove from the particular case one of the most compelling pressures toward steadiness.”<sup>165</sup> Even if, as Gulati and McCauliff were assured, no such norm ever existed on the court, the very mechanism of

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Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 599, 611 (2003) (footnote omitted). For an application of the bounded rationality concept to explore the “affirmance effect” in appellate courts, see Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights Into the “Affirmance Effect” on the United States Courts of Appeals*, 32 FLA. ST. U.L. REV. 357, 374-85 (2005).

158. See DIR. OF ADMIN. OFFICE OF U.S. COURTS, *supra* note 119, at 210 tbl.B-1. Looking back to 1945, one sees a reversal rate of 27.9%. DIR. OF ADMIN. OFFICE OF U.S. COURTS, 1945 ANNUAL REPORT 70 tbl.B-1. But 1960 is generally regarded as the year in which the dramatic changes in the business of the lower federal courts began. See Martha J. Dragich, *Once A Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25 n.72.

159. See DIR. OF ADMIN. OFFICE OF U.S. COURTS, *supra* note 119, at 27 tbl.B-5.

160. See POSNER, *supra* note 11, at 71-77.

161. See Reynolds & Richman, *supra* note 98, at 1291 (“It is, of course, difficult to show that the outcome of any appeal would be different if the judges had considered the case more carefully, but there is circumstantial evidence suggesting that at least some results would change.”).

162. POSNER, *supra* note 11, at 74-75. Judge Posner is, at a minimum, skeptical of this as the primary or even a significant explanation for the decline in reversal rates, concluding instead that the appellate docket has evolved to include a smaller proportion of difficult cases. *Id.* at 75-77.

163. Gulati & McCauliff, *supra* note 92, at 162.

164. *Id.* at 158, 184.

165. LLEWELLYN, *supra* note 98, at 27. However, Llewellyn also goes on to state that “when wisely administered, such removal can prove immaterial.” *Id.* This immateriality is due to the large amount of meritless appeals the disposition of which does not require an opinion. *Id.*

the judgment order provides no reassurance to the contrary, since everything is left unsaid. Somewhat less insidiously, several judges and commentators have noted the federal appellate courts' increasing reliance on deferential standards of review in disposing of cases.<sup>166</sup> Judge Mary Schroeder describes these as “techniques of avoidance: describing factors to be balanced, applying discretionary standards of review, examining the trial court process rather than the substantive meaning of statutes and rules. They avoid the difficult task of deciding whether the trial court actually reached the right or fair result in the particular case.”<sup>167</sup>

Regardless of whether they are grounded in empirically verifiable reality, these comments supply another reason to be concerned about the modified appellate process. In the context of adjudicative legitimacy, perception is, in an important sense, reality.<sup>168</sup> The fact that appellate courts no longer afford to each case that comes before them the same treatment, both relative to the other cases on the docket and to the historical norm, creates in observers the impression that courts are not “doing their job” with respect to some portion of their caseloads.<sup>169</sup> Even if it were possible to demonstrate that the implementation of the traditional, full appellate process in all of these cases would change neither the result nor the essential components of the decisional process, the fact that the public's perception is otherwise counsels consideration of mechanisms for restoring adjudicative legitimacy.

#### IV. JUDICIAL OPINIONS AS INFORMATIONAL REGULATION

Courts, commentators, and special commissions have devoted countless hours to the consideration of how the appellate process or the structure of the appellate courts might be modified to better accommodate ever-growing caseloads.<sup>170</sup> These efforts have resulted in various proposals

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166. See POSNER, *supra* note 11, at 175-77.

167. Schroeder, *supra* note 156, at 11; *see also id.* at 27-28 (“We are abandoning the factual and legal analysis, we are abandoning the individual problem, we are abandoning a process essential if we are to reach ‘a right and fair solution.’”).

168. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189, 278-81 (2004) (discussing the importance of the perception of legitimacy to the proper functioning of a system of procedure).

169. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99, at 25 (“The use of nonjudicial staff, nonargument decision-making procedures, summary orders or unelaborated dispositions, and other procedural accommodations to caseload volume have made the courts more efficient, but at some cost to the appearance of legitimacy of the appellate process, and at some risk to the quality of appellate justice.”).

170. See generally COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *supra* note 99 (proposing basic and conservative changes, especially focusing on the overburdened Ninth Circuit); BAKER, *supra* note 21, at 106-286 (discussing and comparing both intramural and extramural possibilities for radical and conservative reforms); CARRINGTON, ET AL.,

in addition to those that have already been implemented and referred to in the preceding discussion. Examples include the creation of an additional tier in the federal judiciary,<sup>171</sup> the use of two-judge panels (rather than the traditional three) for some categories of cases,<sup>172</sup> the modification of the federal appeals courts either by further subdividing the existing circuits or eliminating the circuits entirely,<sup>173</sup> and the simple addition of judges.<sup>174</sup> In general, the goal of these proposals has been to facilitate courts' ability to cope with rising caseloads through reduction of each judge's workload.<sup>175</sup> Such reduction would occur by making each judge responsible for fewer cases in the aggregate, removing or deemphasizing some portion of the decisional process from the judge's workload (as by shifting some portion of the circuit courts' law creation function to another judicial level), or some combination thereof. The apparent working assumption is that the key to restoring adjudicative legitimacy is to provide judges with more time to perform their responsibilities.

This Part opens the exploration of a somewhat different avenue of reform. Rather than focusing on the reduction of judicial workload, it considers whether there may be ways to modify the process of appellate adjudication so as to encourage more consistent compliance with the adjudicative duty without significantly affecting workload. Toward that end, and as a prelude to the next Part's proposal, this Part develops a conception of judicial opinions as "informational regulation." Such an analysis not only provides a fresh perspective on the forms and functions of judicial opinions, but also invites consideration of how the opinion device might be modified so as to better channel the behavior that it ostensibly merely reflects.

#### A. *An Overview of Informational Regulation*

Traditional regulation operates largely through the imposition of regulatory prescriptions or targets relating to such things as means of production, rates, allocation of scarce resources, and the like.<sup>176</sup> Under

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*supra* note 99 (suggesting structural and procedural measures to mitigate the adverse effects of growing caseloads in the appellate courts); POSNER, *supra* note 11 (arguing that volume and size reforms are not useful and discussing reforms through an economic lens and the modification of jurisdiction requirements).

171. See BAKER, *supra* note 21, at 242-61.

172. *Id.* at 172-73.

173. *Id.* at 239-42, 269-76 (discussing proposals to eliminate the current circuits and replace them with smaller courts, and to merge all of the existing circuits into a single court).

174. See Richman & Reynolds, *supra* note 99, at 297-334 (advocating increasing the size of the judiciary as the "obvious solution").

175. See, e.g., POSNER, *supra* note 11, at 193.

176. See STEPHEN BREYER, REGULATION AND ITS REFORM 161 (1982); see also ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 121-40 (4th ed.

these mechanisms, the means to achieving the regulatory goal is a requirement that the regulated entity alter its conduct so as to comply with the prescription or target.<sup>177</sup> Manufacturers, for example, must produce goods having certain features, and industry must reduce its pollutant emissions to specified levels. However, experience has revealed these traditional “command-and-control” approaches to be frequently cumbersome and inefficient, and consequently policymakers have explored alternate methodologies.<sup>178</sup>

One of the more prominent alternatives is “informational regulation.”<sup>179</sup> Under a regime of informational regulation, what is imposed on regulated entities is not a restriction on the targeted conduct itself, but rather an obligation to disclose certain information relating to that conduct.<sup>180</sup> The manufacturer does not have to change the product, but instead must tell the world more about it. The animating principle is that the audience for the information will, by virtue of being better informed, be better positioned to monitor and thus act vis-à-vis the regulated entity, and thereby exert pressure for change via market or political channels.<sup>181</sup> Consistent with this understanding, informational regulation is thought to be most efficient in situations where members of the public would otherwise have difficulty obtaining the relevant information.<sup>182</sup>

Although the mandatory disclosure mechanism is hardly new, its use as a regulatory tool has become increasingly prevalent in recent decades and represents, in Cass Sunstein’s estimation, “one of the most striking developments in the last generation of American law.”<sup>183</sup> Mandatory disclosure requirements have accordingly been employed across such diverse subject areas as banking, securities, food and drugs, the environment, and automobile safety.<sup>184</sup> Even so, only within the past decade has there emerged much scholarly consideration of the mechanisms of informational regulation.<sup>185</sup> The resulting literature has

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2003) (providing an overview of environmental regulatory strategies).

177. See BREYER, *supra* note 176, at 163.

178. See *id.*

179. See *id.* at 161.

180. See *id.* at 163.

181. See *id.* at 161.

182. See Cass R. Sunstein, *Democratizing America Through Law*, 25 SUFFOLK U. L. REV. 949, 960-61 (1991).

183. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613 (1999); see also Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 530 (2004) (“One of the most promising [recent] developments is the concept that information may be a surprisingly effective and efficient regulatory instrument.”).

184. BREYER, *supra* note 176, at 161-62.

185. See, e.g., Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 260-61 (2001);



loosely categorized the types and aims of informational regulation, as well as the limitations that inhere in disclosure-based mechanisms.

### 1. The Benefits of Informational Regulation

The most salient benefits of informational regulation accrue via its market- and political process-enhancing effects. As this suggests, the device is versatile. Disclosure requirements can be aimed at modifying (or at least informing) the behavior of private actors—as is the case with nutritional labeling on food products—or directed toward the behavior of governmental agents—as with the requirement that agencies prepare environmental impact statements in connection with major actions.<sup>186</sup> As these examples reflect, disclosure requirements can be divided between disclosure requirements designed to facilitate the functioning of markets and those designed to enhance the operation of political safeguards.<sup>187</sup> The premise underlying the former is that market participants must possess a certain minimum amount of information in order for a market to function properly.<sup>188</sup> Federal securities laws provide one of the more prominent examples of mandatory disclosure geared toward this end.<sup>189</sup> Disclosure designed to trigger political safeguards stems from the analogous idea that properly functioning democracy requires that citizens possess an appropriate baseline amount of information in order to be effective participants in the political process.<sup>190</sup> Both private actors and governmental entities often lack the incentive (or face disincentives) to disclose information necessary to a full assessment of their decisions.<sup>191</sup> Required disclosure of such information can enable the now-informed

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William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1701 (1999); Christopher H. Schroeder, *Third Way Environmentalism*, 48 U. KAN. L. REV. 801, 804 (2000); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 21-24 (2001); Sunstein, *supra* note 183, at 613; Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 654 (1993); Sunstein, *supra* note 182, at 949; Vandenberg, *supra* note 183, at 522-23. *See generally* David W. Case, *The Law and Economics of Environmental Information as Regulation*, 31 ENVTL. L. REP. 10773 (2001) (providing an overview of the economic and legal literature concerning informational regulation in the environmental context). The literature in the securities law area has a somewhat longer history. *See* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1047 (1995) (noting the existence of “a small but influential theoretical literature . . . on the efficiency of mandatory disclosure”).

186. *See* Sunstein, *supra* note 183, at 614.

187. *Id.* at 619. As Sunstein acknowledges, mandatory disclosure may often serve both ends.

*Id.*

188. *See* BREYER, *supra* note 176, at 161.

189. *See id.* at 162.

190. *See* Sunstein, *supra* note 183, at 619.

191. *See* Sunstein, *Informing America*, *supra* note 185, at 655-56.

public not only to better monitor the actions of officials to ensure that those actions are consistent with applicable standards, but also to monitor the appropriateness and effectiveness of the standards themselves, and to effectively debate the need for modifications.<sup>192</sup>

There are also less-apparent advantages that can result from the imposition of a disclosure requirement. One of particular interest for present purposes is that informational regulation can directly affect the regulated entity's conduct. That is, the very process of complying with a disclosure requirement can also lead to changes in the underlying activity independent of the effects of external monitoring. The phrase often associated with this effect is "you manage what you measure."<sup>193</sup> To the extent a disclosure requirement leads the regulated entity to compile information it had not previously gathered, the entity may make different decisions than it otherwise would have, simply as a result of having additional information to take into consideration in its decision-making process.<sup>194</sup> Thus, even in a situation where there is no prospect that disclosure will trigger any external consequences, a disclosing entity may have other reasons, including simple business imperatives, to modify its behavior.<sup>195</sup> Relatedly, the process of complying with a disclosure requirement might lead to the internalization of the norms underlying the regulatory regime, leading in turn to behavior that is generally more consistent with those norms even without further regulatory activity.<sup>196</sup>

A further benefit present across all these mechanisms is that informational regulation allows for flexibility of response. Traditional regulation works by prescribing some aspect of the regulated entities' conduct, which to be effective requires the regulator to anticipate all of the situations to which the requirement might apply.<sup>197</sup> Informational regulation, in contrast, allows the regulated entity to determine how best to change its practices to be more consistent with the goals of the regulatory regime, and indeed to decide whether to adjust its conduct at all.<sup>198</sup>

Any given regime of informational regulation can have many or even

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192. See Sage, *supra* note 185, at 1801-25; Sunstein, *supra* note 183, at 625-26.

193. Karkkainen, *supra* note 185, at 299 (quoting Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1342 (1996)).

194. See Karkkainen, *supra* note 185, at 297.

195. See *id.* at 294-305.

196. See Stewart, *supra* note 185, at 127-28 (placing informational regulation within the "reflexive law" conception of regulation).

197. See *id.* at 127.

198. See Mary Graham, *Information as Risk Regulation: Lessons from Experience* 9-10, (Regulatory Policy Program Working Paper No. RPP-2001-04, 2001), available at [www.ksg.harvard.edu/cbg/research/rpp/RPP-2001-04.pdf](http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2001-04.pdf).

all of these types of effects.<sup>199</sup> Consider two of the prominent examples of informational regulation in the environmental context. The National Environmental Policy Act (NEPA)<sup>200</sup> requires federal agencies not merely to consider the environmental consequences of their proposed activities, but also to issue an environmental impact statement (EIS) including a detailed discussion of those consequences as well as alternatives.<sup>201</sup> Significantly, that is nearly all that NEPA requires. It does not create any requirements concerning how the agencies use the information once it has been compiled.<sup>202</sup> NEPA, then, can be categorized as requiring disclosure aimed at modifying the behavior of governmental agents through the operation of political safeguards. An EIS makes at least part of an agency's decision-making process transparent, and therefore subject to the scrutiny of the public as well as other political actors. At the same time, at least part of the motivation behind NEPA was to improve agency decision-making independent of these political effects.<sup>203</sup> A mere requirement that agencies take environmental considerations into account, the reasoning goes, would be largely meaningless standing alone. But when combined with the processes necessary to generate an EIS—largely the gathering and analysis of information that might otherwise have gone unconsidered—the resulting agency decisions should be better simply because they are better informed.<sup>204</sup> At the same time, the process might lead to the internalization of environmental norms, such that agency behavior becomes generally more environmentally conscious without the need for further regulation.<sup>205</sup>

The second prominent example of informational regulation in the environmental area is the Toxics Release Inventory (TRI).<sup>206</sup> Under TRI, facilities that meet certain minimum thresholds must report, in a standardized fashion, their annual releases of more than 650 toxic

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199. *Id.* at 7 (observing that “in practice there are probably few cases of requirements that create incentives that are purely economic or purely political”).

200. 42 U.S.C. §§ 4321-4370a (2000).

201. *See id.* § 4332(C).

202. As Bradley Karkkainen puts it: “NEPA famously requires federal agencies to produce environmental impact statements (EISs) prior to undertaking ‘major Federal actions significantly affecting the quality of the human environment.’ It requires little else, and therein lies both its singular genius and its fatal flaw.” Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 904 (2002) (footnote omitted).

203. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 810-11 (2d ed. 1994).

204. *See* Karkkainen, *supra* note 202, at 909-16.

205. *See id.* at 910-11.

206. The TRI was created by the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 11001-11050 (2000)).

chemicals.<sup>207</sup> The EPA, in turn, compiles this information in a publicly accessible database.<sup>208</sup> The TRI is largely directed toward affecting the behavior of private actors, namely the companies that own or operate the facilities that release toxic chemicals.<sup>209</sup> As with NEPA, the animating principle was to enable the public to inform itself about companies' environmental behavior and to exert market and political pressure against those with high emissions.<sup>210</sup> Indeed, the TRI is considered one of the more successful instances of informational regulation. Not only has it led to reductions in emissions,<sup>211</sup> it has proven to be a valuable source of information for Congress and the EPA to use in adjusting regulatory requirements and strategy.<sup>212</sup> What is more, like NEPA, the TRI may have led to behavioral changes simply as a result of making information regarding toxic emissions both available and salient to the appropriate decision-makers.<sup>213</sup>

## 2. The Costs of Informational Regulation

There are, of course, limitations and drawbacks associated with informational regulation. First, information can be costly to gather or distribute, and the costs may outweigh the resulting benefits.<sup>214</sup> Second, the information may not have its desired effect simply because of the limitations of human cognition.<sup>215</sup> For example, people are consistently poor at assessing certain types of information, such as that relating to low-probability events, with the potential result being either an under- or over-reaction to disclosure.<sup>216</sup> And too much information may lead to overload, in which case recipients tend to ignore all the information provided.<sup>217</sup>

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207. *See id.* § 11023.

208. *See* EPA.gov, Toxics Release Inventory (TRI) Program, <http://www.epa.gov/tri/> (last visited Mar. 27, 2006).

209. *See* EPA.gov, What is the Toxics Release Inventory (TRI) Program?, <http://www.epa.gov/tri/whatis.htm> (last visited Mar. 27, 2006).

210. *See* PERCIVAL, ET AL., *supra* note 176, at 485.

211. *See id.* at 485-90; *see also* Schroeder, *supra* note 185, at 818-19 (attributing the emissions reductions resulting from TRI "to the impact of the disclosures themselves . . . without any direct regulation being imposed on these various sources, they apparently have responded to citizen reaction, or anticipated citizen reaction, to the information disclosed by the TRI.").

212. PERCIVAL, ET AL., *supra* note 210, at 485-90.

213. *See* Karkkainen, *supra* note 185, at 295-305.

214. *See* Sunstein, *supra* note 183, at 626-27.

215. For a detailed discussion of the potential negative effects of informational regulation, *see* Sunstein, *Informing America*, *supra* note 185, at 667-69.

216. *See id.* at 667.

217. *See id.*; *see also* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 417-20 (2003).

Third, mandatory disclosure may skew the incentives of the discloser.<sup>218</sup> While we may want agencies to take environmental considerations into adequate account while making decisions, we almost certainly do not want them to do so to the exclusion of other matters. Yet by requiring agencies to devote resources to the preparation of EISs, we may be doing just that.<sup>219</sup> Alternatively, agencies forced to deal with the preparation of EISs on a regular basis may develop “boilerplate” approaches to the process, such that the information provided has the appearance of exhaustiveness, but does not reflect a considered analysis.<sup>220</sup> Relatedly, disclosure may underinform or misinform the monitoring activity of the audience to which it is directed. The TRI, for example, facilitates monitoring of companies with respect to those chemicals to which its reporting requirements relate, but in so doing it may draw the attention of the public and advocacy groups away from companies’ handling of substances not on the required disclosure list but which may ultimately pose a greater danger.<sup>221</sup>

### 3. The Importance of Design

As the preceding discussion suggests, it is critical to the effectiveness of any scheme of informational regulation that the disclosure mechanism be precisely tailored to the ends sought to be achieved.<sup>222</sup> This requires in the first instance an understanding of the nature of those ends.<sup>223</sup> A lack of consensus concerning the purposes of the regulatory regime can thus thwart the development of a scheme of informational regulation, either by preventing agreement on what should be disclosed or by inducing compromise that results in either incomplete or inapposite disclosure requirements. In similar fashion, an incomplete understanding of the purposes animating a regulatory regime or of the processes being regulated might lead to the formulation of a disclosure requirement that misdirects the efforts of the disclosing entity and the intended audience for the information. Both will tend to focus on the information provided, and to exert pressure for change at the mechanisms underlying that information

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218. See Sage, *supra* note 185, at 1781.

219. See *id.* at 1781-82 (arguing that “[i]ncreasing attention to the items for which disclosure is mandated inevitably diverts resources from other uses which may be more valuable to society”) (footnote omitted).

220. See Karkkainen, *supra* note 202, at 921-23 (describing the tendency for agencies to generate such EISs). Karkkainen concludes that NEPA’s present configuration creates incentives for agencies to attempt first to avoid the EIS requirement altogether, and, when they cannot, to produce EISs that “tend to consist of exhaustive compilations of recycled information, sometimes of dubious quality.” *Id.* at 923.

221. See Graham, *supra* note 198, at 19.

222. See Sage, *supra* note 185, at 1781.

223. See *id.*

to the near-exclusion of other conduct. As a consequence, informational regulation should ideally follow a relatively comprehensive analysis of the processes to which the disclosure is to relate, so as to determine what the most important components of those processes are. At a minimum, those designing a program of informational regulation must take care to ensure that the consequences of disclosure are not inconsistent with the goals of regulation.<sup>224</sup>

### B. *Judicial Opinions as Informational Regulation*

Although the idea that judicial opinions serve as an example of informational regulation has gone unexplored, the conceptual fit between the informational regulation template and the judicial opinion device is strong. In a basic sense, opinions simply look like informational regulation. The entity subject to regulation—the court—is required to disclose certain information—the justifications for its decision, via a written opinion—thereby facilitating the monitoring of its conduct. The analogy works at a deeper level as well. As is the case in the paradigmatic instance of informational regulation,<sup>225</sup> opinions serve to provide the public with information to which it would have virtually no access absent a disclosure requirement. As noted above, the judicial decision-making process is for the most part inherently private.<sup>226</sup> Not even those with the most information bearing on a court's decision—the litigants themselves—are likely to know why a court acted as it did without an explanation. This lack of access to information is particularly acute in the appellate setting, where oral argument represents the only other portion of the process where the public can see the court “in action.” As we have also seen, opinions further relate to a process as to which direct regulation is largely ineffective.<sup>227</sup> Courts might occasionally suggest that they are

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224. This is not to suggest that informational regulation is inappropriate absent a comprehensive understanding of the processes sought to be regulated. It may be, for example, that an incomplete or misdirected scheme of informational regulation may lead to the development of knowledge and experience based on which to formulate more finely-calibrated regulation in the future.

225. *See supra* note 182 and accompanying text.

226. *See supra* Part II.C.

227. This is not to suggest that there is no direct regulation of judicial decision-making. Quite the contrary is true. Because judges are to decide cases in accordance with the law, in an important sense all of law operates as direct regulation in this context. At least in an idealized sense, the judicial role involves simply determining what the law is, and applying that law to the precise situation presented. The law, however, will not always provide an answer. Whatever one's position on larger jurisprudential debates concerning the extent to which the law actually constrains judicial behavior, it seems clear that the law does not provide definitive answers in a substantial portion of cases that are litigated to the stage of requiring some sort of judicial determination. There will often be uncertainty concerning what the applicable legal standard is, which of multiple conflicting

under an obligation to decide in a certain way, but these suggestions cannot meaningfully be made enforceable.<sup>228</sup> Opinions accordingly function as an important component of the cluster of informal constraints that have traditionally operated to regulate judicial behavior.<sup>229</sup>

The existing literature concerning the functions of judicial opinions identifies three primary functions of opinions: to create precedent, to provide the parties and the public with assurance that judicial decisions are based on appropriate grounds, and to discipline the decision-making process. Each of these functions bears at least some of the hallmarks of informational regulation, and the literature implicitly recognizes these characteristics. Express consideration of opinions as informational regulation, however, allows for a more refined sense of the capabilities of the opinion device, particularly as it relates to opinions as a means to shape decision-making. The remainder of this subsection develops a conception of these functions as informational regulation, and outlines the features of opinions necessary to best support that functioning.

### 1. Devices for the Creation of Precedent

Perhaps the most apparent function of appellate judicial opinions is to memorialize decisions for use as precedent in subsequent cases.<sup>230</sup> Opinions are virtually indispensable to a precedent-based system.<sup>231</sup> This is not to suggest that it would be impossible to have a system of precedent without judicial opinions, but that it would necessarily be a very different, less precise system.<sup>232</sup> Observers could still track results in cases, could draw conclusions regarding the types of facts and arguments that seem to have mattered in those cases, and could accordingly make arguments to a court about the appropriateness of deciding a given case in a particular way based on how a similar case was decided in a specific way in the past.<sup>233</sup> But, as James Boyd White observes, these arguments would be limited, because they could not explain:

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standards ought to be given precedence, or how the standard ought to be applied to the facts of a given case. In these cases, however broad a portion of the judiciary's workload they may represent, a judge cannot mechanically act in conformity with some preexisting constraint. Instead, the judicial role, to a large extent, involves the formulation, modification, and exercise of judgment in the application of those constraints.

228. See *supra* Part III.A.

229. See *supra* Part III.B.

230. See BAKER, *supra* note 21, at 120-21. See generally James Boyd White, *What's An Opinion For?*, 62 U. CHI. L. REV. 1363 (1995) (considering the relationship between opinions and the concept of precedent).

231. See White, *supra* note 230, at 1363-64.

232. See *id.* at 1364.

233. See Eisenberg, *supra* note 35, at 412 (noting that "rules ordinarily cannot emerge from an outcome unless the reasons for that outcome are given"); White, *supra* note 230, at 1365-66.

[W]hat each [case] meant in an accurate and authoritative way . . . [f]or only the judge himself can tell you what facts counted for him, or did not count; what paradigm or template he applied to it; or how he resolved the tension, present in nearly every case, between the claims that can rationally be made on one side and those that can be made on the other.”<sup>234</sup>

All that would be possible in such a regime would be rough prediction. “But with the opinion, a wholly different dimension of legal life and thought becomes possible—the systematic and reasoned invocation of the past as precedent. With this practice, in turn, there can emerge an institution that simultaneously explains and limits itself over time.”<sup>235</sup>

Even in this function one can see elements of informational regulation. Put aside for now the fact that assuring compliance with the essential ideal of a system of precedent—that like cases be treated alike—requires some method of comparing past and present cases. Judicial opinions as statements of law facilitate monitoring along another dimension—namely, monitoring of the law itself.<sup>236</sup> Opinions are not only the place where courts state what the law is, but also where they must justify the law they have articulated.<sup>237</sup> Both in the context of the individual case and across an entire line of cases, opinions allow for the doctrines courts create to be analyzed and critiqued.<sup>238</sup> Interested parties can thereby exert appropriate pressures for change either through further resort to the judicial branch or through the political branches.

The key aspect of opinions in performing this function is clarity of exposition. The more clearly an opinion articulates the reasoning underlying the court’s analysis and conclusions, the better able the audiences for the judiciary’s doctrinal output (the legislative and executive branches, the bar, and the public more generally) will be to assess the soundness of that doctrine, and act in response to it. At the same time, clarity of doctrinal expression is valuable to those who must conform their conduct to the law. Such actors are better able to draw appropriate lines in structuring their affairs<sup>239</sup> and can more comfortably assume that future

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234. White, *supra* note 230, at 1365-66.

235. *Id.* at 1367.

236. *See id.*

237. *See id.* at 1366-67.

238. *See id.* at 1368.

239. As Henry Hart puts it:

[T]he test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems



courts confronted with a similar question will interpret the doctrinal statements of the prior court in a manner consistent with the actors' reading.

Notably, in the performance of this function neither candor nor responsiveness is especially important in any given case. To the extent that their opinions function merely as statements of law, courts resemble legislatures in that what they say generally matters considerably more than why they said it. Future courts will be guided by prior courts' opinions, and thus by prior courts' public statements regarding the nature of the dispute before them and why it was resolved as it was. If the prior court recharacterized the facts of the dispute, or provided reasons for its decision that were not the true reasons, a subsequent court will not be likely to know that and will deal with the prior opinion on its own terms. This is not to suggest that candor and responsiveness are not important to the functioning of opinions as repositories of doctrine. Both are generally necessary to establish the background norms on which the system of precedent depends.<sup>240</sup> If courts consistently fail to provide accurate accounts of the reasons for their decisions or to resolve the actual dispute presented to them (as opposed to a version of the dispute with some of the troublesome facts overlooked), then the doctrinal statements in opinions would become meaningless as everyone realized that they were merely a façade behind which courts exercised unbridled discretion. A departure from candor or responsiveness in a single case, however, is unlikely to have a significant impact on an opinion's status as a statement of law.

## 2. Devices to Facilitate Monitoring of Adjudication

There is another sense in which opinions facilitate monitoring, which represents the most apparent manifestation of opinions serving as informational regulation. Opinions facilitate the monitoring of judicial conduct apart from the creation of precedent in two significant respects. First, opinions allow for the monitoring of the disposition of individual cases.<sup>241</sup> An opinion provides the parties to a case (and the public, more generally) with assurance that the court's decision was based on appropriate factors and reached pursuant to the appropriate processes.<sup>242</sup>

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of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.

Henry M. Hart, Jr., *The Supreme Court, 1958 Term: Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959).

240. *See id.* at 737.

241. *See* BAKER, *supra* note 21, at 119-20; Wald, *supra* note 152, at 1372.

242. This was Fuller's argument in favor of generally requiring opinions. *See supra* note 34 and accompanying text.

As Judge Wald puts it, opinions serve “to reinforce [courts’] oft-challenged and arguably shaky authority to tell others—including our duly-elected political leaders—what to do.”<sup>243</sup> If a court’s explanation for its decision fails to satisfy one of the many metrics by which judicial decisions are to be assessed, such as rationality, compliance with law or responsiveness to the parties’ arguments, the parties or the public can respond. Such a response might involve public critique of the court and the opinion or resort to a higher court or legislature.<sup>244</sup> There is another component to this dynamic. As we have seen, internal monitoring has historically constituted a substantial constraint on appellate adjudication.<sup>245</sup> If the judge responsible for drafting an opinion failed to account for some aspect of the case, his colleagues could be relied on to call the matter to his attention following their review of the opinion. This latter form of monitoring in the individual case receives less attention in the literature, but may ultimately be more significant as a means of regulating judicial conduct.

The second respect in which opinions facilitate monitoring is more general. Opinions enable the assessment of courts’ performance over a long period of time and a large number of cases. Over such expanses it becomes possible to determine the extent to which courts are in fact treating like cases alike, or whether instead certain categories of cases or types of litigants receive differential treatment.<sup>246</sup> Opinions further facilitate monitoring for candor by allowing for evaluation of the relationship between the results in individual cases and a court’s stated reasons for its resolution of those cases. Put another way, opinions enable observers to check the pattern of results in individual cases when viewed over time against both the specifics of the legal doctrine ostensibly being applied and the underlying goals of that doctrine. Only such a distant perspective can reveal whether, for example, a doctrine that purports to give criminal defendants a procedural advantage ever actually results in defendant victories. If it doesn’t, the problem might lie with the doctrine, which might be unworkable for some reason. Or the problem might lie with the courts, whose failure to be candid about their reasons for deciding the cases in question could perhaps only be revealed through an analysis of the results of a series of cases over time. In either case, the existence of the disconnect between the apparent dictates of doctrine and the results in

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243. Wald, *supra* note 152, at 1372.

244. See Shapiro, *supra* note 68, at 737.

245. See *supra* Part III.B.

246. See Wald, *supra* note 152, at 1372, 1376 (suggesting that opinions “demonstrate our recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike” and asserting that opinions are necessary for the existence of “reasonably consistent justice administered by hundreds of judges for millions of people”).

actual cases can be brought to the attention of the courts or political bodies in an effort to better align the two.

As this discussion suggests, candor is critical for opinions to effectively fulfill their mission as devices to enable monitoring of judicial conduct. Only when a court discloses the true reasons for its decision is it possible for a reader to determine whether the court acted appropriately and, consequently, to react to the court's decision in an appropriate manner. And to the extent that one accepts the prescriptions of the adjudicative duty outlined in Part I, this in turn requires that opinions should reflect an analysis that is appropriately responsive to the parties' contentions.

### 3. Devices to Affect Performance of the Judicial Function

Judges frequently observe that the mere fact of having to write an opinion affects the process of deciding a case.<sup>247</sup> Certainly the use of writing, as opposed to purely oral methods of disposing of cases, allows for a controlled process in which complicated problems are more easily resolved.<sup>248</sup> What is more, those who have experienced the process of organizing one's thoughts and putting them down on paper know that it inevitably leads to refinement of rationale, often leads to substantial changes in rationale, and occasionally leads to entirely different conclusions.<sup>249</sup> To the extent, then, that rationality is an important source of adjudicative legitimacy, and that the more heavily deliberated decisions with written opinions are consequently more rational, opinions are desirable—and perhaps even indispensable<sup>250</sup>—components of the adjudicative process.

The literature on the functions of judicial opinions generally does not advance beyond the basic observation that the act of writing requires more (and more disciplined) thought, which might in turn engender different

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247. See, e.g., COFFIN, *supra* note 115, at 57-58 (discussing the ways in which the act of writing constrains the act of deciding); WALD, *supra* note 152, at 1374-75 (noting that the process of justifying a decision often leads to a change of rationale or even result, and contrasting this with the process of "writing to explain a pre-ordained result").

248. See Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1186 (2004) ("When a lawyer is required to commit a legal argument, or a judge is required to commit a judicial opinion to writing, she becomes capable of a level of both creative and critical thinking that is not possible when legal analysis is expressed only in an oral form.").

249. See BAKER, *supra* note 21, at 120 ("A decisionmaker who must reason through to a conclusion in print has reasoned in fact."); CARRINGTON ET AL., *supra* note 99, at 31 (noting that "[c]onclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision."); McGOWAN, *supra* note 79, at 513 ("[T]he premise that judicial writing can be divorced from deciding or other aspects of judging is wrong. How the judicial opinion is written affects how cases are decided: Writing affects how judges judge.").

250. See McGOWAN, *supra* note 79, at 513-14 (arguing for the indispensability of written opinions authored by judges themselves).

thought.<sup>251</sup> This overlooks what is apparent from consideration of judicial opinions in light of the literature on informational regulation, namely that there are more subtle ways in which the opinion form directs the process of judging. Consider, for example, a judge who follows an opinion format that invariably includes a paragraph addressing the nature and source of the court's jurisdiction.<sup>252</sup> Such a judge, in a classic example of management of what is measured, would be considerably less likely to miss a problem with the court's jurisdiction than a judge who does not make it a practice to address jurisdiction.

It is this last observation that is most valuable in terms of using opinions as a device to remedy judicial inactivism. Perhaps the opinion form can be harnessed to change the manner in which judges go about deciding cases and, to the extent the processes are distinguishable, the process of justifying their decisions. If opinion design can be modified so as to encourage greater candor and responsiveness, decisions would tend toward greater compliance with the adjudicative duty as a result of the changes. And since increased candor eases the burdens involved in monitoring adjudicative behavior, further compliance would follow.

A candor requirement is, however, more easily articulated than implemented. Those who have considered the topic of candor in detail have uniformly come to the conclusion that, whatever its desirability as a matter of theory, full candor is unattainable in practice.<sup>253</sup> Judges themselves are unlikely to fully understand, much less be able to describe, their decisional process in any given case.<sup>254</sup> Perhaps the best we can hope for, then, is a set of proxies for full candor. Although we cannot know precisely how the judge made her way from a set of inputs (facts, precedent, arguments, and the like) to a conclusion, by making that information readily available and encouraging, if not requiring, an opinion that sets forth a reasoning process tying those inputs together as it proceeds to a conclusion, we could promote greater responsiveness and, at the very least, make it more difficult for a judge to avoid providing a candid justification for a decision. The next Part explores the possibility of such a mechanism.

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251. *But see id.* at 513 (“The opinion form also affects what questions judges believe they may decide and how they may decide them.”).

252. *See, e.g.,* *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 434 (3d Cir. 2005) (Roth, J.); *Lazorko v. Pa. Hosp.*, 237 F.3d 242, 247 (3d Cir. 2000) (Roth, J.); *United States v. Needle*, 72 F.3d 1104, 1108 (3d Cir. 1995) (Roth, J.); *United States v. Pollen*, 978 F.2d 78, 83 (3d Cir. 1992) (Roth, J.).

253. *See* Oldfather, *supra* note 5, at 155-60.

254. *See* Dan Simon, *The Double-Consciousness of Judging: The Problematic Legacy of Cardozo*, 79 OR. L. REV. 1033, 1044-45 (2000) (discussing, through an analysis of Cardozo's work, the difficulty judges have in understanding their decisional process).

## V. FRAMING ARGUMENTS—USING THE OPINION FORM TO RESTORE ADJUDICATIVE LEGITIMACY

Although the informational-regulatory features of judicial opinions are apparent, it is likewise clear that opinions in their present form serve as somewhat blunt instruments in terms of facilitating the monitoring and directing of judicial behavior.<sup>255</sup> In part this is simply a function of information overload on a broad scale. Given the sheer volume of opinions issued by courts, both external and internal monitoring has become more difficult simply because of the magnitude of the resources necessary to do so effectively.<sup>256</sup> Externally, while the parties remain relatively well-positioned to assess, based on an opinion, whether the court in their case resolved it in an appropriate way, the public generally has long been unable to engage in effective monitoring via review of opinions.<sup>257</sup> Under the idealized conception of appellate adjudication, judges have ample time to study an opinion drafted by one of their colleagues, and to do so in light of the parties' contentions as developed in the briefs and at oral argument. Now, however, the time for leisurely review and reflection has vanished. And, as we have seen, procedural changes implemented to conserve judicial time have worked to decrease the depth of judges' contact with most cases.<sup>258</sup> Not only does today's judge have less time to monitor, she also has a less-developed understanding on which to base her monitoring. If one of her colleagues nods, she is less likely to notice. The same is true if the colleague intentionally departs from the appropriate manner of resolution. When the departure involves inactivist conduct—which generally involves a failure to act rather than misguided action—she will be especially disadvantaged in her ability to detect a violation.

The opinion form also contributes to its shortcomings as an instrument of informational regulation by failing to channel judicial behavior toward compliance with the adjudicative duty. At present, although there is certainly a rough uniformity among judicial opinions from judge to judge and from court to court,<sup>259</sup> courts do not closely prescribe format.<sup>260</sup> As a

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255. See LLEWELLYN, *supra* note 98, at 27 (“[T]he very fact that the opinion has varied functions makes it possible to play up one to the neglect of another.”).

256. See *supra* note 138 and accompanying text.

257. Interestingly, early proposals for limited publication of opinions came from the bar, which found that an increasingly large number of opinions made it difficult to keep pace with courts' output. See, e.g., John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14 (1949) (referencing such a proposal).

258. See *supra* Part III.C.1.

259. See ALDISERT, *supra* note 79, at 607 (suggesting that the necessary components of an opinion are a “narration of adjudicative facts, . . . the statement of the issue or issues framing the case for decision,” and the justification for the court's decision).

260. See *supra* note 80 and accompanying text.

consequence, opinion authors enjoy considerable freedom to manipulate their portrayal of the facts of the case, the parties' arguments, and so forth.<sup>261</sup> Nothing ensures that an opinion issued by one judge would greatly resemble an opinion in the same case were it to be issued by a different judge.

The amorphousness of the opinion form renders it deficient as an informational-regulatory device in two ways. First, it hampers the monitoring function. Because the reader of an opinion can have no fixed expectation regarding what should appear in it, he cannot know simply from the opinion when something that should be there is not there. In this way the lack of a prescribed format abets inactivism. It also thwarts monitoring by preventing effective comparison of cases against one another. If a judge writing an opinion in Case B has (and uses) the freedom to portray it as being more similar to Case A than it really is, then it becomes considerably more difficult to determine whether, for example, like cases are really being treated alike. Confronted with the opinion in Case B, an observer has no way of knowing that Case B was actually not like Case A, and therefore perhaps should not have been resolved in the same way. Second, it results in opinions falling short of their potential to channel the conduct of judges. For example, absent a meaningful requirement that all the parties' contentions be at least mentioned in an opinion, a court is less likely to keep track of all those contentions and therefore to address them. A court is also better able to intentionally avoid addressing every argument, because aside from the parties (one of whom will be happy with the court's disposition and thus not care), no one is likely to discover such avoidance. Put in the lingo of informational regulation, because such considerations are not measured, they are not managed.

Conceiving of opinions as a form of informational regulation both invites and facilitates consideration of how the opinion device might be modified to direct judicial behavior. Taking Part I's definition of the adjudicative duty as its regulatory goal, this Part proposes a simple modification to the opinion format, framing arguments, the use of which would bring about direct gains in the responsiveness of judicial decision-making and (though to a lesser extent) in the candor with which decisions are justified, and would likewise enhance the ability to monitor adjudication both internally and externally. Moreover, these effects, together with less apparent potential benefits to the quality of advocacy and parties' sense of participation in the process, would accrue without unduly constraining judges in the exercise of their function.

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261. See Wald, *supra* note 152, at 1386, 1389-90 (observing that the author of an appellate opinion has considerable room in which to manipulate the factual story in a case and that judges do occasionally engage in such manipulation).

### A. *Framing Arguments as a Means to Combat Judicial Inactivism*

The framing argument concept is a simple one. The primary component would be brief, party-generated statements of the issues before the court that would be included as a part of any opinion issued by the court. In effect, each party would have the opportunity to place its assessment of what is at stake in a case alongside the court's. Aside from the presence of these statements in opinions, nothing would change, at least in terms of what judges would be *required* to include in their opinions. Instead, the mere presence of this additional information would both facilitate the monitoring of judicial behavior and shape that behavior more directly.

#### 1. Effects on the Decision-Making Process

Judges forced to write opinions preceded by framing arguments are more likely to reach decisions in a manner that is at least weakly responsive to the parties' arguments. This follows from the notion that what is measured will be managed.<sup>262</sup> As judges' increasing workloads have limited their ability to become deeply engaged with most of the cases that come before them, they are inevitably less able to keep track of, and therefore be responsive to, the parties' claims. This is particularly so given that judges today are more often the editors of the opinions issued under their name rather than the authors.<sup>263</sup> When the initial draft of an opinion is prepared by a law clerk, who as a recent law school graduate is markedly less law-conditioned<sup>264</sup> than a judge, the opinion may be less responsive than would be the case were the judge the author. Even if one assumes that a clerk would generally tend to write an opinion that is appropriately responsive, the writing of such an opinion does nothing to ensure that the underlying decision was responsive. And to the extent the judge relies on a clerk's characterization of the dispute when editing an opinion rather than returning to the briefs, the judge's edits may themselves make the opinion less responsive.

Yet framing arguments retain the flexibility that is one of the primary benefits of informational regulation. The presence of the parties' contentions as part of the opinion increases the likelihood that the court will be mindful of them in deciding the case, and will at least speak to them in its opinion. The court will thus satisfy its obligation to be weakly responsive, while not being compelled to engage in either strong responsiveness or any particular depth of treatment. If a party's

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262. *See supra* notes 193-96 and accompanying text.

263. *See supra* note 130 and accompanying text.

264. *See supra* notes 117, 131 and accompanying text.

contentions are facially without merit, the court can dispose of them quickly. If the court concludes the parties have misconceived the nature of their dispute, it can briefly state why that is so before proceeding to analyze the case in the terms the court deems appropriate.

The use of framing arguments would likewise encourage candor, primarily by making it more difficult for a court to recharacterize the dispute before it so as to avoid what it considers troublesome aspects of that dispute. For example, a court faced with a claim governed by a line of precedent that seems to compel a result the court finds distasteful might normally choose to recast or gloss over the difficult aspects of the case before it. The presence of framing arguments would make it more difficult to do so, however, and would force the court instead to be more forthcoming about the reasons behind its resolution. This effect on candor would of course be limited. Merely having to confront the parties' characterization of the dispute does not ensure that a court's stated reasons for resolving the dispute are its actual reasons for doing so. Still, in the aggregate, framing arguments seem likely to result in more candid opinions.

Framing arguments' effects on the process of adjudicating individual cases might in turn result in more generalized benefits. The literature on informational regulation recognizes norm internalization as one of the legitimate goals of a disclosure-based regime.<sup>265</sup> The underlying idea here is that an entity required to disclose certain information will become more sensitized to the concerns animating the disclosure requirement, and will adjust its conduct accordingly.<sup>266</sup> Thus, even if framing arguments are not implemented in every case—for example in those cases disposed of without any opinion at all—they may nonetheless affect judicial behavior in those cases by rehabilitating judges to the process of responsive decision-making.

## 2. Effects on Monitoring

The second category of benefits that would flow from the use of framing arguments relates to the ability to monitor. The primary source of this benefit would stem from framing arguments' tendency to substantially reduce the effort involved in monitoring a court's performance. The presence of framing arguments would allow a reader to more readily determine whether the court ignored an issue in its entirety, whether it squarely confronted the core of a party's argument, and whether it adequately dealt with the legal authorities on which the party based its arguments. In short, a reader would have a ready gauge for assessing the

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265. *See supra* note 196 and accompanying text.

266. *Id.*



extent to which an opinion is responsive to the parties' arguments. This would facilitate both external and internal monitoring. Not only would the public be better positioned to determine whether a court has truly engaged with the parties' claims, but so would other members of the court.

The salience of the information presented by framing arguments is key to these benefits. It has, of course, always been possible for an interested party to obtain copies of the briefs filed in a case and to compare the arguments made in those briefs with the court's characterization of the parties' arguments and its handling of the claims asserted. But, apart from scholarly interest, there was little point in doing so, and the effort required undoubtedly tended to discourage those whose curiosity might otherwise have led them to undertake this sort of investigation. Even for the judge reviewing a colleague's draft opinion there is some effort involved in pulling the briefs out of the file and reviewing their characterizations of what is at stake. And while that small step might not have traditionally proved to be much of an impediment, contemporary circumstances are different. Today's busy judge may feel it unnecessary to take that extra step, particularly where she has already signed off on the ultimate disposition of the case and where the precise manner in which that disposition is put into effect may be deemed legally irrelevant to all future cases.<sup>267</sup> One might also suggest that the increasing computerization of legal research will also reduce the effort necessary to uncover the precise nature of the claims asserted. Westlaw, for example, provides a link to the parties' briefs in its display of recently issued opinions. Accessing that information, however, is not cost-free. Nor does it possess the immediacy of a statement incorporated into the opinion. In short, if framing arguments are included in an opinion, the reader need look no further for the information. The parties' arguments will accompany the court's statement of its reasoning wherever the reader should happen to take the opinion. This increases the likelihood that readers will give it attention, and consequently the likelihood that readers will act in response to what they perceive as inactivist conduct.

### 3. Additional Benefits

In addition to their tendency to enhance the legitimacy of adjudication, the use of framing arguments might produce related benefits.

#### a. Improved Advocacy

One additional, potential benefit from the use of framing arguments is the effect on the quality of advocacy.<sup>268</sup> Judges, with good reason,

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267. This would be the case with an unpublished disposition in many courts.

268. Thanks to my colleague, Dennis Arrow, for initially spotting this.

complain about the quality of briefs submitted by counsel every bit as often as lawyers complain about judicial opinions.<sup>269</sup> Were lawyers required to formulate issue statements subject to the possibility that their words would appear in the official reporters alongside the court's opinion, most would undoubtedly spend more time in the effort to craft a statement that would not make them look foolish. This effect could be enhanced by placing a strict limit on the number of words that could be used to describe each issue.<sup>270</sup> Legal writing guru Bryan Garner insists that "if you can't phrase your issue in 75 words, you probably don't know what the issue is."<sup>271</sup> It may take some additional time and effort to reach an effective formulation within that limit, but both the parties' argument and the court's decisional process are likely to benefit as a result.

#### b. Enhanced Participation

A less tangible benefit likely to arise from the use of framing arguments is that their inclusion in opinions would enhance the parties' sense of participation. This benefit is distinct from the instrumental benefits of enhanced participation identified above. In other words, apart from its tendency to produce results that are more appropriate in an objective sense, participation in the process promotes acceptance of the results of that process by both the individuals affected and society more generally.<sup>272</sup> As with the instrumental benefits, here too increasing the saliency of participation is likely to facilitate such acceptance. Simply being able to see her arguments featured prominently atop a court's decision is likely to help a litigant believe that those arguments were taken into appropriate account in the decision-making process.

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269. See, e.g., ROBERT J. MARTINEAU, *CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURE* 368 (1987) ("One of the most common complaints of appellate judges and their law clerks is the inadequacy of most briefs filed in appellate courts."); THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS* 28-37 (1978) (giving an account of the mutual disdain with which appellate judges and lawyers tend to view one another's work product).

270. The overall number of issues could safely remain unlimited, since it would be subject to the practical caps imposed by page- or word-limits imposed on briefs.

271. BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* 80 (2d ed. 2003).

272. See Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 *BUFF. L. REV.* 487, 526 (1980) (discussing participation's tendency "to promote litigant and societal acceptance of the decisions rendered by the courts"); Susan P. Sturm, *The Promise of Participation*, 78 *IOWA L. REV.* 981, 995-1002 (1993) (discussing the instrumental and dignitary values of participation); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 *CORNELL L. REV.* 1, 20-21 (1974) (discussing the value of participation as "an approximation to autonomous self-determination of varying degrees of directness").

### B. *Implementation*

The precise format of framing arguments could vary widely. In terms of deployment in opinions, the arguments could be placed at the top of an opinion, in the body, or even in an opening footnote. Turning to content, the parties might be restricted to merely including information that is already present in their briefs (most likely their respective statements of the issues), or they might be required to generate a wholly distinct statement of what they believe to be the most significant aspects of the case. Word and issue limits could easily be applied. Some jurisdictions might broaden the device to allow or require the parties to include a statement of the cases, statutes, or other authorities that are most central to their arguments. The means of implementation might likewise vary. While the use of framing arguments might be required by court rule or by statute, individual judges (who, as we have seen, are relatively unrestricted in how they write opinions) could simply choose to start including them in their opinions. Indeed, a version of the mechanism could be employed with no court involvement at all if a legal publisher were to choose to include the parties' issue statements in its reports of opinions.<sup>273</sup> It might also include each party's list of the cases, statutes, or other authorities that are most central to its arguments. What is significant is not so much the precise format as the notion that the parties have an opportunity to frame the issues before the court in a way that becomes part of the court's opinion.

As changes go, this would hardly be disruptive. Courts in most jurisdictions already require parties to include issue statements in their briefs, and may require statements of apposite authority.<sup>274</sup> While the creation of framing arguments might require a slightly different emphasis, it would not introduce a new element into the process, nor even require more from counsel than they should already be doing. There is, indeed, some historical precedent for the use of framing arguments. In the earliest American law reporters, summaries of the facts and arguments of counsel prepared by the reporter customarily accompanied judicial opinions.<sup>275</sup>

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273. Thanks to my colleague Scott Moss for this observation. Framing arguments implemented in this way would likely be somewhat less beneficial than framing arguments included as part of an opinion generated by a court. While their effect on external monitoring would remain the same, the absence of the arguments during the drafting and circulation stage would leave the difficulties of internal monitoring unchanged. At the same time, the direct effects on judicial behavior would likely be reduced, as the lack of a constant reminder of the need for responsiveness would lead to reduced measurement of responsiveness, and as a result less management of it.

274. See STERN, *supra* note 94, at 263 (noting that statements of the issues or questions presented are required in most jurisdictions, while statements of apposite authority are less uniformly required).

275. See ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 43-44 (1990).

Framing arguments are somewhat different in format, because they would be prepared by the parties and likely subject to length limitations, but similar in function to these summaries.

## VI. CONCLUSION

When judging in accordance with the idealized conception of appellate adjudication represented an achievable ideal, it was perhaps unnecessary to be concerned with judicial inactivism for the simple reason that institutional design generated results largely in accord with the adjudicative duty. Those days are past.<sup>276</sup> It is not possible to establish conclusively that changes in the manner in which appellate courts operate have rendered them unable to satisfy the adjudicative duty in a substantial portion of their cases. But it is clear that the changed conditions of adjudication have resulted in an environment substantially more conducive to inactivism. What is more, in the case of adjudicative legitimacy, perception is, in large part, reality.<sup>277</sup> For some time now, the perception from both within the judiciary and among the bar is that appellate courts are failing to deliver what we expect from them.

This Article has attempted to further define the appropriate content of our expectations for the judiciary and to provide a mechanism by which they might be better satisfied. Framing arguments are not a panacea. Their implementation would, however, increase the barriers to breaches of the adjudicative duty. And by proposing them I hope, if nothing else, to spur further consideration of procedural changes that can enhance the functioning of courts without relying on decreases in workload to do so.

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Surrency notes that his examination of the prefaces to the reports lead to the conclusion “that the reporters considered the preparation of the summaries of the arguments of counsel to be their most arduous task.” *Id.* at 43. Surrency notes the demise of these summaries, but does not offer a cause for their discontinuation.

276. *Cf.* POSNER, *supra* note 11, at 176-77 (explaining courts’ increasing reliance on standards of review as a reaction to caseload pressures and the increased size of the federal judiciary, both of which have made informal monitoring less reliable and, accordingly, rules-based monitoring more desirable).

277. *See generally* Note, *Satisfying the “Appearance of Justice”: The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 HARV. L. REV. 2708 (2004) (considering the relationship between apparent and actual impropriety).