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Defining Judicial Inactivism: Models of Adjudication and the Duty To Decide

CHAD M. OLDFATHER*

TABLE OF CONTENTS

INTRODUCTION 122

I. BREACHES OF THE ADJUDICATIVE DUTY: AN IMPRESSIONISTIC OVERVIEW 126

A. THE PROBLEMS OF INACTIVISM (INCLUDING THE PROBLEM OF DEFINITION) 127

B. THE NEED TO DEFINE THE ADJUDICATIVE DUTY 133

II. A SURVEY OF MODELS OF ADJUDICATION 137

A. THE CLASSIC MODEL OF ADJUDICATION 139

1. Lon Fuller's Participation Thesis 139

2. Adjudication as Representation 143

B. THE PUBLIC LAW MODEL 145

C. THE RELATIONSHIP BETWEEN THE PUBLIC LAW AND CLASSIC MODELS 149

1. Distinct Models of Distinct Phenomena 149

2. The Public Law Model as Descriptive of a Paradigm Shift 150

3. Interrelated Models of Interrelated Phenomena 151

4. Commonalities Among the Models 152

5. Post-Public Law Models 153

D. JUDICIAL CANDOR 155

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III. TRACING THE CONTOURS OF THE ADJUDICATIVE DUTY 160
A. A FRAMEWORK FOR ANALYSIS 160
1. Cases and Claims 161
2. Duties and Preferences 161
3. Scope, Responsiveness, and Elaboration 161
B. TRACING THE CONTOURS OF THE ADJUDICATIVE DUTY 164
1. Scope 165
2. Responsiveness 168
a. The Case Against a Duty of Strong Responsiveness 168
b. The Case for a Duty of Weak Responsiveness 172
3. Elaboration 175
a. Elaboration as Evidence of Adjudicative Behavior 175
b. Elaboration as an Integral Part of Adjudicative Behavior 178
c. The Robust Preference for Elaboration 180
4. The Adjudicative Duty Summarized 180
CONCLUSION 181

INTRODUCTION

Debates over the proper functions of courts have focused primarily on delineating the outer bounds of judicial authority.[1] Indeed, the primary danger associated with the judicial branch bears a name—"judicial activism"—that invokes imagery of courts doing more than they should. Among their other perceived transgressions, "activist" judges reach out to decide issues the parties did not raise, or decide cases on grounds that go well beyond those necessary to resolve the precise dispute presented.[2] Whatever the particulars of the conduct at issue, the thrust of the activist critique is that the judge to which it is applied

1. *See* 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?"); *cf.* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 259 (1990) (suggesting that prevalent, exclusionary approaches to the definition of a "case" for purposes of Article III "may come from considering Article III solely as a limitation on the courts, and not as an exhortation to perform certain tasks").

2. Of course, "judicial activism" is itself a term without a fixed definition. *See generally* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441 (2004) (tracing the history and uses of the phrase). Kmiec "identifies five core meanings of 'judicial activism': (1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent,

is exercising too much authority, and thereby overstepping the proper bounds of the judicial role.

But what of what we might term "judicial inactivism"? Judicial inaction, which operates to preserve the status quo, can have consequences that are every bit as significant as those resulting from judicial action.[3] And if there is good reason to be concerned about judges acting in ways that go beyond their assigned role, then there is good reason to be concerned about judges acting in ways that fall short of their assigned role. Indeed, because doing nothing generally leaves fewer traces than doing something, judicial failures to meet the minimum requirements of the role are likely to be more difficult to detect than action going beyond its proper limitations. As a result, we ought perhaps to be more concerned about judicial inactivism than we are about judicial activism.

Yet there is no literature concerning the problems of inaction.[4] This Article seeks to begin the process of filling that gap and raises the basic question of what judicial inactivism, or at least one variety of it, might look like. Roughly

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(3) judicial 'legislation,' (4) departures from accepted interpretive methodology, and (5) result-oriented judging." *Id*. at 1444.

3. *Cf.* Heckler v. Chaney, 470 U.S. 821, 851 (1985) (Marshall, J., concurring in the judgment) ("[O]ne of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.").

4. There are some limited exceptions. The debate over unpublished opinions is one such exception, and one featuring a great deal of recent activity. The most recent flurry was touched off by the Eighth Circuit's short-lived holding in *Anastasoff v. United States*, 223 F.3d 898, 905 (8th Cir. 2000), that Article III of the Constitution incorporates the doctrine of precedent into the nature of the judicial power, such that federal courts must accord precedential effect to all their decisions. The Ninth Circuit promptly and emphatically rejected this view in *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001). Since then, legions of trees have been sacrificed in service of the debate over the propriety of unpublished, nonprecedential opinions. A few of the more recent contributions include: Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004); Michael B.W. Sinclair, Anastasoff v. Hart: *The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003); Carl Tobias, Anastasoff, *Unpublished Opinions, and Federal Appellate Justice*, 25 HARV. J.L. & PUB. POL'Y 1171 (2002); Lauren Robel, *The Practice of Precedent*: Anastasoff, *Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002); Johanna S. Schiavoni, Comment, *Who's Afraid of Precedent? The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859 (2002). There is also a currently pending proposal to amend Federal Rule of Appellate Procedure 32.1 to allow parties to cite to unpublished opinions. For a critique, see Anne Coyle, Note, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 FORDHAM L. REV. 2471 (2004).

Other exceptions include the debate over judicial candor, *see infra* Part II.C, and the debate between Martin Redish and David Shapiro discussed *infra* at note 15. This latter debate comes closest to addressing the problems confronted by this Article but is, as noted therein, distinct in a couple of significant respects.

On a broader level, several prominent commentators have developed sets of standards for or necessary components of a properly functioning appellate court. *E.g.*, 3 AM. BAR ASS'N, STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS (1994); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 7–12 (1976). These formulations tend to be somewhat more loosely constructed than what I hope to achieve here, more overtly aspirational, and more focused at the systemic level than at the adjudication of individual cases.

stated, the inquiry considers whether a court may decide not to decide. To put it somewhat more precisely, may a court presented with a justiciable claim over which it has jurisdiction choose not to adjudicate that claim? Or, put yet another way, does the judicial function include some inherent discretion to avoid adjudication?

The instinctive response to such questions is "absolutely not." Adjudication of disputes is, after all, why courts exist.[5] So long as I can assert that someone has violated a legally protected interest of mine[6] and that I am therefore entitled to a remedy that is within the court's power to grant, the common understanding is that the court to which I bring my claim must act on it. What is more, this understanding holds that the court must act even if it fears the likely consequences—such as the creation of a potentially troublesome precedent or the protection of conduct it finds distasteful.[7] Thus the court must determine both the scope of my asserted interest and whether the conduct at issue violates that interest. If so, it must further determine whether I am entitled to the remedy I seek, some other remedy, or no remedy at all. In addition, the court should (particularly if it is an appellate court) issue an opinion in which it provides a reasoned explanation for its conclusions that is grounded in the applicable legal authority.

But this instinctive understanding of what courts should do coexists with a suspicion that courts often fail to act in accordance with the ideal. Regardless of whether courts ought to enjoy, in the abstract, the discretion to avoid disputes, claims, or arguments they would prefer not to confront, we suspect that they nonetheless do engage in such avoidance. Courts often leave the impression that they have not adjudicated a claim that "should have" been adjudicated.[8]

This Article explores these neglected issues and seeks to locate some of the

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5. As Alexander Bickel puts it, courts of general jurisdiction "sit as primary agencies for the peaceful settlement of disputes and, in a more restricted sphere, as primary agencies for the vindication and evolution of the legal order. They must, indeed, resolve all controversies within their jurisdiction, because the alternative is chaos." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 173 (2d ed. 1986).

6. *See, e.g.*, MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 4 (1988).

> The kinds of claims a court may property act upon are . . . limited. The claim must normally be contested—that is, the subject of a dispute. The claimant normally must assert that the respondent has either infringed (or threatens to infringe) upon his rights, or is otherwise at fault in a manner that sufficiently invokes the claimant's interests to render it appropriate for him to make a claim whose disposition turns on that fault. The claim must be based on a standard that relates to social conduct rather than, say, on an artistic standard. The standard on which the claim is based must rise to a certain level of significance, in terms of either the seriousness of the injury that typically results from its violation or the importance of the norm or policy that it reflects.

Id.

7. *See infra* notes 16–17 and accompanying text.

8. *See infra* Part I; *see also* BICKEL, *supra* note 5, at 122 ("There is no judicial discretion to decline adjudication, no such attenuation of the duty. But many judges have thought, and most have from time to time acted, otherwise.").

contours of what I will call the "duty to decide" or "adjudicative duty." The aim is to attempt to distill the minimal components of the judicial role by way of an analysis guided by past efforts to conceptualize that role. The inquiry accordingly draws on prominent models of adjudication—primarily Lon Fuller's participation-based version of the classic model[9] and Abram Chayes's and Owen Fiss's formulations of the public law model[10]—and brings that body of theory together with the largely distinct literature concerning the extent to which judicial opinions ought to fully and accurately reflect the reasoning behind the decisions they justify.[11] The analysis reveals a largely consistent conception of what courts' minimal adjudicative obligations ought to entail. Reduced to its essence, the conclusion is that courts should operate under a duty to decide the claims presented by the parties in what I call a "weakly responsive" fashion, and that there ought to be a strong preference for providing a full, candid statement of the reasons the court decided as it did. Perhaps the most significant component of this duty—at least in the sense that it involves an obligation thus far only implicit (at best) in the literature—is the concept of "weak responsiveness." This is the notion that adjudicative legitimacy depends not so much on the courts' generation of decisions that are based on and strictly proceed from the parties' proofs and arguments (as Fuller would have it), but rather on decisions that squarely confront those proofs and arguments, even if the court determines that they do not ultimately supply an appropriate basis for resolution.[12]

More broadly, my goal is neither to present a comprehensive catalog of judicial inactivism, nor even to provide the last word as to those forms of inactivism that I identify.[13] I aim instead to frame what I anticipate will be an ongoing debate, and to offer a way of thinking about the judicial role that can be useful not only in resolving existing controversies—such as that over the appropriate use of unpublished opinions[14]—but also serve as a reference point in questions of process and institutional design that will inevitably arise as the stresses on the judiciary continue to mount.

The balance of this Article proceeds as follows. Part I undertakes an initial exploration of the sorts of judicial behavior that might qualify as inactivism and

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9. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

10. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 25–27 (1979).

11. *See infra* Part II.C.

12. *See infra* Part II.A.

13. Two additional points bear mention, so as to help frame what I hope to accomplish by underscoring what I do not attempt to accomplish. First, this is not an article about interpretive method, but rather about the processes by which such methods ought to be applied. This is not to suggest that some of the arguments I make do not have implications for questions of interpretive methodology, but only that they are not the focus of this Article. Second, this is not an article about judicial review or federal jurisdiction, at least not directly. My focus instead is on adjudication more generally, such that the analysis applies as much, if not more, to state courts as to federal courts.

14. *See supra* note 4.

considers some of the theoretical and empirical difficulties that accompany an attempt to formulate the duty to decide. It also suggests that structural and procedural changes in the methods of adjudication implemented over the last several decades have operated to reduce the effectiveness of the traditional checks against judicial inactivism, and that the continued accumulation of pressures from growing caseloads will lead to the continuation of these trends. Part II surveys the literature formulating and commenting upon models of adjudication, focusing primarily but not exclusively on the "classic" and "public law" models and their interrelation. It also discusses the topic of judicial candor, or the extent to which courts should be obligated to provide the "true" reasons for their decisions. Finally, Part III first articulates a framework for approaching the formulation of an adjudicative duty. From there, it proceeds to consider the implications of the theory discussed in Part II for the components of the duty, and distills from that analysis the core components of the duty before returning briefly to the examples introduced in Part I.

I. BREACHES OF THE ADJUDICATIVE DUTY: AN IMPRESSIONISTIC OVERVIEW

Imagine a garden-variety civil lawsuit. Plaintiff claims to have been wronged by Defendant, and brings suit claiming an entitlement to recovery under a handful of theories. Defendant responds by disputing Plaintiff's characterization of the facts, by arguing that Plaintiff has misinterpreted the law underlying its claims, and by raising an affirmative defense. There is no basis for suggesting that either the case or any of the claims are non-justiciable. This is, by all appearances, a lawsuit that must be adjudicated.

But is that so? Does the court have the power to decide not to decide? In other words, does the judicial power encompass the discretion to avoid adjudication altogether (or in part) even beyond that conferred by the various justiciability doctrines? To approach the matter from the opposite direction, if there is a duty to decide, how far does it extend? Will the court satisfy its obligations by simply picking a winner as between Plaintiff and Defendant, or must it engage with each of their claims and defenses—or perhaps even the specific underlying arguments? Must the court disclose the reasoning behind these decisions, or will simply announcing the result suffice? If it must disclose, does that obligation extend to all the reasons behind the court's decision? To some subset? Are the answers to these questions different if the court is a trial court versus an intermediate appellate court versus a court of last resort with discretionary jurisdiction? What if the case is not a bilateral dispute over private rights, but rather one the resolution of which will necessarily impact a substantial number of non-parties, as in a suit to compel the enforcement of an environmental regulation? Are the answers absolute? In other words, assuming there is a duty to decide, is it really a "duty" that must be satisfied in every case, or is it instead a set of "preferences" that should be satisfied in most cases but which must in some cases give way to certain conflicting ideals?

These are the questions this Article explores. Their answers, of course,

depend to a large degree on the purposes of adjudication and their interrelation not only with one another but also with the mechanisms of adjudication, a topic that is the subject of Part II. Before undertaking that inquiry, however, it is appropriate to develop the questions further. The first subsection of this Part provides a somewhat impressionistic overview of the problems of judicial inactivism, providing both context for the analysis that follows and consideration of some of the difficulties involved in attempting to define an adjudicative duty. The second subsection explains why an investigation of these questions is important in general, and why recent changes in the adjudicative landscape have increased the significance of these issues over the past several decades.

A. THE PROBLEMS OF INACTIVISM (INCLUDING THE PROBLEM OF DEFINITION)

There is more than mere intuition behind the notion that courts must decide the matters put before them. The very existence of justiciability doctrines, which excuse courts from deciding cases in certain circumstances, implies that where those circumstances are not present, courts do not enjoy the freedom to abstain from adjudication.[15] Outside the reach of these doctrines lies a presumably large category of cases in which a party has presented a legally cognizable claim of right to an appropriate judicial body and prosecuted that claim in accordance with all applicable procedural requirements. In these cases, where no justiciability or similar doctrine could plausibly relieve the court of its

15. There is, of course, room for debate concerning how broadly such doctrines ought to apply to excuse courts of their obligation to decide. But even Alexander Bickel, who advocates the broad utilization of justiciability doctrines, recognizes that there are limits. *See* BICKEL, *supra* note 5, at 170 ("[T]here are limits to the occasions on which these doctrines and devices may be used, limits that inhere in their intellectual content and intrinsic significance."). There is also room for debate regarding whether some discretion to decline jurisdiction exists beyond the reach of justiciability doctrines. *Compare* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (criticizing judicial abstention doctrines as contrary to separation of powers principles), *with* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (advocating broad judicial discretion to decline to adjudicate cases over which jurisdiction exists). For additional background, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 650–55 (4th ed. 1996) (discussing the issue of whether the Supreme Court enjoyed the discretion under its pre-1988 mandatory jurisdiction to decline adjudication); Daniel J. Meltzer, Jurisdiction and Discretion *Revisited*, 79 NOTRE DAME L. REV. 1891 (2004) (discussing the themes developed in Shapiro's article). Note, however, that not even Shapiro advocates unbounded discretion. Instead, he calls for the exercise of principled jurisdictional discretion, which

> means that criteria drawn from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the grant arose guide the choices to be made in the course of defining and exercising that jurisdiction. Of equal importance, it means that these criteria are capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch. The elemental requirement of candor, which is basic to the proper carrying out of the judicial function, calls for no less.

Shapiro*, supra*, at 578–79. While there is some overlap between the subject of the Redish-Shapiro debate and the problems addressed in this Article, their debate is concerned solely with the federal courts and how those courts are to exercise the limited jurisdiction conferred on them. My analysis assumes away the jurisdictional question, and considers what it is that a court that even Shapiro would agree must adjudicate a case is obligated to do.

perceived adjudicative obligations, decision would appear to be mandated.[16]

Yet any search for the body of law articulating this assumed mandate would be in vain. This is not to suggest that the entirety of American case law is free of language that could be taken to support the proposition that courts must decide such cases. Indeed, Chief Justice Marshall appeared to speak directly to the question 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.[17]

The principle for which *Cohens* is typically cited, however, is not the notion that courts operate under a generalized duty to decide, but instead the "doctrine of necessity," which governs in cases of judicial disqualification and holds that in a situation where all judges available to hear a case would be disqualified under normally applicable principles, one or more of them must nonetheless entertain the case because of the necessity of providing some judicial forum.[18]

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16. This understanding is occasionally articulated, but typically assumed. For example:

> If a claimant comes before a court of general jurisdiction with jurisdiction also over the person of the defendant and asks for a remedy of a type which the court is empowered to give, the dispute, it seems, must always be adjudicable. For either there is some previously formulated settlement affirming or denying the right to the remedy or there is not. If there is, the question of the claimant's right, of course, can be determined by conventional processes of judicial reasoning. If there is not, then, it is suggested, the only difference is that reasoning must probe more deeply to the basic postulates of the social order—to the rational implications of the 'shared purposes' of the members of the society of which Professor Fuller speaks. A reasoned answer to the question whether those implications do or do not justify the asserted right will always be possible. Within the limits fixed by established remedies, in other words, the common law provides a comprehensive, underlying body of law adequate for the resolution of all the disputes that may arise within the social order.

HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 646–47 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also* 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 appeal lack a general ability to avoid adjudicating the claims brought to them); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) (arguing, in the context of a response to Bickel, that "there is an obligation to decide in some cases; there is a limit beyond which avoidance devices cannot be pressed and constitutional dicta cannot be urged without enervating principle to an impermissible degree"). Indeed, Bickel himself recognizes the appropriateness of this conclusion outside the context of Supreme Court adjudication of constitutional cases. *See supra* note 5.

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

18. *See, e.g.*, United States v. Will, 449 U.S. 200, 213–16 (1980) (discussing the history of 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

And despite the occasional suggestions of a more broadly applicable duty,[19] there simply does not exist a body of law that meaningfully supports such a doctrine, to say nothing of a developed jurisprudence addressing what the duty might require. What is more, the evidence suggests that courts frequently act contrary to a duty to decide.[20]

Neither case law nor academic commentary has squarely confronted the propriety of judicial failure to decide in these situations where decision seems required.[21] It remains, then, to explore whether there even is such a thing as judicial inactivism, or whether instead some sort of discretion to avoid adjudication inheres in the judicial function apart from the familiar, doctrinally sanctioned mechanisms of avoidance. If there is no such discretion, it is easy to imagine what judicial inactivism would look like. A failure to decide could take a multitude of forms. In its most extreme sense, a court could simply fail to respond. Imagine a case in which the parties undertake all the appropriate steps to put their dispute before the court, following which the court does nothing. It issues neither an opinion nor an order summarily stating the result, and it provides no justification for its failure to act. This would, of course, be a complete abdication of the judicial role, and would necessarily violate any formulation of a duty to decide, for any standard that condoned such behavior could not be justified as embodying a duty. Such failures are, not surprisingly, exceedingly rare.

At the other extreme, an adjudicative duty might entail an obligation to decide the matters put before the court on the parties' terms.[22] So delineated, the duty would require the court to decide the parties' dispute precisely as they have defined it. At this end of the spectrum, failure is inevitable. Nearly every

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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."); 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).

19. *See, e.g.*, United States v. Garza, 165 F.3d 312, 314 (5th Cir. 1999) (suggesting that a litigant has a "right to have all issues fully considered and ruled on by the appellate court"), *quoted in* Bernklau v. Principi, 291 F.3d 795, 801 (Fed. Cir. 2002).

20. *See supra* note 8. For examples of cases in which a dissenting judge accuses the majority of avoiding the issues actually raised by the parties, see Motorists Mut. Ins. Co. v. Said, 590 N.E.2d 1228, 1236 (Ohio 1992) (Douglas, J., dissenting) ("Today's majority opinion is so far afield from what the court of appeals held, and what this case is all about, that it is my guess that the court of appeals' judges . . . and also the parties herein, will not recognize that we are discussing their case."); Simmons v. All Am. Life Ins. Co., 838 P.2d 1088, 1090 (Or. Ct. App. 1992) (Riggs, J., dissenting) ("The majority either misunderstands, mischaracterizes or chooses to ignore the issues actually raised by the parties."); and Bethea v. Forbes, 548 A.2d 1215, 1219 (Pa. 1988) (Larsen, J., concurring in part and dissenting in part) (suggesting that the majority's resolution of the case "ignores the legal issues which were raised and argued by the parties in the lower court, considered and decided by the lower court, and raised and briefed on appeal").

21. As noted above, there are several debates that discuss aspects of the larger question, *see supra* note 4, but I am not aware of previous efforts analogous to the one I attempt here.

22. See *infra* Part III.B.2.

conflict that results in litigation involves some fundamental incompatibility of viewpoint. Even if the parties agree in broad form about the nature of their conflict, they will not agree about its particulars, such that it would be meaningless to talk about "the dispute" between the parties. Indeed, it is the very absence of complete agreement concerning the contours of the relationship between them that has resulted in the conflict they have asked the court to resolve. Nor will the court share every aspect of the parties' view of the case. The same features of human psychology that prevent the parties from taking identical views of their dispute will likewise lead the court to form its own perspective.[23] Even if the court were somehow able to fully adopt the characterization of one of the parties, it could not fully adopt both. The necessary result would be that at least one of the parties would feel to some degree that the court did not decide the dispute as envisioned by that party.[24]

The more interesting cases lie between these extremes, where there exists a broad range of judicial behavior that might qualify as a failure to decide. Imagine, for example, Defendant X, who has been sued for consumer fraud based on conduct that X claims is shielded from liability under the First Amendment. A court that simply ignored X's argument of First Amendment protection could, absent some overriding rationale that rendered the argument superfluous,[25] justifiably be characterized as having breached its adjudicative duty. From X's perspective, the court has decided some other case, one involving different rules, and imposed the results on the parties to the case before it.

Assessment of whether the court acted properly in this situation may depend on the court's motivations for ignoring the argument. A court that affirmatively chose to avoid the argument, because of a sense that the plaintiff's claim ought to succeed regardless of whether the conduct fell within the protection of the First Amendment, would have acted inappropriately by most assessments. The same is true of a court that simply failed to consider the argument out of carelessness. We might, however, choose to excuse a court that disregarded the First Amendment argument were it made not as the centerpiece of X's case, but rather as an insignificant part of a "kitchen sink" answer to the complaint or as a throwaway argument tacked in superficial fashion to the end of a brief. Perhaps in this latter situation we could say that it is not the court that has failed to do its job, but rather X. According to this understanding, the duty to decide would extend only to claims and arguments that have been put before the court in a meaningful way. In any event, it seems indisputable that, even if a court can be excused for electing not to do the parties' work for them, there must come a point where the parties have satisfied their participatory obligations with respect

23. *See* Fuller, *supra* note 9, at 388 (noting that "a perfect congruence between" the judge's views and the parties' views is impossible to attain).

24. Anthony Kronman writes of this dynamic in terms of the occasional incommensurability of the parties' arguments. *See* ANTHONY M. KRONMAN, THE LOST LAWYER 339–40 (1993).

25. This would be the case if, for example, the court concluded that the conduct at issue could not constitute consumer fraud as a matter of law.

to an argument, thereby triggering the adjudicative duty.[26]

A court might also be viewed as having abdicated its adjudicative responsibilities even if it did not completely ignore troublesome aspects of a party's arguments, but rather glossed over or failed to consider them altogether. Here imagine Plaintiff Y, who has brought a consumer fraud suit in the face of a line of precedent that appears to establish that the general category of conduct the defendant engaged in does not constitute consumer fraud. But Y asserts that the conduct at issue in this case, even though it initially appears to fall within the category exempted from liability, is different. What is more, Y accompanies that assertion with a plausible account of the asserted difference and its significance in terms of the broader aims of consumer fraud law. A court that affirmed a grant of summary judgment against Y on the basis of the prior cases, and that did so without giving proper consideration to Y's assertion that this case is distinct, might also be viewed as having breached its adjudicative duty.

The nature of "proper consideration" in such a case is, of course, subject to dispute. Here, as in the case of a court that ignores an argument completely, we confront a range of behavior. It would be one thing for the court to act as though Y had not asserted a distinction between his case and those the court had decided previously, another thing for the court to acknowledge the distinction but dismiss it without consideration, and still another for it to misconstrue either the nature of Y's argument or the holdings of the prior cases. Here again, the appropriate characterization of the court's behavior may turn on the court's motivation for its actions. As in the case of a court that ignores a party's arguments in their entirety, a court in this second situation that acts out of carelessness or a conscious result-orientation would almost certainly earn our disapprobation.

But the court might have more noble purposes in mind. In the court's estimation, instead of "glossing over" certain aspects of Y's arguments, it might be "recharacterizing" the dispute based on a perception that the parties have mischaracterized it either by misreading the law or relying on the wrong law altogether.[27] Thus the court may feel that the dispute between the parties is better resolved according to an alternative set of rules—that what the court regards as a tort case is best resolved according to tort law even if the parties have argued it as if it were a contracts case, to use an extreme example. The court may conclude that this is necessary simply to best serve the aim of doing justice as between the parties. Alternatively, the court might fear that resolution of the dispute according to the parties' proposed criteria would result in the creation of precedent that would operate to the detriment of the public by introducing conflict and confusion in the applicable body of law. Depending on

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26. I will leave any attempt to quantify the amount and nature of participation necessary to trigger that duty for another day.

27. For an analysis of the appropriate judicial response to a case in which the court concludes that the parties have "missed the point," see Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251 (2004).

one's conception of the relative prominence that dispute resolution and law creation ought to play in the exercise of the judicial function,[28] these motivations may or may not justify the court's behavior. While there is thus room for disagreement concerning precisely how and where the adjudicative duty ought to extend in this latter category of cases, it nonetheless seems clear that at least some portion of these cases involve unjustifiable judicial avoidance.

The discussion to this point has overlooked a significant complicating factor, namely that there may be a distinction between the process of making a decision and justifying that decision.[29] Although readers of judicial opinions are accustomed to assuming that the reasons provided in an opinion are the actual reasons for the court's decision, that need not be the case (and in an important sense cannot be the case).[30] Thus the fact that the opinion in Defendant X's case did not speak to X's First Amendment argument does not necessarily mean that the court failed to consider that argument in deciding the case, only that it did not disclose the content of its consideration. Here, too, one can imagine varying motivations for the court's behavior. The court might have concluded that X's argument was so frivolous as not to warrant consideration in the opinion. Or perhaps the court felt that X's conduct should not be protected, but found itself unable to say why in a manner that fit within the constraints of existing doctrine, and feared that any attempt to do so would create precedent susceptible to misinterpretation or abuse. Relatedly, the court might have found X's argument to be entirely within the scope of First Amendment doctrine but nonetheless have concluded that to sanction X's conduct in this case would be to condone an unacceptably broad range of conduct that the court believes should not be protected. Each of these reasons arguably provides the court with a justification for not fully articulating the reasons behind its decision, and one might therefore conclude that even though the court's opinion suggests a breach of the duty to decide, the court's actual behavior was consistent with the duty.

This raises both a theoretical problem and an empirical one. The theoretical question is straightforward, at least in terms of what it asks, namely whether and to what extent a court must disclose the bases of its decision. The empirical question is somewhat less tractable, particularly if the adjudicative duty does not include an obligation to elaborate on the decisional process. The difficulty stems from the very nature of the problem. A court that violates the adjudicative duty by definition leaves no readily accessible record of having done so.[31] Nothing on the face of a judicial opinion will suggest that the court has "ducked" an issue. To the contrary, prevailing stylistic norms require judicial opinions to proceed as if both result and reasoning are the inevitable conse-

28. *See infra* text accompanying notes 48–51.

29. *See infra* Part II.B.3.

30. *See infra* Part II.D.

31. *Cf.* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 378 (1997) (noting the empirical problems involved in tracking the true bases of a court's decision).

quences of a mechanistic application of settled law.[32] Any suggestion that the court has done anything other than resolve the dispute put before it in a manner consistent with this depiction is out of place. Thus, even if courts operate under a duty to elaborate fully and candidly on the bases for their decisions, determining whether a court breached the duty would in most cases require an investment of nearly the same level of effort—reviewing the record and the briefs, researching the law, and the like—necessary to properly decide the case in the first instance. Absent evident flaws in a court's treatment of a case, only that level of investigation would reveal whether the court's portrayal of what is at stake accurately reflects the parties' analyses or the underlying legal standards. And if courts enjoy some degree of freedom to be less than fully candid in their decisionmaking, determining whether a court has breached the duty would be nearly if not completely impossible.

B. THE NEED TO DEFINE THE ADJUDICATIVE DUTY

At its most basic level, the case for defining the adjudicative duty seems plain. Only when we understand what courts should do can we assess what they actually do. To a large degree, the legitimacy of courts is a function of the perception that judges are meeting the demands of their role in an appropriate manner.[33] The practical difficulties involved in assessing whether courts are living up to their adjudicative responsibilities only underscore the necessity of making the effort to more fully define those responsibilities. At least anecdotally, the practicing bar perceives that violations of the adjudicative duty—in all of the various forms contained in the preceding impressionistic sketch—are relatively common.[34] Providing greater definition to the adjudicative duty will

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32. "Opinions are overstated, rigid, seemingly inevitable. The rhetorical style is that of closure. The judge is depicted as having little choice in the matter: the decisions are strongly constrained by the legal materials." Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 11 (1998) (citations omitted); *see also* Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653 (1931) ("Opinions, then, disclose but little of how judges come to their conclusions. The opinions are often ex post facto; they are *censored expositions*."); Martin Shapiro, *Judges As Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) (arguing that "[l]ying is the nature of the judicial activity"); Simon, *supra*, at 8–9 (summarizing the literature regarding the sense of certainty conveyed by judicial opinions and its illusory nature). Lawrence Solan concluded from an analysis of Justice Cardozo's opinions that not even a judge as forthright as Cardozo was about the indeterminacy of law and the process of decision was immune from writing decisions with a false sense of certainty. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 22–27 (1993).

33. *See, e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1827–33 (2005) (discussing the "sociological legitimacy of courts and their decisions"); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging on the U.S. Courts*, 56 STAN. L. REV. 1435, 1483–84 (2004) (discussing the relationship between perception and legitimacy in the context of unpublished opinions); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 189, 277–81 (2004) (discussing the importance of the perception of legitimacy for the proper functioning of a system of procedure).

34. For example, the cases of Defendant X and Plaintiff Y used above are representative of actual cases described to me by the lawyers involved. More broadly, I have discussed this problem with lawyers engaged in varying practices before state and federal courts across the country, and nearly all

not only help to inform that perception, but also enable judges to better understand and fulfill the responsibilities of the judicial role.

In similar fashion, only with a full appreciation of what adjudication is meant to accomplish can we properly address questions of institutional and procedural design that arise as society's demands on the judicial system evolve. The rapidity and significance of change in the adjudicative landscape over the past several decades has led to a situation in which theory has failed to keep pace with practice.[35] Thus, the absence of a past focus on the particulars of the adjudicative duty can perhaps be explained as a product of the fact that, traditionally, the very nature and structure of the courts, coupled with the characteristics of the claims they were empowered to entertain, operated to ensure that judges worked in rough accordance with the contours of the duty.[36]

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can relate an instance in which they perceived that a court failed to adjudicate their case. None have denied that adjudicative failures are common. Unsurprisingly, lawyers are unenthusiastic about making such allegations for attribution. Equally unsurprisingly, Alan Dershowitz is an exception: "It is widely known that many state court judges and some lower court federal judges play favorites among litigants and lawyers. . . . I have seen it with my own eyes in the courts of Boston, New York, and elsewhere." ALAN M. DERSHOWITZ, SUPREME INJUSTICE 116 (2001).

There is, I recognize, some room for skepticism regarding such complaints. As Karl Llewellyn noted in a related context forty-five years ago, "ever since lawyers began to lawyer, there have been losing counsel aplenty who have so believed in their causes that they have bitterly blamed the court." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3 (1960). The lawyers with whom I have spoken might entertain views shaped by their experience as advocates for a particular view of the case, which could easily render them incapable of assuming a neutral perspective, and thus unable to perceive the appropriateness of the court's resolution. But there are countervailing factors, too. Lawyers face tremendous incentives not to make public allegations that a court has failed in its responsibilities. Not only might lawyers believe it wise to "stay on the court's good side," particularly if they are likely to appear before the same court again, but they might also fear being sanctioned if they are too outspoken about suggesting that the court has failed in its responsibilities.

For recent examples of lawyers being disciplined for criticizing courts for failing to live up to obligations falling within this Article's conception of the adjudicative duty, see *In re* Wilkins, 777 N.E.2d 714 (Ind. 2002); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (Ohio 2003). In *Wilkins*, the disciplined lawyer suggested that the opinion issued by an intermediate appellate court was "so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for [his client's opponent] and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." 777 N.E.2d at 715–16. In *Gardner*, the disciplined lawyer quite colorfully asserted, among other things, that an intermediate appellate court failed to address the crux of his client's arguments, and suggested that the judges were motivated to do so by their past experiences as prosecutors. 793 N.E.2d at 427. *See also* Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 729 (1997) ("The problem is not that too many lawyers are publicly criticizing judges. Unfortunately, too few lawyers are willing to do so, even when a judge has committed serious ethical violations and should be held accountable.").

35. *See generally* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003) (arguing that some of the most significant current procedural controversies have arisen because of a disconnect between theory and practice).

36. Indeed, Abram Chayes suggested that these "less tangible institutional factors" would hold the judiciary in check in public law adjudication despite the fact that such cases in many ways require judges to act in nontraditional ways. *See* Chayes, *supra* note 10, at 1315. I explore these structural effects in greater detail in Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation* (unpublished manuscript, on file with the author).

At the trial court level, appeal has long served as the primary mechanism for policing judicial behavior, and throughout most of the existence of the American justice system litigants could expect that a judge who failed to decide their case, whether partially or completely, and whether through intention or neglect, would be brought back into line through an appeal. Yet the emergence of "managerial judging" has resulted in a situation in which trial judges must deeply involve themselves in cases in the pretrial stage, as a result of which they are able to exercise considerable authority in ways that are beyond the reach of appellate scrutiny.[37] At the same time, appellate courts have systematically narrowed the scope of their review over a wide range of issues, leaving considerably greater discretion to trial courts and further diminishing the controls afforded by the appeal mechanism.[38] At the appellate level, formal mechanisms such as en banc or discretionary review that might once have served to enforce the duty are no longer up to the task.[39] The informal constraints on judicial behavior that arose from the design of the appellate process as historically implemented—such as oral argument and the process of opinion writing—have likewise been diluted.[40] These constraints have diminished at the same time that the temptation to stray has grown stronger. Indeed, both phenomena have been driven by the same fundamental cause: the massive increase in appellate caseloads over the past half-century.[41]

Whatever one believes about the frequency with which the adjudicative duty is violated, it is clear that the practical nature of adjudication has evolved to become more conducive to violation. The decline in reversal rates in the federal appellate courts over the past half-century is consistent with, and perhaps at least partially explained by, an increase in inactivist conduct.[42] Simply because

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37. *See* Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 407 (1982) (noting that pretrial conferences are informal and infrequently made public). Resnick observes:

> As managers, judges learn more about cases much earlier than they did in the past. They negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation. These managerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.

Id. at 378.

38. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 75 (1996).

39. *See infra* Part II.A.

40. *See infra* Part II.B.

41. *See infra* note 42.

42. The proportion of reversals among the total dispositions of the federal courts of appeals has declined markedly over the past several decades. In 1960, the courts of appeal reversed 24.5 percent of the cases those courts terminated on the merits. *See* DIR. OF THE ADMIN. OFF. OF U.S. CTS., ANNUAL REPORT 210 tbl.B1 (1960) [hereinafter 1960 REPORT]. Looking back to 1945, one sees a reversal rate of 27.9 percent. *See* DIR. OF THE ADMIN. OFF. OF U.S. CTS., ANNUAL REPORT 70 tbl.B1. (1945). 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. By 2003, the percentage of reversals had declined to 9.4. *See* ADMIN. OFF. OF U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 27 tbl.B-5 (2003) [hereinafter 2003 REPORT].

judges are human, we might reasonably expect that some will take advantage of the increased opportunities to avoid decisions that they would prefer not to make. It may also be the case that, with less time to look for error, judges consequently find less error.[43] As Judge Posner pointedly notes, "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."[44]

As the next Part explores, adjudicative theory has had difficulty keeping in step with these developments. Models of adjudication are formulated only to be characterized as "outdated" a couple of decades later,[45] and attempts at normative justification of these new paradigms of adjudication lag even further behind.[46] Amidst such constant change, important particulars are inevitably overlooked. While it might in the past have seemed unnecessary to worry over such particulars, simply because institutional design could be counted on to encourage conduct in rough accordance with the adjudicative duty, that is no longer the case. Instead, the evolution of the forms of adjudication and the changes to the institutions in which it takes place have rendered inquiry into the components of the duty important both in terms of calibrating institutional design and in terms of developing the theory that drives the calibrating. My goal in this Article is not to add yet another model, but rather to survey existing models to determine whether they offer a consistent, or at least reconcilable, set of answers regarding the contents and contours of the duty to decide, if indeed such a duty exists at all.

Some, perhaps even most, of this phenomenon can be explained by changes in the composition of the appellate caseload over that time period to include a greater proportion of meritless appeals, coupled with the courts' having deliberately narrowed the scope of appellate review to leave a greater proportion of issues to the discretion of trial courts. *See* POSNER, *supra* note 38, at 77 (concluding that the portion of difficult cases on the federal appellate docket has been decreasing). But the decline in the reversal rate occurred alongside a rapid increase in the aggregate volume of cases before the courts of appeal, which faced more than fifteen times as many appeals in 2003 as in 1960, *compare* 1960 REPORT, *supra*, at 210 tbl.B1 (showing 3,899 cases commenced in the courts of appeal), *with* 2003 REPORT, *supra*, at 23 tbl.B-1 (showing 60,661 cases commenced in the courts of appeal), without a proportional increase in the number of judges. 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 (noting between 1973 and 1983, appeals in state courts increased at a rate double that of trial court filings).

43. *See* William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 CORNELL L. REV. 1290, 1291 (1996) ("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.").

44. POSNER, *supra* note 38, 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.

45. *See* Molot, *supra* note 35, at 29–30 (observing that changes in the practical nature of litigation have outpaced the development of models of adjudication); Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 692–94 (1988) (discussing how litigation and adjudicative theory have advanced past Chayes's portrayal).

46. *See infra* note 142.

II. A SURVEY OF MODELS OF ADJUDICATION

As the discussion to this point suggests, the concept of an adjudicative duty is easy to grasp in the abstract, but difficult to pin down in its particulars. A major difficulty with attempting to draw conclusions about the necessary components of an adjudicative duty is that, even when the inquiry is limited to the American system, there is no pre-existing, fixed concept of adjudication, or of its functions, against which to assess alternative forms. Adjudication is a social construct created to serve different needs in different times and places and subject to continual modification as the needs of society evolve.[47] In an ultimate sense, then, efforts to characterize variations on judicial practice as either consistent or inconsistent with the essence of adjudication run a serious risk of futility. To an extent, adjudication simply is what it is, suggesting that an adjudicative duty must be defined tautologically, if at all. One response to the changes in the practical nature of adjudication in the American system over the past half-century, then, might be to conclude that the nature of the duty (to the extent that "duty" even remains an appropriate term) has undergone corresponding changes. The normative basis for expecting a great deal from our courts may have vanished right alongside the courts' ability to deliver on that expectation.

Surely, however, this overstates the case. Despite the contingent character of adjudication, it is possible to identify certain points of fundamental agreement from which to begin the task of defining the adjudicative duty. Contemporary discussions of adjudicative theory in the American judicial system assume two general goals for that system. The first and arguably most fundamental is providing a peaceful method of dispute resolution.[48] Satisfaction of this goal requires primarily that disputes be settled, with perhaps an implicit subsidiary requirement that the process of settlement be "fair."[49] This function supports the

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47. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1911–12 (2001) ("What we know as the judicial power does not inhabit an immutable, autonomous sphere of public power, but instead is associated in complex, contingent ways with legal rules, institutional design, and everyday practice."). Indeed, to take just one example, the nature of appellate review within the American system has changed considerably over the course of the nation's history. *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 35–38 (1990) (exploring the differences between modern appellate review and the systems in place at the time of the framing of the Constitution).

48. *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). Martin Shapiro suggests that the conflict resolution triad—"[T]hat whenever two persons come into a conflict they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution."—is the basis of courts' social logic and political legitimacy. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981). Shapiro also identifies a conceptually distinct social control function, which operates via a courts' imposition on the parties of a pre-existing set of rules embodying societal interests. *Id.* at 17–18, 26. In practice, he notes, this function is "almost inevitably intertwined" with the dispute-resolution function. *Id.* at 18.

49. *See* Scott, *supra* note 48, at 937 ("To facilitate acceptance of the outcome and resort to the process, the rules should be seen as 'fair' in terms of prevailing community values, but notions of what is fair may vary a great deal from one era or society to another. Such variations are of only secondary importance; it is more important for society that the dispute be settled peaceably than that it be settled

imposition of some form of duty to decide, at least in the sense that consistent failure to resolve disputes would threaten the very basis of the system by encouraging litigants to seek resolution elsewhere. The second goal is lawmaking: the creation of norms to govern the future conduct of parties beyond the immediate adjudication.[50] Here the implications for an adjudicative duty are less clear. Courts make law in the course of resolving disputes, but this has no necessary prescriptive consequence for the manner in which any given case is resolved. Indeed, there is a tension between dispute resolution and law creation because, at least insofar as a court must give reasons for its decision and be bound by them in subsequent cases, the resolution of a specific dispute may give rise to law the court would prefer not to create.

The tension between these two goals underlies much of the variance among models of adjudication.[51] The remainder of this Part provides an overview of the dominant models of adjudication—the "classic" and "public law" models—and their interrelation. In so doing, I hope to achieve two aims. First, I aim to highlight the normative implications of both models for the formulation (or degradation, as the case may be) of a duty to decide. The two models themselves are not, of course, inherently authoritative sources. They are, however, strongly suggestive evidence of the essential nature of adjudication in the American system and thus serve as useful points of reference for the analysis. Second, I aim to focus on the extent of the descriptive and normative changes in the judicial role, as reflected in both models, and to reinforce the claim that inquiry into the existence and precise contours of a duty to decide is more timely than ever.

This Part concludes by taking up the topic of judicial candor, which concerns the relationship between a court's public statement of the reasons behind a decision and the actual reasons behind the decision. Consideration of this relationship has been largely absent from the classic and public law literature. Yet, because judicial opinions provide nearly the exclusive basis for monitoring

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in any particular way."); Sward, *supra* note 48, at 304 ("[I]f the goal were simply to resolve conflicts, it could be achieved by allowing a judge to flip a coin. . . . Obviously, however, such a system would not be seen as fair: Victory would depend solely on a random event. Citizens would not voluntarily submit to such a system.").

50. *See* Scott, *supra* note 48, at 938–40 (describing what he calls the "Behavior Modification Model"); Sward, *supra* note 48, at 306–08 (separating out and describing the rulemaking and behavior modification goals).

51. Indeed, it would be possible to develop pure-form models based on these goals—one a pure dispute resolution model and the other a pure law-creation model. Such models would serve largely as caricatures, however, since there is general agreement that both functions play some role in adjudication, with the relative prominence of the respective goals standing as the basis of differences among the models. *See* Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 1–7 (1985) (dividing adjudicative theories into "arbitration" and "regulation" models based on the relative prominence of the dispute-resolution and law-creation functions, and assessing the relationship between them). This tension has, in turn, defined the formulation of justiciability doctrines. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 625–36 (1992) (tracing the tension between the "dispute resolution" and "public values" models and its implications for justiciability doctrine).

judicial behavior, it (or, alternatively, "the relationship") must be addressed in the context of any effort to delineate courts' minimal adjudicative obligations.

A. THE CLASSIC MODEL OF ADJUDICATION

As its name suggests, the classic model is associated with a vision of adjudication in its quintessential form, involving the resolution of a private dispute between private parties. This section focuses on the version of the classic model formulated by Lon Fuller and refined by Melvin Eisenberg, as well as a related model of adjudication-as-representation developed by Christopher Peters. Fuller's model provides an appropriate starting point for the analysis because of its focus on party participation and relatively well-developed consideration of the ways adjudication must be structured to best accommodate and facilitate that participation. Peters's model, in turn, provides a connection between party participation and the lawmaking function of adjudication that is largely absent from Fuller's model.

1. Lon Fuller's Participation Thesis

Perhaps the most prominent formulation of the classic model of adjudication is that articulated by Lon Fuller in a posthumously published article, *The Forms and Limits of Adjudication*.[52] 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."[53] Thus, from Fuller's perspective, the crucial question to ask concerning any proposed feature of adjudication is whether it adversely affects this mode of participation.[54] In his own words, "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."[55]

From this starting point,[56] which Melvin Eisenberg calls "the Participation

52. Fuller, *supra* note 9.
53. *Id.* at 364.
54. *Id.* at 382.
55. *Id*. at 364.
56. As Owen Fiss notes, Fuller simply postulated this characterization of adjudication without explaining its basis. *See* Fiss, *supra* note 10, at 42 ("[A]lthough much of the essay rightly celebrates the role of reason in human affairs, and sees the important connection between reason and adjudication, there is no explanation of why reason requires the kind of individual participation that Fuller insists upon."); *see also* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1730 (1992) ("[T]he opportunity to present proofs and reasoned arguments and the rationality of decision are not as intricately tied together as Fuller suggests."). Robert Bone suggests that Fuller's focus on participation was instrumental, arising primarily from Fuller's belief that "individual participation through reasoned argument in an adversarial format was the institutional form that made it possible for courts to develop sound principles and render good decisions." 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, 1303 (1995).

Thesis,"[57] Fuller derives several related conclusions relevant to the discussion here. First, the centrality of reasoned argument to the adjudicative process requires that decisions made in response to those arguments must likewise "meet the test of reason."[58] Second, while Fuller concludes that maintaining the integrity of the adjudicative process does not necessarily require that the decisionmaker provide reasons for its decision, he also suggests that integrity is enhanced by the issuance of opinions setting forth those reasons.[59] This is so because the issuance of an opinion helps to ensure the litigants that their participation was not illusory, and that the reasons and proofs they offered were actually considered by the decisionmaker.[60] Finally, while he concedes the impossibility of achieving complete correspondence between the parties' and the decisionmaker's view of the issues, with the result that the decision will almost always rest, at least to some degree, on grounds other than those argued by the parties, he cautions that "this is no excuse for a failure to work toward an achievement of the closest approximation of it."[61] If such correspondence is absent, "then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning."[62]

Fuller's model thus calls for the judiciary to assume a passive role pursuant to which judges restrict themselves as much as possible to reacting to the parties' arguments. He cautions, for instance, against the initiation of proceedings by the judiciary—on the grounds that the mere act of initiation would lead to preconceptions, which in turn would reduce the effectiveness of party participation.[63] More broadly, the general goal of maximizing the significance of party participation requires the court to adopt a posture of responsiveness rather than proactiveness.

Eisenberg, in a companion article to *Forms and Limits*, identifies three norms that emerge from Fuller's arguments.[64] First, the norm of attention requires the decisionmaker to "*attend* to what the parties have to say."[65] Second, the norm of explanation requires the decisionmaker to "*explain* his decision in a manner that provides a substantive reply to what the parties have to say."[66] Third, the norm of strong responsiveness requires that the resulting decision "be *strongly respon-*

Bone also posits that Fuller believed there was symbolic value in participation, as well as an intrinsic value to party control of lawsuits. *Id.*

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

58. Fuller, *supra* note 9, at 366–67.

59. *Id.* at 387–88.

60. *Id.* at 388 ("A less obvious point is that, where a decision enters into some continuing relationship, if no reasons are given the parties will almost inevitably guess at reasons and act accordingly.").

61. *Id.*

62. *Id.*

63. *Id.* at 385–86.

64. Eisenberg, *supra* note 57, at 411–12.

65. *Id.* at 411.

66. *Id.* at 412.

sive to the parties' proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments."[67]

Eisenberg proceeds to analyze the relationship of these norms to the dispute resolution and lawmaking functions of adjudication. The norm of attention, he concludes, serves both functions.[68] Although Eisenberg does not expand on this assertion, his reasoning is presumably that, unless the court attends to the parties' arguments, it cannot fully comprehend their dispute, and that without such comprehension, true resolution is impossible. Similarly, with respect to the lawmaking function, the court cannot effectively make law to govern similar future disputes without a full appreciation of the nature of the dispute before it. As we will soon see, the court may ultimately determine that the parties' arguments do not suggest the appropriate grounds on which to formulate a legal standard and may thus render a decision that is not strongly responsive to those arguments.[69] Nonethelesss, the Participation Thesis requires that the court give the parties' arguments careful attention.

Eisenberg reasons that the norm of explanation, in contrast, is more critical to the lawmaking function than to dispute resolution.[70] That is not to say that explanation is valueless for purposes of dispute resolution—by giving the losing party reasons for the result, the decisionmaker provides that party with a basis for concluding that the process was not arbitrary, thereby enhancing the legitimacy of the courts and facilitating their ability to effectively and finally resolve disputes. Explanation provides the related benefit of furnishing evidence that the decisionmaker has fulfilled the norm of attention. But explanation is especially critical to the lawmaking function simply because it would be difficult for law to emerge from adjudication unless the adjudicator provides reasons for the result it has reached.[71]

Eisenberg's most significant gloss on Fuller is his conclusion that strong responsiveness does not follow naturally from the Participation Thesis but rather "is an independent norm which both helps define adjudication and gives a special meaning to participation through proofs and arguments."[72] He reasons that party participation alone is not what defines adjudication, suggesting that there are other forms of social ordering—such as notice-and-comment rulemaking, which he identifies as an example of a "consultative process"[73]—in which parties enjoy the right to present proofs and reasoned arguments to a decisionmaker.[74] In the adjudicative process, he reasons, it is also critical for the

67. *Id.*
68. *Id.*
69. *See infra* text accompanying notes 75–79.
70. Eisenberg, *supra* note 57, at 412.
71. *Id.* ("[R]ules ordinarily cannot emerge from an outcome unless the reasons for that outcome are given.").
72. *Id.* at 413.
73. *Id.* at 414–15, 418.
74. *Id.* at 412.

resulting decision to arise out of and be connected to the parties' proofs and arguments. Strong responsiveness is thus essential to the dispute resolution function of adjudication, because only if the court's decision is responsive to the parties' arguments will it resolve the dispute that the parties seek to have resolved.[75]

Strong responsiveness, however, stands in tension with the lawmaking function, for the simple reason that whatever rules the court generates as a result of its resolution of the specific dispute before it must be of the sort that can be applied to similar disputes in the future.[76] If the dispute before the court is somehow not representative of the broader category of disputes of which it is a part, or if the parties' arguments fail to address issues that are critical to the formulation of a rule that must be applied across a range of future disputes, then strong responsiveness could lead to a decision that is based on an incomplete set of inputs and thus generate law that is inappropriate to the needs of future disputants. As a consequence, Eisenberg would excuse departures from strong responsiveness in public law cases,[77] which by their very nature have immediate implications extending well beyond the parties before the court.[78]

Even so, Eisenberg concludes that courts should feel obligated to work toward as close an approximation of congruence between the parties' arguments and the rationale for the court's decision as possible.[79] Indeed, as Eisenberg's reference to public law cases suggests, strong responsiveness may only be in real tension with a conception of the lawmaking function that allows for and encourages courts to generate broad rules intended to provide general guidance over a range of situations extending well beyond the situation presented by the dispute before the court. A minimalist conception of the lawmaking function, in contrast, can coexist peacefully with strong responsiveness. "Judicial minimalism" calls for courts to focus on resolving the cases before them, avoiding to the extent possible statements of abstract principle and other matters not critical to the resolution of the dispute.[80] If courts consistently follow this recipe, a prior court's strong responsiveness to the misplaced or incomplete arguments of the parties will not hamper the resolution of subsequent cases, since the subsequent court will be able to distinguish away the prior decision.

75. *Id.* at 413; *see also* EISENBERG, *supra* note 6, at 4 (suggesting that, in fulfilling the dispute resolution function, "a court is limited to action that is responsive to the claim made").

76. Eisenberg, *supra* note 57, at 413–14.

77. *Id.* at 427–28.

78. *See infra* Part I.B.2.

79. Eisenberg, *supra* note 57, at 413–14.

80. "A minimalist court settles the case before it, but it leaves many things undecided. . . . It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions." CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (1999); s*ee also* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1459–61 (2000) (describing the minimalist conception of judging).

2. Adjudication as Representation

A common critique of Fuller's model is that it fails to provide an adequate link between its emphasis on elevating the significance of party participation and the proper functioning of courts.[81] Indeed, insofar as rational decisionmaking is taken to be at the heart of adjudication, this is an apt criticism, since participation does not guarantee rationality, and rationality does not require participation.[82] And, as Eisenberg acknowledges, in at least some instances the fulfillment of both the dispute-resolution and law-creation functions can only be properly accomplished through the consideration of interests beyond those of the parties before the court.

There are, however, other justifications for emphasizing party participation in a classic model of adjudication.[83] One such justification is provided by Christopher Peters's theory of adjudication as representation.[84] Peters does not seek to provide a comprehensive theory of adjudication, but instead to justify judicial lawmaking by challenging the common view of adjudication as inherently nondemocratic. He argues that two fundamental, yet overlooked, features of adjudicative lawmaking provide it with considerably more democratic legitimacy than traditionally understood. The first is the fact that judicial decisions are not constructed out of whole cloth by judges, but instead proceed from the proofs and arguments presented by the parties.[85] That is to say, what emerges from the adjudicative process is not the product merely of the judge, "but rather of a process of participation and debate among the parties to the case . . . ."[86]

81. *See supra* note 56; text accompanying notes 76–78.

82. *See* Tidmarsh, *supra* note 56, at 1730, 1735–38.

83. I focus on Peters's theory because it provides an express link between participation and judicial lawmaking. It is hardly the only justification of participation as an integral component of adjudication. For a recent example, see Larry Solum's "participatory legitimacy thesis":

> Because a right of participation must be afforded to those to be bound by judicial proceedings in order for those proceedings to serve as a legitimate source of authority, the value of participation cannot be reduced to a function of the effect of participation on outcomes; nor can the value of participation be reduced to a subjective preference or feeling of satisfaction.

Solum, *supra* note 33, at 275. Solum, however, expressly disclaims any attempt to justify judicial lawmaking, focusing instead "on the core case of civil adjudication—the case in which the general rules are fixed and application is the focus of the adjudicative process." *Id.* at 242.

84. *See generally* Peters, *supra* note 31.

85. *Id.* at 347.

86. *Id.* Martin Shapiro echoes this interpretation: "More often than not what we would label as adversary proceedings are rituals in which three law speakers, the judge and the two parties or their attorneys, speak on until arriving at some verbal formulation of the law synthesized from their various versions." SHAPIRO, *supra* note 48, at 13. Even so, Shapiro does not connect this dynamic with the legitimacy of judicial lawmaking but rather with facilitation of the dispute-resolution function, suggesting that:

> [M]ost of the conventional attachment to adversary proceedings is based not on the desire to heighten the level of conflict in judicial proceedings, but quite the opposite, on the need to have both parties present before the judge if he is to have any chance of creating a resolution to which both parties will consent. Every effort is made to preserve the appearance that both parties voluntarily come before the court.

This limits a court's decisional options and leads to outputs that resemble those generated by democratic legislatures, which likewise act on the basis of participation and debate among those likely to be affected by a statute.[87] The second feature concerns the nature of precedent. Law generated in one judicial decision prospectively binds others not party to that decision only in proportion to the degree of congruence between the situation that led to the decision and any subsequent situation to which the decision might be applied. As a result, later litigants will only be bound by a prior decision if, and to the extent that, prior litigants can meaningfully be said to have put the interests of the later litigants before the court. "The parties to precedential cases thus can be said to serve as interest representatives of subsequent litigants in much the same way that we expect our elected legislators to serve as interest representatives of their constituents."[88]

Peters identifies three conditions as being necessary to the proper functioning of adjudication as representation. According to Peters:

> The first general condition is . . . more or less a restatement of the features thought necessary by Fuller in order for adjudication in its core sense to exist: the parties must be allowed to take the lead in shaping the litigation through the presentation of proofs and reasoned arguments, and the court's decision must (in Professor Eisenberg's paraphrase) actually "proceed from and be congruent with [the parties'] proofs and arguments."[89]

The greater the departure from strong responsiveness, the lesser the democratic legitimacy of the decision. The second condition is that courts must apply stare decisis correctly, such that prior decisions bind subsequent parties only to the extent the subsequent parties are similarly situated to the original litigants or the subsequent parties are afforded the opportunity to participate in the decision to extend the precedent.[90] According to the third condition, the parties who litigated the precedential case must have done so adequately.[91]

Consistent with these conditions, Peters advocates the strict application of justiciability doctrines in most contexts to ensure that litigants "have a sufficient personal stake in the outcome to produce a legitimately binding rule."[92] Peters

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Id. at 12–13.

Indeed, Owen Fiss offers a similar dynamic as a justification for the judicial role in public law litigation, noting that a "judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values." Fiss, *supra* note 10, at 13.

87. Peters, *supra* note 31, at 347.

88. *Id.* at 347.

89. *Id.* at 375.

90. *Id.*

91. *Id.* at 376.

92. *Id.* at 428. Peters acknowledges that in some instances "reasons not connected with democratic legitimacy" might compel the relaxation of the personal stake requirement. *Id.* at 425. He also acknowledges the need for ensuring broad participation in public law cases. *Id.* at 417–19.

further argues that the proper functioning of adjudication as representation requires rejection of the so-called "passive virtues," pursuant to which courts rely on doctrines like justiciability to avoid decisions that they conclude are, for prudential reasons, best left until another time.[93] Resort to the passive virtues is problematic for Peters not only because such avoidance has an effect on the parties—namely, maintenance of the status quo—but also because it amounts to a decision that does not proceed from the proofs and arguments of the parties and in fact precludes the presentation of proofs and arguments.[94] He acknowledges the possibility that a court might confront a case it would prefer not to decide out of a concern that the parties before it are not representative of the large class of potential litigants that would be affected by the decision. The court might therefore be tempted to defer adjudication on the issue involved until a later case with more appropriate parties.[95] Peters rejects this, however, in favor of decisional minimalism. Courts confronted with such a case should not avoid adjudication, but instead should decide the case on the narrowest available grounds. As a result, such courts can ensure that if the initial parties turn out to be as unrepresentative as the court perceived, subsequent courts will be able to distinguish the prior decision and thus limit the decision's scope.[96]

B. THE PUBLIC LAW MODEL

The classic model of adjudication is often contrasted with the "public law" model, typically associated with Abram Chayes and Owen Fiss.[97] Chayes introduced the model in his famous 1976 article *The Role of the Judge in Public Law Litigation*.[98] Chayes's project is largely descriptive—it begins with the observation that much of the adjudication then taking place in the federal courts was inconsistent with the classic model and indeed from the perspective of that model may be "recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge."[99] Chayes observes that "[p]erhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies."[100] While the paradigm case under the classic model might be a tort suit between

93. *See* BICKEL, *supra* note 5, at 111–98.

94. Peters, *supra* note 31, at 416–17.

95. *Id.* at 416.

96. *Id.* at 416–17.

97. Chayes, *supra* note 10; Fiss, *supra* note 10. For examples of works treating the models as contrasting, see Molot, *supra* note 35, at 34–37; Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1382–1403 (1991). Chayes and Fiss were by no means the only ones addressing the topic. *See* Marcus, *supra* note 45, at 656 (observing that there was already an emerging body of scholarship concerning public law litigation at the time Chayes's article appeared).

98. Chayes, *supra* note 10.

99. *Id.* at 1302.

100. *Id.* at 1284. Although Chayes confines his analysis to federal civil litigation, he notes his belief that a similar evolution away from the classic model has occurred in state courts. *Id.* at 1284 n.12.

two private parties, under the public law model it involves an effort at institutional reform conducted on behalf of a group of plaintiffs, as would be the case in school desegregation or prison reform litigation. The tort suit would involve a focused, historical inquiry into a discrete event. Nearly every question raised would relate to a past happening: how the defendant acted, whether that action was appropriate, and to what extent the plaintiff was damaged. The institutional reform case, in contrast, while perhaps triggered by a discrete past event—such as an instance of police brutality or the refusal to admit a black student to a school—requires inquiry, as Fiss puts it, into "a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition."[101] This requires a shift in focus away from what has happened toward what might happen and away from the "finding" of "adjudicative" fact toward the "evaluation" of "legislative" fact.[102]

All of this involves a dramatic reorientation of the judicial role. In a "morphology" of the public law model, Chayes identifies eight respects in which public law litigation is wholly distinct from the classic model:

> (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
>
> (2) The party structure is not rigidly bilateral but sprawling and amorphous.
>
> (3) The fact inquiry is not historical and adjudicative but predicative and legislative.
>
> (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
>
> (5) The remedy is not imposed but negotiated.
>
> (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
>
> (7) The judge is not passive, his function limited to analysis and statement of the governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
>
> (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.[103]

101. Fiss, *supra* note 10, at 18.
102. Chayes, *supra* note 10, at 1297.
103. *Id.* at 1302.

Although Chayes remains largely agnostic regarding the legitimacy of adjudication according to the public law model, he does venture into normative territory to articulate some of the institutional advantages that courts might enjoy vis-à-vis the political branches in confronting institutional reform.[104] One such advantage stems from institutional competence. Chayes suggests that, contrary to the traditional belief that agencies and legislatures are better equipped for fact-gathering than courts, courts benefit from the adversarial structure. Though diluted in public law litigation, the adversarial structure provides the parties with incentives to furnish the court with relevant information.[105] And since even the relatively sprawling disputes at the heart of public law cases nonetheless are tied to a specific situation, the adversarial process allows for a depth of focus less likely to be achieved in a more generalized legislative or administrative inquiry.[106] Another advantage stems from the judiciary's relative inability to avoid confronting a grievance. Chayes asserts that, "[u]nlike an administrative bureaucracy or a legislature, the judiciary *must* respond to the complaints of the aggrieved."[107]

Fiss took up the topic some three years later. He provides a descriptive account of what he refers to as "structural reform" litigation that in broad form parallels Chayes's description of public law litigation.[108] Fiss's more significant contribution is to articulate a normative justification for the revised judicial role in public law cases. At the operational level, he contends that a more proactive judge is necessary to counter representational deficiencies that are much more likely to surface in public law cases. Because the named plaintiff in an institu-

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104. As Jay Tidmarsh observes, while Chayes may have succeeded in justifying the enhanced judicial role in public law litigation relative to the political branches of government, he did not "demonstrate the normative legitimacy of the judge's power with respect to the jury, the parties, and the lawyers. Given that litigation over public rights is inevitable, why should the judge, and not the other players in the litigation enterprise, be the ones to shape the political-juridical debate?" Tidmarsh, *supra* note 56, at 1721–22. The judicial branch is:

> a "messy admixture" of litigants, interested bystanders, juries, lawyers, and judges. The assertion by judges of additional powers often comes at the expense of at least one of these other participants, thus invoking concerns of autonomy (when the traditional rights of parties and bystanders are altered), democratic participation (when the traditional role of the jury is disturbed), and adversarial procedure (when the role of the lawyers is reduced).

Id. at 1722 n.168.

105. Chayes, *supra* note 10, at 1308.

106. *Id.*

107. *Id.* Chayes identified six such institutional advantages in total. The other four are: (1) that the process is presided over by a judge, whose professional tradition and practical background are likely to have acquainted him with a wide range of policy problems, and whose idealized role requires dispassionate analysis; (2) that the use of litigation as a vehicle for institutional reform allows for ad hoc experimentation in discrete settings, as well as the flexibility to adapt as circumstances and experience dictate; (3) that, even in the public law model, litigation allows for a great deal of participation in the process by those who will be affected by its outcome; and (4) because the judiciary is not bureaucratic, it enjoys greater flexibility to assemble (and later disassemble) task forces to address specific problems on an ad hoc basis. *Id.* at 1307–09.

108. *See* Fiss, *supra* note 10, at 18–28.

tional reform suit is only one member of the larger group affected by the litigation, there is greater reason to be concerned that she will not adequately represent the interests of that group.[109] She may not share the group's concerns, either because she has different priorities, or because she does not take a sufficiently broad view of the interests that might be affected. And if she does not appropriately conceive of the problem underlying the litigation, she might compound these deficiencies by failing to name the appropriate parties as defendants, thereby compromising the adequacy of representation on both sides.[110] This could happen if, for example, the plaintiff in a school desegregation suit fails to see segregation as the product of both housing and school policies and brings only the school board into court.[111] As a result of these dangers, it is no longer appropriate for the judge merely to react to the issues raised by the nominal parties to the litigation. Instead, the judge must take this greater array of interests into account. In some instances, this may require the judge to "construct a broader representational framework" by getting more parties involved, appointing special masters, and the like.[112] In every instance, it will require the judge to adopt a broader perspective and take a more proactive approach.

But Fiss does not stop there. Instead, he argues for an even broader conception of the judicial role. For him, the classic model of adjudication—which he takes as conceiving of dispute resolution as the primary function of courts—fails to capture the essence of the judicial role. Rather than existing merely to resolve disputes—which Fiss disparages as "an extravagant use of public resources"[113]—"courts exist to give meaning to our public values, not to resolve disputes. Constitutional adjudication is the most vivid manifestation of this function, but it also seems true of most civil and criminal cases, certainly now and perhaps for most of our history as well."[114] Indeed, for this reason Fiss elects not to join Chayes in using the "public law" label. To Fiss, "all rights enforced by courts are public."[115] Thus Fiss places a considerably greater emphasis on the lawmaking function of courts than on dispute resolution,

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109. *Id.* at 25.
110. *Id.*
111. *Id.*
112. *Id.* at 26. Chayes noted this as well:

> 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. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.

Chayes, *supra* note 10, at 1284.
113. Fiss, *supra* note 10, at 30.
114. *Id.* at 29.
115. *Id*. at 35–36.

particularly in the sense of strongly responsive dispute resolution as envisioned in the Fuller/Eisenberg model.[116]

C. THE RELATIONSHIP BETWEEN THE PUBLIC LAW AND CLASSIC MODELS

Two purposes animate this Article's exploration of the classic and public law models of adjudication. The first is simply to explore the features of adjudication that the various models deem fundamental and to ascertain the values underlying the elevation of those features to fundamental status. Only with a clear sense of what adjudication is meant to achieve and which features of adjudication are critical to its doing so will it be possible to assess whether an adjudicative duty exists and, if so, to take the additional step of defining its contours. The second purpose is to consider the nature and extent of any commonalities between the models. If the models' prescriptions diverge so far as to require fundamentally different judicial orientations, it may not be possible to formulate an adjudicative duty without first selecting one model over the other. If, on the other hand, there are appropriate points of fundamental agreement between the models, an adjudicative duty might be formulated independent of any need to privilege one model's conception of the judicial role. As I hope to demonstrate in this section, the latter formulation is the more accurate. Whatever the relation between the models, they share certain fundamental conceptions upon which it is possible to ground an adjudicative duty.

There is no canonical formulation of the public law model. As Richard Marcus observes, "[t]here is a real problem in deciding what public law is, popular though the concept may be."[117] Thus it is impossible to state with certainty what the relationship between the classic and public law models is, even if one takes Fuller as having set forth the authoritative formulation of the classic model. It is, however, possible to sketch out three broad conceptualizations of the relationship. And it is also important in the context of a search for a core adjudicative duty to bear in mind the commonalities between the models, despite their divergent theoretical heritage.

1. Distinct Models of Distinct Phenomena

One view of the relationship between the two models would assert that they describe distinct phenomena. Certainly, if one takes the position that "public law" represents a category apart from the run of "private" rights enforced by courts, involving only those cases seeking to enforce constitutional or statutory policies against governmental institutions, this is a viable distinction. Indeed, this is largely the concept that Chayes uses to set apart public law litigation from traditional litigation.[118] One might also extend the concept a bit further to include other cases that manifest many or all of the features of public law

116. *See* Bone, *supra* note 56, at 1275 (contrasting Fuller's theory with the public law model).
117. Marcus, *supra* note 45, at 670.
118. *See* Chayes, *supra* note 10, at 1302.

litigation even if they are not based on "public law" in this restricted sense.[119] Under either concept, one could credibly argue that while expansions of the concept of adjudication and notions of the proper judicial role are appropriate in the limited context of such cases, they ought not be extended more broadly to traditional litigation. Thus Fuller's model might remain appropriate, both descriptively and normatively, for traditional, bipolar litigation involving private rights such as a classic contract or tort suit. At the same time, the public law model may provide better guidance in cases with public law features, including those having direct implications for non-parties, such as suits to reform public housing authorities or to compel enforcement of environmental regulations.[120]

Regardless of one's assessment of the theoretical appeal of such an understanding of the relationship, it appears inaccurate as a description of what has actually taken place. Chayes notes his impression that much of what he described appeared not only in public law litigation, but in other contexts as well.[121] And even if Chayes's impressions were mistaken, subsequent developments have made it clear that judges "applied the lessons they had learned from their public law litigation experiences outside that realm."[122] While one could certainly argue that judges ought to tailor their roles to the nature of the litigation before them, plainly that is not what has happened.

2. The Public Law Model as Descriptive of a Paradigm Shift

Another approach to the relationship would be to take the public law model as emblematic of a fundamental shift in the nature of the judicial role. Whether for reasons related to the increased governmental role in society[123] or otherwise, the role of courts may have evolved to include a relatively greater emphasis on, in Fiss's phrasing, "giving meaning to our public values."[124] According to this view, while adjudication might look more or less unchanged on a superficial level, its purpose and therefore the judicial orientation may have changed. While the business of courts would still involve the application and articulation of law in the context of relatively concrete factual situations, the emphasis

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119. Indeed, Chayes seemed willing to accept this possibility, *id.* at 1302–03, and as the next section will show, such a view underlies at least a portion of post-public-law theorizing. *See infra* Part II.C.

120. Meir Dan-Cohen advocates one such "view of adjudication as a more heterogeneous institution, assuming different forms and discharging different functions in various contexts." Dan-Cohen, *supra* note 51, at 5. His specific focus is on the implications of the increasing prominence and prevalence of large-scale organizations for the appropriate conception of adjudication.

121. Chayes, *supra* note 10, at 1315.

122. Marcus, *supra* note 45, at 675. Marcus opines that "[t]he features of public law litigation that prompted judicial efforts to control litigation cannot meaningfully be limited to that kind of litigation." *Id.* "Having found a significant public interest in most civil litigation, judges reacted by taking charge of ordinary cases in a way somewhat similar to that in which they had taken control of the cases Chayes described." *Id.*

123. Chayes traces out how this may have developed. Chayes, *supra* note 10, at 1285; *see also* Dan-Cohen, *supra* note 51, at 4 (discussing the view that there was or is currently underway a transition from a dispute resolution model to a public law model).

124. Fiss, *supra* note 10, at 31.

would be on the law rather than on the appropriate resolution of the precise dispute before the court. The question, under this view, is not: "What are the mechanisms that will best facilitate resolution of this dispute between these parties?" Rather, the question is: "What is the best way to bring public values to bear on this situation?"

Fiss clearly takes the position that the appropriate judicial orientation is toward the implementation of public values, although he questions whether this view came about by evolution or is simply a more-or-less accurate account of the way adjudication has always been.[125] In his view, what has changed is not the function of adjudication, but rather its forms, occasioned by "the emergence of a society dominated by the operation of large-scale organizations."[126] Because adjudication involving these organizations simply does not work within the traditional model—for the reasons outlined above—it becomes necessary to broaden the focus somewhat to accommodate the greater array of interests implicated.

3. Interrelated Models of Interrelated Phenomena

A third approach to the relationship between the classic and public law models would hold that both the models and the phenomena they describe are interrelated.[127] Eisenberg, for example, asserts that "no element of the public law model is inconsistent with Fuller's concept of participation."[128] He conceives of Fuller's model as flexible enough to accommodate the subordination of the court's obligation toward strong responsiveness in situations where its decision will have effects beyond the parties.[129] According to this view, while the traditional forms of adjudication may be expanded or adjusted, they should not be abandoned. While the parties' proofs and arguments need not define the dispute, neither should they be devalued or disregarded. And while the judge in many cases can no longer remain passive until the moment of decision, she must remain passive as long as she can and must continually strive to maintain her neutrality.

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125. Fiss, *supra* note 10, at 35–37.

126. *Id.* at 36.

127. Such an interrelation could take any number of forms, and I do not purport to offer a comprehensive catalog here. Meir Dan-Cohen suggests one alternative to those identified in the text:

> [T]he two models are, both in theory and in fact, inexorably linked in every institutionalized mode of adjudication. 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 51, at 5.

128. Eisenberg, *supra* note 57, at 427.

129. *Id.* at 427–28; *see also* EISENBERG, *supra* note 6, at 3 ("Like a conventional trustee, the judge is morally bound by his acceptance of office to obey the rules that govern the conduct of his office. Thus adjudication is driven not (or not only) by the rights of the parties, but by the duty of the judge, which runs both to the parties and to the larger society." (citation omitted)).

A variation on this approach would be to suggest that even if the public law model does properly counsel the abandonment of some aspects of the traditional forms of adjudication, it has failed to make the case for the abandonment of all of them. Indeed, the proponents of the public law model have failed even to try. Chayes in particular used Fuller's model as his starting point,[130] and both his and Fiss's discussions were shaped by their reactions to Fuller.[131] And while Fiss certainly writes as if his intent is to thoroughly discredit and displace Fuller's model, much of Fiss's characterization of the appropriate judicial role embraced the familiar components of that model.[132]

4. Commonalities Among the Models

The classic and public law models of adjudication set out core conceptions of the judicial role that are in many respects fundamentally distinct. In the classic model, the inquiry is focused on past events and limited to the immediate parties to the litigation. The public law model, in contrast, looks more toward the future and considers a broader class of parties and interests. These are significant differences, and they quite obviously call for distinct means of fulfilling the judicial role. Yet it is important to bear in mind that the models—whatever the precise nature of their relationship—have many important commonalities. These commonalities reveal a shared understanding of many of the basic features of the judicial role, which not only suggests the feasibility of formulating a broadly applicable adjudicative duty, but also provides guideposts for that undertaking. Adjudication under the public law model still involves an inquiry into relatively discrete circumstances. Even though the questions may be more fluid and less tightly focused than in a classic private law dispute, and the orientation more prospective than retrospective, the undertaking remains quite constrained when contrasted with a legislative or administrative hearing. And while the judge can no longer remain passive, she must remain independent and impartial.[133]

Perhaps the most important commonality, for purposes of this Article, is party participation, which remains a critical feature of adjudication under both models. Chayes argued that the participation opportunity afforded to potentially affected parties is a good in its own right that in turn justifies the judicial role in public law litigation. This opportunity for participation places the judiciary in an advantageous position relative to the political branches, where such direct involvement by potentially affected parties is unlikely to be available.[134] In addition, both Chayes and Fiss emphasized the instrumental value of party

130. *See* Chayes, *supra* note 10, at 1284.

131. *See id.*; Fiss, *supra* note 10, at 41–42.

132. *See* Molot, *supra* note 35, at 36 n.18 ("When Chayes and Fiss challenged Fuller's ideas on adjudication's limits, they embraced many—but not all—of Fuller's ideas on litigation's forms.").

133. *See* Chayes, *supra* note 10, at 1307–08; Fiss, *supra* note 10, at 14.

134. Chayes, *supra* note 10, at 1308.

participation via adversarial proceedings.[135] Because the parties want to win, they operate under an incentive to present their best and most complete case to the court. While maximizing the significance of party participation may no longer be a predominant goal of adjudication under the public law model, as is the case under Fuller's conception of the classic model, it nonetheless remains a goal. As a consequence, processes that foster or facilitate party participation should still be encouraged, particularly if their implementation does not adversely affect more prominent goals. This, in turn, has implications for the scope of the duty to decide in terms of the extent to which that duty is tied to the proofs and arguments of the parties.

5. Post-Public Law Models

Although the classic and public law models represent the dominant conceptions of adjudication, they do not individually or in combination capture all of what transpires in the modern judicial system. Just as Chayes demonstrated that the classic model could not describe institutional reform litigation, subsequent commentators have suggested that neither the classic nor public law models accurately capture certain types of litigation that have become prominent in recent decades.[136] In particular, mass tort and other similar forms of complex litigation do not fit well into either category. Such cases bear a strong superficial resemblance to the cases that triggered the development of the public law model. Indeed, some scholars and judges have suggested or at least acted on the implicit belief that the public law model provides an appropriate template for adjudication in this context.[137] But the similarities—particularly the "sprawling and amorphous"[138] character of the litigation—belie significant differences, which range from the typically private nature of the parties and harms to the largely retrospective orientation of the factual inquiry to the form of the relief sought, which is typically damages rather than an injunction.[139] Although mass

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135. *Id.* at 1308; Fiss, *supra* note 10, at 29–30.

136. *See, e.g.*, William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001) ("My premise in this Article is that just as the adversarial model failed to account for what courts were doing in fact, so too do these newer conceptions [i.e., the public law and managerial judging models] fail to explain much of what is now happening in complex private litigation."); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1016–18 (2004) (arguing that in practice much of what could be characterized as lawmaking in institutional reform litigation occurs not through reasoned application of principles generated by appellate courts but rather through a process of "transjudicial administration" in which remedies consented to in earlier, similar cases form the basis for remedial agreements in later cases).

137. *See, e.g.*, Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 414, 421–24 (1999).

138. Chayes, *supra* note 10, at 1302; *see also* Mullenix, *supra* note 137, at 414 (describing mass tort litigation as "sprawling [and] complex").

139. Linda Mullenix identifies seven respects in which the public law model does not fit mass tort litigation: (1) Mass tort litigation typically involves only private parties and private harms. (2) Mass tort litigation typically does not involve an attempt to reform a public or quasi-public institution. "Thus, very little mass tort litigation is directly invested with a public purpose." Mullenix, *supra* note 137, at 426. (3) The underlying claims are grounded in local law concerning the rights and duties of private

tort litigation appears to involve adjudication, in large measure it is characterized by an absence of adjudication. Such cases are almost inevitably channeled toward settlement, often through processes of negotiation that may be brokered by the presiding judge, but in a manner that involves comparatively little adjudication in the relatively narrow sense of this Article. Thus, despite its adjudicative veneer, the process is better described as "private legislation implemented through private administrative means but still sanctioned with a judicial imprimatur"[140] or as a "transactional" process that has "more in common with business deals than . . . with traditional adversarial litigation, legislative activity, or executive management."[141]

The implications of these developments for the formulation of an adjudicative duty are indirect. Those who have written about the emergence of this new form of litigation have avoided attempting to provide a normative justification for the judicial role in the resolution of these lawsuits.[142] Indeed, given that one of the more salient features of this litigation is the relative absence of adjudication, it is not clear that the prescriptive implications of such a theory would be significant. But the distinctive behavior that these cases lead judges to engage in may lead to a further weakening of the largely informal constraints that have traditionally operated to effect judicial compliance with the adjudicative duty. As Judith Resnick observes, the creation of discovery rights by the Federal Rules of Civil Procedure—which required greater judicial involvement in cases at an earlier stage than was historically the norm—coupled with the variations in the judicial role required in public law litigation outlined above, led judges to become more comfortable with (and thus more likely to engage in) behavior

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parties, as contrasted with constitutional law claims or claims grounded in other federal law. (4) Mass tort litigation has been dealt with under a considerably greater range of procedural mechanisms, such that "just as there is no paradigmatic mass tort litigation, there also is no paradigmatic method for resolving these cases." *Id.* at 428. Public law cases typically involve injunctive class actions or consent decrees. (5) While public law litigation typically involves similarly situated plaintiffs suffering an essentially common harm, mass tort plaintiffs involve differently situated plaintiffs with highly individualized harms. (6) Mass tort litigation typically does not require ongoing postdecision judicial involvement, because the settlement will typically be administered by the parties. (7) Mass tort litigation typically involves a suit for damages, while public law cases typically involve claims for equitable relief. *See id.* at 426–29. William Rubenstein offers a similar list:

> But in several key ways, complex private cases differ significantly from public cases. First, while the party structure may be complicated by subclasses with differing interests, the parties in these private cases are easily identifiable as plaintiffs or defendants. Second, liability is premised upon rather traditional notions of intent, fault, and causation. Thus, unlike in public law cases, the fact inquiry in complex private cases (when undertaken) tends to be more historical and conventionally adjudicative than public law cases. Furthermore, relief is thought to be compensatory. Finally, judicial involvement is not required beyond the entry of judgment, indeed, it is barely required before that.

Rubenstein, *supra* note 136, at 415.

140. Mullenix, *supra* note 137, at 431.

141. Rubenstein, *supra* note 136, at 372.

142. *See* Mullenix, *supra* note 137, at 424; Rubenstein, *supra* note 136, at 438.

that is more proactive than called for under the classic model.[143] In similar fashion, the entirely new dimensions of the judicial role utilized to shepherd mass tort cases toward resolution might lead judges to stray still farther. To the extent any of this "mission creep" might affect the judicial tendency to adhere to the adjudicative duty, the emergence of yet another form of litigation only underscores the need to clarify precisely what it is that we expect of judges in deciding cases and claims.

D. JUDICIAL CANDOR

For the most part, the models of adjudication discussed above do not engage the relationship between the processes of decision they describe or advocate and the manner in which those decisions are justified by the courts charged with making them. This is a significant omission. Without a public statement of the reasons for a court's decision, it is difficult for the public to assess whether that decision was reached in proper fashion, including whether it was in accordance with an adjudicative duty. What is more, it might be the case that justification serves not merely the purpose of facilitating public monitoring, but instead constitutes an important part of the decisional process itself. In either case, it is critical to the task of defining the adjudicative duty to go beyond the question of whether a court must elaborate on the reasons for its decision to consider the appropriate depth and extent of that elaboration.

Central to this inquiry is the topic of judicial candor, which concerns the extent to which judicial opinions can and should fully and accurately set forth the reasons for a court's decision.[144] An obligation of candor has obvious intuitive appeal, and the intellectual justifications for such a duty likewise spring readily to mind.[145] On a moral plane, judicial failures to be completely

143. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); *see also* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 112 (1995) (arguing that the tools of managerial judging "effectively evade the checks on judicial power that the framers created").

144. As Judge Guido Calabresi observes, the topic of candor is vast and underlies a great many significant legal debates. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172 (1982). Thus it makes frequent, though often largely implicit, appearances through a broad range of legal scholarship. There is, however, a small body of scholarship focusing directly on the issue. *See generally* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Scott C. Idleman, *A Prudential Theory of Judicial Candor,* 73 TEX. L. REV. 1307 (1995); Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979); David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509 (2001); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) [hereinafter D. Shapiro]; Shapiro, *supra* note 32; Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

145. Scott Idleman catalogues nine potential justifications for a candor requirement: (1) to enhance accountability; (2) to provide a limitation on judicial power; (3) to create incentives for greater care in decisionmaking and thereby engender greater quality of decision; (4) to enhance authoritativeness; (5) to fulfill an obligation to justify a court's decision to the parties before it; (6) to provide guidance to those who need to structure their affairs in accordance with legal norms; (7) to provide a means of judicial catharsis; (8) to foster the long-term development of the law; and (9) to fulfill moral obligation. *See* Idleman, *supra* note 144, at 1335–73.

forthcoming strike us as inappropriate simply because such behavior is dishonest. We regard lying as bad in the abstract and perhaps particularly troubling when engaged in by the arm of government charged with pronouncing and applying the law impartially.[146] There are instrumental justifications as well. Courts—especially appellate courts—operate largely outside the public eye. Because nearly all of the decisional process is hidden from view, the judiciary's legitimacy and authority depend largely on its ability to persuasively explain and justify its decisions.[147] The process of explanation and justification, of course, occurs largely through the issuance of written opinions, which provide the almost exclusive basis for holding judges accountable and assessing their performance in general.[148] Only when the reasons provided by a court are those that actually motivated its decision can the public properly debate the appropriateness of the decision, legislatures react to it, and private actors structure their affairs to comply with it. If the court's true reasons remain hidden, subsequent litigants may find that their case is not resolved according to the criteria apparently relied on in the prior case but instead according to some hidden rule.[149] For similar reasons, an effective candor requirement would operate to discipline judges. Judges who must disclose the actual reasons for their decisions are more likely to work to confine their decisional process to the consideration of acceptable criteria,[150] including those relied upon by past courts.[151]

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146. *See* D. Shapiro, *supra* note 144, at 736–37 ("The case for honesty in all human relations, I believe, rests in part on the importance of treating others with respect: lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worth of respect, than the speaker."); Zeppos, *supra* note 144, at 401–02 ("[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." (citations omitted)).

147. *See* D. Shapiro, *supra* note 144, at 737 ("A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) ("One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.").

148. *See, e.g.*, ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 4 (1941) (observing that written judicial opinions "serve[] as a check upon the judiciary under our system of checks and balances in a polity in which so many legal questions are political and so many political questions are legal").

149. *See* POSNER, *supra* note 38, at 147 ("Prolixity and lack of candor are not mere inelegances in judicial opinions. They increase the time required for reading an opinion . . . [a]nd they reduce the opinion's usefulness as a guide to what the judges are likely to do in future cases.").

150. Candid judges are more likely to act based on the reasons they or their predecessors have provided for action in the past, because the very idea of precedent means those reasons constitute acceptable criteria for acting. This is, I realize, a loose conception of precedent. While I concede that the question of whether the system of precedent ought to be so conceived is open to debate, *see* John B. Borger & Chad M. Oldfather, Anastasoff v. United States *and the Debate Over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 908–10 (2001), I stand by Llewellyn in maintaining that all the reasons provided by a prior court are at least potentially precedential in a later case if the later court elects to use them in that way. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 66–67 (3d ed. 1960).

In turn, this means that consumers of judicial opinions will be better able to predict what the court

The mechanism breaks down if the reasons provided by a court do not track the actual reasons for its decisions. The breakdown could happen in two ways. Most dramatically, the justifications provided for a single decision could be so self-evidently inappropriate or inadequate as to call into question, in dramatic fashion, the court's credibility as a neutral and competent interpreter of the law.[152] More likely, the gradual accumulation of apparent differences between the way a court resolves cases and the reasons it offers in support of those resolutions could lead it to be discredited over time. In either case, a court that is not candid will come to be viewed as a court that is not credible.[153] A court that is not regarded as credible, in turn, runs a considerable risk of becoming a court that is not regarded as legitimate.[154]

For these reasons, the generally accepted yet rarely articulated position is that courts should strive to be universally candid.[155] Indeed, perhaps the most common critique found in legal scholarship is that the court whose work is under consideration has failed to be appropriately forthcoming about what it aims to accomplish.[156] Yet, despite the intuitive appeal of candor in judging, even a moment's reflection reveals that, whatever its desirability as a matter of theory, full candor is unattainable in practice. A judge can no better explain all the reasons behind a decision than I can fully explain why I have chosen to write this sentence using these words in this order.[157] Within broad parameters

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will do with the next case to come before it. Predictability is the most commonly offered, if not the most fundamental, justification for the system of precedent. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).

151. The magnitude, if not the existence, of these effects on predictability has been questioned. If one effect of more candid decisionmaking would be to enlarge the category of permissible bases for decision, this effect would potentially decrease predictability for the same reasons that standards are generally less predictable in application than rules. *See* Zeppos, *supra* note 144, at 402–03.

152. Justice Stevens suggested this was the case with the Supreme Court's decision in *Bush v. Gore*. *See* 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.").

153. *See* POSNER, supra note 38, at 148–49.

154. "It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law." *Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

155. *See* Idleman, *supra* note 144, at 1309 ("The conventional wisdom, to be sure, is apparently that candor is an ideal toward which judges should almost always aspire and that any exceptions to this rule are few and far between.").

156. *See* D. Shapiro, *supra* note 144, at 731 ("A typical law review note, or even a leading article, will address an important judicial decision, or series of decisions, in an effort to show that the court has misconceived the problem, the solution, or both. Implicit in the analysis is a hint that whoever wrote the opinion was too inept, or perhaps too devious, to reveal what was really at stake.").

157. *See* Frank, *supra* note 32, at 653–55 (characterizing judicial opinions as post hoc justifications of decisions based on hunches resulting from "[t]he effect of innumerable stimuli on what is loosely termed 'the personality of the judge'"); Leflar, *supra* note 144, at 723 ("The failure of judicial opinions to set out the real reasons for a court's decision is seldom deliberate coverup. A good result (or a bad one) may be based more on judicial intuition, on a judge's sense of what fits in with his standards and ideals, than on thorough analysis."). Dan Simon suggests that "the making of a good decision is convoluted in that it entails an extensive series of constructing and testing of a large number of combinations of legal arguments. Even if a full report of this process were possible, it would be

such explanation is possible, but in its particulars the decision to take one of a multitude of available paths to roughly the same location defies explanation. What is more, even if I could formulate reasons for my choice of words, the list would likely be too long and complex to justify the endeavor. The problem remains even if the obligation to be candid does not extend to such an extreme. As Nicholas Zeppos puts it:

> [T]he complexity of the [judging] process may also belie the notion that the judge can separate out the "false" reasons for a decision . . . from the "real" reasons . . . . As much as any other product of human decisionmaking, the judge's work is subject to the complex ways in which the human mind orders, explains, and processes information.[158]

As the discussion suggests, a candor obligation has two potential dimensions. The first is that of subjective candor. A judge fails to be candid in this sense when she consciously provides false or misleading justifications for her conclusions[159] or, perhaps, when she is indifferent to whether her justifications will mislead.[160] The primary focus is on the judge's state of mind. The second dimension is that of objective candor. Under an objective definition, a candor obligation might extend to include not only judicial self-deception, but any failure to measure up "to one or more external criteria of assessment such as truth, logical validity, or factual or empirical accuracy."[161] Here, a judge might be charged with a failure to be candid that arises entirely from his ignorance of, say, the falsity of one of the grounds on which he has justified a decision, even if he has acted entirely in good faith.[162] Thus objective failures of candor include the judge's "ignorance or incompetence."[163]

Having noted the dual dimensions of a candor obligation, commentators typically proceed to focus their analyses on the subjective component.[164] To a large degree, this is because subjective failures are what most observers find troubling.[165] In addition, there are the perceived difficulties involved in policing and remedying violations of an objective candor requirement: not only determin-

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unmanageably lengthy, very confusing, and thus quite useless." Simon, *supra* note 32, at 35 (citation omitted).

158. Zeppos, *supra* note 144, at 407.

159. *See* Idleman, *supra* note 144, at 1317–18. There are, not surprisingly, subtle variances in the way different commentators define and distinguish these concepts. Altman, for example, uses the concepts of candor and introspection to capture a roughly similar distinction. *See* Altman, *supra* note 144, at 297 ("Perhaps judges should be candid but not introspective. By candid, I mean never being consciously duplicitous. Candid opinions do not offer reasons judges know do not persuade them. By introspective, I mean critically examining one's mental states to avoid any self-deception or error.").

160. *See* D. Shapiro, *supra* note 144, at 733.

161. Idleman, *supra* note 144, at 1317.

162. *Id.* at 1317–18.

163. *Id.* at 1318.

164. *Id.* at 1316–21.

165. *Id.* at 1318.

ing what judges do not know, but getting them to recognize that they lack the relevant knowledge.[166] Even for those judges willing to seek the greater self-awareness necessary to reduce violations of an objective candor requirement, the payoff may not be worth the considerable effort necessary.[167] What is more, some have suggested that the result of greater judicial self-awareness might be, from a systemic perspective, undesirable. Scott Altman argues that if judges were to hold accurate beliefs about the validity of theories of neutral decisionmaking, the result would be that they would feel less constrained in their decisionmaking.[168] That is, he contends that even though legal standards do not provide the level of constraint on their decisions that most judges believe they do, the mere fact that most judges hold such a belief renders them more constrained than they would feel if greater self-awareness led them to appropriate conclusions about the lack of constraint effected by law.[169]

Nor does subjective candor warrant a universal obligation. Even David Shapiro, who characterizes candor as "the sine qua non of all other restraints on abuse of judicial power,"[170] concedes that candor is not "an unshakable rule of judicial behavior."[171] Commentators have identified a number of situations in which complete candor might not be desirable.[172] While each of these examples is contestable, both in terms of its basic validity and its scope, the key point is that no one who has focused on the issue of judicial candor has failed to conclude that there are at least some occasions on which a lack of candor may be excused. Thus, to focus on a few examples, sometimes the use of absolute language to describe a legal doctrine or justification may be appropriate even if not completely accurate, simply because it functions to neutralize potential slippery-slope problems. Calabresi uses the example of state regulation of religion:

> If we admit that the state can regulate religion, we are psychologically, if not logically, more likely to allow such regulation than if we say that there can be no regulation of religion and then from time to time define behavior by some cults as not religious and hence subject to regulation.[173]

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166. *Id.* at 1319.

167. *See* Zeppos, *supra* note 144, at 411.

168. *See* Altman, *supra* note 144, at 298–99.

169. *See id*. at 304.

170. D. Shapiro, *supra* note 144, at 737.

171. *Id.* at 738.

172. The exceptions discussed here do not constitute a comprehensive list of those identified in the commentary. For additional exceptions, see Idleman, *supra* note 144, at 1382–88; D. Shapiro, *supra* note 144, at 739–50.

173. CALABRESI, *supra* note 144, at 173. Prohibitions on the torture of criminal suspects present another example:

> This family of behaviors is difficult to regulate. It consists of acts we want committed so rarely, if ever, that we dare not endorse them explicitly under any circumstances; yet, we may quietly hope that a breach of the norms against them will occur if the benefits are extraordinary and the costs containable.

Or a case may present a conflict between fundamental values, in which instance full candor would require a court to acknowledge that it is sacrificing one of those values for the sake of the other. If recognition of this sacrifice "would be too destructive for the particular society to accept,"[174] then something less than complete candor would be acceptable, according to Calabresi, simply because we place a lesser premium on candor as compared to the other values at stake in the case.[175] There may also be institutional or jurisprudential reasons for a lack of complete candor, including for example the need for judges on multiple-member courts to accommodate the views of their colleagues[176] and the need to work within the system of precedent.[177] Indeed, Martin Shapiro has argued that the very nature of our system of precedent makes deceit a central feature of the act of judging. As he put it, courts "must always deny their authority to make law, even when they are making law. One may call this justificatory history, but I call it lying. Court and judges always lie. Lying is the nature of the judicial activity."[178]

My intent is not to offer another perspective on the relative flexibility of the candor obligation. Instead, it is to note for present purposes that candor is a highly desirable even if not unconditional feature of legitimate adjudication. As David Shapiro points out, "even arguments for occasional deception depend for their effectiveness on a background of truthfulness, for the deception loses its point if it is not believed."[179] It is also appropriate to note that the considerations making candor desirable likewise suggest that courts generally ought to provide a public statement of reasons for their decisions. It is the unification of this strand of theory with that embodied in the literature on models of adjudication that is most significant for purposes of formulating a duty to decide.

III. TRACING THE CONTOURS OF THE ADJUDICATIVE DUTY

A. A FRAMEWORK FOR ANALYSIS

The goals of this Part are to draw on adjudicative theory to bring the questions raised in Part I into sharper focus and to trace the contours of the adjudicative duty as precisely as possible. This turns out to be a slippery undertaking. Consequently, some further definition is appropriate.

Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227, 236–37 (2001). Even if one accepts this as an appropriate basis for departing from the norm of candor, its use must be reserved for exceptional circumstances. As Cardozo warned, "[g]reat maxims, if they be violated with impunity, are honored often with lip-service, which passes easily into irreverence." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 93–94 (1921).

174. CALABRESI, *supra* note 144, at 172.

175. *Id.* at 172–73.

176. *See* Idleman, *supra* note 144, at 1384–85; D. Shapiro, *supra* note 144, at 742–43. Indeed, in such circumstances there is a sense that notions such as candor and sincerity are inapplicable. *See* John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 487–88 (2001).

177. *See* Idleman, *supra* note 144, at 1382–83; D. Shapiro, *supra* note 144, at 739.

178. Shapiro, *supra* note 32, at 156.

179. D. Shapiro, *supra* note 144, at 737.

1. Cases and Claims

The first distinction I want to make is between a "case" and "claims." By "case" I mean the lawsuit between the parties at a broad level, without regard to its legal subcomponents. Thus resolution of a case might require only a determination that the defendant in a tort suit must compensate the plaintiff. By "claims" I mean any claim, issue, or argument that, if considered by the court and resolved in a particular way, would have a material effect on the disposition of the case. In a tort suit, claims would include not merely the plaintiff's asserted theories of liability—negligence, strict liability, and so on—but could also extend to arguments about the admissibility of expert testimony, the applicability of evidentiary privileges, and the like. Note that this is an inherently fluid definition. The defendant might, for example, challenge liability as a matter of law, dispute the admissibility of plaintiff's expert testimony, and assert that plaintiff's contributory negligence bars recovery. If the court agrees with the argument that plaintiff has failed to state a claim as a matter of law, then the remaining arguments are no longer "claims" for present purposes, simply because their resolution can have no effect on the ultimate disposition of the case.

2. Duties and Preferences

I also want to draw a rough distinction between a "duty" and a "preference." I will use the word duty in its sense as a correlative of a right.[180] Thus a court is under a duty to do that which the parties have a right to expect of it, just as everyone has the right to expect others to act with reasonable care. In this sense, a duty is a requirement with no, or at least very few, exceptions. I will use the word preference, in contrast, to refer to the relative strength of an obligation to do things that are desirable in the abstract, but that are not categorically required. Under this usage, a preference may be foregone when it conflicts with a duty, a stronger preference, or perhaps even prudential concerns that render compliance with the preference inappropriate under the circumstances.

3. Scope, Responsiveness, and Elaboration

The core question this Article seeks to address concerns whether and to what extent a court presented with a case involving otherwise justiciable claims operates under a duty to adjudicate that case and the claims presented therein. To this point, those questions have remained somewhat imprecise. If there is a duty to adjudicate (or even a mere preference for adjudication), a host of subsidiary questions follow. What do we mean by "adjudication"? What, in

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180. *See* BLACK'S LAW DICTIONARY 453 (5th ed. 1979) (defining "duty" as "the correlative of *right*" and noting that "wherever there exists a right in any person, there also rests a corresponding duty upon some other person or upon all persons generally"); WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 36–38 (Walter Wheeler Cook ed., 1919) (conceiving of "rights" and "duties" as correlatives).

other words, are the permissible ways for a court to resolve the claims put before it? Are some of those ways preferable to others? Can a court simply declare a winner, or must it provide some explanation for the result it reached? Must it select from the grounds for resolution offered by the parties, or is it free to base its decision on different grounds? These questions lead to still other questions, threatening to imperil the project in a definitional muddle before it gets underway. What is more, the answers to many of these questions may depend on the nature of the claim involved, as well as the court to which that claim is presented. We might, for example, expect courts to deal with fact-intensive questions differently than pure questions of law. And not only are the questions before trial courts often quite distinct from those presented to courts of last resort, so too are the functions of those respective courts distinct. As a consequence, even when presented with the same claim in the same case, we might want a district court judge (whose focus ought to be more on dispute resolution) to adjudicate in a different manner than a justice of a supreme court (who must place more emphasis on the formulation of an appropriate legal norm).[181]

Some simplification is clearly in order. The discussion in Parts I and II was largely indifferent to the distinctions just mentioned, in part because most models of adjudication tend to recognize such distinctions only implicitly, if at all. Part III, however, will focus on claims arising before intermediate appellate courts, which present the questions in the cleanest fashion.[182] Such courts do not typically enjoy the express ability to refuse to consider the justiciable cases brought before them.[183] In addition, the claims asserted in those cases are characteristically discrete and well defined. As a result, it is realistic to assume that an adjudicative duty, whatever its content might be, applies to such courts. It is also possible, because the appeals process requires the parties to isolate and identify the bases on which they seek relief, to specify the claims at issue and assess the court's obligations with respect to them. I do not mean to suggest that the analysis that follows cannot be extended beyond this context, though I do

181. *See* Solum, *supra* note 33, at 241–42 (recognizing the need to be mindful of such distinctions in the design and implementation of procedural theories); *cf*. Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 470–71 (1998) (observing that factors of institutional design and individual incentives may combine to result in different decisions at the trial and appellate levels).

182. A focus on appellate courts does introduce one potential complication, namely that the right to appeal can itself be called into question. *See, e.g.*, Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985). But given that we routinely impose constraints and grant rights within the context of appeals even without an underlying right, it seems appropriate to conclude that we would want to impose the adjudicative duty in the context of such appeals as we choose to allow.

183. Some have suggested that, at least with respect to the federal courts of appeal, this lack of discretion is more theoretical than real. *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275 (1996) (arguing that, despite an apparent statutory obligation to the contrary, "the circuit courts have become certiorari courts").

mean to suggest that context is more important than prior analyses have generally recognized. All of what follows can be applied to the trial context, but because the functions of trial courts differ from those of appellate courts, the implications of the analysis will necessarily differ. The discussion adverts to some of these possible differences, but it does not purport to be comprehensive.

Consider an appeal in which the appellant raises three typical claims: (1) the evidence was insufficient to support the verdict against him, (2) certain evidence was erroneously admitted or excluded, and (3) the jury was improperly instructed on some point of law. The appellant presumably believes that a ruling in his favor on any of these claims entitles it to relief. Thus the common understanding is that the court's responsibility is to contend with these issues in such a way that at the end of its decisional process it has resolved all the claims, either ending the case or remanding to the trial court for further proceedings. The court might, for example, reject all of the appellant's claims, in which case the litigation would end. Or it might agree with the appellant that the evidence was insufficient to support the verdict, in which instance it would only be necessary to address the second and third issues if the remedy were a remand for a new trial. Almost certainly the court will justify its decision by issuing an opinion, which will specify the appellant's claims, identify the pertinent authority, analyze the claims in light of that authority, and set forth the court's conclusions regarding the validity of those claims.

But the fact that appellate courts take such actions in most of the cases that come before them does not mean, of course, that the courts are obligated to do so. Indeed, one can imagine an entire range of obligations that might be characterized as falling within a duty to adjudicate, varying according to the answers to the questions posed at the outset of this discussion. And the use of the "range" metaphor, which implies a unidimensional continuum of potential obligations, may be somewhat misleading, given the multiple, often conflicting values, norms, and ends that adjudication is designed to serve.[184] In recognition of this, the remainder of Part III.A identifies several dimensions of a potential adjudicative duty, which can themselves be classified as questions of *scope*, questions of *responsiveness*, and questions of *elaboration*. These are not independent questions. As the analysis will reveal, there is a considerable degree of interrelation among them. It is useful nonetheless to focus on each separately, because each implicates a distinct set of concerns.

In terms of decisional *scope*, two options exist, in addition to the possibility that courts operate under no duty at all. These options correspond to the distinction between cases and claims drawn above. Thus, at its most fundamental, an adjudicative duty might require only that a court resolve the case. A court would satisfy such a duty simply by selecting a winner in the case before it. Since at this point we are only concerned with scope, no particular methodology of decision is implied. Alternatively, an adjudicative duty might extend to

184. *See supra* text accompanying notes 47–51.

include resolution of the claims presented. Again, the manner in which that decision is reached presents a separate question.

Responsiveness refers to the degree to which the decision is based on and proceeds from the arguments and information presented to the court by the parties.[185] Three possibilities arise. A requirement of *strong responsiveness* would bind the court as closely as possible to the content and contours of the parties' arguments. The complete lack of a responsiveness requirement, which I will call *nonresponsiveness*, would not obligate the court to confine its analysis to the parties' arguments or even to consider them at all. A third possibility is *weak responsiveness*, which would require the court to consider and respond to the parties' arguments, but not to confine the raw materials of its decisional process to those arguments.

Elaboration concerns the extent to which, and candor with which, the court provides reasons for its decision. The obvious endpoints of the measure are full elaboration, pursuant to which the court would be obligated to state as fully as possible the reasons behind its decision, and no elaboration, pursuant to which only the announcement of a result would be required. Here, too, a middle range exists, although the range of alternatives is perhaps easier to appreciate conceptually than define precisely.[186] The forms of elaboration can vary, as well: from oral, off-the-record statements to a written, published opinion. *Candor* refers to the extent to which the reasons the court provides are the "real" reasons for its decision, rather than a subterfuge.[187] There are also stopping points between a full candor obligation and no candor obligation, although once again precise definition of any such point is a task not worth the effort for present purposes.

B. TRACING THE CONTOURS OF THE ADJUDICATIVE DUTY

Having developed a framework for analysis, Part III.B returns to the conceptions of the adjudicative process discussed in Part II. The analysis addresses questions of scope, responsiveness, and elaboration in turn, with the goal of exploring the models' implications for each dimension of the adjudicative duty. As suggested in Part II.C.4, the analysis reveals that the classic and public law conceptions of adjudication are largely consistent with respect to each dimen-

185. I borrow the concept of responsiveness from Melvin Eisenberg, who uses it to characterize Fuller's model as calling for strong responsiveness. *See* Eisenberg, *supra* note 57, at 411–14.

186. Here is Judge Coffin's attempt at delimiting points along a similar spectrum (which he calls "formality"):

> In the continuum of increasing formality, decisions may be ranked as follows: a one-sentence or several-sentence order affirming under a rule or a cited authority; a sentence indicating adoption of the opinion of the trial court, sometimes with a few added comments; a *per curiam* opinion (i.e., unsigned, without indication of individual authorship) of a paragraph or two, usually unpublished; a full opinion, but so fact-bound and lacking in precedent that it is not to be published and is often unsigned; a full opinion, signed, and to be published.

FRANK M. COFFIN, ON APPEAL 165 (1994).

187. *See supra* Part II.D.

sion. Specifically, I argue that intermediate appellate courts have a duty to adjudicate the claims raised by the parties in a weakly responsive fashion, coupled with a preference for strong responsiveness and full, candid elaboration. Although I advocate a specific position, it is perhaps more important to recognize that while the normative implications of the theories considered for the content of an adjudicative duty are not consistent in all their particulars, the general implications of theory turn out to be both broadly consistent and compatible.

1. Scope

As has been frequently noted, the dispute resolution function of courts at its most fundamental requires only that courts decide at the level of the case.[188] Both the classic and public law models clearly rely on this assumption; neither model allows the courts to decline to select a winner.[189] The more interesting question concerns whether courts must also decide the claims presented. Resolution at the level of the case does not necessarily decide the dispute as the parties conceive it. A court that declares a winner following the flip of a coin could bring a lawsuit to a final conclusion by doing so, and if that method of decision were to be sanctioned by law, it could preclude the parties from ever raising the matter again. Remaining unresolved, however, would be the precise disagreement between the parties. In other words, Party A might know that Party B was ordered to pay damages, but it would not have an authoritative answer to its claim that Party B breached the contract between them. This might not prove to be enough. Finality is a necessary but not sufficient condition to the legitimacy of adjudication.[190] Thus any adjudicative system that values party participation must require courts to confront the claims and not merely the case. This is so for the reasons articulated by Fuller, and it is inherent in the argument for strong responsiveness. If courts are not required to attend to the proofs and arguments of the parties and otherwise engage the dispute at the level of the claims asserted, the decisional process is likely in at least some instances to become so untethered to the parties' participation as to render it meaningless. This circumstance, for Fuller, would render the entire process "a sham."[191] But note as well that a requirement that adjudication take place at the level of claims does not

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188. *See supra* text accompanying notes 58–59.

189. Fuller and Eisenberg can be taken to have assumed a duty to decide at the level of the case because, as the remainder of this section demonstrates, their analyses also call for the imposition of a claim. Both Chayes and Fiss expressly articulate the assumption in the context of discussing the institutional characteristics of courts. *See* Chayes, *supra* note 10, at 1308 ("Unlike an administrative bureaucracy or a legislature, the judiciary *must* respond to the complaints of the aggrieved."); Fiss, *supra* note 10, at 13 ("Judges are not in control of their agenda, but are compelled to confront grievances or claims they would otherwise prefer to ignore.").

190. "This finality of adjudication, indeed, is one of its prime attractions as a method of social control. It is a means of disposing of controversies definitively—providing, of course, that the disposition proves to be acceptable enough to be dispository." HART & SACKS, *supra* note 16, at 642.

191. Fuller, *supra* note 9, at 388.

obligate the court to accept the parties' characterization of their dispute. Strong responsiveness implies a duty to adjudicate claims, but the implication does not run in the other direction.

A view of adjudication as representation likewise requires an adjudicative duty that extends to claims, because without such an obligation judicial lawmaking would be shorn of its democratic characteristics and thus less legitimate.[192] In this sense, it stands contrary to most views of adjudication that elevate the lawmaking function over the dispute resolution function.[193] Under the traditional conception of the lawmaking function, responsiveness to the parties' characterization of their dispute is at best incidental to the fulfillment of the broader goal of formulating appropriate legal standards. According to this view, the lawmaking function, standing alone, would be best served if there were no adjudicative duty at all, in which case questions of scope would be a nonissue. Some cases simply do not present the "right" set of facts upon which to base legal standards that will be binding in future cases, and consequently a court created solely or primarily for the creation of law would be well advised to refuse to decide those cases if it could. Such courts exist, of course, in the form of nearly all the supreme courts in the United States.[194] But even those supreme courts generally limit themselves to resolution of the claims presented by the parties.[195] This self-limitation can be seen as a manifestation of the logic underlying the design of the judicial mechanism, which recognizes the value of engaging with specific disputes. After all, specific disputes define the type of reasoning and decisionmaking a court may partake in.[196] By extension, it is appropriate for courts to engage with the specific claims presented, since those claims represent the parties' conceptualization of the specific dispute they bring to the court and thus stand as strong evidence of the legally significant facts that ought to anchor the court's reasoning. Of course, courts further down the judicial hierarchy have either express or implied dispute resolution responsibilities, which provide independent justification for a claims-centered duty.

This analysis holds even under the public law model. Because a court operating under that model is charged with a proactive role and has a responsibility to factor a broad set of interests into its decision, it may be appropriate for

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192. *See supra* Part II.A.2.

193. *See supra* notes 48–50 and accompanying text.

194. In three-tiered judicial systems, "the supreme court is concerned primarily with the development of the law, while the intermediate court is concerned primarily with the application of existing law." DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 26 (1994).

195. It is noteworthy when they do not. *See, e.g.*, Albert Tate, Jr., *Sua Sponte Consideration on Appeal*, 9 TRIAL JUDGES' J. 68 (1970) (discussing the "notable" instances in which high courts have departed from this paradigm).

196. *See, e.g.*, KRONMAN, *supra* note 24, at 319 ("Judges are disciplined by the specificity of the cases they must decide, and this discipline not only puts a limit on the speculative theorizing in which they may engage, but is also bound to remind them, as they go about their work, of the value of deliberative wisdom—the wisdom that consists in a knowledge of particulars and that no general theory can provide.").

the court to conclude that the parties have raised the wrong claims and to base its decision on a distinct set of concerns. This would not, however, be inconsistent with an obligation to decide the parties' claims, at least insofar as rejecting those claims in favor of the court's characterization of the dispute constitutes an appropriate form of deciding the claims (as I argue below). Moreover, from a systemic perspective, there is a lawmaking benefit to requiring the court to engage with the parties' claims in the sense of attending to the proofs and arguments that compose those claims—even if it ultimately rejects them—rather than resolving the case in free-form fashion without giving meaningful consideration to the parties' input. This benefit stems both from the benefit of having courts engage with specific disputes[197] and from the fact that doing so provides some information about what the law is not—and, as a result, what the law is. These arguments are even stronger in the appellate context. Because appellate courts are extremely limited in their capacity to gather nonlegal information about a case other than that presented by the parties,[198] and in any event are generally restricted to basing their decision on the record created before the trial court,[199] there is more reason to suggest that appellate courts should decide the claims presented.[200] Not only are such courts comparatively ill-suited to expand the representational framework, but the trial court will presumably already have done so if appropriate. Thus the difference between an appeal under the public law versus classic model will be considerably less than that between the same cases at the trial level.[201]

It bears emphasis that the present discussion is concerned only with the scope of adjudication, not with the means or products of the process. While it may not be possible to completely separate these features, it is appropriate to suggest that we want courts to engage with the claims as they are characterized by the parties regardless of how the courts ultimately use those characterizations, if at all. The more information a court takes into account in its process of making law, the better the law is likely to be. In sum, true fulfillment of the dispute resolution function requires that the scope of the adjudicative duty extend to the claims presented. A duty of such scope is necessary to ensure meaningful party participation. While such a duty might be inconsistent with some views of a

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197. *Id.*

198. For a general discussion of the factfinding capabilities of appellate courts, see Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437 (2004).

199. *See* ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 175 (2d ed. 1989).

200. This is not to suggest that there is no difference at the appellate stage between traditional cases and public law cases. *See, e.g.*, CARRINGTON ET AL., *supra* note 4, at 6 ("A growing breed of appeals is not of the classic, bipolar mold, with A suing B for damages, divorce, or disseisin, but is polycentric, affecting rights of large groups of people, with many possible outcomes, and requiring assimilation of complex data.").

201. I do not mean to imply that a claims-centered duty does not apply at the trial court level, only that the arguments are even stronger at the appellate level, which is my focus here. The specifics of the adjudicative duty may be different at different levels of the judicial hierarchy. *See supra* Part III.A.3. However, this is not one of the areas of difference.

pure lawmaking body, it is perfectly consistent with, and may even enhance the operation of, a court that must fulfill both the lawmaking and dispute resolution functions.

2. Responsiveness

There are two realistic options for the responsiveness component of an adjudicative duty.[202] Strong responsiveness would confine a court as closely as possible to the proofs and arguments of the parties. A strongly responsive court would maintain a wholly reactive posture, addressing disputes on the terms suggested by the parties and resolving them only by resort to the materials offered by the parties to support their positions. Weak responsiveness, in contrast, would obligate the court 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 would 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.

Of course, these are not distinct categories in the sense that a decision is either one or the other (or neither). A decision could be based partially on considerations offered by the parties, thus exceeding the requirements of weak responsiveness while not qualifying as strongly responsive. The point is to determine whether one or the other ought to serve as a minimum component of adjudication. As the remainder of this Part argues, the practical and theoretical underpinnings of the adjudicative process support the *imposition* of a duty to be weakly responsive, but only a *preference* for strong responsiveness.

a. The Case Against a Duty of Strong Responsiveness. On initial consideration, strong responsiveness seems essential to fulfillment of the dispute resolution function, for the same reasons that dispute resolution requires a duty that extends to the claims presented.[203] Only if a court bases its decision on the parties' proofs and arguments can the court truly be characterized as resolving the parties' dispute in a legitimate fashion.[204] But further consideration reveals cracks in this analysis. The parties might simply misconceive the nature of their dispute. A tort claim does not become a contract claim simply because the parties have decided to discuss it as if it were, and it would make no sense for a court to attempt to resolve the claim using what it has concluded is the wrong law. Less dramatically, but more likely, is a dispute in which, as Anthony Kronman puts it, "the claims which compete for judicial endorsement

202. Earlier I identified nonresponsiveness as a possible third option. *See supra* text accompanying note 185. Because nonresponsiveness would place no obligations on a court, it is inconsistent with the imposition of a duty, and thus not discussed in this section.

203. *See supra* text accompanying notes 188–190.

204. *See* Eisenberg, *supra* note 57, at 413.

cannot . . . be commensurated without recharacterizing them in a way that alters their essential meaning for the parties involved."[205] If the parties' arguments cannot be assessed under a common unit of comparison, the court must necessarily adopt one frame of reference and thereby leave at least one of the parties with the feeling that the decision is not strongly responsive. Indeed, as Fuller recognized, even when the court and the parties are on the same conceptual page, it is inevitable that their understandings of the case will not be fully coextensive.[206] These instances may be relatively rare, but they surely exist. Thus even dispute resolution can support only a preference for strong responsiveness.

The same holds true with respect to the lawmaking function. As Eisenberg recognizes, strong responsiveness stands in tension with any view of the lawmaking function that calls upon courts to generate rules to govern similar disputes in the future.[207] The public law model forsakes strong responsiveness for similar reasons. This is so whether the model is viewed to advocate elevating the lawmaking function or public values over dispute resolution, or simply taken to stand for the need to take a broader array of interests into account in certain types of disputes. Whatever the governing standard, there remains the possibility of gaps between the parties' interests and the universe of interests potentially affected by the lawsuit's resolution. This possibility requires a shift in emphasis: from strong responsiveness to the parties' precise claims to generation of legal standards that are responsive to this broader community of needs.[208]

Of course, perhaps the most significant aspect of adjudication as representation for present purposes is that it provides an account of the lawmaking function that calls for strong responsiveness. Peters recognizes the tensions just discussed, but counsels in favor of judicial minimalism as the appropriate solution. Thus courts should reach issues only when necessary to resolve the case and should tailor their decisions as closely to the facts of the case as possible.[209] Only by operating in this fashion, Peters argues, can courts maintain the connection between the litigants' proofs and arguments and the resulting decisions. Without this connection, litigants cannot serve as interest representatives for those who will be bound by the decisions in the future.

But minimalism only partially addresses the critiques offered by public law theory. A court could avoid unnecessarily affecting the rights and interests of nonparties by tailoring its decision as narrowly as possible to the precise dispute before it,[210] but the public law model suggests that often such a disposition

205. KRONMAN, *supra* note 24, at 340.

206. *See supra* text accompanying notes 61–62.

207. *See supra* text accompanying notes 76–78.

208. *See* Eisenberg, *supra* note 57, at 427–28 (discussing the relationship between the Fuller and public law models of adjudication).

209. *See* Peters, *supra* note 31, at 417.

210. *See supra* text accompanying note 209.

would be impractical if not impossible. If, for example, resolution of the lawsuit requires a court to adjudicate the appropriateness of the acts of some government institution, such as a school district or prison system, it will necessarily affect those who must deal with that institution even if they are not parties to the case. The way out of this dilemma, I argue in the next section, is not reliance on minimalism, but weak responsiveness.

Strong responsiveness also stands in tension with a candor obligation, in that a court consciously working toward strong responsiveness faces incentives to avoid candor in both the subjective and objective senses. As to subjective candor, if certain factors are deemed appropriate bases for decision (that is, those presented by the parties), and all others are not, then a court is likely to describe its decision in terms of the permitted factors even if they do not constitute the actual grounds of decision.[211] In its generic sense, a requirement of subjective candor simply requires that the publicly announced reasons for a court's decision correspond with the "true" reasons for the decision, at least to the extent such correspondence is possible. Standing alone, such a requirement places no restrictions on the proper bases for decision beyond the more general requirement that, loosely speaking, they be legally appropriate.[212] When coupled with a requirement of strong responsiveness, however, a subjective candor requirement places a potentially large range of otherwise permissible grounds for decision off-limits, because the proper grounds for decision now include only those offered by the parties. As a consequence, if a court concludes that the parties have somehow mischaracterized their dispute and that resolution properly turns on factors other than those identified by the parties, in order to be strongly responsive, the court would have to ignore its conclusion and nonetheless attempt to base its decision only on the arguments the parties presented. It might be logically possible to decide in this manner. That is, a court could perhaps resolve what it perceives to be a tort claim on the contract law theories the parties have argued. But there would be a significant tension between decision in such a manner and a requirement of subjective candor, because the court by definition would be deciding the case not merely on grounds that it does not believe provide an appropriate basis for decision, but quite possibly on grounds that it does not even believe provide a logical means of approaching the problem. In such circumstances there would be a temptation to somehow justify the decision on the permissible, strongly responsive grounds even though the court has difficulty conceiving of (and thus actually deciding) the case on those terms.[213]

211. *See supra* note 32 (observing the judicial tendency to craft opinions giving the appearance of certainty that the outcome is determined by appropriate, legal materials rather than inappropriate, nonlegal materials).

212. That the boundaries of the category of "legally appropriate" reasons for a judicial decision are highly contestable does not affect the basic comparative point I am making.

213. This is analogous to the arguments in favor of candid approaches to statutory interpretation, where the suggestion is that the more restrictive, textually based approaches to interpretation, by overly

As to objective candor, a court that is restricted to picking from the alternatives presented by the parties is less likely, to resort to Calabresi's vivid metaphor, to look into dark corners,[214] and thus less likely to gain the incremental self-awareness of the real bases for its decision that freedom from a responsibility to be strongly responsive might engender. Of course, in a regime requiring strongly responsive decisions, the objective criterion for assessing candor would presumably require an analysis of the extent to which the decision actually proceeds from the proofs and arguments of the parties.[215] This is, as Fuller acknowledges, unattainable in an absolute sense, simply because of the impossibility of achieving complete congruence among the court and the parties regarding the parameters of the dispute.[216] There is also a danger here that parallels that identified in the discussion of subjective candor—the danger that judges familiar with the broad range of legally permissible bases for decision might unconsciously base their decision on criteria other than those actually proffered by the parties. The court might, in other words, misconstrue the parties' construction—or misconstruction—of doctrine. This would result in a decision that would be more objectively candid when assessed by some broader external criterion, such as consistency with the appropriate body of doctrine, but less so when measured according to strong responsiveness. As with subjective candor, the problem is not that strong responsiveness creates new opportunities for failures of candor so much as it expands existing opportunities by greatly restricting the range of permissible grounds for decision.

Of course, not even the most extreme scholarly advocate of judicial candor argues that the obligation of candor is unqualified.[217] Yet it seems clear that conflicts between candor and strong responsiveness must at least occasionally, and probably generally, be resolved in favor of candor. Neither is an end in itself. Rather, both serve to facilitate the larger dispute-resolution and law-declaration functions of adjudication, which are (as we have seen) themselves in tension. In some situations the fulfillment of those functions will justify dispensing with one, the other, or perhaps even both.[218] A systematic prioritization of candor and strong responsiveness, assuming one is even possible, is beyond the scope of this Article. The important point is simply that the conflict between candor and strong responsiveness exists, and that it must at least sometimes be resolved against strong responsiveness, thereby providing further support for the conclusion that the adjudicative duty ought not require strong responsiveness.

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restricting the grounds on which courts may justify their interpretations, simply generate more subterfuge, since courts either cannot or will not limit their decisions to such grounds. *See* Zeppos, *supra* note 144, at 360–62.

214. CALABRESI, *supra* note 144, at 172.

215. *See supra* text accompanying notes 161–163 (defining objective candor in terms of external criteria of assessment).

216. *See supra* text accompanying note 61.

217. *See supra* text accompanying notes 170–172.

218. *See* KRONMAN, *supra* note 24, at 339–40.

b. The Case for a Duty of Weak Responsiveness. Weak responsiveness is not merely consistent with the proper workings of adjudication, but affirmatively works to facilitate such functioning. It ensures that the court comes to terms with the parties' dispute, but allows for a departure from the parties' view of the dispute if they have mischaracterized its nature or overlooked some factor that is key to its appropriate resolution. In effect, it expands the range of resolutions available to the court. A court obligated to be strongly responsive must come to a full appreciation of the dispute as the parties perceive it and then resolve the dispute by choosing from the range of alternatives implicitly put before it by the parties. A court required only to be weakly responsive must come to the same understanding of the dispute as a strongly responsive court, but it need not feel constrained to resolve the case on the parties' terms. This requirement preserves the crucial elements of the dispute resolution function while allowing weakly responsive courts the freedom to achieve the other goals of adjudication—be they law-creation, the articulation and application of public values, or accounting for the interests of nonparties. At the same time, this approach preserves the meaningfulness of party participation, itself of independent significance for adjudicative legitimacy.

These notions are either implicit in or consistent with the conceptions of adjudication discussed in Part II. Although neither Fuller nor Eisenberg makes the point expressly, their formulation of the classic model calls for weak responsiveness as a fallback position should strong responsiveness prove inappropriate. A decision on grounds other than those offered by the parties might prove necessary in service of other ends of adjudication, but it nonetheless stands in obvious tension with the Participation Thesis. Even if the court concludes that the parties have missed the point and that resolution of a claim properly turns on factors other than those the parties have emphasized or even mentioned, the court should nonetheless provide some form of response to the parties' arguments. In other words, the court should acknowledge those arguments and explain why it believes they provide inappropriate grounds for resolution. By elucidating its reasoning for resorting to such alternative grounds, a court can at least assure the parties that their participation was meaningful, even if not ultimately so. The court's explanation also signals to the public that the parties' arguments received due consideration, even if the arguments did not ultimately affect the result. This in turn enhances adjudicative legitimacy on a more global level by assuring prospective litigants that their participation will likewise be factored into the court's decisional process and thereby holds the potential to affect the result.[219]

There are likewise strong arguments for the imposition of a duty to be weakly responsive under the public law model's conception of adjudication. As noted

219. For another conception of how participation can be viewed as "meaningful" even if it does not factor into the result, see Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 25–27 (2001).

above, the model values participation both as an independent good and for its instrumental contributions.[220] In this regard it is worth returning to the observation that the classic and public law models are not as incompatible as often portrayed.[221] While Fuller is typically associated with a model of adjudication that emphasizes the dispute resolution function of adjudication to the near exclusion of the lawmaking function, this may be a mischaracterization of Fuller.[222] And even if the standard characterization of Fuller's position is correct, the two models need not be viewed as making mutually exclusive claims, either descriptively or normatively. Instead, it may be that the models depict two perceptions of the judicial role, neither of which is absolutely or unqualifiedly correct, but both of which appropriately describe adjudication in different contexts.[223] Fuller's model might therefore be appropriate, both descriptively and in terms of its normative implications, for traditional, bipolar litigation. At the same time, the public law model may provide better guidance in a case having direct implications for nonparties. Under such a view, particularly if one sees Fuller's model as providing the default model,[224] the argument for weak responsiveness in public law cases becomes slightly stronger.

A related argument, and a particularly compelling one if the public law model primarily emphasizes the lawmaking function of courts, is that weak responsiveness facilitates lawmaking. While the parties may not be in a position to provide full information to the court, they will often be able to provide a good deal of information that is critical to a fully informed decision, and an assurance that their arguments and information will be meaningfully factored into the decision-making process creates a strong incentive to provide that information.[225] More directly, the court's engagement with the parties' agents will itself clarify the content of the law. Simply put, a court's determination of what the law is in the context of a particular case, even if that determination is based on arguments and information beyond what the parties have presented, is nonetheless enhanced by an articulation of why those arguments and that information do not compel a different outcome.

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220. *See supra* text accompanying notes 134–135; Sturm, *supra* note 97, at 1391–96 (exploring the extent to which party participation is a shared norm between the models).

221. *See supra* Part II.C.4. Jonathan Molot suggests that the public law attack on Fuller was directed to a much greater extent at Fuller's conception of adjudication's limits than its forms. Indeed, Chayes and Fiss "embraced many—but not all—of Fuller's ideas on litigation's forms." Molot, *supra* note 35, at 36 n.18.

222. *See* Bone, *supra* note 56, at 1275 ("Contrary to conventional wisdom, Fuller's theory lies somewhere between the public law and dispute resolution poles of this dichotomy, and considerably closer to the public law end.").

223. *See supra* Part III.C.3; Dan-Cohen, *supra* note 51, at 5–6 (articulating such a unitarian vision of the models).

224. The fact that Chayes and Fiss largely accept Fuller's conception of litigation's forms, *see supra* note 221, provides some support for this position.

225. Chayes implicitly recognizes this point. *See* Chayes, *supra* note 10, at 1308 (noting the advantages conferred by party presentation of information, even if incomplete).

Weak responsiveness likewise operates to satisfy the requirements of adjudication as representation. Peters's suggestion that the democratic legitimacy of judicial lawmaking decreases in relation to a court's departure from the norm of strong responsiveness[226] implies that weak responsiveness would serve only as a distant second-best mechanism. A court obligated only to be weakly responsive to the parties' arguments, after all, would be free to base its decision on grounds not asserted by the parties. Yet the legitimacy differential between strongly and weakly responsive judicial decisionmaking, measured in terms of the extent to which such decisionmaking is democratic, may not be that great.[227] So long as weak responsiveness requires that the decision maker actually factor the proofs and arguments of the parties into the decisionmaking process, the baseline requirements of the theory are satisfied. Without delving into the theoretical underpinnings of adjudication as representation, the analogy between courts and legislative bodies as representative lawmakers seems expansive enough to allow for a judicial role that requires that the decisional process include consideration of, as opposed to selection among, the grounds for decision offered by the parties. We do not question the democratic legitimacy of legislation simply because direct democracy might have resulted in different law.[228] Judicial lawmaking resulting from party participation that is meaningful, even if not dispositive, might likewise achieve the sort of democratic legitimacy that Peters describes.

Finally, the relationship between weak responsiveness and candor is likewise one of enhancement. A court operating under a requirement of weak responsiveness must consider and respond to the proofs and arguments offered by the parties, but it need not feel constrained to ground its decision in them. It cannot simply ignore inconvenient facts or precedent presented by the parties. It must instead provide a reasoned explanation of why those facts or that precedent do not make the case before it as distinct from the run of cases as it might otherwise appear. This is not to suggest that weak responsiveness provides a

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226. *See supra* text accompanying note 89.

227. Peters's later works appear to recognize this dynamic:

> Without responsiveness to the parties' efforts, a court decision is only a *judge's* decision, not a decision of which the parties can claim some authorship and in which they have some stake. An unresponsive decision is no better than rule by fiat.
>
> In adjudication, the primary evidence that the court's decision is responsive to the efforts of the litigants is the written (or sometimes oral) judicial opinion. A well-crafted opinion demonstrates that the arguments of the losing litigant have been considered in good faith and rejected on their merits.

Christopher J. Peters, *Participation, Representation, and Principled Adjudication*, 8 LEGAL THEORY 185, 192 (2002) [hereinafter Peters, *Participation*]; *see also* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004).

228. One who adheres to an extreme form of the view that legislative representatives are to serve as the agents of their constituents might raise an objection on this basis, but whatever its normative merits the position lacks descriptive merit. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 123–24 (2d ed. 1995).

cure-all for candor violations. The court's reasoned rejection of the parties' assertions might after all not reflect the true reasons behind the decision. While a requirement of weak responsiveness would not ensure full candor, even if that were desirable, it would create an obstacle to many violations of candor, while not presenting the incentives toward subterfuge that flow from strong responsiveness. If a court concludes the parties have misapprehended the nature of their dispute, the court would not be constrained to attempt to somehow force what it has concluded is the square peg of resolution into the round hole of the analytical framework the parties have furnished. It could instead make and explain its decision in terms of the factors it has concluded are appropriate. The requirement that it consider and respond to the parties' arguments in the course of elaborating its decision would function to enhance candor in this context. Likewise, where the court might prefer to justify its decision on grounds that do not reflect the true reasons behind its decision, an effective weak-responsiveness requirement would create a substantial barrier: proofs and arguments (suggested by the parties) the court would otherwise seek to evade. Weak responsiveness would mitigate objective failures of candor for similar reasons. An obligation to give meaningful consideration to the parties' arguments and assertions increases the likelihood that the court will peer into the dark corners of the dispute and its legal context and consequently be more candid in an objective sense.

3. Elaboration

Largely absent from the literature articulating and developing the models of adjudication discussed in this Article is consideration of the relationship between the adjudicative behavior prescribed by those models and courts' elaboration on that behavior. This is a complex relationship, and it constitutes a subject too broad for comprehensive treatment in the context of this Article. Even so, there is considerable value in uniting these disparate lines of scholarship. Judicial opinions provide nearly all the information available to the public regarding what a court has done. As a result, any attempt to prescribe judicial behavior must be mindful of the nature of elaboration, its possible limitations as the basis for enforcing prescriptions, and the possibility that the process of elaboration may have effects on the behavior it merely purports to describe. Accordingly, this section outlines the two views of the relationship and offers the conclusion that, at least in the appellate context, both views support at a minimum a robust preference for elaboration, the depth of which should in turn be a function of the candor obligation.

a. Elaboration as Evidence of Adjudicative Behavior. According to one view of the relationship between elaboration and the proper processes of judicial decision, elaboration serves merely as an instrument to validate the proper workings of the decisionmaking process, rather than as an essential component of that process. This view separates the act of deciding from the act of

justification.[229] Thus a judicial decision can be legitimate even without the issuance of reasons supporting it so long as the process that led to the decision complied with the criteria of legitimacy. Under this view, it is more important that the court actually make its decision in a weakly responsive fashion (if that is the relevant criterion) than that it announce to the world that it did so and how.

This position is implicit in the work of Fuller and Eisenberg, both of whom suggest that elaboration is a preferred but not essential component of adjudication.[230] From their perspective, opinions are valuable because they help to ensure the parties that their presentation of proofs and arguments was not in vain, and because the requirement of issuing an opinion also disciplines the court to consider those proofs and arguments.[231] Neither addresses the concepts of depth or candor, although it is reasonable to suppose that the goal of maximizing party participation creates a preference for greater depth, at least insofar as the elaboration relates to components of the analysis that are responsive to the parties' arguments. The relationship between candor and participation is somewhat less straightforward, as the preceding discussion revealed.

Similar conclusions can be drawn with respect to adjudication as representation and the public law model. In the case of the former, Peters does not directly address the issue of whether elaboration is to be required, although the implications of adjudication as representation on this point do not differ from what we have already encountered. A requirement that a court's decision be strongly responsive to the parties' arguments does not compel the conclusion that the court provide elaboration, for the same reasons that Fuller's theory does not support a duty of elaboration. Nor does anything else in Peters's theory require elaboration. A court can decide claims and cases in accordance with the theory's dictates without having to announce to the world that it has done so. However, just as Fuller concluded that the issuance of opinions advances the integrity of adjudication, it also advances adjudication as representation.[232] Here, too, we find a preference for elaboration.

The public law model likewise prefers but does not compel a duty of elaboration. Given its relative emphasis on the lawmaking function, the model clearly supports a preference for elaboration. While elaboration of the reasoning

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229. *See, e.g.*, SOLAN, *supra* note 32, at 174 (suggesting that the distinction between the two activities leads to the phenomenon in which "judges will sometimes find it difficult to present acceptable justifications for their decisions, even when the judges are comfortable with the decisions themselves"); RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 548 (2d ed. 1996) ("[T]he 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.").

230. Eisenberg, *supra* note 57, at 412; Fuller, *supra* note 9, at 387–88.

231. This is not a point that Fuller expressly makes. It is, nonetheless, a common theme in the literature concerning judicial opinions that the act of writing engenders more comprehensive consideration of the grounds on which the opinion is based. *See infra* note 241.

232. *See* Peters, *Participation*, *supra* note 227, at 192–93 (noting, with reference to Fuller, the importance of opinions to the functioning of adjudication as representation).

behind a court's decision might not be strictly necessary to the development and evolution of legal standards—because interested parties could track the results of cases and attempt to divine the underlying principles themselves—the absence of elaboration would significantly hinder the process. This is particularly so if courts exist primarily "to give meaning to our public values"[233] rather than merely to resolve disputes. Moreover, if the case requires the court to intervene in a set of ongoing relations among those whose interests are potentially affected, as is typical of institutional reform cases, some elaboration may be necessary as a practical matter. These arguments also suggest a preference for comparatively full elaboration—without being so strong as to support a categorical duty. Cases presenting no new issues of law or implementation, for example, might not require an opinion, because the lawmaking function is not implicated.[234]

Although the instrumental nature of elaboration under this conception cannot, standing alone, support a duty, it comes close. The benefits associated with judicial candor[235] can only be achieved if courts provide reasons for their decisions. Because judicial opinions provide the nearly exclusive basis for assessing courts' performance, there must at a minimum be a strong preference for elaboration that is both full and candid. This becomes apparent from even a brief consideration of a world without judicial opinions. In the absence of elaboration neither the parties nor the public could determine the bases of a court's decision. Nor could they assess the adequacy of those bases. From the public's perspective, decisions based on reason would be indistinguishable from decisions based on whim. This would erode confidence in the process and along with it the perceived legitimacy of adjudication as a mechanism for dispute resolution.[236] A world without judicial opinions would also be a world in which fulfillment of the lawmaking function would be nearly impossible. Unless a court elaborates on its reasons for decision, it provides no guidance concerning how it will resolve similar cases in the future. To be sure, interested parties would undoubtedly track the results of adjudication—and from those results attempt to divine the principles behind them—but this would not constitute the

233. Fiss, *supra* note 10, at 29.

234. Precisely how often such cases are likely to arise is a matter of some dispute. According to one view, there will almost never be a case in which elaboration would fail to be appropriate under this standard, because no two cases are identical, and consequently every decision extends the law at least slightly. *See* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222–23 (1999). This question underlies a significant portion of the debate over the appropriateness of nonprecedential opinions. *See supra* note 4.

235. *See supra* Part II.D.

236. *See* D. Shapiro, *supra* note 144, at 737 ("A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power."); Wald, *supra* note 147, at 1372 ("One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.").

making of law in the sense that we expect.[237] There is undoubtedly some room for disagreement concerning both how full[238] and how candid[239] elaboration ought to be to adequately support the lawmaking function. What is clear is that some elaboration is necessary to effectuate judicial lawmaking. But again, this argument does not extend so far as to require elaboration in all cases.

There are, however, strong pragmatic arguments in favor of a duty to elaborate. The costs of requiring elaboration in all cases might be relatively small in comparison with the benefit to adjudicative legitimacy in the aggregate. A duty of elaboration scaled to the need for candor would require very little from a court in "easy" cases, in which there is no new law to be made and little need to assure the public that the decisions are not the product of mere whim. A court could provide candid elaboration on its decision by saying very little, perhaps only a sentence or two along with a cite to the controlling authority. At the same time, the absence of a duty would create a temptation to avoid elaboration in at least some cases in which it would be highly desirable.[240] In sum, although the logic of elaboration under this conception only supports a preference, there are strong prudential arguments for imposing a duty.

b. Elaboration as an Integral Part of Adjudicative Behavior. There is another view, however, according to which the processes of decision and justification cannot be separated. It is common for the act of writing to enhance clarity and precision of thought. Accordingly, many judges have observed that a decision that once seemed perfectly reasonable can often turn out to be considerably less so following an attempt to write a justification.[241] David McGowan presses the point, asserting "that the premise that judicial writing can be divorced from

237. *See* Fuller, *supra* note 9, at 388; *see also* James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995) ("One can have law of a certain kind without the judicial opinion, then, perhaps of a good kind. 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. It is here, in the creation of legal authority, rather than in the facilitation of prediction, that the opinion performs its peculiar and most important task.").

238. *See, e.g.*, James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 809, 833–46 (1993) (arguing that social inclusion is aided by ambiguous opinions); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1736 (1995) (suggesting the desirability of opinions employing "relatively narrow or low-level explanations" for the conclusions they justify).

239. *See supra* Part II.D.

240. *See* Mitu Gulati & C.M.A. McAuliff, *On* Not *Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 163 n.24 (suggesting that one federal court recently operated under a norm in which it routinely disposed of some of its hardest cases by means of summary affirmances without elaboration).

241. *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 120 (1994) ("A decisionmaker who must reason through to a conclusion in print has reasoned in fact."); CARRINGTON ET AL., *supra* note 4, at 31 ("Conclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision."); Wald, *supra* note 147, 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 preordained result").

deciding or other aspects of judging is wrong."[242] He argues instead that writing and deciding are inextricably linked: "Writing affects how judges judge. The opinion form also affects what questions judges believe they may decide and how they may decide them."[243]

Of course, the descriptive claim that the act of writing affects the process of adjudication the writing is intended to describe does not lead necessarily to the normative claim that the process must therefore incorporate the act of writing. It may result in "better" decisions, whether measured by rationality or some other standard, but that may not be enough to support the imposition of a duty.[244] After all, nowhere in our exploration of adjudicative theory have we encountered the notion that any of the participants are entitled to perfection. "Getting it right" is one of the competing values at stake, but as the legal chestnut has it, sometimes it is better that cases be decided finally than that they be decided correctly.[245] An elaboration requirement cannot come without costs. Given a system in which the parties bear primary responsibility for developing arguments,[246] and in which judicial resources are scarce,[247] there are pragmatic arguments that it is unrealistic and perhaps inappropriate to expect judges to work through a written justification of the decision in each case.[248]

Even so, one can imagine various arguments supporting the proposition that the superiority of the decisions resulting from elaboration justifies the imposition of a duty. Writing might simply be critical to sound decisionmaking, in which case decisions rendered without the aid of elaboration would be illegitimate by definition. Alternatively, one might suppose that writing is necessary in every case to ensure that courts ferret out those cases that turn out to be more complex or otherwise difficult than they first appear. This might be so because, by its nature, the act of adjudication requires that decisions be made in this way. Or it might be the case that adjudicative decisionmaking requires a certain level of involvement with the subject of the decision that can only be attained by

242. McGowan, *supra* note 144, at 513.

243. *Id.*

244. *See* Tidmarsh, *supra* note 56, at 1729–30 (questioning Fuller's procedural prescriptions by asserting that they do not necessarily follow from Fuller's norm of party participation: "Fuller's further assumption that procedures that better advance the norm are somehow 'more valid' does not seem to be required normatively").

245. The allusion, of course, is to Justice Brandeis's assertion that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnett v. Colo. Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Although Brandeis was speaking to the desirability of settling a rule of law rather than an individual dispute, a similar dynamic exists in the context of resolving individual cases. At some point, the virtues of finality outweigh the costs involved in efforts that might result in marginal enhancements in accuracy. For a discussion of some of these issues, see Oldfather, *supra* note 198, at 483–86, 490–94.

246. *See* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 3–4 (1988).

247. *See supra* note 42.

248. Of course, nowadays it may be inappropriate as a descriptive matter to expect most judges to work through a written justification at all in any capacity other than that of an editor. *See* BAKER, *supra* note 241, at 140–47; POSNER, *supra* note 38, at 147–49.

decisions involving elaboration. Whatever the appeal of these views, they are not justified by the theoretical tools canvassed in this Article. The classic and public law conceptions of adjudication—at least as treated by the theorists discussed in this Article—envision elaboration as mere evidence of adjudicative behavior. That does not mean that a conception of the adjudicative duty that requires elaboration as a necessary component of the judicial function would be inconsistent with the processes identified in the models. But consistency without more does not constitute justification. Ultimately, even if the link between decision and elaboration is more than merely instrumental, such a relationship does not necessarily support the imposition of a duty to elaborate. Further work remains to be done.

c. The Robust Preference for Elaboration. It is clear that the theoretical underpinnings of the American adjudicative system, however conceived, support the existence of a strong preference for elaboration on the reasons behind judicial decisions. To a significant degree, the system could not function otherwise. Moreover, there are compelling arguments for the imposition of a duty to elaborate. While none of these arguments standing alone can justify a requirement of elaboration in all cases—at least absent further work demonstrating that elaboration is a necessary component of sound adjudication—taken together, they render elaboration desirable in nearly every case. The depth of that elaboration, meanwhile, should be a function of the duty to be weakly responsive, coupled with the desire for candor—itself a virtue that is strongly preferred but subject to enough potential exceptions to avoid characterization as a duty.

Although this set of conclusions may lack the theoretical elegance that a series of categorical duties might possess, as a practical matter its prescriptions are clear. In the overwhelming majority of cases, the court should provide reasons for its decision. To the extent possible, those reasons should be the "real" reasons for the court's conclusions, both subjectively and objectively. The depth of the elaboration, in turn, should be driven by the need for candor, which will require less in easy cases than in more difficult ones. While there may, in theory, be cases in which the lack of elaboration would be appropriate, such cases ought to be so rare as to be negligible. In effect, the theoretical preference for elaboration should compel a practical duty.

4. The Adjudicative Duty Summarized

What emerges from our summary of adjudicative theory is a well-defined core duty to decide. Under any of the dominant models of adjudication, courts must—at a minimum—decide the claims presented in a weakly responsive fashion. There is a preference for strong responsiveness, although other ends of adjudication, such as fulfillment of the lawmaking function, may require departures from this preference. There is also a strong preference—and depending on one's conception of the relationship between decision and elaboration, arguably a duty—for full, candid elaboration. These, then, are the sticks by which

judicial inactivism is to be measured.

To provide some further sense of how this works in practice, let us return to the examples explored in Part I. There we saw Defendant X, whose First Amendment defense to a consumer fraud claim was ignored by the court, and Plaintiff Y, whose argument that her claim is materially distinct from those disallowed under prior cases was either "glossed over" or "recharacterized" by the court that ruled against her. On the surface, at least, both of these situations present clear violations of the adjudicative duty as I have described it. In the case of Defendant X, the court appears not to have decided one of the claims presented, and in the case of Plaintiff Y, the court's decision was not even weakly responsive to Y's arguments. Instead, the court resorted to precedent as if Y's asserted distinction had never been raised.

As even this brief consideration reveals, elaboration is critical to meaningful assessment of whether a court has breached its duty in a given case. At least to the extent that the processes of decision and elaboration are distinct, a court's failure to elaborate on its decision in a manner consistent with the requirements of the duty does not mean that the underlying decision was not made in the appropriate manner. But the mere existence of such a gap means that the court has not been candid about its decision. Moreover, that failure is unlikely to be grounded in one of the appropriate excuses for a lack of candor, even in the broad formulations of those who are relatively permissive about excusing a lack of full candor.[249] In general, this sort of gap between elaboration and the type of decisionmaking called for by the adjudicative duty is strong evidence that the court has not gone about its decision in the appropriate manner. Only if the court finds it difficult to square its decision with the apparent dictates of precedent, or if it actually gives little consideration to the issue, will it be likely to fail to candidly address the matter in its opinion. Thus, once a court undertakes to provide some elaboration on its decision, it should provide enough elaboration to satisfy the candor requirement.

It bears further emphasis that the duty to decide does not compel the court to accept either party's characterization of their claim or the relevant authority. The court must, however, attend to the arguments, factor them into its decisional process, and reject them—if that is what it ultimately decides to do—only for legally appropriate reasons. Elaboration on its decision must—absent extraordinary circumstances—candidly reflect that process. Thus, its opinion should articulate the bases for its conclusion that a party's characterization of its claim does not provide an appropriate ground for resolution.

CONCLUSION

As courts continue to respond to the pressures created by their expanding dockets, concern over judicial inactivism will continue to grow. The recent

249. *See supra* text accompanying notes 170–178.

explosion in concern and commentary regarding the widespread use of unpublished, nonprecedential opinions[250] provides just one example of the problems that arise when expediency clashes with our core understanding of the judicial role. Debates concerning the need for structural reform are also likely to resurface.[251] This Article presents an attempt to articulate that core understanding more precisely, and thus to provide a framework and set of criteria by which to assess both historic and future changes in the adjudicative process. Like the models of adjudication from which it is largely drawn, the duty to decide represents an idealized conception of the judicial role. What is more, it, like all conceptions of adjudication, is subject to modification as the needs of society and the functions of adjudication shift. It is nonetheless important that necessary modification be undertaken in a way that is mindful of the theory underlying the mechanism being changed. As I have demonstrated, there is a fundamental consistency among the dominant models of American adjudication concerning the minimal components of legitimate adjudication. Decisions must be at least weakly responsive to the proofs and arguments of the parties and should candidly elaborate on the underlying reasoning. Departures from these norms should be undertaken only with great caution and with due regard for the broader functions of adjudication.

250. *See supra* note 4.

251. For an overview of past reform discussions, see DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 1047–1158 (1994).