1-1-2005

A Prudential Theory of Judicial Candor

Scott C. Idleman
Marquette University Law School, scott.idleman@marquette.edu

Follow this and additional works at: http://scholarship.law.marquette.edu/facpub

Part of the Law Commons
Publication Information

Repository Citation
http://scholarship.law.marquette.edu/facpub/181

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
A Prudential Theory of Judicial Candor

Scott C. Idleman*

Candor, according to the conventional wisdom, is both a virtue and a requirement of judges, the avoidance of which is warranted only in extraordinary circumstances, if ever. In this article, Scott Idleman critically examines this normative commitment and argues that the conventional wisdom, on closer analysis, is at best partially defensible and that judges, subject to prudential considerations, theoretically may enjoy substantial discretion as to the use and form of candor.

After briefly examining the nature of candor and the conception of the judicial function, the author examines nine rationales that might support the conventional wisdom, concluding that none is adequate to impose a full and general requirement on judges. Even in those situations in which one or more rationales do generate a candor requirement, the author contends that several normative or practical constraints—of which the author identifies six—may limit the force of that requirement.

Ultimately, the author proposes a methodology for determining when judicial candor is or is not appropriate. In addition to determining whether any of the nine rationales gives rise to a candor obligation, and in turn whether any of the six constraints limit its scope, judges may properly advert to prudential considerations—such as the need to preserve institutional legitimacy—when deciding either to employ or avoid candor. In reaching this conclusion, the author critically examines a prudentialist model of candor. Though acknowledging certain potential problems with using a prudential model of candor, the author concludes that such a model may lead paradoxically to greater candor, or, at the very least, to a more honest assessment of the role of candor in judicial decisionmaking.

I. Two Foundational Considerations ................. 1314
   A. The Conception of Judicial Candor ............. 1316
      1. Definitional Scope .......................... 1316
      2. Functional Scope ......................... 1321

* Assistant Professor, Marquette University Law School (beginning Fall 1995). B.S. 1989, Cornell University; J.D. 1993, M.P.A. 1993, Indiana University at Bloomington. I am greatly indebted to Patrick Baude, Robert Gordon, Elizabeth Staton Idleman, Daniel P. Meyer, William Popkin, Lauren Robel, Jeffrey Saxon, Suzanne Woods, and the editors of the Texas Law Review for their insightful comments and criticisms in relation to this Article. Particular thanks are due to Roger Dworkin, whose perspectives may diverge substantially from those contained in the following pages, but whose consistent candor and prudence have greatly enhanced this author's appreciation for the law.
3. Multidimensional Nature .................................. 1324
4. Instrumental Nature ..................................... 1328

B. The Conception of the Judicial Function .............. 1328

II. The Conventional Wisdom Reconsidered .............. 1334
   A. Rationales for Candor—An Exposition and Critique .... 1334
      1. Accountability ...... 1335
      2. Power ........................................... 1345
      3. Quality ........................................ 1350
      4. Authoritativeness ................................ 1353
      5. Justification .................................... 1357
      6. Notice .......................................... 1358
      7. Catharsis ....................................... 1367
      8. Progress ....................................... 1370
      9. Moral Duty ..................................... 1373
   B. Summary and Assessment ................................ 1376
      1. Methodological Concerns ......................... 1377
      2. Preliminary Conclusions ......................... 1379

III. Constraints on the Use of Candor ...................... 1381
   A. Practical Constraints ................................ 1382
      1. Limited Foresight ................................ 1382
      2. Relative Inefficacy ................................ 1383
      3. Consensus-Building ................................ 1384
   B. Normative Constraints ................................ 1386
      1. Moral Exigency .................................. 1386
      2. Institutional Legitimacy .......................... 1388
      3. Legal Phraseology ................................. 1394

IV. A Prudential Theory of Judicial Candor .............. 1395
   A. The Meaning of Prudentialism ....................... 1395
   B. The Appropriateness of Prudentialism .............. 1398
   C. Prudentialism and Candor—A Preliminary Sketch .... 1400
   D. Two Problems with Prudentialism .................... 1407
      1. The Magnitude of Judicial Discretion ............ 1409
      2. The Merger of Law and Politics .................. 1412

V. Conclusion ................................................. 1415
A world of vested interests is not a world which welcomes the disruptive force of candour.¹

Within the vast and contentious realm of contemporary judicial theory, the prospect of finding general rules supported by a consensus of the bench, bar, and academy may often seem quite remote. Drastic shifts in jurisprudential thought over the past several decades, coupled with significant changes in the institutional nature and societal role of judicial decisionmaking, have rendered the attainment of such rules or principles difficult indeed. Despite this pattern of disunity, however, the basic rule that judges ought to be candid in their opinions—that they should neither omit their reasoning nor conceal their motives—seems steadfastly to have held its ground. 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.² Whether justified in terms of enhanced political accountability, improved judicial decisionmaking, increased notice to those who rely on judicial opinions, or any number of other reasons,³ the normative position that judges ought to be forthcoming in their pronouncements would appear to be virtually unassailable.⁴ It might seem difficult to imagine, therefore, especially in this

¹. AGNES REPPLIER, Are Americans a Timid People?, in UNDER DISPUTE 58, 76 (1924).
². See, e.g., Scott Altman, Beyond Candor, 59 Mich. L. Rev. 296, 296-97 (1990) ("On one point ... the academy has mostly united: if judges are either misled or duplicitous, they should become aware of and disclose the real reason for their decisions." (footnotes omitted)); Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 666-68 (1983) ("Candor has a distinctive normative status in law."); Robert A. Leflar, Honest Judicial Opinions, 74 Nw. U. L. Rev. 721, 723, 740-41 (1979) (arguing that intellectual honesty is an essential element of a great judicial opinion); David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 736-38 (1987) (arguing that the judicial process of reasoned argument requires candor in the crafting of judicial opinions); see also Phototron Corp. v. Eastman Kodak Co., 687 F. Supp. 1061, 1062 (N.D. Tex.) ("The requirement that the judiciary be candid is perhaps absolute ... .") (citing Shapiro, supra, at 750), rev'd on other grounds, 842 F.2d 95 (5th Cir.), cert. denied, 486 U.S. 1023 (1988).
³. See infra subpart II(A) (examining nine possible rationales for judicial candor).
⁴. Indeed, some commentators would go even further and argue that candor is a fundamental obligation that judges, perhaps especially the Supreme Court, must always fulfill. See, e.g., JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 19 (1992) (arguing that Justices "have a professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest"); John W. McCormac, Reason Comes Before Decision, 55 Ohio St. L.J. 161, 166 (1994) ("A judge should candidly explain the choices that are made and the reasons for those choices. The reasons should be substantive ones, specifically described so that a reader can ascertain the real motives for the choice."); Henry P. Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 25 (1979) ("If justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment. A Justice who initially reached a decision on the basis of factors he is unwilling to assert publicly as a justification is, to my mind, under a duty to reconsider his decision with the impermissible factors excluded so far as humanly possible." (emphasis added)). This position is also found, often implicitly, in the work of the late Arthur S. Miller. See ARTHUR S. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982)
age of acute political cynicism, a theory of judging that would explicitly reject the conventional wisdom in favor of a view that judges may be anything less than candid. In this Article, I present such a theory. In particular, I argue that judges—especially life-tenured appellate judges, such as those sitting on the U.S. Supreme Court and Courts of Appeals—may regularly forgo candor under the principles of logic and prudence and still retain their political legitimacy and institutional integrity.

My analysis proceeds in four parts. Part I sets forth and examines two foundational considerations that necessarily inform the debate over judicial candor: the conception of judicial candor and the conception of the judicial role. Part II then engages in a critical analysis of the pro-candor position (the conventional wisdom), first by stating, and then by critiquing, the nine principal rationales in favor of such a position. Based on this analysis, I contend that the conventional wisdom is at best only partially defensible and is limited by the internal logic and reasoning of each rationale. Part III addresses a variety of independent reasons that either explain or support the avoidance of candor, even when candor would otherwise appear to be warranted by one or more of these rationales. Turning to the normative realm and drawing from the consequences and conclusions of Parts II and III, Part IV then offers a theory of judicial candor grounded in prudentialism—the view that judicial decisionmaking may properly rest on political and institutional considerations. In essence, I argue that while prudentialism need not be the only source of decision for judges when choosing between the use and the avoidance of candor, it provides a thoroughly appropriate, and possibly superior, theoretical framework for the resolution of such choices.

The purposes of this Article are several. First, it attempts to fill a void, for there currently exists in the literature no general, systematic treatment of the judicial candor question. By and large, the scholarship to date has focused exclusively on specific subcategories of the candor debate, such as the procedural nature of judicial decisionmaking or opinion-writing.

5. See Shapiro, supra note 2, at 738 (“Why, after all, would be Grinch-like enough to argue for lack of candor?”).

6. As explained infra at subpart I(B), I have in mind chiefly the federal appellate bench, most notably the Supreme Court. However, several of the analyses in this Article are equally applicable to state appellate courts, and even to many trial courts, to the extent that they are subject to structural and political factors similar to those affecting the federal appellate courts.
processes, the role of candor in statutory interpretation or in the interpretation of precedent, the significance of dissenting opinions, the presence or absence of candor in specific substantive areas of judicial decisionmaking, the function and propriety of legal fictions, or the regulation of judicial expression that is either independently outrageous or in some way relevant to pending litigation. And while several of these works are excellent in their own right, none attempts to provide the broad and comprehensive analysis undertaken in this Article.


12. See, e.g., Lon L. Fuller, Legal Fictions (1967); see also John C. Gray, The Nature and Sources of the Law 37, 30-37 (1921) (examining the uses of legal fiction and cautioning that “one should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand”); Aviam Soifer, Reviewing Legal Fictions, 20 Ga. L. Rev. 871 (1986) (discussing the implications of legal fictions for the law and literature movement). For a brief discussion of the relationship between candor and analogical or metaphorical reasoning, much of which can also be fictitious, see Shapiro, supra note 2, at 733-34.

13. See, e.g., Talbot D’Alemberte, Searching for the Limits of Judicial Free Speech, 61 Tul. L. Rev. 611 (1987) (arguing that tolerating a judge’s occasional abuse of free-speech rights is preferable to abridging those rights); Leonard E. Gross, Judicial Speech: Discipline and the First Amendment, 36 Syracuse L. Rev. 1181 (1986) (examining the problems inherent in determining when judges’ speech in court and outside of court should be subject to regulation). Outrageous judicial expression would include overtly racist or sexist speech. See, e.g., In re Stevens, 645 P.2d 99, 99 (Cal. 1982) (en banc) (approving of the censure of a superior court judge, on the recommendation of California’s Commission on Judicial Performance, because he “repeatedly and persistently used racial and ethnic epithets, and made racially stereotypical remarks to counsel and court personnel”).

14. The most general treatment is found in an essay by Professor David Shapiro. See Shapiro, supra note 2. Likewise, the most systematic treatment is found in an article by Professor Scott Altman.
Second and more significantly, this Article demonstrates that the conventional wisdom may be substantially untenable and does so at a time when the appropriate scope of candor, particularly in relation to the Supreme Court, is less than certain. Indeed, precisely because the candor question has thus far received so little systematic treatment, we should be concerned that our resolution to date—the conventional wisdom—is largely an oversimplification and hence in need of critical reexamination. In that spirit, this Article seeks not so much to displace

See Altman, supra note 2. Shapiro’s short essay, though broad in scope, cannot be considered systematic or comprehensive, while Altman’s article, though systematic, is not truly general in scope, as it focuses mainly on the specific issue of introspection in judicial decisionmaking. See id. at 297 n.5 (defining the scope of his thesis and noting that his article does not “join issue directly” with Shapiro’s essay).

15. Compare Goldstein, supra note 4 and Shapiro, supra note 2 (both arguing for forthright opinions and for the Court to act as a unitary body in every decision) with Alan Hirsch, Candor and Prudence in Constitutional Adjudication, 61 Geo. Wash. L. Rev. 858, 863-68 (1993) (reviewing Goldstein, supra note 4) and Book Note, Democracy and Dishonesty, 106 Harv. L. Rev. 792, 796-97 (1993) (reviewing Goldstein, supra note 4) (both suggesting that while candor is important, situations arise in which ambiguity is necessary for stability). At a less theoretical level, consider three recent and related controversies involving issues of secrecy, and thus of candor broadly understood, in relation to the Court. First, when political scientist Peter Irons breached his contract with the National Archives and released for publication transcripts and audiotapes of several oral arguments before the Court, the reaction among members of the legal community—including the Court itself—was seriously divided. Jeffery L. Sheler, No, It Doesn’t Please the Court, U.S. News & World Rep., Sept. 13, 1993, at 14. The Court first went so far as to threaten legal action against Professor Irons, see id., but eventually announced a new policy allowing generally unrestricted public access to its audiotapes of oral arguments. See Linda Greenhouse, Supreme Court Eases Restrictions on Use of Tapes of Its Arguments, N.Y. Times, Nov. 3, 1993, at A22; Tony Mauro, Glasnost at the Court?, The Recorder, Nov. 10, 1993, at 8, available in LEXIS, News Library, RECRDR File (both chronicling the Court’s change of heart regarding the release of its tapes). Second, when Justice Thurgood Marshall’s papers, housed at the Library of Congress, were made publicly available within months after Marshall’s death, there was reportedly “an uproar at the [C]ourt.” Tony Mauro, Tales of the Court, USA Today, May 27, 1993, at A1, available in LEXIS, News Library, USATDY File [hereinafter Mauro, Tales of the Court]. Third and finally, the propriety of broadcasting oral arguments before the Court, much like C-SPAN covers legislative floor debates or Court TV covers state court trials, is the subject of never-ending debate. For various procoverage views, see Elliot E. Slotnick, Media Coverage of Supreme Court Decision Making: Problems and Prospects, 75 Judicature 128, 129-35 (1991) (arguing that the public receives virtually all of its news from television and that the lack of television coverage of the Court distorts the dissemination of news about the Court to the public); Alan M. Dershowitz, The Supremes: Soon To Be on TV?, S.F. Examiner, Oct. 16, 1993, at A15, available in LEXIS, News Library, SFEXAM File (questioning why the Supreme Court should not follow the other major branches of government in making its activities accessible to the public via radio or television); He-e-e-re’s Justice, New Yorker, Oct. 11, 1993, at 6 (arguing that broadcasting Court proceedings would lead to greater public awareness of its activities with few drawbacks). Recently, the United States Judicial Conference overwhelmingly rejected a proposal, which grew out of a three-year pilot program, to authorize extensive visual coverage of federal judicial proceedings. See Joan Biskupic, Vote on Cameras Reveals Judges’ Deep Concerns, Wash. Post, Sept. 23, 1994, at A3 (conveying some judges’ concerns that opening federal courts to television cameras would adversely affect jurors, witnesses, and court proceedings).

16. One commentator notes, correctly I believe, that “[t]he debate [regarding judicial candor] focuses on the problems involved in achieving candor while not seriously questioning the value of
the conventional wisdom as it does simply to re-open the candor question, to unearth and explore its inherent complexity, and thereby to highlight those points at which the conventional wisdom appears to break down.

Third and finally, this Article attempts to develop a more viable model of judicial candor, premised collectively on the understanding that the partial indefensibility of the conventional wisdom leaves open a realm of substantial judicial discretion concerning candor; that even when candor seems compulsory, there may nevertheless be independent reasons to forgo its use; and that because of the intrinsic nature of candor, these two decisionmaking situations ought properly to be informed by the principles of prudence. Prudence—or, more properly, "prudentialism"—emphasizes the political and institutional dimensions of judging and sees as entirely legitimate their consideration in the judicial decisionmaking process. To the legal purist, of course, the notion of a prudential theory of judicial candor—a theory inviting judges to make politically motivated decisions not to disclose their reasoning or intentions—no doubt verges on the heretical. Likewise, to the legal nihilist—the extreme indeterminist—the entire issue of judicial candor may be nonsensical, for a judge's candor would doubtless be considered neither significant to the case at hand nor useful as a measure of how future cases would be resolved. How-

17. As this Article was in progress, I was apprised of a book review by Alan Hirsch that touches on some of the issues addressed here. See Hirsch, supra note 15. Although Hirsch and I share some points of similarity (most obviously our linkage of candor and prudence), we differ significantly both in our views of the conventional wisdom (which he adopts, see id. at 869) and in our points of focus and analysis (he is concerned, for example, exclusively with the constitutional decisionmaking of the Supreme Court, see id. at 862-63).

18. The term "purist" is appropriately used by Alan Hirsch to describe a person who sees the Court's role in constitutional decisionmaking as straightforward: expounding the meaning of the Constitution and applying it to the case at hand. The Court, like a scholar, pursues truth; practical consequences, such as public acceptance of the decision or of the Court as an institution, play little if any role.

Hirsch, supra note 15, at 863; see also Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges, 75 COLUM. L. REV. 359, 388 (1975) (calling "purist" the position that considerations of social or political acceptability "are inappropriate for judges deciding issues").

19. See, e.g., Anthony D'Amato, Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought, 85 NW. U. L. REV. 113, 118 (1990) ("The justificatory legal language used in judicial opinions . . . is not provided to explain—much less constrain—the result in the case. Rather, it is a
ever, to the pragmatist—or, better yet, the prudentialist—it constitutes an approach to judging that appropriately and justifiably takes account of the inherent complexity, the situational variability, and the wide array of extrinsic pressures that necessarily define the art and the science of judicial decisionmaking.20

I. Two Foundational Considerations

In many respects, the entire question of judicial candor ultimately boils down to two conceptual issues—how one conceives of judicial candor and what one believes the nature and function of the judiciary ought to be.21

20. I should emphasize that the major effort of this Article is normative; I basically leave unaddressed the empirical question concerning the extent to which judges actually are or are not candid. As one might expect, those who have addressed this question have reached divergent answers. At one end of the spectrum are those, such as the late Judge Jerome Frank, who would argue categorically that “[o]pinions . . . disclose but little of how judges come to their conclusions. The opinions are often ex post facto; they are censored expositions.” Jerome Frank, What Courts Do in Fact, 26 ILL. L. REV. 645, 653 (1932) (emphasis in original); see also Joel Levin, The Concept of the Judicial Decision, 33 CASE W. RES. L. REV. 208, 221-22 (1983) (arguing that judicial opinions do not reflect judges’ true motivations); Martin Shapiro, Judges as Liars, 17 HARV. J.L. & PUB. POL’Y 155, 156 (1994) (“Courts and judges always lie. Lying is the nature of the judicial activity.”). At the other end are those, such as Judge Robert Keeton, who would consider the allegation that judges often lack candor to be merely a manifestation of cynicism that verges on “judge-bashing.” See ROBERT E. KEETON, JUDGING 10 (1990) (maintaining that “the percentage of cases corruptly decided for reasons other than those disclosed is quite small”). The truth, of course, probably lies somewhere between these two views: opinions may frequently explain the judge’s reasoning process, and assertions that judges are less than candid do not inherently amount to judge-bashing. Then again, assertions that the Supreme Court plays “three-card monte” with the Constitution, see Karl N. Llewellyn, The Constitution as an Institution, 34 COLUM. L. REV. 1, 17 & n.29 (1934) (likening judicial decisionmaking to a game where “[a] major technique is the diversion of attention”), might just rise to the level of judge-bashing that Keeton has in mind.

21. A third foundational consideration, which I have chosen not to discuss at any length, might be the rich historical context and inheritance informing the contemporary debate over judicial candor—the recognition that candor in judging is, as Professor Leflar suggests, a concern that “antedates the invention of pen and ink.” Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 COLUM. L. REV. 810, 819 (1961); see also Lawrence C. Marshall, The Canons of Statutory Construction and Judicial Constraints: A Response to Macey and Miller, 45 VAND. L. REV. 673, 679 n.23 (1992) (calling judicial candor an “age-old subject”). Indeed, as far back as the Corpus Iuris Civilis of Roman law, one can find a prudential admonition against the candid explication of rules by judges: “Omnis definition in lure civili periculosa est: parum est enim, ut non subverti posset. (Any definition in the civil law is a dangerous thing for there is scarce a one which cannot be faulted.)” J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 49 (1976) (citing Dig. 50.17.202 (Javolenus), in 1 CORPUS IURIS CIVILIS (emphasis added) (footnote omitted)). Closer to our present situation, both temporally and genealogically, one may recall the notorious confrontation between King James I of England and Lord Coke, in which Coke was nearly struck by the King for his candid insistence that the civil courts were superior to the ecclesiastical courts. See D’Alemberte, supra note 13, at 624-25. Several authors have noted the generally pro-candor views of such figures as John Austin, Jeremy Bentham, and Edmund Burke. A well-known example is Burke’s report on the trial of Warren Hastings:
Indeed, the candor question must begin with these first principles precisely because they, more than almost any other considerations, define the terms and parameters of the debate. Accordingly, I have devoted this first Part of the Article to a close examination of these two issues as well as the many secondary issues to which they give rise.

Of course, for the very reason that these considerations are so fundamental, they are also likely to prove to be an ultimate source of disagreement in any attempt to analyze and resolve the debate over candor's proper function and scope. Consequently, I should further point out that a number of the issues and questions in this first Part are raised simply for the purpose of noting their existence, explaining their importance, and revealing the differences that their alternative resolutions can make in terms of our understanding of judicial candor. To a large extent, then, what follows should be understood as only the beginning, and not the end, of the critical task of constructing the conceptual framework within which the propriety of judicial candor may be evaluated.

Your committee do not find any positive law which binds the judges of the courts in Westminster Hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land.

Report from the Committee of the House of Commons appointed to inspect the Lord's Journals, in relation to their Proceeding on the Trial of Warren Hastings, Esquire, in 6 THE WORKS OF EDMUND BURKE 423, 451 (London, Henry G. Bohn 1856); see also Louise Harmon, *Fragments on the Deathwatch*, 77 MINN. L. REV. 1, 73 n.135 (1992) (discussing Bentham's extreme dislike of the legal fiction because it "poisons the sense of every instrument it comes near" and permits judges to make covert modifications in the law without legislation (quoting 1 JEREMY BENTHAM, A Fragment on Government, in WORKS OF JEREMY BENTHAM 221, 235 n.s (John Bowring ed., Edinburgh, William Tait 1843) (1776))); Zeppos, supra note 8, at 400 n.272 (noting Austin's observation concerning the lack of candor in equity administered by English Chancellors (citing JOHN AUSTIN, LECTURES ON JURISPRUDENCE 628, 638-41 (1873))). Finally, legal historian Calvin Woodard has suggested that the historical concern over excessive judicial power, see infra section II(A)(2), was a primary reason for requiring American judges to exercise candor through written opinions. See Calvin Woodard, *Justice Through Law—Historical Dimensions of the American Law School*, 34 J. LEGAL EDUC. 345, 353 (1984) ("From an early date in this country, unlike England, a jealous public developed two major means of controlling the virtually unlimited powers of the judiciary . . . [one of which was] requiring the judges to publish written opinions justifying their decisions . . . "). As these historical illustrations suggest, the contemporary debate over judicial candor is neither novel nor free from the weight of our collective past, but rather is both a continuation and a product of an evolving effort to define the role of courts in the political order and, even more fundamentally, to discern the substance and scope of governmental legitimacy.

22. Of course, other considerations exist which are even more basic than these and which necessarily inform any debate regarding law or legal institutions—the nature of political legitimacy, the foundations and limits of our discourses, the purpose of law and the state, and so on. Some of these are addressed fairly directly, see infra Part III, and all of them are implicated at some point in this Article.
A. The Conception of Judicial Candor

In this first subpart, I will touch on four matters relating to the conception of candor: (1) the definition of candor; (2) the potential scope of a candor obligation (to the extent such an obligation is ultimately justifiable); (3) the multidimensional nature of candor; and (4) the instrumental nature of candor. Because reasonable people may disagree as to their proper resolution, the first two of these I will basically pose as open-ended questions, without attempting to advance a "correct" answer beyond what is necessary for the purposes of the Article. The latter two, by contrast, I will attempt to establish as truisms, the exposition of which is necessary only because each is critical to a meaningful treatment of the judicial candor question and because each seems implicitly to be denied in much of the present scholarship and debate on this question.

1. Definitional Scope.—Logic dictates that our first order of business must be to attempt to define "candor," and specifically "judicial candor."23 The intuitive definition, and one likely in accordance with the conventional wisdom, is simply the full disclosure of relevant information.24 In turn, a pro-candor conception of the judiciary which employed this definition might propose that judges, in their written or oral opinions,25 should thoroughly reveal all considerations bearing on the resolution of a dispute. Simplicity can be misleading, however, for I suspect we will soon find ourselves debating the meaning of "full," "disclosure," "relevant," and perhaps even "information." And this

23. A definition of terms is also the starting point of Professor Shapiro, who notes that "[o]ne who asks whether, and to what extent, judges have an obligation of candor must at least attempt to explain what he means by candor." Shapiro, supra note 2, at 732.

24. This particular phrasing, though arbitrarily selected, is common to several areas of law—securities law, bankruptcy law, and the law of discovery, among others. Nonlegal definitions tend to be cast more broadly. Webster's, for example, defines "candor" as "openness of heart; frankness; sincerity; honesty in expressing oneself." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 263 (2d ed. 1983). Likewise, "frank" is defined as "open; ingenuous; candid; free in expressing what one thinks or feels." Id. at 728.

assumes that we in fact accept the proposed definition—which of course need not be the case. After all, can it really be said that "the selective disclosure of relevant information," for example, or "the full disclosure of critical information" is not also a legitimate definition of candor? In fact, the problem is not so much finding a definitional starting point—such abstractions are easily devised—but rather discerning coherent and workable limits on that definition's operation. The difficulty, in other words, is one of specifics and particularities: deciding how much or how little disclosure is practical or appropriate, determining on what grounds such a decision should be made, and then explaining how one can detect when those limits have been reached.\textsuperscript{26}

In resolving this difficulty, at the very least we must decide whether to adopt a subjective definition or an objective definition. A subjective definition of candor is one that calibrates the meaning of "full disclosure of relevant information" to the actual cognizance of the judge. That is, candor is measured subjectively from the judge's point of view.\textsuperscript{27} By contrast, an objective definition is one that calibrates the meaning of candor to one or more external criteria of assessment such as truth, logical validity, or factual or empirical accuracy.\textsuperscript{28} Under this latter definition, candor is measured not simply by the perceptions of the judge, but also by the degree to which the judge's disclosure actually comports with what we

\textsuperscript{26} It is perhaps not surprising, therefore, that when faced with the task of defining candor, many commentators seem more amenable to explaining what does not constitute candor. See, e.g., infra note 27 (discussing David Shapiro's definitional attempt, which is largely a description of what would not qualify as candor). In part this may stem from the strong tendency of commentators to begin by privileging the conventional wisdom, for then the focus necessarily shifts to what constitutes an acceptable deviation from full candor. More likely than not, however, it also stems from a realization that defining candor from the ground up is an inherently difficult and risky endeavor.

\textsuperscript{27} David Shapiro, for one, has proposed the use of an essentially subjective definition. See Shapiro, supra note 2, at 733, 732-33 (arguing that the critical question is: "[D]oes the speaker intend—or is he indifferent to the fact—that the omission will render the statement he has made misleading in some material way?"); id. at 734 ("The question of candor turns ultimately on the judge's state of mind. A judge, I contend, fulfills any requirement of candor [regarding the use of precedent] when he believes what he is saying about the force of a particular case."); see also id. at 738 n.33 ("I do not think that a judge is obligated to search out and disclose the 'deepest' explanation of his actions.").

\textsuperscript{28} I am not suggesting that these external criteria are themselves objective or absolute. See generally Heidi L. Feldman, Objectivity in Legal Judgment, 92 Mich. L. Rev. 1187 (1994) (examining modern critiques of legal objectivity). Rather, the relative truth or accuracy of a judge's statement would be measured by the standards of acceptability generally employed within the legal, and perhaps nonlegal, communities. For examples of judicial statements or underlying views that may be considered false or unacceptable, see infra text accompanying notes 29-30. Moreover, in choosing to invoke a simple dichotomy between the subjective and objective, I am not unaware that there exist powerful critiques of language and mental processes that necessarily complicate the question of judicial candor. See, e.g., Charles M. Yablon, Are Judges Liars? A Wittgensteinian Critique of Law's Empire, in WITTGENSTEIN AND LEGAL THEORY 249, 251, 257-64 (Dennis M. Patterson ed., 1992) (arguing that judges play a language game that results in opinions which do not clearly mirror their analyses).
know about the subject matter of her expression. As a consequence, a judge could be considered less than candid whenever she adheres to or propounds a position that is either factually incorrect or logically unsound. For example, adherence to a hopelessly mistaken model of constitutional interpretation—e.g., that one can derive a meaningful, singular original intent of the Constitution's framers from the Federalist Papers— or to an erroneous paradigm about judging—e.g., that judges do not make law—could amount to a problem of judicial candor, even if the judge is not personally cognizant of the idea's unsoundness and thus may have no intent to deceive or mislead her readers. Certainly there would be a candor problem under either standard when the judge actually knows that constitutional originalism based solely on the Federalist Papers or rigid judicial positivism is largely a sham and that her audience will likely accept her interpretive products as authoritative nevertheless. But under an objective standard, the judge could be held responsible for her own ignorance or incompetence—her own intellectual negligence, if you will—including a failure to advert to her shortcomings.

The choice between these two conceptions, unfortunately, is neither obvious nor simple. On the one hand, the subjective definition seems most suitable, if only because most people who express concern about an apparent absence of candor no doubt have in mind knowing duplicity or disingenuousness on the part of judges. In addition, it seems impractical to address the absence of candor in an objective sense when the actors in question, the judges, might not even be aware of this absence. Many omissions of candor, after all, are not conscious ploys on the part of judges, but rather the product of either less-than-thorough or genuinely

29. See James G. Wilson, The Most Sacred Text: The Supreme Court's Use of The Federalist Papers, 1985 B.Y.U. L. REV. 65 (criticizing the Supreme Court's seemingly uncritical acceptance of the authority and theoretical uniformity of the Federalist Papers in light of their many ambiguities and inconsistencies); James W. Ducayet, Note, Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation, 68 N.Y.U. L. REV. 821 (1993) (rejecting the notions that the Federalist Papers enjoys an historically consistent interpretation, that its authority has been consistently recognized, and that it provides useful insight into the framers' intentions).

30. See JEFFREY A. SEGAL & HAROLD I. SPAETH, THE SUPREME COURT AND THE ATTITUDBAL MODEL 5-7 (1993) (noting the continuing assertions by the judiciary, including Supreme Court Justices, that judges merely find or discover the law rather than make it); see also RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 202 (1985) (noting that "the formalist idea dies hard" in part because it serves as a "judicial defense mechanism" (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 84-98 (1962))); Shapiro, supra note 20, at 156 ("[A]lthough every court makes law in a few of its cases, judges must always deny that they make law... . They live that paradox; they have lived it in the past and will continue to live it in the future.").

31. Cf. Kent Greenawalt, The Perceived Authority of Law in Judging Constitutional Cases, 61 U. COLO. L. REV. 783, 786 (1990) (suggesting that even though "[w]hat some or most judges are doing does not... determine what judges should be doing... [o]rdinarily a normative theory should not call for behavior that is impossible or extremely difficult").
Judicial Candor

As Robert Leflar notes,

[the failure of judicial opinions to set out the real reasons for a court's decisions 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. . . . The opinion becomes a poor one because the judge has not thought through the problem and has not identified the real reasons that support his decision. He has not been dishonest, but his writing does not reflect the completeness and clarity essential to thoroughgoing integrity in judicial opinions, if not in judges.]

Thus, although enhancing the cognizance of judges for the purpose of increased candor may be possible, the effort that would likely be required may seem too costly, particularly considering the potential risks that might be incurred and the marginal nature of the benefits.

On the other hand, to calibrate the definition of candor to the limit of each judge's cognizance is effectively to abandon all hope of transforming judicial decisionmaking from the mediocre into the excellent. Indeed, in an era when the awareness of one's deeply ingrained cultural biases has assumed increasing importance, the need to push judges to greater

---

32. See, e.g., J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981) ("The subconscious may mask its work, but it is difficult for one who has attempted to discern the factors affecting his own decisions to accept the idea that legal doctrine, professional standards of craftsmanship, and the formulation of a rationale for the decision are all delusions, or worse, charades."); Arthur S. Miller & Ronald F. Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 682 (1960) ("Surely it is manifestly impossible for a judge to tell us entirely what really motivated him." (emphasis in original)); Zeppos, supra note 8, at 407 ("In some cases, it may be that the process of interpretation occurs so quickly that the judge never consciously considers the reasons for the choice and therefore believes that the decision was compelled by objective, external sources."); id. at 409 ("It is also possible that judges reach a result consistent with their personal preferences but convince themselves that they have done no more than read the originalist evidence. Thus, if we asked these judges to be candid and to tell us their 'real' reasons, they would look genuinely puzzled and point to their written opinions."); Alvin B. Rubin, Book Review, 130 U. PA. L. Rev. 220, 224 (1981) (reviewing FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH (1980)).

33. Leflar, supra note 2, at 723.

34. See Altman, supra note 2, at 351 (recognizing the possibility of enhanced judicial cognizance or self-awareness, but ultimately advising against encouraging it because it could lead to extreme self-doubt among judges about the true nature of their decisionmaking); Zeppos, supra note 8, at 411 (proposing that we might "shift our strategy from criticizing judges for deceptive practices to devising schemes for more self-awareness in the judicial process," but then examining the costs and limits of such a proposal). One risk of absolute candor is that it may erode the authority of law. Cf. JEROME FRANK, LAW AND THE MODERN MIND 40-41 (1930) (distinguishing between legal fictions, which are useful and necessary, and legal myths, which are used to maintain a false perception of the law among laymen and professionals alike akin to a child's perception of the instructions of a father); id. at 248-51 (arguing that abandonment of the "father-authority" view of the law need not result in anarchy if it is understood that an abandonment of absolute authority does not require abandonment of all authority).
self-understanding is all the more critical. Moreover, while an objective definition may seem senseless or futile in the abstract, and thus might be summarily rejected by certain readers, actually it is overwhelmingly implicit in much of the legal scholarship and commentary dealing with judicial decisions. The all-too-common and all-too-easy process of essentially "stripmining" judicial opinions oftentimes appears to rest on the assumption that courts, like wandering lambs, have simply lost their way and need only to be guided to the pasture of enlightenment. In fact, a great deal of academic criticism would make little sense apart from such an assumption. At the same time, a recognition of these two competing definitions of candor may partly explain the gap between those who so vehemently argue that judges are not often candid and those who so vehemently argue that they are.

In light of these competing considerations, it is difficult to say which definition, a subjective one or an objective one, is clearly preferable. Much depends on one's understanding of what makes a normative theory of judicial decisionmaking valid—e.g., to what extent one believes a proper theory should attempt to alter the judiciary, presumably for the better, or instead should simply accept the judiciary in its present state. Many definitions seem to attempt to have it both ways, blending the subjective (the status quo) and objective (the aspirational) into an indeterminate middle position. Justice Abrahamson of the Wisconsin Supreme Court, for example, proposes a definition of candor which appears to be primarily subjective (actual self-awareness), but which is loosely coupled with an urging towards greater objectivity (potential self-awareness):

35. See, e.g., Donald C. Nugent, Judicial Bias, 42 CLEV. ST. L. REV. 1 (1994) (analyzing the sources, types, and impact of bias on judicial decisionmaking).
36. Gene R. Shreve, Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m), 67 IND. L.J. 85, 89 (1991) (noting in regard to the Supreme Court that academics "stripmine the Justices' opinions and devote innumerable pages in law journals to interpreting and second-guessing the Court's work"); see Shirley S. Abrahamson, Judging in the Quiet of the Storm, 24 ST. MARY'S L.J. 965, 992 (1993) (noting the scholarly practice of "dismembering" opinions); Edward L. Rubin, The Practice and Discourse of Legal Scholarship, 86 MICH. L. REV. 1835, 1848 (1988) ("The point of an article about a judicial decision is usually to remonstrate with the judge for the conclusion reached and the rationale adopted.").
37. See Shapiro, supra note 2, at 731 ("Implicit in the analysis [in law reviews of judicial opinions] is a hint that whoever wrote the opinion was too inept, or perhaps too devious, to reveal what was really at stake.").
38. See supra note 20 (contrasting Jerome Frank, Joel Levin, and Martin Shapiro with Robert Keeton on the empirical issue of candor). It may be that those who allege that judges are more often than not lacking in candor are actually using an objective standard of candor, effectively holding some judges to a level of cognizance that they simply may not possess. Likewise, those who find that judges rarely avoid the use of candor may not be rigorous enough in their evaluation of those judges' decisions, deferring too readily to shortcomings of judicial cognizance as long as the judges themselves believe that they have discharged their obligation of candor.
When I talk about candor, I am talking about a judge's self-awareness in decision-making and disclosure. Of course, neither full self-awareness nor full disclosure is possible. None of us is able to be fully introspective. The judge's mind which reaches the result sometimes works faster than the judge's fingers on the word processor's keyboard. Others may not have the ability to articulate a satisfactory account of that reasoning. Judges, themselves, may disagree about the process through which decisions are reached. But we can strive to the best of our abilities for self-awareness and disclosure of our reasoning.

Similarly, Professor Scott Altman is at best ambivalent towards the possibility of rigorous introspection by judges regarding their candor and thus, like Abrahamson, situates himself essentially at the subjective-objective interface.

Normally I would align myself with this middle position, straddling the fence between the reality of limited judicial cognizance and the ideal of a fully self-conscious judiciary. Nevertheless, for the remainder of this Article, it seems most prudent to rely on a strictly subjective formulation, in part because it removes certain difficulties from the analysis—difficulties that are not necessarily critical to my thesis—and in part because it is likely the formulation that most readers had in mind before the choice was presented. In conjunction with the subjective formulation, moreover, it seems simplest for the purposes of this Article to use the basic definition offered at the outset of this subsection—the full disclosure of relevant information—as long as we recognize that the meaning and limits of this definition are not entirely self-evident. Where appropriate, I will attempt to highlight the differences that various alternative definitions, particularly an objective formulation, might make. By and large, however, for the purposes of this Article, the reader may properly equate candor with the full disclosure of relevant information, evaluated subjectively from the judge's point of view.

2. Functional Scope.—Moving away from the matter of definition, our next task is to decide which aspects of judicial decisionmaking and the judicial process ought to be subject to a candor requirement, assuming that we ultimately find such a requirement to be both warranted and desirable. The purist, I suspect, may respond simply by asserting that any and all aspects of the judiciary's work should be performed with full candor and disclosure. But such a requirement is not practical. More realistic is a requirement that judges disclose to the best of their abilities the relevant information, and that they strive to do so.

40. See Altman, supra note 2, at 298 ("Although I think judges are not so misled as [Critical Legal Studies] writers allege, it seems to me possible that judges hold inaccurate beliefs about their jobs, and that a legal system including such beliefs could be justified.")
that questions over scope are therefore irrelevant if not dangerous. If we look more carefully at the range of a judge’s or court’s functions, however, it is not clear that the purist’s position is in fact appropriate or, for that matter, innocuous. Consider, for example, the various aspects of the written judicial opinion to which a candor obligation might apply in whole or in part: the exposition of facts, the explanation of legal principles and precedent, the proposed policy considerations, the application of the law to the facts, the articulation of the ratio decidendi and the disposition, and the long-term intentions of the judge regarding the subject matter of the case. Should such a requirement apply to some of these, to all of these, to each with the same strength or in the same situations? Moreover, should the requirement extend beyond written opinions to include, for example, discretionary denials of review or injunctive relief, the deliberative processes of judges, communications within and among judicial chambers, or the related activities of clerks and staff attorneys?

41. For an analytical effort to divide judicial justifications into three “levels,” thus potentially creating even more complexity than is offered here, see Joel L. Levin, How Judges Reason: The Logic of Adjudication 15-55 (1992).

42. Somewhat relatedly, I should note that I reject the view that the processes of judicial decisionmaking and judicial opinion writing should be treated as entirely distinct for the purposes of candor. For one statement of this position, see Robert J. Martineau, Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction, 62 Geo. Wash. L. Rev. 1, 31 (1993) (“The debate on candor in opinions . . . misses the point that judicial opinions do not intend and are not intended to be a record of the thought processes of the court in reaching a decision.”). Such a view, it seems to me, is inappropriate for at least three reasons. First, drawing a bright-line distinction between these processes, although perhaps analytically helpful, cannot possibly capture the full complexity and variability inherent in the judicial function. Sometimes these processes are no doubt fairly distinct; more often than not, however, their relationship is presumably one of interaction and two-way causality. Second, it is simply not proper to treat homogeneously the entire judicial process by claiming that “judicial opinions do not intend and are not intended to be a record of the thought processes of the court in reaching a decision.” Even if empirically accurate most of the time, such an assertion is at best overbroad and at worst prescriptive under the guise of being descriptive. Third and finally, this view only begs the question regarding candor. It may be that opinions “are not intended to be a record of the [court’s] thought processes,” but we must then ask “Why not?” If one function of candor, for instance, is to increase the predictability of judge-made law, see infra section II(A)(6), and if a court’s after-the-fact justifications are relevant in this regard, then it logically follows that a court’s animating mental processes would be relevant as well. Indeed, prospective litigants should ultimately be concerned not about what the courts say they have done in fact, but rather about “what the courts will do in fact.” Oliver W. Holmes, Jr., The Path of the Law, in Collected Legal Papers 167, 173 (1920).

43. For a discussion of candor in relation to the Supreme Court’s certiorari process, see Zeppos, supra note 8, at 403 n.282. For a careful examination of that rather uncandid process in general, see H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (1991).

44. For an amazingly candid, and arguably inappropriate, passage on the function of law clerks, see Conroy v. Aniskoff, 113 S. Ct. 1562, 1571-72 (1993) (Scalia, J., concurring in the judgment) (“The excerpts [of legislative history] I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task. The other Justices have, in the aggregate, many more clerks than I, and it is quite possible that if they all were unleashed upon this enterprise they would discover . . . many faces friendly to the Court’s holding.”).
Alternatively, should different requirements of candor—either in substance or degree or both—apply to each of these functions, creating in effect a sliding scale of judicial disclosure?

As I will attempt to show in the following section, the question of judicial candor cannot be treated monolithically but rather is bound up with a variety of contextual factors. In the same way, the judicial process must be seen in all its stages and complexity, such that generic claims about candor in "judging" simply will not suffice. What one must do is to examine each element of the judicial process, ask what the justifications and functions of each element are, compare these answers with each of the rationales for candor (examined in Part II), and then decide which elements are logically amenable to a candor requirement of one sort or another. Indeed, even those who would limit a candor requirement to only one function, most likely the written opinion (which itself is not a monolithic product), must nevertheless explain both why that element or each of its parts is suitable for such a requirement and on what basis that element is meaningfully distinguishable from each of the other excluded elements.

Anything less is formalism, and it is time that the characteristic yet retarding presence of formalism in the judicial candor debate be once and for all eradicated.

One final point regarding the possible scope of a candor obligation is the related question of what form, what public expression, such an obligation ought to take. For example, should that obligation be somehow codified or formalized—say, as a canon or provision of the Code of Judicial Conduct? Alternatively, should we simply let it stand as an unwritten though generally agreed upon rule of judicial decisionmaking, much in the same way that the conventional wisdom appears to function today? Or ought we to select some middle ground, such as formalizing it as an advisory rule (e.g., judges should be candid) rather than a mandatory rule (e.g., judges shall be candid)? The proper course of action is not entirely clear, but the question is an important one, because each alternative includes both drawbacks and advantages as well as the possibility of being irreconcilable with our current approaches, both formal and informal, to materially similar rules of judicial conduct and decisionmaking.

45. CODE OF JUDICIAL CONDUCT (1994). As I indicate infra text accompanying notes 223-24, there is currently no provision in the Code of Judicial Conduct that expressly requires judicial candor as a general rule, despite the existence of a duty of candor to the court for attorneys.

46. Formalizing a candor requirement, for example, may be futile due to the problems of undetectability and unenforceability, while choosing not to formalize such a requirement may be difficult to reconcile with the codification or quasi-codification of other standards or ideals of judicial conduct, such as impartiality in the execution of judicial functions. See id. Canon 2 (requiring a judge to avoid impropriety and the appearance of impropriety in all of her activities); id. Canon 3B(5) (requiring a
3. Multidimensional Nature.—Beyond the two introductory issues concerning the definition and scope of judicial candor, two fundamental and interrelated conceptual aspects of candor remain: (1) that the nature of judicial candor is highly variable and contextual (and thus its propriety is also variable and contextually contingent), and (2) that the value of candor is almost always instrumental and not intrinsic. In turn, these aspects of candor effectively preclude any effort to formulate models of judicial candor that are abstract, absolutist, or teleological in character.

Let us begin by examining the trait of multidimensionality. Contrary to what is assumed in much of the contemporary discourse, judicial candor is not some type of fixed or unidimensional "thing," but rather embodies the intersection or configuration of countless textual and contextual factors. Just as there exist any number of judicial functions to which a candor requirement might attach, so too there exist any number of variations on the use of candor within any given function. In particular, I have in mind three such sources of variation—the subject matter or content of the candor, the form or medium through which the candor is expressed, and the particular style in which the candor is presented. Consider first the element of subject matter or content. Not only can distinctions be drawn among areas of law—candor in constitutional law versus candor in contract law, for example—but different categories of candor may also be discerned within any particular area. Thus a judge may speak candidly about the case at hand or about the larger legal issues that it implicates: the factual aspects that he finds particularly relevant, the specific doctrinal principles and policy factors which inform his decision in the case, 47 the possible or probable consequences of his decision, the competence of the court to address the subject matter of the case, 48 and even his preferences as to how similar cases in the future should be resolved—or, when changing his mind, the reasons why he now believes his past resolution to be less than sound. 49 Alternatively, the judge may speak more generally about the

47. One of the more notorious disclosures of social policy is Justice Holmes's "Three generations of imbeciles are enough" in the sterilization case of Buck v. Bell, 274 U.S. 200, 207 (1927).

48. See, e.g., Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("[P]erhaps I could never succeed in intelligibly [defining the kinds of material embraced by the Court's prior descriptions of obscenity]. But I know it when I see it . . . ."); White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (acknowledging, in regard to the subject of vertical territorial limitations in the context of antitrust law, that "[w]e do not know enough of the economic and business stuff out of which these arrangements emerge").

49. Compare Moldea v. New York Times Co., 22 F.3d 310, 311 (D.C. Cir.) (withdrawing its earlier opinion, 15 F.3d 1137 (D.C. Cir. 1994), and, through the same author, candidly acknowledging that the earlier opinion rested on "a mistake of judgment"), cert. denied, 115 S. Ct. 202 (1994) with Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994) (changing by 180 degrees the result of its earlier decision, 65 Empl. Prac. Dec. (CCH) ¶ 43,246 (9th Cir. July 25, 1994), which had
dynamics of courtroom litigation or appellate advocacy, or about the nature
of judicial decisionmaking, perhaps even without regard to particular cases
before him. Finally, the judge may speak about the political or insti-
tutional aspects of the judiciary: its sources of power and legitimacy, its
theoretical and prudential limits, the selection and tenure of its
membership and the impact of the selection process, its relationship to
the public or to public opinion, and its relationship to other branches of
government.

been withdrawn, Nos. 92-55228, 92-55644, 1994 WL 510343 (9th Cir. Sept. 20, 1994), and without
any mention whatsoever of the earlier opinion changing to the more anonymous per curiam mode),

50. One of the most well-known and most candid extrajudicial writings on the nature of judicial
decisionmaking is Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision, 14 CORNELL L.Q. 274 (1929). See also JOSEPH C. HUTCHESON, JR., THE JUDGMENT INTUITIVE 14-34 (1938) (describing the process and function of following "hunches" in the judicial decisionmaking process). Perhaps the most widely read and celebrated is BENJAMIN N. CARDozo, THE NATURE OF THE JUDICIAL PROCESS (1921). Three recent additions to this genre, the first two by a sitting federal appellate judge, the third by a former state supreme court justice, are FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING (1994); COFFIN, supra note 32; and JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989). At least one reviewer of Justice (now Professor) Grodin's book suggests that "[c]andor—at least public candor—is more a hallmark of former judges than of those currently on the bench." Eric Freedman, Welcome Candor, 73 JUDICATURE 168, 168 (1989) (reviewing GRODIN, supra).

51. A remarkable example of these first two types of institution-focused candor can be found in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814-15 (1992) (plurality opinion) (discussing the perceived bases and limits of the Court's legitimacy vis-à-vis the public). For an analysis of the Court's expressed views and a discussion of the relationship between perceptions of legitimacy and public acceptance of judicial decisions, see generally Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 DUKE L.J. 703 (1994).

52. Justice Blackmun spoke frankly of his imminent departure:
In one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote. I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue [of abortion] before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Casey, 112 S. Ct. at 2854-55 (Blackmun, J., concurring and dissenting). Compare this with Joan Biskupic, "I Am Not an Uncle Tom," Thomas Says at Meeting, WASH. POST, Oct. 28, 1994, at A1 (quoting Justice Thomas as saying in response to criticism of his appointment, "I'm going to be here for 40 years. For those who don't like it, get over it.").

53. In yet another abortion case, Justice Scalia noted at length his concern about the public's relationship to, and perception of, the Court:
We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—the unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.

54. See, e.g., RICHARD NEELY, HOW COURTS GOVERN AMERICA (1981) (discussing the political functions of courts and their relationship with the other, more democratically accountable, branches of government). The federal courts' jurisdiction cases are replete with commentary about their horizontal and vertical relationships to other branches and levels of government. See generally ERWIN
A second source of variation on the use of candor is the form or medium through which the candor is expressed. This Article, for example, focuses significantly on the medium of the written judicial opinion. Within this medium alone, the potential for variation is significant, as there are majority opinions representing different levels of division, plurality opinions, single- and multimember concurrences, single- and multimember dissents (including *dubitante* stances), memorandum or per curiam opinions (single and seriatim), opinions dissenting to a denial of review or rehearing, advisory opinions, and so-called special opinions. In addition to opinions, judges may express themselves through a variety of other media: law review articles, speeches, letters, diaries, popular press articles, electronic media interviews, oral arguments, books, and so on. And while it is true that the role of candor within many of these media should be treated roughly the same, there are differences among these media—from *United States Reports* to the *Atlantic Monthly*—that cannot be ignored and that may in fact have a great deal to say about the propriety of candor in any particular instance.

Finally, in conjunction with these particular variations in subject matter and form, judges may also employ different styles of candor—different manners of speaking frankly, if you will. For example, judges may transmit ideas and opinions directly, in plain and clear language, or

---

55. Candor is without doubt more characteristic of separate opinions, especially dissents, than it is of majority opinions. In part, this is due to the institutional dynamics inherent in the coalition-building process that are often necessary to produce a majority of judges. See infra section III(A)(3). In part, however, this is also due to the fundamental nature of a dissent—the basic idea being that one judge finds significantly unpersuasive the rest of the court’s analysis. See infra note 133. One of the most striking examples of the disparity in candor between dissenting and majority opinions involved Supreme Court Justice Byron White. Dissenting from *Miranda v. Arizona*, 384 U.S. 436 (1966), Justice White expressed in no subtle terms that the Court’s analysis was simply a fabrication—and that much of what the Court regularly does is of the same nature:

*The Court has not discovered or found the law in making today’s decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed it is what it must do . . . until and unless there is some fundamental change in the constitutional distribution of governmental powers.*

*Id.* at 531 (White, J., dissenting) (footnote omitted). As a majority opinion author, however, Justice White not once displayed the same level of candor, even though his comments in *Miranda* no doubt had application to some of those opinions. See Ray Forrester, *Truth in Judging: Supreme Court Opinions as Legislative Drafting*, 38 VAND. L. REV. 463, 472-75 (1985) (praising White’s candid admission that the Court creates new law, but questioning why White never made a similar pronouncement in a majority opinion).

56. *See supra* note 25.
more subtly, through any number of rhetorical or literary devices—
inuendo, allusion, implication, and so forth. In turn, that transmission
may be accompanied by a variety of modifiers or qualifiers that shed
additional light on, or in some cases detract from, the meaning and
predictive value of the expression. Alternatively, the transmission may
assume the form of an ad hominem attack, thus apprising the reader not
only of the judge's particular ideas but also of the existence of serious,
though potentially frivolous, division within the court. 57 In short, the
possible styles of a judge's candor may be as diverse and numerous as the
bounds of human creativity and language permit. Placed in combination
with the many available variations in content and form, the potential
variety of configurations of judicial candor becomes large indeed.
Precisely for this reason, candor cannot be treated monolithically, and
abstract formulations of judicial candor simply will not do.

Needless to say, the elements of content, form, and style are not
entirely distinct from one another, and several correlations could no doubt
be drawn among various combinations within each category. More impor-
tantly, these three elements are not the only sources of variation in the
expression of candor. In particular, three significant variables remain
unaddressed, namely (1) the identity of the speaker (which or what type of
court or judge is employing candor); (2) the one or more audiences to
whom the candor may be addressed; and (3) the larger context (e.g.,
political, social, legal) in which the candor is being expressed. Indeed,
judges themselves, in a survey at New York University's Appellate Judges
Seminar, identified at least nine potential audiences for which they might
be writing in any given case: posterity, the bar, future judges, the
legislature, law students, readers of the New York Times or comparable
local newspapers, the writing judge himself, the losing lawyer or the
lawyers and parties in the case, and fellow judges for the purpose of
forging a majority. 58 This level of variety or complexity is significant,
for the value of candor is largely a function of the audience or audiences
to whom the judge is writing, and logic suggests that the breadth of one's
candor may vary with the differing needs and expectations of one's
audiences. 59

57. For a critique of ad hominem and related styles of opinion writing, see POSNER, supra note
30, at 230-35.

58. Leflar, supra note 21, at 813-14; see also Abner J. Mikva, For Whom Judges Write, 61 S.
audience for judicial opinions as the chief reason opinions have become "less luminous and more
voluminous"); Frederick Schauer, Opinions as Rules, 53 U. CHI. L. REV. 682, 687-88 (1986)
(reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985))
(arguing that recently published drafts of Warren Court opinions reveal little concern for addressing
particular audiences).

59. See, e.g., Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in
Criminal Law, 97 HARV. L. REV. 625 (1984) (arguing that complete awareness of the decisional rules
4. *Instrumental Nature.*—One final but very important point concerns the valuation of candor. Assuming that candor is either sometimes or always desirable, the question remains whether this is because candor is valuable in itself, because candor is a means toward one or more valuable goals, or because it may be both an end and a means depending upon the circumstances. Implicit in some of the discussion over judicial candor, unfortunately, are the first and third alternatives—that candor, at least some of the time, is an end in itself. I say “unfortunately” because this is almost certainly wrong. As far as judging is concerned, candor should almost always be understood as a means, not an end, and its value should be viewed as being mostly contingent on the degree to which its use furthers other goals or values. Indeed, it is precisely this kind of initial conceptual error, among others, that leads us to adopt uncritically the conventional wisdom and thus hinders our ability to engage in a meaningful and rigorous analysis of judicial candor.

B. **The Conception of the Judicial Function**

The second foundational inquiry concerns one’s normative conception and empirical understanding of the judicial role, insofar as one’s view of judicial candor invariably rests on the meaning of “judicial” no less than the meaning of “candor.” To be sure, the issue of judicial candor arises only if there is some sense that judges should be candid—that their office somehow brings with it certain communicative obligations. Thus, if one believes that judges ought to be entirely independent and generally accountable, then their lack of candor may be unproblematic. Conversely, if one believes that judges are given independence in large part because we expect them to be forthright in their written opinions, then a lack of candor obviously poses a serious concern. All of which is to say that, in order to analyze the propriety of judicial candor meaningfully, we must ask what the judiciary is all about: what are its reasons for being, and what are the bases and limits of its legitimacy? Why have we created courts—or, alternatively, why do we allow them to exist—and what do we expect from them procedurally and substantively?

At the outset, we must acknowledge that the judiciary, like the concept of candor, is not a homogeneous entity, but rather consists of many bodies

---

by which conduct is judged may undermine compliance with substantive rules of conduct and therefore that a less-than-candid communication of decisional rules may advance the aims of the law. Professor Dan-Cohen’s thesis is nicely summarized and briefly discussed in Shapiro, supra note 2, at 744-45.

60. *Cf.* Shapiro, *supra* note 2, at 737, 737-38 (arguing that “the case for candor in the crafting of judicial opinions and in other judicial acts draws special strength from the nature of the judicial process”). For a discussion of various judicial conceptions of the judicial role, see Michael E. Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 Marq. L. Rev. 725 (1992).

61. *See infra* note 107 and accompanying text.
with a variety of different natures, functions, and purposes. It is quite likely, for example, that the U.S. Supreme Court's reasons for existence and legitimacy with regard to deciding federal constitutional questions are vastly different than the reasons for existence and legitimacy of, say, a state-level trial court that deals primarily with traffic violations or an administrative-law judge who addresses utility rate-setting or denials of unemployment benefits. It is for this reason that I have attempted to limit my focus to a single, albeit large subset of judicial institutions—namely, appellate courts comprised of life-tenured judges (or judges subject to basically pro forma retention elections).

The reasons for this choice are several. Most obviously, the opinion-writing function tends to be relatively more important to appellate courts and is frequently confined to them. Insofar as one major forum for candor—or for its absence, depending on the situation—is the judicial opinion, it makes a great deal of sense to focus on those judicial tribunals that regularly author and publish opinions. Additionally, the hierarchical and structural position of appellate courts tends to create relatively more situations in which judges may be tempted to forego or limit their candor, including fashioning new legal doctrines, extending existing doctrines into new and often controversial areas, and confronting questions that place the courts in unusually awkward or uncertain relationships vis-a-vis other governmental branches or the public. At the same time, these situations may greatly increase the importance or relevance of several of the pro-candor rationales, such as providing guidance to legal actors or long-term legal development. While these circumstances or situations are not unique to, nor are they always present in, the realm of appellate judicial decisionmaking, their frequency and significance are likely to be heightened in that realm.

Finally, my selection of this genre of judicial institution no doubt has a great deal to do with my own understanding of appellate judges, at least at the federal level. Although readers need not share this understanding in

---


63. See infra section II(A)(6).

64. See infra section II(A)(8).
order to embrace the central theses of the Article, it arguably supports and illuminates them and therefore warrants exposition at this point. Specifically, I believe that such judges have essentially two personae, one of public servant and the other of public fiduciary, each of which is independently defensible and both of which are necessary to the overall legitimacy of the appellate bench. The first of these, that of public servant, can be defined principally by the trait of strict subservience to formal legal authority, particularly positive legal authority, as it is found within his jurisdiction. In essence, a court or judge wearing its public servant hat is more or less a follower of various political, legal, and social cues—the will of the legislature, the weight of the past, such as precedent or tradition, and so forth. At the same time, however, the judge as public servant should not be seen merely as a product of judicial restraint. While it is true, in terms of actual effect, that restraint is certainly one of his characteristics, the judge in public servant mode is by definition restrained and as a result simply would not envision himself, from the outset, as having the discretion or the legitimacy to entertain conduct that might constitute activism. Furthermore, insofar as the label “public servant” implies that the judge in performing this role is to seek the public interest, this characterization would be accurate only insofar as the public interest is explicitly embodied in positive legal authority. If, in fact, the issue is the extent to which courts should do what is in the public interest, that role, while implicit in both personae, is more fully implicated by the latter persona.

By comparison, the judge as public fiduciary may legitimately, consciously, and relatively freely make decisions for society, and for our political and legal regime, in accordance with what he perceives to be the public’s intermediate- and long-term best interests. This would include even choices that are not entirely in accordance with legislative will, current public sentiment, or the existing body of case law and settled principles. At the same time, however, just as the public servant is not


66. In support of this two personae theory, see STEVEN J. BURTON, JUDGING IN GOOD FAITH (1992). Professor Burton advances two theses, the good faith thesis and the permissible discretion thesis, that may be considered loosely analogous to the two personae set forth in the text. “The good faith thesis claims that judges are bound in law to uphold the conventional law, even when they have discretion, by acting only on reasons warranted by that law as grounds for judicial decision.” Id. at xii. The permissible discretion thesis, described as a “companion thesis” by Burton, “claims that, when exercised in good faith, judicial discretion is compatible with the legitimacy of adjudication in a constitutional democracy.” Id. For a comparable analysis of civil judges in France, see Michél de S.-O.-E. Lasser, Judicial (Self-)Portraits: Judicial Discourse in the French Legal System, 104 YALE L.J. 1325 (1995) (arguing that, in the French legal system, there is both an official portrait of the civil judge as passive and mechanical and an unofficial portrait of the civil judge as relatively active and
truly the embodiment of judicial restraint, neither is the public fiduciary the true embodiment of judicial activism. The fiduciary judge is neither radical nor reckless; rather, he is consciously paternalistic—in essence, a judicial statesman. He is, in the words of Tocqueville, “wise to discover the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off, and the supremacy of the Union and the obedience due to the laws along with them.” In turn, the essential requirement of the fiduciary judge is that he possess sufficient discretion to render socially beneficial decisions—conscious and deliberate choices of present and future social ordering—based on his circumspection, experience, and strong sense of stewardship toward law and toward the people whom his decisions govern. The judge as public servant, by contrast, need possess only that amount of discretion necessary to decide the cases before him in a legally legitimate manner; in some respects, he is the contemporary representation or manifestation of positivism, of Blackstonian judicial decisionmaking.

67. The concept of paternalism in law, including its controversial place within liberal democratic theory, is discussed in Gerald Dworkin, *Paternalism, in Morality and the Law* 107 (Richard A. Wasserstrom ed., 1971) (cataloguing the nature and potential problems of explicitly paternalistic legislation); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 Va. L. Rev. 519 (1988) (arguing that legislatures may generally employ paternalistic decisionmaking, subject to popular will and limited constitutional constraints, though courts should be reluctant to do so).

68. See *Gary J. Jacobsohn, Pragmatism, Statesmanship, and the Supreme Court* 13-19 (1977) (contending that a Justice must have the statesmanlike ability to adapt to social change without altering fundamental constitutional principles).

69. Id. at 14 (quoting 1 *Alexis de Tocqueville, Democracy in America* 157 (Phillips Bradley trans., 1945)).

70. See generally *Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession* (1993) (describing the ideal of the lawyer-statesman, including its relationship to judicial craft, and documenting its decline over the last half century). Cf. Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 Cal. L. Rev. 1735, 1755-56 (1988) (arguing that discernible “judicial virtues” do exist—intelligence, integrity, wisdom, and justice—and that they generally require, among other things, the cultivation of experience in the practice of law). Professor Solum’s conception of judicial wisdom is especially helpful: Practical wisdom is the virtue that enables one to make good choices in particular circumstances. The person of practical wisdom knows which particular ends are worth pursuing and which means best achieve those ends. Judicial wisdom is simply the virtue of practical wisdom applied to the choices which judges must make.

Id. at 1752.

Some may find my own use of the term “fiduciary” ironic given the thesis of this Article that judges need not always be candid, for one of the fundamental duties of a fiduciary is to be candid. There is no inconsistency, however, because I would generally require candor from judges when it is logically warranted by one or more of the pro-candor rationales discussed infra subpart II(A). Beyond that, judges should be accorded a significant degree of discretion—and discretion, it must be remembered, is a basic characteristic of fiduciaries, too.
Where, then, do these two personae fit within the appellate judicial function—and to what extent are they in tension? Ultimately, their co-existence actually serves to shape, and even to define, that function. By virtue of this coexistence, in fact, they repeatedly produce an institutional or situational dialectic, the resolution of which naturally plays out through the resolution of particular cases and controversies.

This view is not uncontroversial, and the idea of judges as fiduciaries may strike some as unacceptably undemocratic. Yet without both personae, a judge would not truly be a judge. Without a role as fiduciary in particular, the judge is simply an administrator, not unlike the head of the Environmental Protection Agency or the Secretary of the Department of Housing and Urban Development. In short, without the potential for significant discretion, and without a sense of more than mere short-term responsibility to the public good, the concept of the judge would lose much of its vitality and meaning, if not also its theoretical legitimacy.

71. See, e.g., LEARNED HAND, THE BILL OF RIGHTS 73 (1958) ("For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."); cf. John Hart Ely, Another Such Victory: Constitutional Theory and Practice In a World Where Courts Are No Different from Legislatures, 77 VA. L. REV. 833, 864-65 (1991) (noting that "undemocratic" has become a dirty word in this country, to the point where even its approximate invocation would be rhetorical suicide" even though "[d]own deep most commentators simply do not agree that our principal policy-making organs must be democratically selected"). In particular, the paternalism inherent in such a conception has the potential to clash with a strong liberal individualist strain (reinforced by a genuinely libertarian undercurrent) in American culture. See, e.g., Shapiro, supra note 67, at 529-45 (surveying the "antipaternalist sentiment" in the United States and arguing that the paternalist, when seeking to engage the coercive force of the state, should bear the burden of persuasion). For a defense of "respectful paternalism," at least in the realm of medical ethics, see Roger B. Dworkin, Medical Law and Ethics in the Post-Autonomy Age, 68 IND. L.J. 727, 739-42 (1993) (arguing that we should "refocus our rhetoric and our rules away from concern for individual choice and toward respect for individuals, while . . . recognizing that individuals live in groups whose individual members deserve respect too") (emphasis in original).


73. See infra text accompanying notes 106-08 (arguing that meaningful independence is necessary, not antithetical, to the fundamental legitimacy of the federal courts). Even Judge Hand recognized that the judge's task is one that must draw from the first principles and collective experience of human history and culture, and that the judge is invariably placed in the position of rendering fundamental decisions of social ordering.

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with
I should mention two other aspects of the judicial role that bear heavily on the issue of candor. First, without belaboring the obvious, it is worth highlighting the sometimes forgotten fact that significant institutional differences exist between judges and other members of the legal community, particularly attorneys and scholars. Like lawyers, judges may at times be advocates, although not normally for particular or paying clients. Similarly, judges may even be like scholars. In the final analysis, however, judges are not and cannot be either of these. The institutional, ethical, and intellectual responsibilities of judges, as well as the political, historical, and social forces that constrain them, are simply different from those facing either the attorney or the law professor. In conceptualizing judicial candor, then, we must be certain to distinguish among these fundamentally different roles. Second, as we approach the question of candor, we must also remain cognizant of the fact that judging is, above all, a human activity encumbered with the full weight of the human condition. As Nicholas Zeppos observes:

It may be that for various reasons, including the absence of information, we can never fully understand the judicial decision-making process or expect judges to articulate their reasoning candidly. . . . Until we put to rest doubts about our understanding of the judicial decisionmaking process, the calls for judicial candor are premature, if not altogether unrealistic.

We must keep in mind these limitations and their consequences in terms of

---

Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs or thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which makes [sic] it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

Learned Hand, Sources of Tolerance, 79 U. PA. L. REV. 1, 12-13 (1930).
74. See infra note 181 and accompanying text.
75. See supra text following note 55 (enumerating the various media through which judges may express themselves, including law review articles and books).
76. See, e.g., CALABRESI, supra note 8, at 180-81 (contrasting judicial and scholarly roles with regard to absolutism); KRONMAN, supra note 70, at 219-23, 318-19 (describing the different roles of judges and academics in the development of the law as well as the different constraints that limit the two groups); Paul F. Campos, Advocacy and Scholarship, 81 CAL. L. REV. 817, 849-50 (1993) (contrasting judicial and scholarly functions in relation to truthfulness); see also Altman, supra note 2, at 348-51 (discussing the dilemma faced by legal scholars who demand candor from judges yet who realize that such introspective candor may detrimentally cause judges to see the transparency of much of the judicial endeavor).
77. Zeppos, supra note 8, at 411-12.
how we conceptualize, and to what extent we demand, candor in the judicial process.

II. The Conventional Wisdom Reconsidered

Having laid the conceptual groundwork in Part I, we are now in a position to analyze directly the question of judicial candor. I have divided the analysis into two sections. Subpart A discusses the major rationales that might seemingly justify a pro-candor position similar to that which I have labeled the conventional wisdom. Following an exposition of each rationale is a critique of its internal logic and reasoning, which in many cases serves to undermine substantially the strength or validity of the rationale. Because of the length and scope of this first section, subpart B serves as a kind of tentative summary, in which the results and implications of subpart A are gathered together and assessed.

A. Rationales for Candor—An Exposition and Critique

By calling into question the conventional wisdom, I am not suggesting that the pro-candor position is entirely without merit. To the contrary, as this subpart will illustrate, such a position can be supported by a variety of arguments and from a range of perspectives. What I am contending, however, is that upon closer examination, several of these arguments are either logically or practically unsound, and that none of them is truly able to support a general (that is, across-the-board) imposition of a strong requirement of candor on appellate judges or courts. As a means of reaching this conclusion, this subpart will present seriatim the nine most persuasive arguments in favor of candor and then, following each argument, set forth the countervailing reasons as to why that particular argument is less compelling than it may first appear. Ultimately, I wish to expose the internal theoretical defects or limitations of each rationale—to illustrate that each rationale either is theoretically problematic as constructed, or is valid but of limited strength or breadth of application—without resort to extrinsic concerns such as inefficacy, judicial dynamics, and the like. Only after this internal analysis will I turn, in Part III, to this latter group of considerations—extrinsic factors which suggest that, regardless of the logical reach of any given pro-candor rationale, serious competing values and forces may strongly counsel against the use of candor.78

78. Before moving to the first rationale, I should add a few words on methodology. My goal, as I have said, is basically to reopen the question of candor's legitimacy—to ask why the conventional wisdom is what it is, and why observers of the judiciary become so enraged at the courts when their opinions and other actions are perceived to be less than candid. Accordingly, my analytical approach differs significantly, and in important ways, from that of most other commentaries, including David
I. Accountability.—One of the most commonly articulated arguments in favor of judicial candor is that it provides an indispensable means to keep judges and courts accountable. Governmental accountability is, without doubt, one of the core principles of our political order. If anything, its salience has only increased in recent generations, in which the shadows cast by experiences such as Vietnam, Watergate, and Iran-Contra, among others, have darkened the public perception of the state and have left behind an arguably tragic skepticism within the public psyche.

Many judges and courts, however, remain relatively free from the mechanisms of accountability imposed either by the normal political processes, such as meaningful elections, or by positive law, such as freedom of information or open meeting requirements. In addition to the

Shapiro’s In Defense of Judicial Candor, supra note 2. The analysis in this Article is basically the reverse of Shapiro’s, which devotes little space to the case for candor (thus effectively adopting the conventional wisdom as a starting point) and instead examines five rationales against this strong pro-candor position. In contrast, Shapiro’s catalog of possible reasons not to be candid—i.e., those instances in which a departure from the norm of candor may seem justifiable—is largely detached from the reasons supporting his case for candor. As will become apparent in the following sections, this fundamental methodological difference can significantly transform both the question of judicial candor and our understanding of how that question ought to be answered.

79. See, e.g., Note, Federalism, Political Accountability, and the Spending Clause, 107 HARV. L. REV. 1419, 1421-22 (1994) (describing the importance of political accountability within a federal system). “Without accountability, . . . the system becomes ‘undemocratic . . . in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic.” Id. at 1422 (quoting JOHN HART ELY, DEMOCRACY AND DISRUPT 132 (1980)).

80. See, e.g., Stanley I. Kutler, In the Shadow of Watergate: Legal, Political, and Cultural Implications, 18 NOVA L. REV. 1743, 1759, 1748-63 (1994) (recounting how Watergate “reshaped American attitudes toward government” and gave rise to a wave of reforms intended to restore government accountability).

81. It is true, of course, that several states subject their appellate judges to some kind of elective process, such as periodic retention elections. See generally SUSAN B. CARBON & LARRY C. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES (1980). The value of many of these elections is highly questionable, however, and one may suppose that few judges consider the prospect of them to be a pivotal factor in their decisionmaking. See William K. Hall & Larry T. Aspin, What Twenty Years of Judicial Retention Elections Have Told Us, 70 JUDICATURE 340, 347 (1987) (finding a 98.8% retention rate over a 20-year period in a sample of 10 states). One notable exception, and arguably a gross aberration, involved a 1986 California election in which three supreme court justices were removed from office. See Robert S. Thompson, Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986, 61 S. CAL. L. REV. 2007, 2036 (1988) (arguing that departures from norms of judicial decisionmaking rendered the justices vulnerable); John T. Wold & John H. Culver, The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability, 70 JUDICATURE 348, 355 (1987) (speculating that “the 1986 election may prove to have been a historical aberration”).

82. Freedom of information laws require certain government agencies, upon a citizen’s proper request, to release documents in their possession, typically subject to the withholding or redaction of
absence of these formal legal mechanisms, it is also the case that the actions of courts (like the actions of administrative agencies) generally receive little press coverage.\(^85\) As a consequence, their accountability must derive from alternative sources such as the expressed reasoning of their written opinions\(^86\)—that is to say, from their purported candor—and from the relationship between the substance of that reasoning and their ultimate sources of authority.\(^87\) Moreover, for the very same reasons that

---


84. Consider, for example, the seemingly large number of ways that Supreme Court decisions may be modified or overruled: “1) the restaffing of the bench over many years (with significant input on part of the President, who nominates judges, and the Senate, which must advise and consent to such nominations); 2) persuading Justices to change their minds about prior opinions; 3) congressional modifications of the Court’s jurisdiction; 4) constitutional amendment; and 5) impeachment.” MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY 3 n.4 (1993). As Gerhardt and Rowe note, these “means that the political branches can use to try to undo the Court’s constitutional rulings are difficult to effect and time-consuming.” \textit{Id.} at 3. For an exposition and critique of the various power- and democracy-based arguments in favor of judicial self-restraint, see POSNER, supra note 30, at 211-14.


86. \textit{Cf.} Joel B. Grossman, \textit{Comments on “Secrecy and the Supreme Court,”} 22 BUFF. L. REV. 831, 835 (1973) (conceding that when judges are not accountable to an electorate, “knowing as much as possible about what these judges are doing makes a certain amount of intuitive sense”). Of course, in terms of openness, the distinction drawn between the operations of the courts—and I have in mind especially the Supreme Court—and the operations of the other branches of government, at least at the federal level, is not always clear or coherent. For one thing, it is true that “a good part of the Court’s work is done in public sessions, and that every single case, petition, or application. . . . All too often, indeed, not only the process but the decisions themselves are kept from the public—as in national security matters.” MILLER, JUDICIAL ACTIVISM, supra note 4, at 12.

87. \textit{See} John Hart Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 YALE L.J. 920, 949 (1973) (“[B]efore the Court can get to the ‘balancing’ stage, before it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority.” (emphasis omitted)); Thomas W. Merrill, \textit{A Modest Proposal for a Political Court}, 17 HARV. J.L. & PUB. POL’Y 137, 137-38 (1994) (noting the pervasiveness of the view that the legitimacy of the Supreme Court derives substantially from a perception that its decisions are “dictated by law”); Richard B. Saphire, \textit{Making Noninterpretivism Respectable: Michael J. Perry’s Contributions to Constitutional Theory}, 81 MICH. L. REV. 782, 783 n.6 (1983) (“Since federal judges are not electorally accountable . . . their authority must derive from the Constitution itself. . . . Where courts cannot plausibly trace the exercise of their
federal judges are not otherwise accountable—because of life tenure and nondiminishment of compensation, for example—there is no obvious reason why their candor should be withheld.

To be sure, the argument from accountability is one of the most frequently assumed or articulated rationales for the requirement of judicial candor, and, at an intuitive level, it arguably makes a great deal of sense: courts, like legislatures and administrative agencies, are political entities established by and operating within a constitutional order in which all authority is derived from the people and which is theoretically dependent on the accountability of these political entities for its ongoing integrity and viability. In this respect, accountability provides a power to the Constitution, that power may be considered suspect.

Professor Stephen Wasby suggests that there are two types of judicial accountability, one "within the legal system" and one "to the broader political system":

The former includes judges' socialization; precedent and the public nature of judicial action; reversal of lower court judges' decisions; and constraints imposed by courts' organizational needs. Political accountability [the latter type] derives from selection and removal of judges (also part of accountability within the legal community); the role of public opinion; and resistance to judges' decisions.


89. See Jonathan R. Macey & Geoffrey P. Miller, The Canons of Statutory Construction and Judicial Preferences, 45 VAND. L. REV. 647, 660 n.45 (1992) ("Judges with life tenure have no reason to refrain from articulating their views."). But see Marshall, supra note 21, at 679-85 (noting that, despite life tenure for judges, disincentives to candor exist such as the increased likelihood of reversal, the potential for criticism, and the reduced chances for promotion).

90. See, e.g., BAKER, supra note 62, at 119-20 (arguing that a written opinion, stating a court's reasoning, allows "litigants and the public [to be] assured the decision is the product of reasoned judgment and thoughtful evaluation rather than the mere exercise of whim and caprice" and that "[a] writing requirement does by definition serve, at least, to constrain arbitrariness"); Forrester, supra note 55, at 477 (maintaining that judicial candor increases public accountability and is, therefore, "more conducive to sound national health"); Arthur S. Miller & D.S. Sastri, Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain, 22 BUFF. L. REV. 799, 822-23 (1973) ("In a polity that considers itself to be democratic, secrecy should be the exception and openness and disclosure the rule."); Washy, supra note 87, at 216 ("The requirement of written opinions is part of the process of producing accountability."); see also William Ray Forrester, Are We Ready for Truth in Judging?, 63 A.B.A. J. 1212, 1214 (1977) ("Honesty in judging might lead to greater individual responsibility on the part of all in the process of governing the republic."). Along the same lines, Professor Shapiro argues that the case for candor rests in part on "the need for trust in the carrying on of human affairs." Shapiro, supra note 2, at 737. Accountability and trust may be related in two ways. First, the perception of governmental accountability may serve as a basis for continued public trust in the state, without which the state might seriously lack legitimacy. Second, accountability may serve as a substitute for trust; in the absence of any real faith in the integrity or efficacy of the government, the people may seek assurance through particular mechanisms of accountability, such as disclosure requirements, supervision or oversight requirements, ad hoc or systematically scheduled investigations or audits, and the like.

91. See, e.g., MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 10 (1991) ("[A] pragmatic, large-scale democracy must emphasize the notion of political accountability: the requirement that those who do make policy choices periodically present themselves to the populace for an accounting . . . ."); Abrahamson, supra

HeinOnline -- 73 Tex. L. Rev. 1337 1994-1995
wonderfully seductive justification for candor, for it draws upon our most basic conceptions of fair and honest government and evokes sentiments of political idealism that hark back to the very founding of our nation and the framing of our Constitution.\textsuperscript{92} For three very important reasons, however, it is also an extremely problematic rationale, for it rests on a conception of the judiciary, particularly the federal courts, that is substantially inconsistent with the structural design and philosophical framework of our constitutional order.

First, there is an inherent tension between the ideal of accountability and the ideal of judicial independence, insofar as each appears to undermine or lessen the other. Consider more closely, for example, the ideal of judicial independence, which has at least two functions. The received wisdom or primary function relating to independence is its necessity, instrumentally speaking, for the achievement of impartial decisionmaking, the latter being a fundamental goal of any system based on the rule of law and the principle of equal treatment by the state.\textsuperscript{93} The realization of impartiality requires, among other things, "a certain degree of independence from pressures exercised upon the judge, including, on the one hand, the outside pressures from government (independence in its central, traditional meaning) and from other centres of power, public and private, and on the other hand, the inside pressures from the parties themselves."\textsuperscript{94} A second and often related goal of independence concerns not impartiality as such, but rather the relative freedom to chart the course of the law—to shape new rules and to experiment with new concepts—particularly when the other branches of government lack either the capital, the conviction, the cognizance, or the capacity to do so. Whether we adopt

\begin{footnotes}
\footnote{36, at 990 ("[I]n a democracy, the people should have the opportunity to judge the judges and their reasoning." (citing Martha L. Minow, \textit{Judging Inside Out}, 61 U. COLO. L. REV. 795, 801 (1990)).}
\footnote{92. As Bernard Schwartz suggests, "Americans firmly believe in the healthy effects of publicity and have a strong antipathy to the inherent secretiveness of government agencies."\textsuperscript{4} SCHWARTZ, \textit{supra} note 72, § 3.17, at 146. Incidentally, the disparity between the attractiveness of candor when viewed in abstract terms (e.g., as part of our democratic order) and the potential unattractiveness of candor when fleshed out in concrete reality is a major theme in this Article and has been recognized by at least one other commentator in the judicial candor debate:}
\footnote{93. \textit{See} MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 70 (1989) (noting that judicial independence is "but an instrumental value, the goal of which is to safeguard another value—connected for sure, but different and much more 'ultimate': the impartiality of the judge" (emphasis in original)).}
\footnote{94. \textit{Id.} at 71.}
\end{footnotes}
as our model for this second goal the activism of *Brown v. Board of Education*\(^\text{95}\) or the extraordinary fluidity of the common law, the basic notion that courts ought to participate in the evolution and robust interpretation of our laws, and that independence is a prerequisite for that role, is virtually beyond question.\(^\text{96}\)

Yet, whichever vision of independence one embraces—and one may certainly embrace both—the tension between the goals of independence and the ideal of accountability is difficult to avoid.\(^\text{97}\) Regarding impartiality, for example, an obligation of candor could very well render the judiciary subject to the expectations of certain potential constituents, such as the legislature (which may control its jurisdiction and the confirmation of its nominees), the executive (which chooses its nominees and may, through selective enforcement, effectively control its docket), or the press (which can affect the palatability of its decisions as well as the success of its nominees). Insofar as this is correct, then is not this first basis for judicial independence effectively undermined by such an obligation? It is true, of course, that “despite [the] American emphasis on judicial independence, courts are not fully independent or autonomous institutions. Their structure, jurisdiction and resources, including their budget and personnel, are determined by the other branches of government.”\(^\text{98}\)

Likewise, it is true that a lack of candor may itself produce adverse consequences among these constituencies—*e.g.*, their resultant distrust of judicial decisionmaking upon discovering this lack of candor\(^\text{99}\)—and that full candor need not always

---


96. Our commitment to judicial independence, largely as an attempt to secure one or both of these goals, is embodied in the doctrine of absolute immunity for judges acting within their official capacity. See, *e.g.*, Stump v. Sparkman, 435 U.S. 349, 355 (1978) (“As early as 1872, the Court recognized that it was ‘a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.’” (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872))); Pierson v. Ray, 386 U.S. 547, 554 (1967) (“This immunity applies even when the judge is accused of acting maliciously and corruptly, and it ‘is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that [the] judges should be at liberty to exercise their functions with independence and without fear of consequences.’” (alteration in original) (quoting Scott v. Stansfield, 3 L.R.-Ex. 220, 223 (1868))).

97. Professor Seidman observes that the tension between independence and accountability, and the ambivalence we experience towards choosing between them, are the inevitable result of our subjective preferences as a political community. See Louis M. Seidman, *Ambivalence and Accountability*, 61 S. Cal. L. Rev. 1571, 1573-74 (1988).

98. Wasby, *supra* note 87, at 216.

99. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 7, 178 (1993) (“When a court lacks candor, and the readers know it, the result can only be that the readers have less reason to trust that what the court says corresponds to what it means, and this results in a decrease in the legitimacy of the decisionmaking process.”); Shapiro, *supra* note 2, at 737 (“[L]ack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.”); Zeppos, *supra* note 8, at 401-02 (“[D]eception in judging undermines the integrity of the judiciary.”).
result in the judiciary being beholden to such entities. Nevertheless, the fact remains that a requirement of candor, which is effectively a denial of the choice to forgo candor, may often affect judicial impartiality in adverse ways. That courts are not fully independent in other respects, or that the periodic choice to forgo candor may itself subvert the impartiality of courts, does not justify denying them that choice altogether.

A requirement of candor may also seriously undermine the second rationale for independence—the judiciary’s ability to fulfill its creative lawmaking function (in accordance with its persona of public fiduciary) free from the political and related pressures to which the other lawmaking branches are regularly subjected. In this sense, judicial independence is loosely analogous to academic tenure, at least insofar as the latter exists to secure intellectual and ideological freedom.100 Of course, the purist might argue that judges should be creative only to the extent they are willing to disclose fully and consistently any attempt on their part to bring about doctrinal or structural reform through their decisionmaking capacities. This view, however, rests on a terribly constrained understanding of the concept of “creativity,” one that is highly incongruent with that concept’s meaning both in other areas of human endeavor, such as the literary, visual, and musical arts,101 and in our idea and historical images of “great judging,”102 whether one has in mind the Grand Style of common-law reasoning and opinion-writing103 or the forging of modern


101. A major constraining force on the creativity of artists is a lack of independence resulting from the limits imposed on them by the patronage system, whether through the Church, through private individual or corporate patrons, or through the government. See, e.g., GIDEON CHAGY, THE NEW PATRONS OF THE ARTS 72-79 (1973) (examining the relationship between corporate patronage and artistic freedom and integrity); David F. Partlett, From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry, 66 TUL. L. REV. 771, 812-15 (1992) (noting the influence and decline of the institutional patronage system governing the production of music). Needless to say, the battle over artistic independence and creativity continues today, most notably in the context of federal governmental patronage. See Craig A. Masback, Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts, 10 YALE L. & POL’Y REV. 177, 177-80 (1992); Alvano I. Anillo, Note, The National Endowment for the Humanities: Control of Funding Versus Academic Freedom, 45 VAND. L. REV. 455, 458-73 (1992) (both providing an overview of controversies in government funding of the arts).

102. See, e.g., Abrahamson, supra note 36, at 990-91 & n.78 (noting serious doubt as to whether Benjamin Cardozo, considered by many to have been a great judge, was truly candid in his decision-making); Richard A. Posner, Law and Literature: A Relation Reargued, 72 VA. L. REV. 1351, 1379-88 (1986) (suggesting that the greatness of Justice Holmes’s opinions came not from their careful or complete reasoning, but rather from their rhetorical force).

First Amendment doctrine. Indeed, circumscribing judicial creativity by a mandate of full candor is not unlike imposing sunshine requirements on administrative agencies—an especially apt comparison insofar as such a mandate effectively would bring judges one step closer to being quasi-administrators.

It is not clear, moreover, what relationship actually exists between candor and accountability. To what extent is the judiciary really judged by the content and form of its decisionmaking as opposed to simply the palatability of its results? And even if that relationship could somehow be reduced to a quantitative or qualitative equation, who ought to decide? Which side of the balance—the goal of accountability or the goals of independence, i.e., impartiality and creative legal evolution—should prevail in any given instance of tension? In other words, even if we could demonstrate that candor is an efficacious means toward achieving judicial accountability, we would still lack a basis for deciding when the gain in accountability is worth the loss in independence. Accountability, after all, is not clearly more important than either impartiality or creative legal evolution.

A second and more serious argument against the accountability rationale is that any effort to transform courts into accountable government agencies may paradoxically undermine the judiciary's legitimacy. The independence and interpretive ultimacy of the federal courts, or at least the Supreme Court, appear to present what Bickel called the "countermajoritarian problem." However, to the extent we understand the judiciary's independence as its source of legitimacy—as its raison d'être amidst a field of otherwise publicly accountable governmental institutions—then to take that independence and resultant discretion away is effectively to render the judiciary less legitimate. For then the very basis of its legitimacy—its relative unaccountability—is taken away as well, and courts would look a great deal more like agencies, designated to carry out legislative and executive tasks subject basically to a full disclosure requirement.

Of course, in rebuttal one may argue that I have committed a fundamental conceptual error by using independence as the status quo or analytical baseline, thereby making candor appear as some sort of intrusion into the otherwise unfettered freedom of judges. Might it actually be the

104. See David Cole, Agon at Agora: Creative Misreadings in the First Amendment Tradition, 95 YALE L.J. 857 (1986) (analyzing the judicial misreading of precedent and concluding that we as a legal culture ultimately demand such misreadings for the sake of legitimacy and continuity, despite our more immediate demand that judges adhere narrowly to precedent).

105. In this regard, see generally SCHWARTZ, supra note 72, § 7.30 (discussing the requirement that government agencies articulate the reasons for their decisions).

case that judges are given independence from the outset based in part on an expectation that they will be candid? In other words, might not candor be a condition precedent, rather than an obligation subsequent, to the relative independence of judges? Theoretically, of course, this is possible, particularly if we embrace a contractarian understanding of the state (one in which power is understood as being minimally and conditionally ceded from the people to the government) and we assume substantial cognizance and rationality among the parties to the social contract. The problem with this vision, however, is that it does not necessarily comport either with the historical reality of the genesis and evolution of the judiciary or with the contemporary functioning of courts in our constitutional order. Moreover, regardless of whether candor is understood as a precedent condition or a subsequent obligation, and even if such an obligation could be defended solely on contemporary grounds, this criticism serves only to beg the question regarding independence, for there still remains the fundamental concern about the underlying legitimacy of courts where their independence is abridged. We may not be bound to the history of the judicial function, but we are still bound by the logic of Marbury. A judiciary encumbered with an obligation to be fully candid simply cannot

107. See, e.g., Bruce M. Selya, Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age, 55 OHIO ST. L.J. 405, 411 (1994) ("[P]ublication [of opinions] rarely has been perceived as part and parcel of our jurisprudential heritage. Although a number of states in the nineteenth century passed statutes mandating publication, this development appears to have been driven by short-term political considerations and by resentment at the extreme practice of issuing reversals without opinion." (citing Max Radin, The Requirement of Written Opinions, 18 CAL. L. REV. 486, 487, 490 (1930))). The early period of the Supreme Court is replete with examples of secrecy and thus lack of candor. See, e.g., Miller & Sastri, supra note 90, at 806-09 (noting Jefferson’s objection to Marshall’s introduction of secret conferences of the Justices before announcing decisions). In fact, the federal judiciary is notable for, among other things, the secrecy surrounding both its origins and its establishment in the constitutional order. Its creation, though not necessarily its ratification, transpired at a constitutional convention marked by deliberate efforts to avoid public awareness. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 86-87 (1986) (discussing the secrecy surrounding the Constitutional Convention). Likewise, the very power of judicial review, which must have come to accept as desirable although not necessarily entirely defensible, was most definitively articulated in the arguably uncandid case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See, e.g., RICHARD FUNSTON, A VITAL NATIONAL SEMINAR: THE SUPREME COURT IN AMERICAN POLITICAL LIFE 6-10 (1978) (noting the shortcomings in Chief Justice Marshall’s analysis); William W. Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 DUKE L.J. 1 (providing an analytical review of the decision and questioning much of its reasoning). Finally, there is nothing in the Constitution itself suggesting that candor is a condition precedent to the independence of the judiciary. Structural independence is clearly intended, see, e.g., U.S. CONST. art. III, § 1 (proscribing the diminishment of judicial compensation), with no express conditions other than those for holding office. These are not, of course, arguments in favor of contemporary judicial secrecy; rather, they are intended to emphasize that full candor is not especially a part of our heritage.

108. Marbury, 5 U.S. (1 Cranch) at 137; see, e.g., MICHAEL J. FERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 15-27 (1994) (discussing the theory that judicial review is necessary, or at least serves us well, in the protection of constitutional directives).
be considered sufficiently independent to justify its existence, or at least its exercise of judicial review, in an otherwise democratic constitutional order.

Third and finally, the accountability rationale fails, I believe, if we take a closer look at the meaning of judicial accountability, the relevant question being "accountability to what"?\textsuperscript{109} Thus far, we have largely proceeded as if accountability ought to mean democratic accountability—\textit{i.e.}, candor is necessary for accountability, and accountability is necessary for democratic legitimacy—hence the persistence of the so-called counter-majoritarian difficulty. Yet judicial accountability need not mean ultimate responsibility to the people in a democratic sense, at least in the short-term, but instead might concern accountability to the rule of law; to an agreed institutional or structural framework in which governmental decisions are made (\textit{e.g.}, Articles I-VI of the Constitution) or are implemented (\textit{e.g.}, the concept of procedural due process under the Fifth and Fourteenth Amendments); to various substantive principles, such as justice or equality; to various methodological principles, such as logic or rationality; or to some privileged point in time or space or humanity, such as a purported adherence to the intent of the framers.\textsuperscript{110} In turn, the question becomes not how the courts ought to be accountable to the people or their representatives in the context of any particular decision, but rather who should determine, by what standards, whether the courts have been faithful to these principles and institutions.\textsuperscript{111} Indeed, the central idea of American constitutionalism is the unfolding and maintenance of a functioning and acceptable political and social order over the long term, not necessarily the rightness or democratic acceptability of particular decisions arising under

\begin{itemize}
\item \textsuperscript{109} David S. Clark, \textit{The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat}, 61 S. CAL. L. REV. 1795, 1799 (1988) (raising this question and proposing that "[i]n our Western tradition, the answer would seem to be accountability to law").
\item \textsuperscript{110} Compare James L. Oakes, \textit{The Proper Role of the Federal Courts in Enforcing the Bill of Rights}, 54 N.Y.U. L. REV. 911, 949 (1979) ("[T]he legitimacy of judicial solution to many of the most perplexing problems of the day must be, and is, ultimately supported by the accountability of the judiciary to the people.") with Planned Parenthood v. Casey, 112 S. Ct. 2791, 2865 (1992) (plurality opinion) ("The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.").
\item Professor Mauro Cappelletti offers a four-component typology of judicial accountability, consisting of (1) political accountability; (2) societal or public accountability; (3) legal (vicarious) accountability of the state; and (4) legal (personal) accountability of the judge. CAPPELLETTI, supra note 93, at 72; see also COFFIN, supra note 50, at 243-44 (listing six forms of federal appellate accountability).
\item \textsuperscript{111} The question of "who" is not a simple one, but once again the best answer may not be the public or their direct representatives. Certainly, the federal courts cannot consistently render publicly unacceptable decisions without ramifications for the composition and power of the judiciary, a phenomenon that is arguably fully consistent with our constitutional structure. The appropriate standard would probably be something like our collective experience as a nation, perhaps from the vantage point of our posterity, although this answer is admittedly amorphous if not question-begging.
\end{itemize}
the Constitution.\textsuperscript{112} This is not to say that American constitutionalism is entirely of a subsistent, as opposed to aspirational, nature. To the contrary, scholars, attorneys, and others should feel free to criticize the courts for the purpose of reform and correction, and the courts, in turn, should humbly be open to such criticism. Nor is it to say that candor could not play an important role within this alternative scheme or paradigm of accountability. But it is to suggest that the effort to justify a judicial candor obligation on the basis of \textit{democratic} accountability rests on a narrow and potentially misguided conception of the judiciary's relationship to the constitutional order.

Based on these considerations, one may simply choose to reject the model of accountability set forth earlier in the analysis and to embrace instead the view that courts, although perhaps effectively accountable to the people in the long term, are chiefly and fundamentally accountable to certain principles embodied in the Constitution. At least at a structural level, such a view would certainly be congruent with the idea that one function of the judiciary is to "check" the more politically sensitive branches through the power of judicial review. In this regard, Martin Redish has argued in relation to the substantive and the jurisdictional decisionmaking of federal courts that

both common sense and practical experience dictate that the provisions of the Constitution will effectively be deprived of all legal force and meaning if the very majoritarian branches regulated and controlled by that document are allowed to act as the final arbiters of the counter-majoritarian limitations which the document imposes upon them. It is, then, the basic, positivistic belief in the rule of law which dictates that only one branch of government formally insulated from majoritarian pressures must exercise the final interpretive and enforcement power over \textit{all} the Constitution's provisions.

\ldots To the extent that the exercise of such an authority by the unrepresentative judiciary may be characterized as "undemocratic," it is so only to the extent that the American political structure is itself undemocratic.\textsuperscript{113}

\textsuperscript{112} This may partly explain why the actual mechanisms of control over federal courts and judges, \textit{see supra} note 84, are so limited or difficult to implement.

\textsuperscript{113} REDISH, \textit{supra} note 91, at 5-6 (emphasis in original). Professor Luban offers an even broader perspective on this matter:

The countermajoritarian difficulty \ldots has nothing essentially to do with the "anomaly" of a nonmajoritarian judiciary, and indeed nothing essentially to do with the judiciary at all. The difficulty inheres instead in the very nature of constitutionalism itself.

For constitutions by their very existence constrain the desires of majorities, and pure majoritarianism makes constitutionalism impossible.

Luban, \textit{supra} note 65, at 456-57 (footnote omitted); \textit{see also} Robert A. Dahl, \textit{Decision-Making in a...
In short, the relationship between candor and accountability is at best qualified and at worst indeterminate. Certainly it is not of the order necessary to support the broad mandate embodied in the conventional wisdom. This does not mean, of course, that the principle of accountability could support no candor requirement whatsoever; neither the tension between accountability and independence nor a nondemocratic conceptualization of accountability leads to the conclusion that candor may freely be forsaken by members of the bench. (After all, judicial independence, like judicial candor, is simply a means and not an end, and therefore its antagonistic relationship to accountability should presumably cease when independence no longer serves its underlying goals.) But candor could be required to the extent that it would further the goal of accountability, however conceived, and would not plainly undermine the principles of judicial independence. Beyond this point, any obligation of judicial candor must rest on other grounds.

2. **Power.**—Logically and historically related to the idea of accountability is the notion that candor serves to limit the discretion and thus the power of judges.

Candor and sincerity are part of the distinctive process that legitimates judicial power—a process of decisionmaking and discourse whose requirements include writing opinions and giving reasoned justifications. These constraints help to promote the public accountability of judges and to stimulate judicial reflection and

---

*Democracy: The Supreme Court as a National Policy-Maker, 6 J. Pub. L. 279, 294 (1957)* (concluding that judicial policymaking, like legislative and executive policymaking, results from a process of "conflict, bargaining, and agreement among minorities" rather than true majority rule); *Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 194 (1952)* (contending that "[i]t is a grave oversimplification to contend that no society can be democratic unless its legislature has sovereign powers" and arguing that judicial review protects the democratic process).

114. See, e.g., Zeppos, *supra* note 8, at 397, 395-99 (arguing that when courts are reviewing agency interpretations of statutes, "candid dynamic interpretation" may be undesirable because it "seems to undermine the foundation upon which courts have been able to police agency action").

115. Some scholars would either equate accountability with the limitation of power or subsume the latter under the former. See, e.g., Stephen L. Wasby, *Accountability of the Courts, in Accountability in Urban Society* 143, 145 (Scott A. Greer et al. eds., 1978) (defining accountability in terms of "keeping an institution’s decisions in line with community political or social values and otherwise imposing constraints on the courts’ exercise of discretion"). Yet the goals of accountability and limited power, though clearly related, can nevertheless be distinguished. The central value of accountability as provisionally formulated in the text concerns the democratic ideal that all government institutions be responsible to the people or their representatives, or at least that the people believe their institutions are to some extent accountable, regardless of the specific power those institutions wield. The central value of constraining power, by contrast, relates to the twin political ideals of limited government and diffuse government (usually called the separation of powers) as a means to prevent tyranny or the domination of government by only one type of authority. Actual accountability may serve to constrain governmental power, but the two concepts are not necessarily synonymous.
self-control. Without a requirement of candor, the constraints would be meaningless.\footnote{116} As with accountability, it is precisely because many judges, certainly those at the federal level, are subject to neither direct nor simple control by the public or their representatives that the regulation of judicial power must be achieved through other means such as intra-institutional pressures, individual judicial restraint, and, ostensibly, an obligation to exercise candor.

As a practical matter, such an obligation may constrain judicial power in at least two ways. First, the resultant candor may allow citizens and their legislators to evaluate and critique judicial products more readily, effectively taking advantage of the accountability discussed above.\footnote{117} As Professor Shapiro suggests,

[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. In the absence of an obligation of candor, this constraint would be greatly diluted, since judges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail. In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another.\footnote{118}

In turn, the public may deliberately choose to alter the power of the judiciary based on the sufficiency of its reasoning, not simply the

\footnote{116. Gewirtz, supra note 2, at 667 (footnote omitted); see also EDWARD F. HENNESSEY, JUDGES MAKING LAW 8-9 (1994) (recognizing and discussing "legal reasoning as a restraint upon judges in their common law exercise"); Abrahamson, supra note 36, at 987-88 ("The writing process imposes a profound constraint on judicial discretion. The act of stating reasons that can be judged and evaluated, combined with the doctrine of stare decisis, can control judicial arbitrariness." (footnote omitted)); Kathleen Waits, Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction, 1983 U. ILL. L. REV. 917, 931 ("The discipline of a written opinion ... operates as an important control on judicial arbitrariness."). Even partial candor, e.g., through the use of legal fictions, may serve to limit judicial discretion, even if only partially. See Weisberg, supra note 8, at 252. ("[R]equiring judges to justify their decisions according to a fairly formal rhetoric [i.e., legal fictions] will at least reduce the excesses of result orientation to some degree.").}

\footnote{117. KEETON, supra note 20, at 20-21. As Judge Keeton explains,}

Being more explicit about value implications of a choice ... more clearly exposes for criticism both the choice and the reasons for the choice. Openly acknowledging that courts make value-laden choices will, in the long run, contribute to a sharper focus on issues of principles and policy, and to wiser choices.

\footnote{Id. Forced judicial speech is thus a counterpart to free citizen speech in the control and reform of judicial power specifically and governmental power generally. For an analysis of this role of free speech, see THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 37-46 (1989); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948).}

\footnote{118. Shapiro, supra note 2, at 737 (footnotes omitted).}
palatability of its results. Absent such a requirement, reader comprehension and assessment may suffer and the appropriateness of judicial power will be determined entirely by the outward effects, and not the internal processes, of judicial decisionmaking. The second power-constraining function of candor may be to raise the consciousness of judges themselves, who in turn may perceive an increased obligation to provide sound, legally relevant reasons for their decisions. In this sense, a candor requirement may be part of the self-enforced doctrine of judicial restraint:

Candor requires admitting that the judge’s personal policy preferences or values play a role in the judicial process. This admission promotes judicial self-restraint in its separation of powers sense by exposing judges as people exercising political power rather than passively recording and transmitting (and maybe amplifying just a bit) decisions made elsewhere in the government.

Relatedly, candor presumably enhances the ability of judges to monitor not only their own but also each other’s exercise of discretion, thus elevating the principle of judicial self-restraint to an institutional plane:

The threat of a dissent may improve the quality of the majority’s decision. If a dissent is written, it may help focus on policy implications which the majority has failed to address . . . . If, as sometimes happens, the majority not only reads the dissent but responds to it, the court’s true intent may be clarified.

As with the accountability rationale, this argument has a strong intuitive appeal and may therefore come across as extremely convincing in the abstract. Both conceptually and empirically, however, its soundness is necessarily open to debate. At the very least, it appears to encounter the very same conceptual problem as the argument from accountability—namely, the concept of judicial independence. In particular, the notion that judges ought to employ candor so that a disgruntled public or its representatives can more easily restrict their discretion seems to run contrary to the underlying justifications for judicial independence—impartiality and creativity—as well as the conception of American constitutionalism discussed above in relation to accountability. Even more than the abstract idea of accountability, the actual exercise of popular control over judicial discretion, resulting from the dislike of particular expressed reasons, may conflict philosophically with the textual enumer-

119. Id. at 750 (“[T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders.”).
121. Waits, supra note 116, at 935.
ation of certain structural mechanisms in the Constitution, such as the provisions guaranteeing life tenure and undiminished compensation, and may not be fully consistent with the current function and posture of the federal courts in the constitutional order. This is not to say that excessive discretion through a lack of candor does not remain a legitimate concern, or that this concern would not support some kind of meaningful candor requirement. It does suggest, however, that a full and general candor requirement is philosophically problematic under our legal and political regime as it is presently constituted.

In addition, there is both (1) a serious practical problem with the idea that candor may limit judicial discretion by heightening judicial self-awareness and (2) a serious empirical problem with the idea that judicial candor would enhance the public's capacity to limit judicial power based on the public's assessment of a court's reasoning as opposed simply to its results. As for the first proposition, while it may be true that some increase in self-awareness results from the process of being candid, we must recognize that this increased awareness—and thus any decrease in discretion—will be limited by the judge's cognizance, which in turn will be limited by the unusually potent phenomenon of self-deception. Of course, if we choose to adopt an entirely subjective definition of candor, then incidences of self-deception would not present a candor problem (which is one drawback of using such a definition). If, however, we subscribe to an objective definition, then the limitation in increased awareness caused by self-deception would essentially amount to a failure of candor, thus calling into question the value of this rationale. Additionally, there is some debate as to the nature of the relationship between candor and judicial discretion when viewed in light of the psychology of judicial decision-making. In particular, there may be circumstances in which an increase in

122. U.S. CONST. art. III, § 1; see Philip B. Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 U. CHI. L. REV. 665, 667 (1969); Martha A. Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 SUP. CT. REV. 135, 152-53 ("The Constitutional Convention... decisively rejected removal [of judges] on joint address and refused to consider an elective judiciary. They hoped to make the judges free from popular pressure and from legislative control. Their purpose was to create a truly independent judiciary limited only by the cumbersome process of impeachment.").

The importance of guaranteed tenure, even for a term of years, cannot be overstated—as former Surgeon General Joyceelyn Elders, among others, can attest. See James Popkin, A Case of Too Much Candor, U.S. NEWS & WORLD REP., Dec. 19, 1994, at 31 (discussing the demise of Dr. Elders resulting from public dislike of her freely expressed views).

123. Although Congress has significant power over the courts' jurisdiction, see REDISH, supra note 91, at 17-18, it is generally agreed that there are limits to this power. See CHEMERINSKY, supra note 54, §§ 3.1-3.3; LOW & JEFFRIES, supra note 54, at 170-216 (both delineating various approaches to determining limits on congressional restriction of federal court jurisdiction).

124. See supra notes 31-37 and accompanying text (discussing the relative advantages and disadvantages of choosing a subjective or an objective definition).
some forms of candor may serve to enhance, rather than to restrain, a judge's actual or perceived level of discretion, which might have a consequent paradoxical effect of a decrease in candor. Scott Altman, for example, argues that the more that judges are candid with themselves in the sense of being rigorously introspective regarding the true nature of their decisionmaking, the less constrained they may feel in their exercise of discretion and thus the less candid they may be in their opinions.\textsuperscript{125} In other words, an increase in one type of candor (we might call it "inward candor") may prompt judges to see that they are in fact not constrained by certain forces that they previously believed constrained them, leading them to a greater awareness of their actual power and a greater temptation to forgo candor ("outward candor") in order to maintain the appearance of constraint by those forces. Likewise, Nicholas Zeppos has argued in the context of statutory interpretation, particularly dynamic statutory interpretation, that a judicial candor requirement may not only fail to limit judicial power, but may even enhance it.\textsuperscript{126}

As for the second proposition, which concerns the role of the public in the control of judicial power, the problem is even more significant. While it may be comforting to believe that the public can be involved in such a process, and that candor will enable readers of the \textit{New York Times} or the \textit{Indiana Daily Student} to inspect more thoroughly the judiciary's reasoning, this belief seems to assume that the public should somehow be intimately involved with judicial decisionmaking and that the courts are somehow formally accountable to public opinion. Courts are doubtless influenced by public opinion, and extrinsic pressures on judges may enhance the fidelity of their reasoning and decisionmaking to legitimate sources of legal authority, such as text, underlying principles, and the like.\textsuperscript{127} But it simply does not follow, as a matter of theory, that courts must then express themselves in ways that are satisfying to the public at large. What is more, the public may not even have the interest to read judicial opinions, may not possess the capacity to critique meaningfully their reasoning,\textsuperscript{128} and may not know what to do procedurally, through the statutory or constitutional amendment processes, to effect a change in the distribution of judicial power should such a change be deemed desirable.\textsuperscript{129}

\begin{thebibliography}{9}
\bibitem{125} Altman, \textit{supra} note 2, at 303-27.
\bibitem{126} Zeppos, \textit{supra} note 8, at 385-93.
\bibitem{127} See, e.g., Norman Dorsen, \textit{How American Judges Interpret the Bill of Rights}, 11 CONST. COMMENTARY 379, 387 (1994) (asserting that "public opinion has a powerful effect on judges").
\bibitem{128} This may be true even as to the legal community. "The idea that the commentators, the bar, etc., are 'consumers' who will point out mistakes they know about by reading published opinions is unrealistic. What a judge gets from these 'consumers' is silence or a big yawn, as a rule." Hon. Phillip Nichols, Jr., \textit{Selective Publication of Opinions: One Judge's View}, 35 AM. U. L. REV. 909, 915 (1986).
\bibitem{129} The importance of efficacy is discussed more thoroughly as an independent consideration
\end{thebibliography}
Once again, I am not suggesting that there is no relationship whatsoever between judicial candor and the limitation of judicial discretion, or that this relationship is unable to support at least a limited candor requirement. Indeed, it may often be in the best interest of judges as a matter of their own sense of legitimacy to offer to their readers full and comprehensible explanations in support of their decisions. But it does not follow that judges ought to be forced into that situation by the prospect of having their power diminished. As with the accountability rationale, the limited power justification is valid only to a point—in this case, to the point at which it neither undermines the principle of judicial independence nor exceeds the realistic capabilities of the judge or his audiences.

3. Quality.—Just as candor may serve to enhance the accountability of the judiciary or to restrain the magnitude of its discretion, so too may candor serve to increase the soundness of the judiciary’s decisionmaking and in turn the quality—e.g., the coherence, the clarity, and even the choice of reasons—of its written opinions. The basic idea is that an obligation to be candid will induce the judge, either through heightened cognizance or through the prospect of external scrutiny, to discern only the most compelling reasons in support of her decisions, to connect those reasons to the facts and the outcome in only the most thoughtful and rigorous way, and then to present in written form this entire analysis in only the most articulate and coherent manner. The inducement of

against candor infra section III(A)(2).

130. See infra note 342 and accompanying text (explaining that prudential considerations may frequently indicate that candor is advisable, even if it is not obligatory).

131. See, e.g., BAKER, supra note 62, at 120 (“[T]he very writing of an opinion reinforces the decisionmaking and ensures correctness . . . . A decisionmaker who must reason through to a conclusion in print has reasoned in fact. Misconceptions and oversights of fact and law are discoverable in the process of writing.”); COFFIN, supra note 50, at 286 (“By openness I mean laying on the table the opinion writer’s real reasons and thought processes, for without this there is little chance of meaningful dialogue or consensus.”); KRONMAN, supra note 70, at 330 (asserting that when a judge must justify her decision in writing she is bound by a “duty of responsiveness that can be met only by giving each side a dispute its due”); Leflar, supra note 2, at 736-37 (suggesting that one function of opinions, at least in “the mass of cases whose conclusion is foreordained . . . . [is] to compel the writing judge and his colleagues to understand what they are deciding and why”); Leflar, supra note 21, at 810 (“[T]he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law’s bearing upon them.”); Waits, supra note 116, at 931 (noting that “[t]he very act of opinion writing sharpens judicial thinking”).

132. See Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification 94 (1961) (“To require that the grounds of a decision be made public is to insist that an avenue of independent verification and criticism be kept open.”).

133. In this regard, a proposed dissenting or other separate opinion may often prove useful in prompting the majority opinion author and members to reconsider the logic or substance of their position. As one judge argued,

Dissenting opinions sometimes become, after circulation and consultation, the majority opinion of the Court, and at other times have caused the majority opinion to be modified
Judicial Candor

1995

Judicial Candor, moreover, serves not only to encourage better decisions in and of themselves, but also to further the ideal of rationality within judicial decisionmaking. Though frequently imposed on other lawmakers by judges, the due-process-based requirement that governmental actions exhibit minimal rationality (a “rational basis”), or alternatively that they amount to something more than arbitrary exercises of power, should be part of judicial decisionmaking no less than it is a part of the decisionmaking of these other lawmakers. To this end, candor may serve to minimize the influence of logically insupportable modes of analysis or forms of justification, what Cass Sunstein calls “naked preferences.”

Finally, to the extent one believes that the judiciary, perhaps especially the Supreme Court, has an educative role vis-à-vis the public, it may be argued that this role can be performed only if judicial opinions evince sufficient quality and candor, with the latter being both an element of the former and a distinct characteristic contributing to the educative value of opinions.

These related goals—quality, rationality, and educative value—are undeniably worthy and therefore may seem to form a theoretically unassailable basis for requiring judges to be candid. Before running to re-embrace the conventional wisdom, however, we must first take a critical look at each. Consider more closely, for example, the idea that quality follows from candor or from a candor requirement. Now, insofar as our

or rewritten... [T]he value, importance and influence of dissenting opinions in the historical development and improvement of the law have been so tremendous and so well known to Bench, Bar, and legislative bodies that to arbitrarily deny the right to publish them in the official Reports would be utterly repugnant to the spirit of the times, to our fundamental ideas of fair play and justice, to our lifetime practice, and to sound public policy.


134. Cf. infra note 168 (discussing the rationality requirement in the context of modern substantive due process under the Fifth and Fourteenth Amendments). The rationality requirement is not the only relationship between candor and the concept of due process. See infra section II(A)(5) (analyzing candor as a due process obligation to the immediate parties); section II(A)(6) (analyzing candor as a due process obligation to the public and the legal community).

135. See Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1689, 1695-98 (1984) (justifying rationality review as expressing a prohibition on governmental actions constituting nothing more than “naked preferences”).

136. For a discussion of this role in relation to the Supreme Court, see FUNSTON, supra note 107, at 216-17 (“[T]he Supreme Court is engaged in an educative dialogue with the American people . . . .”); EUGENE V. ROTSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 167-68 (1962) (“The discussion of problems and the declaration of broad principles by the courts is a vital element in the community experience through which American policy is made. The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.”); and Ralph Lerner, The Supreme Court as Republican Schoolmaster, 1967 SUP. CT. REV. 127, 177-80 (describing the early Court’s educative functions). For a more recent examination of this thesis, see Christopher L. Eisgruber, Is the Supreme Court an Educational Institution?, 67 N.Y.U. L. REV. 961 (1992) (questioning and reconceptualizing the Court’s alleged educative role).
choice is not between having written opinions and having no written opinions whatsoever, but rather between variations of the former which are less or more forthright, we are really speaking about only marginal returns in quality. That is to say, while the quality rationale may provide a strong argument for the use of written opinions in the first place (in essence minimal candor), it does not clearly provide a strong argument for the imposition of a full and across-the-board candor requirement on judges who already write and publish their decisions.\textsuperscript{137} Only at a high level of generality, or in the extreme scenario in which one alternative is to issue no opinion at all, might there exist a close correlation between candor and quality; in most other cases, any such correlation is questionable.\textsuperscript{138} In short, candor may lead to quality, but the demand for quality does not logically compel a full and general candor requirement. Moreover, there is some debate about the empirical relationship between candor and quality when viewed in light of what we know, and do not know, about the judicial mind. Once again, I turn to the work of Scott Altman, who concludes that the consequences of “introspection” (that is, candor to oneself) would likely be difficult to predict:

Whether introspection could improve decisions depends both on what sorts of errors judges can recognize, and on how judges would react to such insight. . . . Judges might not be able to identify cases in which they are influenced not to follow the law. . . . If judges fail to notice [that they are not following the law] because they are strongly motivated to reach particular decisions, then introspection raises the risk that this motivation will dominate their commitment to candor and rule of law . . . . If [this were to occur] . . . , law would constrain less, candor would decrease, and decisions would not improve. Additionally, accurately recognizing the level of constraint could decrease determinacy, even for judges who do not defect.\textsuperscript{139}

Unfortunately, the case seems no stronger with regard to the proposed relationship between candor and rationality, the latter of which may simply be viewed as a special aspect or form of quality. Many of the same limitations raised above in relation to quality would likely apply to the criterion of rationality. In addition, it is not clear exactly what level of rationality ought to be required of judges. Generally speaking, our current legal regime normally demands nothing more than minimal rationality in law-

\textsuperscript{137} That being said, I think the quality rationale does provide a strong argument against the practice of selectively not publishing certain opinions altogether or against the practice of issuing summary decisions without an accompanying set of reasons.

\textsuperscript{138} See Nichols, \textit{supra} note 133, at 915-16 (questioning the relationship between the quality of judicial decisionmaking and whether a decision is written or published).

\textsuperscript{139} Altman, \textit{supra} note 2, at 328.
making, and from a practical standpoint, this is simply not a difficult requirement to satisfy. The courts themselves, for example, using the vehicles of equal protection and due process, have routinely upheld actions of the other branches of government that displayed only a modicum of rationality or reasonableness, at least when suspect classifications or fundamental rights were not involved. Consequently, it is difficult to see how the rationality requirement, which is so lenient, could support a full and general candor requirement. Of course, if one has in mind a higher level of rationality, then the role of candor might itself be greater, although, as with the broader argument from quality, the correlation between rationality and candor would at best be speculative at this point. It may be reasonable to speak of a general relationship between rationality and candor, just as one can with regard to quality and candor. It does not seem reasonable, however, to extend that relationship so far as to justify an across-the-board and strong obligation on the part of judges to be candid. Intuition and expediency may permit such an extension, but logic would not appear to be so generous.

Finally, the argument for candor grounded in the judiciary’s alleged educative function is even weaker than the argument based on either the quality or the rationality functions discussed above. While the education of the public through judicial and extrajudicial writings may be socially and politically valuable (although empirically quite debatable), at best it is an incidental benefit arising from the judicial process. Likewise, as with certain other rationales, it may lend rhetorical backing to the conventional wisdom and could certainly assist in the furtherance of an advisory policy urging greater candor by judges. But as for justifying a judicial candor requirement, let alone a full and general requirement, its internal logic simply does not extend that far. In the end, therefore, we must conclude that none of these three functions—quality, rationality, or educative—is sufficiently persuasive when it comes to the question of imposing on judges an obligation to be candid. Each in its own way might point us in the direction of greater candor, but the conventional wisdom clearly requires much more than merely advisory justifications.

4. Authoritativeness.—Another frequently expressed rationale for judicial candor concerns the alleged positive relationship between candor and the authoritativeness of judicial decisions (and thus the legitimacy of the judicial branch). The idea seems to be that authoritativeness

---

141. See infra section II(A)(7) (judicial catharsis), II(A)(8) (long-term legal development).
142. See SOLAN, supra note 99, at 14 ("[T]he loss of legitimacy of the entire judicial process is a by-product of the lack of candor."). Robert Leflar, for example, argues that a critical and unique relationship exists between the substance of judicial opinions and the degree of acceptance of the judi-
inheres in the act of candor and that candor is one of several requisite elements of legitimate judicial decisionmaking.\footnote{143}{See, e.g., \textbf{BAKER}, \textit{supra} note 62, at 119 ("The ultimate integrity of the appellate process requires that courts state their reasons."). Judge Posner, for example, has argued that a decision should be considered "principled" "if and only if the ground for decision can be stated truthfully in a form the judge could publicly avow without inviting virtually universal condemnation by professional opinion." \textbf{POSNER}, \textit{supra} note 30, at 205. Posner is no absolutist, however, for he also states that "complete candor is . . . inappropriate in public documents of government," \textit{id.} at 220, although he provides little concrete and systematic support for such a qualification.} Thus, the argument continues, judges who fail to be sufficiently candid in their pronouncements risk diminishing the otherwise influential and compelling nature of those pronouncements,\footnote{144}{See, e.g., \textbf{Abrahamson}, \textit{supra} note 36, at 990 ("The judiciary loses credibility if the public does not know the reasons for decisions and cannot debate their validity."). One could also argue that a lack of candor in one area or at one level of a particular judicial interpretative enterprise may adversely affect the legitimacy or integrity of the entire enterprise. \textit{See, e.g.}, \textbf{Weisberg}, \textit{supra} note 8, at 251 ("[T]he judge [who claims to be interpreting legislative intent] undermines the vitality and credibility of legitimate statutory interpretation by paying this fictional fealty to legislative intent."); \textit{see also} \textbf{Shapiro}, \textit{supra} note 2, at 737 (arguing that judicial candor may be justified with reference to the more general instrumentalist ground, namely, "the need for trust in the carrying on of human affairs," and that arguments against candor are effective only to the extent there exists generally "a background of truthfulness").} perhaps especially in the long-term.\footnote{145}{Cf. Walter V. Schaefler, \textit{Precedent and Policy}, 34 \textbf{U. CHI. L. REV.} 3, 11 (1960) (arguing that "an opinion . . . whose premises are concealed . . . is not likely to enjoy either a long life or the capacity to generate offspring").}

At first blush, this rationale, like the first three rationales, may seem intuitively persuasive. On closer inspection, however, it necessarily fails as a theoretical basis for imposing a general and strong obligation of candor on judges. To see this, two qualifications are necessary, the first of which is important, the latter of which is critical. First, it seems incorrect to state the argument in its positive form; if anything, it is a \textit{lack} of candor that may lessen, or at least not enhance, the authoritativeness of judicial decisionmaking. In other words, the idea that the absence of candor may be damaging to a court's legitimacy seems a great deal more plausible, and certainly less controversial, than the hypothesis that candor is a necessary element of legitimacy. Second, regardless of which formulation—positive or negative—one embraces, such a formulation seems merely to beg the question of why judges ought to be candid. That is, saying that candor is necessary for authoritativeness simply invites the question of why this is so.

In order to answer this question and thus to see the problem with this argument, we need to take the argument one level further by noting that...
there are actually two possible claims contained within this rationale. The first is that candor is necessary to the judiciary’s authoritativeness as a theoretical matter, much like consent is necessary to the government’s legitimacy as a matter of conventional political theory. Unfortunately, this sounds a great deal like a point already raised and rejected in the critique of the first rationale—namely, that candor is either a condition precedent to legitimate judicial independence or a subsequent obligation thereof.\textsuperscript{146} The second and more viable claim is that perceived candor is necessary to the judiciary’s perceived authoritativeness, or, in negative form, that a perceived lack of candor may damage the judiciary’s perceived authoritativeness.

This second claim is different from the rationales thus far examined because it rests not on the underpinnings of legal or political theory as such (which is why I say it may affect “perceived” authoritativeness), but rather on the perceptions and feelings of observers of the judicial process, whether they be the bar, the media, the academy, or, paradigmatically, the public. For that very reason, however, it constitutes an extremely unstable foundation on which to construct a theoretical obligation of judicial candor. At the very least, there is a serious empirical question concerning the relationship between the courts and the public, or, more precisely, between judicial candor and public perception. In particular, implicit in this position are at least three highly debatable claims: (1) that the public reads judicial opinions; (2) that the public is minimally aware of the doctrinal and textual framework in which opinions are handed down (as well as the inter-institutional relationships in which courts are involved); and (3) that the public then scrutinizes these opinions in light of this framework to an extent that would reveal a lack of candor. None of these claims, however, is borne out either in the social science literature\textsuperscript{147} or in the qualitative observations of judges and legal scholars.\textsuperscript{148} Rather, if there is

\begin{itemize}
  \item \textsuperscript{146} See supra text accompanying notes 106-08.
  \item \textsuperscript{147} See, e.g., Gregory A. Caldeira, \textit{Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court}, 80 AM. POL. SCI. REV. 1209, 1211 (1986) ("Research on the attitudes of adults reveals that there is only a relatively shallow reservoir of knowledge about . . . the Court in the mass public. . . . Few . . . fulfill the most minimal prerequisites of the role of a knowledgeable and competent citizen vis-à-vis the Court."); id. at 1223 ("Citizens, as individuals, evince little or no knowledge of or concern for the Court; to the extent that they express sensible opinions, they base judgments on the vaguest and crudest of ideological frameworks."). Given that this research focuses exclusively on the Supreme Court, its conclusions are especially damaging to the public perception argument. If anything, the use of the Supreme Court as a measure of public perception and awareness of judicial decisionmaking might lead to an overly favorable view of reality, because the public is even less likely to be aware of the decisions of state and lower federal courts than of Supreme Court decisions.
  \item \textsuperscript{148} See, e.g., Gerald Gunther, \textit{The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review}, 64 COLUM. L. REV. 1, 7-8 (1964) (recognizing the general public’s misapprehension of the Court’s actions); Leflar, supra note 2, at 739 ("Popular
meaningful public perception of judicial decisionmaking, it would seem to be concerned largely, if not exclusively, with the outcomes and effects of those decisions and not with their reasoning or methodology. Moreover, even if we accept the proposition that a perceived lack of candor may harm perceived judicial legitimacy, it is equally true that full candor may harm perceived judicial legitimacy as well. As will be discussed below, in fact, certain criteria that are generally considered to be positively related to a court’s authoritativeness—such as unanimity, continuity, certainty, or the use of distinctly legal language—may often favor the avoidance of candor rather than its use.

Even more problematic is that this kind of rationale—one built upon a foundation of public perception and political palatability—indicates not that the use of candor is right or good, but rather that it is simply prudent, even expedient. From a personal standpoint, I cannot say that I find this approach to candor to be too objectionable. After all, one of the major prescriptive points of this Article is that candor may frequently be exercised at the discretion of the courts based, among other things, on a prudential calculus of the political and institutional costs and benefits of using candor in any particular situation. But the whole point of the present analysis is to attempt to justify the conventional wisdom as a matter of theory, based on certain principles or values inherent in our legal and political system, and not on the uncertain nature and shifting tides of public perception. Accordingly, while public perception is certainly one acceptance of new law, whether judge-made or legislative, nearly always depends upon its societal effects rather than upon the language and the theory employed in support of its promulgation.); cf. Joseph R. Grodin, Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections, 61 S. CAL. L. REV. 1969, 1980 (1988) (noting in the context of judicial retention elections “that whatever the applicable criteria are said to be, the voters tend to cast their ballots on the basis of whether or not they like the results in the cases that the judge has decided”).

149. No doubt this has a great deal to do with the manner and extent to which the media does, or does not, cover the judiciary. See generally Shaw, supra note 85 (criticizing media coverage of the legal system as inadequate in both scope and substance).

150. See, e.g., SOLAN, supra note 99, at 7 (noting that “both options, candor and non-candor, in certain difficult cases, lead to the same result: a decrease in the legitimacy of the process”).

151. See infra sections III(B)(2)-(3).

152. See infra subparts IV(B)-(C).

153. It is possible, of course, to ground a more or less theoretical obligation of judicial candor in public opinion and perception, rather than to relegate these factors to the nontheoretical realm as I have essentially done in this Article. Such an approach, however, presents a number of problems. First, if we move directly to public perception as a basis for a judicial candor requirement, we immediately confront a complex empirical thicket, for the relationship among candor, public perception, and legitimacy is, as I have noted, substantially uncertain. In contrast, making public perception one of many bases for choosing to use or forego candor, as this Article recommends, does not require one to resolve definitively the nature of that relationship. Second, from the little we know of that relationship, it seems as if it could cut either way: sometimes it is better for public relations to avoid candor, sometimes it is better to employ candor. As a consequence, it becomes extremely difficult to argue that public perception provides a sound basis for establishing an across-the-board candor requirement. At
source of costs and benefits in a prudential calculus—and thus may provide one basis for judges to take seriously the use or avoidance of candor in their decisionmaking—it does not provide a sound theoretical basis for imposing a general and strong obligation of candor on judges, as the conventional wisdom would apparently have us do.

5. Justification.—Perhaps our efforts to justify the conventional wisdom have been focused at the incorrect level of generality. Perhaps the conventional wisdom merely reflects the proper relationship between the judge and the parties to any given case for which the judge is expected to author a formal opinion. It is also conventional wisdom, after all, that one of the major reasons judges ought to provide opinions in the first place is to fulfill their obligation to the parties in the case.\textsuperscript{154} Just as access to the adjudicatory process—having one's "day in court," as it were—has itself been traditionally understood to be a basic right of prospective litigants, the issuance of a reasoned and persuasive opinion on the merits, once the judgment has been declared, has traditionally been understood to be a basic right of actual litigants whose life, liberty, or property may be affected by that judgment.

This is a wonderfully compact rationale, and it does appear to support a case for candor. That case, however, is severely limited. The most obvious problem is that it demands only that degree of candor needed to address the parties at hand. Far from supporting a general and strong requirement of candor, the logic of this rationale merely directs judges to tell the truth to the litigants before them, or at least to tell enough truth to support the outcome of their dispute.\textsuperscript{155} Indeed, standing alone this rationale might not even support the concept of the written and published opinion, insofar as the judge could simply provide the parties with an oral opinion containing sufficiently persuasive reasoning.

Even without this internal limitation, moreover, this rationale cannot support a general candor requirement to the extent that its operative premise may no longer be congruent with the function of certain appellate

\footnotesize{\textsuperscript{154} See Baker, \textit{supra} note 62, at 121 ("The received tradition always has been that litigants are entitled, as a matter of policy, to some statement of reasons for a decision on appeal."); Martin Golding, \textit{Legal Reasoning} 6-8 (1984) (explaining the importance of an opinion that articulates its justifying reasons to the losing litigant); Leflar, \textit{supra} note 2, at 736-37 (suggesting that one function of opinions is to provide the parties and their counsel with the substance and bases of the court's decision); Leflar, \textit{supra} note 21, at 811 ("The most immediate function of an opinion is to explain to the parties and their counsel what is being done with their case.").}

\footnotesize{\textsuperscript{155} Cf. Leflar, \textit{supra} note 21, at 818 ("The urge to do justice in the particular case does not demand detailed explanation, when doing justice does not disrupt existing principle and theory.").}
courts. In particular, some would argue that much appellate decision-making, especially Supreme Court decision-making concerning issues of "public law," has very little to do with individual litigants at all. Rather, it is concerned primarily with the exposition of broad and generally applicable norms of conduct for the purpose of mass social ordering. Thus one commentator suggests that the U.S. Supreme Court "is no longer a court that decides cases" and that it has "abandoned any sense of judicial duty toward individual litigants." Instead, the Court "has become a legislative body that derives its apparent authority from the mere appearance of deciding particular cases." This view of courts, I realize, is controversial and not always accurate or applicable, but insofar as it is normatively or empirically correct as a general matter, it further undermines the argument for candor based on the idea that judges have a duty of disclosure to the parties at hand.

6. Notice.—If we move the focus away from the immediate parties, we find yet another rationale for judicial candor, this time in relation to the larger public and the legal community. From this broader perspective, candor is important not only for its educative potential and its capacity to foster debate over legal issues, but also because it may provide necessary guidance to those persons whose interests are affected by judicial decisions. Private citizens, for-profit and not-for-profit enterprises,

156. D'Amato, supra note 19, at 116.
157. Id. at 117; see Forrester, supra note 90, at 1214-16 (asserting that the Supreme Court has been transformed into a "governing body" and "has become the major societal agency for reform"); Mary M. Schroeder, Appellate Justice Today: Fairness or Formulas, Lecture at the Univ. of Wis. Law School (Sept. 7, 1993), in 1994 WIS. L. REV. 9, 15 ("The appellate courts today are distanced themselves from the situation before the trial court; their intent is not so much to establish rules for the trial courts and parties... to follow, but rules or formulas designed for future appellate courts to follow.").
158. See Barnett, supra note 62, at 1037 (suggesting that one of the two basic functions of appellate adjudication is "establishing legal rules to guide society as a whole and future judicial decisions" (citing PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 3 (1976); and MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 7 (1988)));
Leflar, supra note 2, at 737 ("The law-making and law-retaining opinions are the ones whose quality concerns us. If they are honest and clear, they furnish better guidance to one who seeks to discover from them what the next case will hold." (citing Irving R. Kaufman, Helping the Public Understand and Accept Judicial Opinions, 63 A.B.A. J. 1567 (1977)));
Leflar, supra note 21, at 810-11 (describing the relationship between judicial opinions and their effect on guiding societal actions); Waits, supra note 116, at 934 ("Honesty is necessary for appellate opinions to serve their primary purpose: to guide lower courts in deciding future cases. Similarly, if private citizens... understand the factors which influenced the appellate court's decision, they can better predict the legal consequences of their actions..."); Zeppos, supra note 8, at 401 (discussing how candor may reduce the uncertainty of the law); see also KENTON, supra note 20, at 19 ("When the guidance [of the community's authoritative sources of law] is... incomplete or ambiguous and the judge must make a choice, candid disclosure of the reasons for [that] choice contributes to clarity of law and promotes understanding."); WASERSTROM, supra note 132, at 61, 61-62 (discussing the relationship between "the predictability of judicial decision" and "the desirability of a more generalized ability to anticipate the future"). As then-Justice Stone said in the
attorneys, government agencies and officials, and even the judiciary itself all may need to rely on the pronouncements of judges and courts, and thus all stand to lose when judges are less than candid regarding the true nature, substance, and bases of their decisions. Only with full disclosure on the part of judges (as well as others who pronounce the law) can these individuals and institutions be expected to order their affairs in a rational and efficient way. According to one judge,

Candor in opinions is necessary if appellate opinions are to serve their primary purpose of guiding the public and lawyers in deciding future courses of conduct and guiding trial courts in deciding cases. The more clearly the factors influencing a decision are explained, the better guidance the decision will offer.

This reasoning assumes particular salience, at least with respect to potential litigants or defendants, when we remember that the consequences of misordering one's conduct may include direct liability, economic and reputational damage, and, at least in the criminal context, significant loss of liberty.

Viewed in this light, candor can be understood as logically intertwined with two larger, interrelated themes running through our lawmaking regime—namely, dialogue and due process. With regard to the first of these, several commentators have persuasively argued that the lawmaking process is best conceptualized as a dialogue among certain combinations of courts, the other arms of the state, lawyers and litigants, the media, and the

1930s to then-Professor Frankfurter:

I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.

CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 13 (1969) (citing ALPHEUS T. MASON, THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP, 1930-1937, at 41 (1953)). According to one commentator, this particular rationale for candor figured significantly into Justice Holmes's understanding of judicial lawmaking as an incremental dialogue between the bench and the bar. See Patricia M. Wald, Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, 100 HARV. L. REV. 887, 897 (1987) ("Holmes placed judges squarely in the forefront of the lawmaking process, instructing them to write their opinions with enough candor and forthrightness to make feasible the lawyer's primary job of ascertaining why they did what they did and what they would do next.").

159. This is not entirely true with regard to attorneys, whose lifeblood at times derives from the fact that judicial decisions are frequently ambiguous, inconsistent, or less than thorough. See infra note 175 and accompanying text.

160. Abrahamson, supra note 36, at 990.

161. These kinds of concerns, relating especially to the issue of reliance, are extremely important to the nature of the overruling process. For an examination of that process, particularly the concept and concerns of so-called "prospective overruling," see LEFLAR, supra note 10, at 133-48.
general public.\(^{162}\) (The more traditional formulation is that basically of a dialectic specifically between the court and the lawyers in a particular case.\(^{163}\) To the extent that this perspective is accurate or desirable, judicial candor may then be viewed as a necessary part of the dialogic process.\(^{164}\) When judges are less than candid, it follows that the dialogic

---


when opinions lack candor, lawyers may fail to bring to the court’s attention important value-related arguments. Lawyers who have been trained in the law-is-found-in-precedent tradition may fail to see the value issues altogether. Others may see the value issues but may be unwilling to address them, fearing the court will see arguments about values as emotional, irrational pleas. Yet the courts need the lawyers’ help in making choices among competing principles as much as they do on questions of fact or analysis of statutory and case law.

Abrahamson, supra note 36, at 990 (footnote omitted).

164. See Baker, supra note 62, at 121 (“A deciding panel participates in a dialogue that is both backward and forward looking, both inwardly and outwardly directed, and both upwardly and downwardly important . . . . An expression of reasoning will always contribute to the body of precedent or usefully inform the other courts, including the Supreme Court.”). Moreover, the case for candor under this rationale may be unusually strong today in light of the alleged decline of the “autonomy” of legal reasoning and methodology. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761, 766-67 (1987) [hereinafter Posner, The Decline of Law] (arguing that a decline in political consensus, the prevalence of disciplines that are “complementary” to law, and a “collapse” in lawyers’ faith in their ability to solve major problems in the legal system have led to a decline in “faith in law’s autonomy as a discipline”); see also Andrew C. Barrett, *Deregulating the Second Republic*, 47 Fed. Comm. L.J. 165, 170 n.19 (1994) (noting with some concern that “[a]s the legal academy no longer promotes a common, unified professional language, less intellectual comity may exist between future lawyers”); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 Ind. L.J. 1, 26-30 (1993) (conceptualizing and charting the transformation of law and the legal profession by reference to cartel theory and the history of medieval craft guilds). To the extent this decline is both actual and meaningful, such that lawyers and judges can no longer rely on a common discourse or methodology, and to the extent the lawyer’s task continues to be, among other things, to discern the future decisionmaking of courts, judicial candor becomes a critical medium for apprising lawyers of what is actually transpiring jurisprudentially at any given time. In fact, Judge Posner specifically
process operating among these persons and institutions functions suboptimally, resulting in less informed decisionmaking on the part of the other legal actors and, quite possibly, an adverse effect on the quality of the law.  

Candor is also logically related to the principle of due process insofar as a lack of candor may effectively preclude full notice to potentially affected parties. Just as complete candor is theoretically necessary to the dialogic nature of lawmaking, so too is it related to law's didactic or authoritarian nature—that is, the capacity of legal institutions to direct various elements of society to conform their conduct to the rules these institutions prescribe.  

For along with this nature or capacity is an obligation on the part of lawmakers to prescribe only clear and comprehensible rules and to indicate, through the use of various techniques such as “signaling,” that some modification of the law is under way. Hence, we adhere to the principle of notice (and the corollary restriction on vagueness) as one of the major components of due process—the procedural or methodological obligations due to citizens as a condition precedent to the enforcement of any given legal command—which in

---

recommends, in light of his observations about the decline of law’s autonomy, that we need a new style of judicial opinion writing (really a return to an older style), in which formalistic crutches—such as the canons of statutory construction and the pretense of deterministic precedent—that exaggerate the autonomous elements of legal reasoning are replaced by a more candid engagement with the realistic premises of decision. Posner, The Decline of Law, supra, at 778. However, if Posner is too correct—that is, if there is too much internal incongruity or conceptual and methodological dissonance among members of the bench and bar—then the call for increased candor may be seriously questioned on grounds of efficacy.

165. Another form of judicial obstruction of the lawmaking dialogue occurs when the judiciary removes entirely from another branch or level of government an issue that was incrementally being addressed by that other branch. See Mary Ann Glendon, Rights Talk: The Improbishment of Political Discourse 58 (1991) (suggesting that the Supreme Court did just this when it decided Roe v. Wade, 410 U.S. 113 (1973), effectively bringing “to a virtual halt the process of legislative abortion reform that was already well on the way to producing [compromise statutes] in the United States”). Of course, in both the matter of candor and the matter of taking an issue from another governmental branch, it cannot be said that cutting off the dialogue is always undesirable—particularly when, as in the integration-desegregation conflicts of the 1950s to the 1970s (and perhaps to the present), that other governmental branch is merely affecting a pretense of dialogue.

166. Cf. Carrington et al., supra note 158, at 7, 7-12 (arguing that there exist certain imperatives of appellate justice, including the articulation of reasons and coherent enunciation of the law, and that “within many, if not all, the imperatives . . . we discern elements of the constitutional concept of due process of law”).

167. See, e.g., Eisenberg, supra note 158, at 122, 122-24 (“Signaling is a technique by which a court follows a precedent but puts the profession on notice that the precedent is no longer reliable. By the use of this technique, a court paves the way for overruling a doctrine it believes would otherwise have to be preserved because of justified reliance.”).

168. See, e.g., Building Officials & Code Adm’rs v. Code Technology, Inc., 628 F.2d 730, 734 (1st Cir. 1980) (“Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. . . . [If access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.”). In the context of the Fifth and Fourteenth Amendments, of course, the
turn is part of our commitment to the rule of law. At the same time, these obligations may be understood either in terms of simple fairness—that it is unfair to burden citizens with vague laws—or in relation to a social contractarian view of the state—that the government’s authority to declare the law, and to enforce it against individual citizens, is contingent on articulating clearly the content and scope of that law.

From the perspective of notice and guidance, moreover, judges may themselves find that the use of candor is in their long-term self-interest. From the trial court judge’s perspective, for example, a lack of candor at the appellate level or by other trial judges is likely to render his decisionmaking more difficult (or at least no simpler) and certainly more risky in terms of being potentially reversed. Similarly, from the appellate court’s perspective, a lack of candor at the trial court level or by other appellate courts potentially hinders appellate review and may very well interfere with the intelligent development of the law.

The concept of due process has taken on various substantive dimensions as well. See generally Laurence H. Tribe, American Constitutional Law §§ 15-1 to 15-2 (2d ed. 1988) (discussing the substantive due process rights of privacy and personhood). Although the idea of “substantive . . . process” may be oxymoronic on its face, by no means is the underlying idea nonsensical. The requirement that lawmakers render decisions which meet various tests of rationality is simply the process or methodology that is due to citizens as a condition precedent to the enforcement of any particular law.

169. See, e.g., Friedrich A. Hayek, The Road to Serfdom 72 (1944) (“Government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”). However, as Professor Eisenberg notes (partly in response to this passage by Hayek), complete certainty is not always necessary for the effective ordering of one’s affairs. See Eisenberg, supra note 158, at 157-59.

170. See Christopher L. Kutz, Just Disagreement: Indeterminacy and Rationality in the Rule of Law, 103 Yale L.J. 997, 1000 & n.12 (1994) (discussing the problems that can arise when law is “substantially indeterminate”); Zeppos, supra note 8, at 401 (“By striving to make the law predictable, candor appeals to basic notions of fairness embodied in our legal system.”). On the issue of applying judicial rulings retroactively, compare American Trucking Ass’n, Inc. v. Smith, 496 U.S. 167, 191-92 (1990) (counseling against retroactive application when “such application would have a harsh and disruptive effect on those who relied on prior law”) with Harper v. Virginia Dep’t of Taxation, 113 S. Ct. 2510, 2517-18 (1993) (announcing a rule of full retroactive application without regard to reliance interests or other criteria of fairness). See also Linda Meyer, "Nothing We Say Matters": Teague and New Rules, 61 U. Chi. L. Rev. 423, 427-38 (1994) (discussing the foundations and development of retroactivity jurisprudence in federal habeas corpus).

171. Note the difference between this rationale and the political accountability-based obligation discussed earlier. See supra section II(A)(1). Although both stem from concerns over political principle (democratic accountability as to the earlier rationale, and due process from the state as to the rationale in question), this latter rationale is also rooted in a pragmatic concern about the ability of parties effectively to conform their conduct to the law as articulated by judges.

172. See Zeppos, supra note 8, at 401 (observing that candid judicial opinions assist other courts in interpreting those opinions).

173. See James E. Clayton, The Making of Justice 85 (1964) (“[T]he reasoning outlined by the Court gives lower court judges a basis for deciding similar cases. The Court’s effectiveness in guiding the development of American law depends on the quality and clarity of its reasoning and the willingness of lower courts to accept it.”).

And from any judge’s perspective, the relationship between candor and dialogue also seems to favor candor. For when diminished judicial candor adversely affects the quality of legal enactments of other institutions (legislatures, agencies, and so forth), often it is the judiciary—which bears the responsibility of construing the resulting inferior products of these other institutions—that ultimately must pay the price. Thus the judge, no less than any other legal actor (with perhaps the exception of lawyers), may find a candor requirement attractive, especially when imposed on the entire judiciary, even though he himself may at times wish to avoid its application.

The importance of notice or guidance, especially when understood in terms of due process, appears to provide a powerful argument for candor. Who, after all, would openly support a model of judicial decisionmaking that kept ignorant the very people whose interests are contingent on the meaning of judicial decisions and who will ultimately pay the price for the misinterpretation of those decisions? Unfortunately, the relationship between dialogue or due process, on the one hand, and judicial candor, on the other, is neither as straightforward nor as compelling as it may seem at first blush.

As for the dialogic theory of lawmaking, we must acknowledge at the very least that (1) the concept of “dialogue,” even though it may seem “to

praised the trial judge’s candor regarding his finding that the homosexual relationship of the petitioner-mother prevented her from obtaining expanded custody of two of her children because it evidenced “moral deficiency” on her part. Id. at 3. “We would prefer to have the trial judge express his belief as to the morality of this issue, than to conceal it and to have it be an unverbalized consideration.” Id. at 5 (emphasis in original); see also Domegan v. Fair, 859 F.2d 1059, 1066 (1st Cir. 1988) (explaining that “written opinions or bench decisions which explicate a trial judge’s reasoning” are valuable because, “[w]ithout them, we are sometimes forced to remand in order to apprehend the basis for decision below”).

175. Clarity and certainty in law are not necessarily desirable from the vantage point of attorneys to the extent that their existence and prosperity are contingent, in part, on the ambiguity of legal texts and rules. See supra note 159. Hence it is often said that a poorly worded statute is a lawyer’s “full employment bill.” See, e.g., Paul T. Rogalski, The Propriety of Issuing an Injunction to Prevent a Plant from Relocating Under Section 10(j) of the National Labor Relations Act, 78 NW. U. L. REV. 673, 689 n.102 (1983) (noting that “[o]pponents of the Taft-Hartley Act characterized the Act as a full employment bill for lawyers, referring to the vague and ambiguous provisions of the statute such as ‘just and proper’”); see also The Lawyer’s Employment Act, WALL ST. J., Sept. 11, 1989, at A18 (deriding the Americans with Disabilities Act because, “[l]ike so much recent federal lawmaking, the bill is a swamp of imprecise language; it will mostly benefit lawyers who will cash in on the litigation that will force judges to, in effect, write the real law”). This parasitic dimension of lawyering may not be pleasant or noble, but it is nevertheless real and therefore may create one source of ambivalence among lawyers on the issue of judicial candor.

176. Of course, this sort of character-specific analysis merely reinforces the notion that the propriety of candor is not an abstract matter, but rather depends in large part on whom you ask, and on that actor’s interests at stake, the context in which he operates, and so forth. See supra section I(A)(3) (discussing the contextual nature of candor).
have become the all-purpose elixir of our time," is by no means a generally accepted or uniformly understood paradigm of the legal and political processes, and that efforts to invoke it as the basis of an across-the-board normative model of judicial candor may therefore be misguided or insupportable; and (2) even if it could enjoy a consensus as to its meaning or propriety, there should be serious concern about the validity of its theoretical underpinnings. In particular, not only is there little evidence to suggest that the participants in the lawmaking process—the courts, the legislatures, the litigants, and so forth—really do function in a dialogic fashion, but there should also be some doubt about whether they actually ever could, even if candor were mandated among all such participants. Dialogic lawmaking, to be meaningful, presumably requires each participant to (1) possess adequate control over the issues and information received and transmitted; (2) possess adequate intellectual and other resources, especially time, to process the information received and prepare the information transmitted; (3) possess adequate knowledge about the relative functions, authority, interests, and capacities of each of the other participants; and (4) be free of influences such as client or constituent interests that would interfere with her responsibilities as a participant in the overall dialogue. Needless to say, few participants could meet these requirements. Judges, for one, would frequently fail the first and fourth requirements (and sometimes the other two) because they do not truly have control over the issues and information that come before them—litigants must first bring a suit or an appeal, and most courts have little or no discretion in taking cases—and because judges are in fact subject to interests other than the furtherance of the overall dialogue, not the least of which is their obligation to dispense justice in the individual cases and to the individual litigants before them. Only if we were to view dialogue at a system-wide level of generality—at which point it would become difficult to justify imposing a candor obligation on each judge at each stage of every case—could the dialogue theory avoid these shortcomings.

Moreover, even if we could assume both the acceptance and the validity of the dialogue theory, to what extent could it actually support the

177. Smith, supra note 162, at 435 (noting the appropriation of dialogic rhetoric by an astonishingly wide variety of schools, from ethical naturalists to legal process theorists to professed antipragmatists).

178. But cf. Friedman, supra note 162, at 654-80 (arguing that, at least with regard to federal constitutional interpretation, a nation-wide dialogue does exist, that it should exist, and that the courts can and ought to play a unique role in it).

179. This of course raises another problem—namely, the need to impose a requirement of candor on all participants, not just on judges, if the dialogic model of lawmaking is to be taken seriously. While it is true that lawyers, for one, frequently may have such a duty, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994) (requiring candor toward the tribunal), it is generally not the case that legislators and others do.
conventional wisdom? The answer, as a matter of logic, is that such an obligation need extend only to the amount of disclosure necessary to inform adequately the other participants in the process, and that this amount may frequently fall short of full candor or may not pertain to all areas of judicial decisionmaking. In fact, it is entirely possible that, in the resolution of cases, judges can offer only partial (or partially acceptable) justifications without necessarily hindering or rendering dysfunctional the ideal of dialogic lawmaking. Furthermore, with regard to new or evolving areas of the law in particular, in which appropriate policy considerations may be uncertain and judicial foresight may be limited, it is not apparent why a regime of dialogic lawmaking would necessitate that judges speak either first or fully, especially when there exist other participants—particularly scholars writing law review articles and nonparties writing amicus curiae briefs—who are willing to initiate and maintain a dialogue in such areas. Thus, even when placed in its theoretically best light, the dialogue version of the guidance rationale is simply not sufficient to justify a full and general obligation of candor. As with several of the other rationales, it appears to favor candor—but only to a point.

To be sure, the seemingly stronger version of the guidance rationale is not dialogue, but rather due process. That version, if you recall, essentially dictates that candor is owed to present and future legal actors, on either social contract or fairness grounds, as a condition to their being held legally liable for potential noncompliance with judge-made law. At the heart of this conception, of course, is an assumption that there exists a direct relationship between judicial candor and meaningful notice to potential legal actors: the more that judges disclose, the more certain or predictable judge-made or judicially interpreted law will become.

It is this very conception, however, that presents the most serious problem to the notice argument for candor. For “notice” is not a singular concept, and the goals of certainty and predictability—which are the primary functions of notice—are affected not only by the volume of information a court discloses, but also by the nature and substance of that information, and specifically by the degree to which the court phrases its holdings and reasoning in certain or uncertain terms. In particular, while it may be true that we generally expect candor in judicial opinions, it is most definitely the case that we expect certainty and confidence as well—e.g., that $X$ and $X$ alone is the best rule, or that $Y_1$ and $Y_2$ are the reasons for the rule, or that $Z$ is the appropriate interpretive method. However, uncertainty is more often the reality—e.g., $X$ is simply one of many plausible, available rules (and may not be the rule in the next case), $Y_1$ and

180. See infra section III(A)(1) (discussing the impact of limited judicial foresight on the issue of candor).
$Y_2$ are merely the only reasons of which the judge was aware (and may not be the reasons in the next case), or $Z$ is actually one of many legitimate interpretive methods (and may not be the interpretive method employed in the next case). One commentator has described this phenomenon as follows:

Although an opinion may be born only after deep travail and may be the result of a very modest degree of conviction, it is usually written in terms of ultimate certainty. Learned Hand has referred to the tendency of some judges to reach their result by sweeping "all the chessmen off the board." The contentions which caused deep concern at one stage have a way of becoming "clearly inapplicable" or "completely unsound" when they do not prevail. Perhaps opinions are written in that positive vein so that they may carry conviction, both within the court and within the profession; I suspect however, that the positive style is more apt to be due to the psychological fact that when the judge has made up his mind and begins to write an opinion, he becomes an advocate.8

Perhaps even more likely a reason than either rhetorical conviction or judicial predetermination, judges write in such absolute terms because they are attempting, in accordance with the legitimate expectation of the public, to create and enunciate concrete rules or doctrines, confidently endorsed by the entire court, in order to provide better guidance to potential legal actors.182 One of the most obvious examples of this phenomenon is the

181. Schaefer, supra note 151, at 9 (footnote omitted) (citing LEARNED HAND, THE SPIRIT OF LIBERTY 131 (1952)); see also Jack Leavitt, The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures, 4 PAC. L.J. 1, 16 (1973) ("[D]ecisiveness in the face of partisan contentions is the mainspring of [the appellate judge's] office."); Yablon, supra note 28, at 261 ("The law is often vague and indeterminate, yet judges mostly write about it as if prior practice gave clear and definitive guidance in most cases. . . . [J]udges] are not describing the state of the law, nor are they describing their own internal thought processes. Rather, they are making arguments."). A remarkably candid acknowledgment of this phenomenon can be found in Butler v. McKellar, 494 U.S. at 415. For an assessment of the jurisprudential implications of the Court's conceptualization of new rules, see Meyer, supra note 170.

182. See EISENBERG, supra note 158, at 7 ("If the courts did not regard the establishment of legal rules as an end in itself, compromise would be explicit, not covert: a major purpose of covertness in such cases is to avoid the injection of doubt about the dispute into doubt about the rule."). Alternatively, Judge Calabresi suggests that the use of absolutist language may allow judges to achieve more easily a socially desirable result and may serve an aspirational or prophylactic function vis-à-vis other legal actors. See CALABRESI, supra note 8, at 173-76; see also Larry Alexander &
overwhelming use of multifactor tests or formulaic standards as a means to capture pre-existing doctrines and relevant policy considerations in simple checklist form.\textsuperscript{183} Yet in the process of generating clear and unambiguous rules—of transforming uncertainty into certainty—judges must deliberately or unconsciously censor or downplay the residual gray areas that are necessarily inherent in many legal issues, thus producing a net loss of candor, or what Professor (now Judge) Calabresi somewhat euphemistically calls "linguistic imprecision."\textsuperscript{184} Certainty and candor may not always point in different directions, of course, but when they do, one must inevitably give way.

The provision of meaningful notice cannot, then, be considered a determinative rationale for supporting a general and full obligation of judicial candor. The need for notice is important, and it may go a long way towards justifying some kind of candor requirement.\textsuperscript{185} The one thing it cannot do, however, is justify a candor requirement in almost all situations or regarding almost all matters, as the conventional wisdom would seem to warrant.

7. \textit{Catharsis}.—Candor, particularly in the form of dissenting opinions, may also function as a necessary cathartic mechanism for judges.\textsuperscript{186} Despite their trappings and mystique, judges are human beings, not machines, and the institutional psychology of the bench may often compel individual judges to speak their minds on issues, or in ways,
that may not be obviously necessary to a legal resolution of the case at hand.\textsuperscript{187} Of course, a conservative view of judicial decisionmaking would likely look unfavorably upon these judicial expressions, deeming them superfluous dicta or merely the personal opinions of judges.\textsuperscript{188} To the extent that we value the phenomenon of judicial catharsis, however, we would presumably be more disposed to adopt a policy of full candor as a means of encouraging both its frequency and its depth.

The most likely, and perhaps ideal, medium for catharsis is the dissenting opinion, for it is the official forum in which dissatisfied, sometimes embittered judges have full control over the strength and substance of their words (though not necessarily over the potency of their sentiments). The dissent, claims one commentator, is much like an act of civil disobedience: it is "protestual, propositional, stipulative, and suggestive in appealing to the authority of conscience."\textsuperscript{189}

To see the phenomenon of judicial catharsis at work, consider two dissenting opinions by Justice Blackmun. The first, characterized by its raw emotive appeal, is Justice Blackmun's opinion in \textit{DeShaney v. Winnebago County Department of Social Services},\textsuperscript{190} in which the Court held that a state had no affirmative constitutional duty to prevent, through its social welfare system, a parent's physical abuse of his child despite the state's knowledge of the likelihood of such abuse. Justice Blackmun lamented,

\begin{quote}
Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents [the state agency] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, \ldots "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all,"—that this child, Joshua DeShaney, now is
\end{quote}

\textsuperscript{187} \textit{See} J. Louis Campbell, \textit{The Spirit of Dissent}, 66 \textit{JUDICATURE} 304, 312 (1983) (arguing that judicial dissents can reveal that "law is transcendent," that "law is enduring rather than ephemeral," and that "law is infused with humanity, and thus is inherently concerned with symbolizing human yearnings").

\textsuperscript{188} \textit{See}, e.g., George F. Will, \textit{Spare Us a Justice's Gut Feelings}, \textit{L.A. TIMES}, Feb. 27, 1994, at M5 (characterizing Justice Blackmun's emotive appeals regarding the administration of the death penalty as "confusing autobiography with constitutional reasoning").

\textsuperscript{189} Campbell, supra note 187, at 307. For Campbell, however, the primary function or value of dissents, like that of civil disobedience, is to effect change, not to provide a medium of catharsis for their authors. \textit{See id.} at 306.

Chief Justice Hughes once described a dissent as "an appeal to the brooding spirit of the law, to the intelligence of a future day." \textit{Charles E. Hughes, The Supreme Court of the United States} 68 (1928).

\textsuperscript{190} 489 U.S. 189 (1989).
assigned to live out the remainder of his life profoundly retarded.\footnote{191}

The second example is Justice Blackmun's recent account of the death penalty in his dissent from a denial of certiorari in \textit{Callins v. Collins}.\footnote{192} In this dissent, in which he ultimately declared his change of mind on the constitutionality of executions, Justice Blackmun, who twenty-two years earlier refused to join in striking down the death penalty,\footnote{193} described in detail the pending execution:

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction. Within days, or perhaps hours, the memory of Callins will begin to fade. The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die.\footnote{194}

Needless to say, these passages in \textit{DeShaney} and \textit{Callins} are only marginally related to a "legal" resolution of their respective cases, and certainly they are of little or no precedential value.\footnote{195} Nor do they obviously or significantly further any of the major rationales for candor discussed thus far—accountability,\footnote{196} limited discretion,\footnote{197} improved quality of decisionmaking,\footnote{198} and guidance to the legal community.\footnote{199} Nevertheless, each was doubtless important to Justice Blackmun (who announced his retirement less than two months after his \textit{Callins} dissent),\footnote{200} and one can imagine that he would have felt judicially unfulfilled had he been unable to speak these words as fully and freely as

\footnote{191. \textit{Id.} at 213 (Blackmun, J., dissenting) (alteration in original) (quoting \textit{id.} at 193).}
\footnote{192. 114 S. Ct. 1127 (1994).}
\footnote{193. \textit{Furman v. Georgia}, 408 U.S. 238, 414 (1972) (Blackmun, J., dissenting) ("Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement.").}
\footnote{194. \textit{Callins}, 114 S. Ct. at 1130 (Blackmun, J., dissenting).}
\footnote{195. \textit{See generally} Barbara J. Flagg, \textit{The Algebra of Pluralism: Subjective Experience as a Constitutional Variable}, 47 \textit{VAND. L. REV.} 273, 312-18 (1994) (examining several appeals to subjective experience in dissenting opinions and concluding that such appeals generally lacked either justificatory basis or doctrinal coherence).}
\footnote{196. \textit{See supra} section II(A)(1).}
\footnote{197. \textit{See supra} section II(A)(2).}
\footnote{198. \textit{See supra} section II(A)(3).}
\footnote{199. \textit{See supra} section II(A)(6).}
\footnote{200. \textit{See} Ruth Marcus, \textit{Blackmun Set to Leave High Court}, \textit{WASH. POST}, Apr. 6, 1994, at A1.}
he did. Yet, if candor were not understood to be some sort of norm, let alone some sort of obligation, then Justice Blackmun might not have felt as able to utter these words or to convey these emotions. In turn, we as readers would not have had the opportunity, through Justice Blackmun’s cathartic moment, to experience the intangible dimensions of (in the case of *Callins*) an otherwise run-of-the-mill denial of certiorari. And if none of this sounds like legal analysis, perhaps that is precisely the beauty of this rationale for candor—that it serves to infuse judicial opinion writing with the unprocessed reality of the human condition.

Yet, without belittling Justice Blackmun’s style of judicial expression, catharsis seems to be an extremely weak justification for a general policy or across-the-board requirement of candor in judicial opinions, let alone in the judicial process generally. Rather than presenting a genuine reason for demanding candor, catharsis more closely approximates an incidental benefit (some would say burden) of employing human judges. Even to the extent that the facilitation of catharsis supports a candor obligation, that obligation need extend only to the very limited circumstances and degree required to allow judges to be cathartic; certainly it would not give rise to the full and general obligation embodied in the conventional wisdom. Finally, we must remember that catharsis itself can be carried too far, even if it might be relevant to the decisionmaking of a court.201

8. Progress.—A general requirement, or at least a general policy, of judicial candor also may be defended as a means of encouraging judges to contribute to the long-term doctrinal or conceptual development of the law. Specifically, such a requirement would ensure that judges are provided with both the opportunity and the urging to include in their opinions, if only in dicta, new ideas or doctrinal modifications. In the words of one commentator, “[i]t is hard to see how legal rules can evolve in a sensible and orderly way if innovative lower courts conceal what they are doing and thereby make it hard for appellate courts to review the innovation.”202

As a practical matter, this kind of long-term, incremental experimentation and speculation can take place either through the direct announcement of a new rule, principle, or justification (a form of legal development that is relatively more short-term than long-term) or through the inclusion of language that, while not immediately related to the resolution of the case at hand, may prove useful in future cases. This latter method is sometimes referred to in terms of “planted seed[s],”203 or less euphemistically as

201. See infra text accompanying notes 285-92 (discussing the often competing goals of candor and judicial civility).
202. Gewirtz, supra note 2, at 671.
"squirreling," in which judges knowingly or at least conveniently include language or ideas in one case upon which they may construct new principles or doctrines in subsequent, and sometimes entirely different, cases.

Historically speaking, this process has unquestionably proven valuable to the evolution of law, and, in many respects, it is integral to the incremental nature of common-law development. Nevertheless, the idea of preserving or fostering this process through the use of a general candor requirement or policy is plagued with an array of practical and conceptual difficulties. At the very least, we must acknowledge that this rationale, like the judicial catharsis rationale, is not so much a rationale as it is an incidental aspect of judicial decisionmaking that may be discouraged if candor in general is discouraged. In addition, to the extent judicial experimentation or speculation takes an indistinct form, such as being placed in footnotes or enmeshed in textual dicta, there has really been only a partial effort at candor, especially if the judge's motives or intentions remain unstated. At the same time, some may fairly question the efficacy and wisdom of pursuing coherent and long-term legal development through the use of footnotes and random textual fragments. Finally, even if these other problems could be ignored, the internal logic of the long-term development argument would itself support only a limited need for candor by the innovative judge. As Robert Leflar explains:

Lines of hoped-for growth need not be spelled out fully when the first seed is planted; often beginnings must be tentative, and one who plants a tentative seed flies in the face of fate if he then announces the full-grown tree that he hopes will ultimately emerge, though he must say enough to indicate to others that a plant is growing so they will be encouraged to help tend it.

204. Rodney J. Blackman, Spinning, Squirreling, Shelling, Stilletting and Other Strategems of the Supremes, 35 Ariz. L. Rev. 503, 507-09 (1993); see also Schroeder, supra note 157, at 9 (describing, though not endorsing, the process by which "a judge can think up a question not presented in that case, and hide it in a footnote, so that the judge can decide it in the next case").

205. See, e.g., Posner, supra note 30, at 236 ("Dissenting and to a lesser extent concurring opinions have played so important a role in the development of the law that it would be a great error to suppress them; it would actually make law less rather than more certain, by concealing from the bar important clues to the law of the future.").

206. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (pondering, in the infamous footnote four, "whether prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry").

207. See, e.g., Mikva, supra note 58, at 1367-68 (asserting that, while Carolene Products's footnote four "is an honored precedent[,] . . . this is scarcely the way to develop constitutional doctrine"). Regarding Judge Mikva's general aversion to footnotes in judicial opinions, see Abner J. Mikva, Goodbye to Footnotes, 56 U. Colo. L. Rev. 647, 664 (1985) ("I consider footnotes in judicial opinions an abomination.").

208. Leflar, supra note 21, at 818-19 (footnote omitted); see also Weisberg, supra note 8, at 253.
Even more serious than these practical concerns, however, is a fundamental conceptual difficulty arising from the nature of the judicial process itself. In particular, working against this means of long-term development is a fairly traditional conception of the judicial role as one that authorizes judges to resolve only the dispute at hand, a role that calls for deliberate limitation of the questions addressed, economy in the analytical process, and restraint in the articulation of seemingly unnecessary dicta. In the jurisprudence of the federal courts (as well as many state courts), this basic principle of judicial restraint manifests itself, among other places, in the maxim that judges should not decide constitutional questions unless they are absolutely forced to do so. In part, of course, this principle stems from practical concerns about the risk of creating subsequently "bad law" or "bad dicta," for, as Justice Traynor correctly observed, "bad precedent is easier said than undone." Likewise, at least for the trial or lower appellate court, it is often wise to keep dicta (and thus candor) to a minimum in order to avoid being unnecessarily reversed on appeal for having said too much.

Most importantly for our purposes, however, the principle of judicial restraint serves effectively to limit excess judicial power, insofar as a policy of full candor in dicta or in the holding may serve to enhance the power of judges by increasing the potential reach of their decisions or by allowing them to address issues not properly within the scope of the case. In turn, this would seem ironically to conflict with the rationale that holds that candor is necessary in order to limit judicial discretion.
Finally, some might argue that the intelligent development of legal doctrine requires not candor to those outside the judiciary, but, quite to the contrary, candor within the court coupled with a norm of confidentiality to protect the court's internal deliberations. Only if judges are truly free to deliberate over and experiment with the development of the law, relatively immune from the extrinsic pressures potentially triggered by compulsory candor, will that development transpire in a coherent and intelligent manner.

The upshot, then, is that the rationale of long-term development does not strongly support the notion of requiring candor, and it certainly does not support a candor requirement that is both full and general. Like the judicial catharsis rationale, it helps us to recognize an important and beneficial function that candor can serve, and in this sense could presumably justify a limited policy of candor. Candor could be encouraged, for example, to the extent that it would legitimate and permit efforts by judges to experiment with the legal matters that come before them. At the same time, however, we would need to recognize the practical costs of that policy as well as any conceptual damage that it may do to the traditional ideal of judicial restraint.

9. Moral Duty.—The final rationale that may provide support for a judicial candor requirement is ethical in nature. Specifically, one could argue that candor is a type of moral obligation incumbent on all persons, and that this obligation does not disappear simply because judges are government officials whose communicative duties are of a uniquely complex and onerous order. At some level, of course, many of us believe this to be the case—that people have a moral duty generally to be candid, and this duty does not in fact vanish when one assumes public office. It may even be the case, although the reality of the matter is uncertain, that we expect citizens to follow an even stricter moral regimen once in office, given the enhanced power and responsibilities that may accompany government service. Before assessing this final rationale, I

215. In relation to the Supreme Court, for example, Professor Stephen Carter has argued that the Justices “can’t have a free and open exchange of views if it’s all going to be public knowledge,” and that their thoughtful deliberations would be perceived as mere “waffling.” See Mauro, Tales of the Court, supra note 15 (quoting Professor Carter).

216. See Zeppos, supra note 8, at 401-02 (implying that the “almost universal condemnation of lying” found among various religious and philosophical traditions is normatively binding in contemporary American culture and therefore provides a “moral high ground” for a position in favor of judicial candor).

217. Cf. Shapiro, supra note 2, 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 worthy of respect, than the speaker.”).
Texas Law Review

should emphasize that it is not to be confused with certain earlier moralistic rationales, particularly the fairness element of notice (which derived entirely from the particular relationship between judges and their audiences). In contrast to these other rationales, all of which have an instrumentalist slant to them, this final rationale expresses the idea that candor or honesty is inherently desirable or good, whether teleologically (as a proper end) or deontologically (as a proper means, without regard to one's chosen end or the outcome of one's actions).

As one who does not make a stark or enormous separation between general ethics and political or professional ethics, I am sympathetic to the essential idea expressed in this rationale. Nevertheless, this position is at odds with the apparently conventional view that general moral principles are not necessarily binding on the professional realms, such as law and politics. Instead, these realms are governed by formal codes, canons, or rules of professional ethics, strongly suggesting, first, that we have committed much of the matter of professional ethics to a process of codification, and, second, that by so doing we have deliberately fabricated a wall of separation, if you will, between the professional ethical realm and the nonprofessional ethical realm. Stated differently, it does not seem to be the case today that legal and political professionals understand themselves—or that we necessarily understand them—to be formally subject to general moral principles, even though many of them as individuals

\[218. \text{See supra notes 166-71 and accompanying text.} \]

\[219. \text{It is this rationale that prompted me to qualify my earlier characterization of candor's value as "almost always" instrumental. See supra section I(A)(4).} \]

\[220. \text{E.g., CODE OF JUDICIAL CONDUCT (1994); MODEL RULES OF PROFESSIONAL CONDUCT (1994).} \]

\[221. \text{See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.7.1, at 70 (1986) (noting the "general omission of any discussion of ethical considerations in the [Model] Rules" and suggesting that such considerations have been relegated or left to the forum of individual conscience). Even those who view candor in moral terms seem implicitly to recognize this point by characterizing judicial morality in professional terms. See, e.g., Gewirtz, supra note 2, at 667 ("[C]andor in judicial reasoning is part of the morality of craft." (emphasis added)).} \]

\[222. \text{This approach to legal ethics, sometimes called "role-differentiation," is addressed in Gerald J. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. REV. 63 (1980), and Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 HUM. RTS. 1 (1975). Naturally, this approach is not universally accepted, and some would argue that it is seriously misguided or mistaken as a conceptual matter. E.g., Serena D. Stier, Legal Ethics: The Integrity Thesis, 52 OHIO ST. L.J. 551, 554 (1991). Others might argue that it is simply incorrect in terms of the actual structure of our codes of professional ethics. After all, one reason for such codes lies to do with notice and prospective conduct control, not ethics in any real sense. Likewise, one could argue that such codes merely embody, and do not render irrelevant, general moral rules accepted by society at large, much like statutes often merely codify the common law. See, e.g., CODE OF JUDICIAL CONDUCT pmbl. (1994) ("The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges."); Edward L. Wright, The Code of Professional Responsibility: Its History and Objectives, 24 ARK. L. REV. 1, 9 (1970) ("Many conclusions arrived at by . . . the Code [of Professional Responsibility] are obviously the same decisions that unbiased lawyers would inevitably reach after mature reflection; but} \]
no doubt see their entire lives as governed by certain ethical standards. Thus, even if candor is a generally accepted moral principle within society at large, that alone may be insufficient to give rise to a requirement of candor on the part of judges. Within the world of professional ethics, moreover, it is interesting to note that while attorneys have an express duty of candor to the bench, there is no analogous rule governing the candor of judges vis-à-vis the bar or the public, at least not one that is so explicit in its coverage. If anything, the various rules against certain forms of judicial expression, as well as the affirmative obligation to preserve the public's confidence in the judiciary, suggest that full judicial candor is neither the established baseline nor always the most appropriate course of action. Indeed, while the relationship between public confidence and judicial candor is admittedly complex and somewhat uncertain, there is little reason to think that the latter is a guaranteed means towards preserving the former and ample reason to think that the relationship is often of an inverse nature.

In addition, even if one rejects the view that the ethics governing the professional realm of judging are distinct from, or should be separated from, the ethics governing the rest of society, it may still be difficult to establish the case for a strong requirement of judicial candor. First, it is not clear that such a requirement would accurately reflect the predominant morality of our culture. To be sure, there is much debate today among ethicists and sociologists, as well as others, about the validity of absolute
or nearly absolute truth-telling as a basic rule of moral conduct. Instead, many would argue, and I believe we can each relate to this in our own experiences with family, friends, and associates,\textsuperscript{230} that the question of candor is often relegated to an informal cost-benefit analysis, in which the potential individual and social benefits of telling another the truth are weighed against the potential harms, both to that individual and to others, that the candor might cause.\textsuperscript{231} Second, and much more problematic, it is potentially very difficult today even to speak about a common ethical regime, and especially about the formal imposition of moral duties, due to an increasing lack of consensus over both private and public morality.\textsuperscript{232}

In a world of widely or universally shared objective morality, the notion of effectively imposing a particular ethical rule on judges may seem entirely appropriate and, at the very least, feasible. In the world we presently inhabit, however, such a notion may be both unacceptable (ironically, it might be morally unacceptable) and unfeasible.

In summary, the argument from morality contains both practical and conceptual difficulties that render it, like the preceding eight rationales, unable to support a full and general requirement of judicial candor. To the extent that social morality is understood to influence professional morality, and to the extent that a candor requirement could indeed be derived from contemporary social morality, some sort of limited requirement would thus seem appropriate. Once again, candor may be obligatory—but only to a point.

\section*{B. Summary and Assessment}

Having surveyed the nine principal rationales for judicial candor, a brief summary and assessment, including a statement of preliminary conclusions, may be useful at this juncture. Before doing so, however, I should address several potential methodological concerns implicated in my analysis of the rationales.

\textsuperscript{230} This is true with regard to both our actions and our omissions. At some point, if not regularly, everyone has said something less than true to another—"That's a very attractive outfit," "You're looking very good," or "No thank you, I have a prior engagement on that night"—or has declined to say something true—"That's an atrocious outfit," "You're looking quite ill," or "I wouldn't have dinner with you if you paid me"—simply as a matter of courtesy, kindness, or self-preservation. For a discussion of these types of situations, see generally SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 146-64, 203-41 (1978).

\textsuperscript{231} Compare Zeppos, supra note 8, at 401-02 (suggesting that the "almost universal condemnation of lying" supports a pro-candor position) with id. at 405 (acknowledging the pervasiveness and possible legitimacy of a utilitarian, cost-benefit approach to issues of truth-telling).

\textsuperscript{232} Cf. Michael J. Perry, Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective, 20 GA. L. REV. 995, 1049 (1986) ("There are many different moral communities . . . each with its own set of basic beliefs about human good.").
1. Methodological Concerns.—There are at least three potential objections to my methodology. First, there may be some concern that my analysis of the various pro-candor rationales is highly reductionist, and that, as a result, I have committed the so-called fallacy of composition. Specifically, implicit in my analysis is the presumption that the failure of each individual rationale in isolation indicates that their combination would prove no more compelling. I recognize, however, that although each rationale may support only a limited case for candor, in concert or synergy they may present a much stronger case. (At the same time, I must also point out that it is theoretically possible that a combination of rationales, insofar as they may cancel each other out in logic or effect, may produce an overall weaker case for candor, although this is somewhat unlikely.)

Nevertheless, for a number of reasons, I believe my analysis is justifiable in its current form. First, this objection may simply be incorrect. The use of a reductionist analysis, far from diminishing the ultimate case for candor, may actually produce a more powerful analysis. Precisely because each rationale is addressed on its own terms, there is relatively little risk of blurring or masking the strength of the individual rationales. Thus, the merit of each rationale is expressed fully and clearly. Second, assuming that the objection is not invalid, any proof of this synergistic effect would require one to show that the rationales at issue may consistently be combined with one another, meaning that they neither conflict on their face nor rest on underlying principles or premises that are themselves inconsistent. Finally, and most importantly, even if such a case could be made, logic would still dictate that the obligation of candor need extend no further than the combined strength of the rationales. In other words, while the resulting set of obligations might in fact be larger using a holistic approach, there would still be no theoretically obvious reason to adopt a general and full obligation of candor. In turn, we would still face a sizable realm of situations or circumstances in which we could offer judges no theoretically compelling reason to employ candor.

Even if the reductionist approach can be presumed valid, a second potential objection to my methodology is that my distinctions among certain rationales—e.g., limited discretion versus accountability versus quality

---

233. \textit{See} DOUGLAS N. WALTON, INFORMAL LOGIC 23, 129-30 (1989) ("The fallacy of composition argues unreasonably from attributes of some parts of a whole or members of a collection, to attributes of the whole or collection itself.").

234. The exception, perhaps, is when a combination of rationales so strongly points towards candor in the vast majority of situations that we might consider adopting a general obligation as a matter of rule-utilitarianism. \textit{See} Shapiro, \textit{supra} note 2, at 738 (suggesting that his case for a strong presumption in favor of candor may be "nothing more than a species of rule-utilitarianism that attaches heavy weight to considerations that might not be evident in a particular instance but that derive force from their cumulative effect").
decisionmaking—are extremely fine and may at times even verge on artificial. In turn, the use of such artificially circumscribed rationales may affect the realism, if not the theoretical integrity, of my subsequent analysis. Admittedly, my purpose in dividing the rationales so finely was chiefly heuristic; any increased realism gained through the consolidation of closely related rationales would, I believed, be largely outweighed by the potential loss of analytical clarity. More importantly, it is not clear that a loss of realism actually resulted or that, even if such a loss did result, the integrity of my analysis or conclusions has in any way been jeopardized as a consequence. Moreover, just as the use of reductionism may actually produce a more powerful analysis, the artificially fine division of rationales may serve to increase, rather than decrease, the likelihood of discerning a basis for the conventional wisdom.

The third potential objection to my analysis of the conventional wisdom is that it is misguided insofar as it implicitly places the burden of persuasion on the pro-candor position. That is, some may argue that it is unjustifiable to begin from an essentially agnostic position—not presuming that a general obligation of candor is either desirable or undesirable—and thereby to assume that, if the conventional wisdom could not be proven from the ground up, then it must be unfounded. This methodology certainly does not comport, for example, with the social scientific approach, which gives deference to the status quo (in the form of the null hypothesis) and rejects the status quo only upon a showing that an alternative model (the experimental hypothesis) is in some way superior.235 For three reasons, however, this objection is not persuasive. First, I do not believe it is really an issue of allocating a burden of persuasion as much as it is an attempt to discern and evaluate the underlying principles of the conventional wisdom. We cannot speak meaningfully about the value and propriety of judicial candor unless we understand its possible justifying rationales, and analytically I see no difference between beginning with a statement of each rationale (followed by a critique) and beginning with the presumption that candor is desirable, only then to proceed to critique its underlying principles. Second, a review of the literature on judicial candor suggests that beginning with the conventional wisdom in place has been precisely the problem to date, because adopting such a presumption naturally inhibits one's ability to secure a detached and critical perspective on the subject. Lastly, this Article is not a scientific investigation into the strength of competing empirical evidence, in which deference to the status

Judicial Candor

quoting is seemingly appropriate; rather, it is a qualitative examination of competing conceptualizations, in which there is no obvious reason to privilege one conception over another. In social science, a null hypothesis occupies a privileged position only because it is understood to have provided, up to the time of any given experiment, a useful and relatively accurate description of some social phenomenon. The conventional wisdom regarding candor, by contrast, is not an empirical hypothesis but a normative principle—one, incidentally, that has arguably not proved clearly valuable or desirable to date.

2. Preliminary Conclusions.—In light of the foregoing survey of rationales, we need once again to pose the basic question of whether judges ought to be subject to a full and general obligation of candor akin to that embodied in the conventional wisdom. To the extent that this survey reveals that such an obligation is only partially defensible as a theoretical matter, the simple answer would appear to be “no.” Insofar as no single rationale can support a strong requirement of judicial candor, then from a logical standpoint it would simply be mistaken to continue to adhere to the conventional wisdom, despite the dissonance such an abandonment might create. However, to the extent the foregoing survey also reveals that several of the rationales appear to support limited obligations of candor, the better answer would seem to be that judges ought to be subject to a qualified candor requirement, applicable in some circumstances and not in others. That is, if logic compels anything, it is neither full candor nor full concealment, but rather an intermediate series of obligations tailored to the internal logic and reasoning of each of the nine supporting rationales.

To see what such an intermediate analytical framework might look like, let us consider the sixth rationale, which holds that candor is necessary to provide notice to the public and the legal community as to the present and future contours of judge-made law. The basic logic of the rationale, if you recall, is that the demands of due process, arising either from social contract or from fairness, impose upon judges a mandate to disclose sufficient information to allow potential legal actors to order their affairs in such a way as to avoid, or at least minimize, legal liability stemming from the enforcement of judge-made law. If you further recall, however, we noted at least two limitations on this general demand, each arising from within the internal logic of the rationale. First, the disclosure need extend only to that information, or that quantum of information, necessary for the ordering of one’s affairs. Second, the disclosure must not interfere with the other notice-based or due-process-based requirement

---

237. See supra notes 158-76 and accompanying text.
that legal rules should be free from ambiguity or uncertainty (i.e., that judge-made law must be concrete and definite in the scope and substance of its demands). We noted, in other words, that this rationale contains within its logical structure both the basis for an obligation of candor and the limits of that obligation: candor is compelled, but only up to the point that it no longer provides relevant notice or to the point that it gives rise to an intolerable level of uncertainty as to what the law actually is. Beyond these limitations, any further obligation must be supported either by another rationale or by some extrinsic consideration, and insofar as no other rationale or extrinsic consideration is applicable, the judge ought to be under no further obligation. In the unusually economical words of Karl Llewellyn, "The rule follows where its reason leads; where the reason stops, there stops the rule."

In turn, we can apply this very same logic to each of the other rationales, until we deductively arrive at a set of roughly finite obligations. And it is these limited obligations, then, that constitute the "some circumstances" in which judges must be candid. That much is straightforward logic. Yet, what of the "other circumstances" in which judges need not be candid—those situations or circumstances in which none of the enumerated rationales provides a reason for requiring judges to be candid? The simple answer, once again, is that judges in fact need not be candid in such situations or circumstances, and that the intuitive foundation of the conventional wisdom is essentially powerless to compel judges otherwise. And we are left then with the possibility that there exists a vast universe of seemingly absolute judicial discretion—a realm akin to H.L.A. Hart's "open texture" upon the exhaustion of available legal rules—that lies beyond the core set of obligations created by the logic of these rationales. Needless to say, such a prospect may be especially disturbing either to those who presume that the conventional wisdom possesses sufficient theoretical grounding or to those who simply tremble at the thought of substantial judicial discretion, particularly if the source of the latter's fear

---

238. By "extrinsic consideration," I mean some influence or reason that is theoretically unconnected to the specific issue of candor, but that may suggest that candor is nevertheless strongly advisable. Several such considerations are the subject of Part IV of this Article, wherein I discuss the role of prudential forces in the judicial decision to employ or forego candor. See also infra section IV(D)(1) (addressing the proposition that, even though internal logic might not compel a general obligation, the prospect of judges miscalculating the applicability of each rationale nevertheless may strongly favor the imposition of a general obligation).


240. See H.L.A. HART, THE CONCEPT OF LAW 124 (1961) ("Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate."). For a recent discussion of Hart's open texture analysis, see BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 7-35 (1993).
is located in the largely refuted pro-candor rationales of accountability and limited power.241

III. Constraints on the Use of Candor

Thus far, I have attempted to examine the validity of the conventional wisdom—the position that judges ought generally to be candid—as an artificially circumscribed, theoretical matter, without particular regard to extrinsic considerations such as externally competing values or the practical institutional constraints on judicial decisionmaking. As that analysis has revealed, the notion that judges ought to be subject to some type of general obligation of candor, even as a theoretical matter, is at best limited and is circumscribed by the logic or reconceived reasoning of each rationale. Before addressing what should be done with the realm of discretion opened up through this realization, I first wish to address the relevance of various extrinsic considerations to the realm in which candor does seem to be justified by these rationales. The relevant inquiry in this Part, therefore, is whether and to what extent judicial candor may be avoided even if the logic of one or more pro-candor rationales would otherwise warrant such candor.

Two types of considerations might support, or at least explain, the avoidance of candor. The first I have labeled "practical constraints." These constraints, such as imperfect information, inefficacy, and the multimember nature of courts, represent actual and often indelible characteristics of judging that, by their nature, frequently appear to make full candor impractical or unachievable. The second category, labeled "normative constraints," comprises a number of competing values that, while not genuinely unavoidable as are the practical constraints, are nevertheless of such importance that judges may believe it is better to forsake candor than to forsake one or more of them. These constraints include the need to hide a fundamental value conflict, the need to maintain institutional legitimacy, and the need to use legal phraseology in the analysis of cases.

Before proceeding to an analysis of these two categories of extrinsic factors, I should state several observations or qualifications relating to this analysis. First, it is important to note that the focus of this section—the tension between otherwise compulsory candor and these seemingly important extrinsic considerations—is in fact the principal battleground upon which a great deal of the contemporary judicial candor debate is waged. Precisely because most commentators adopt wholesale some version of the conventional wisdom, and thus fail to account for the inherent limits of the

241. See supra Part II.
pro-candor position, their only focus of analysis is the tension between candor and competing factors or values such as those discussed below.\textsuperscript{242} As this Article demonstrates, however, this interface is simply one of two major normative fronts in the judicial candor dispute, and in some respects, it is the less important of the two. Second, I should point out that even though most of my discussion of prudential considerations will be limited to Part IV, many of the extrinsic factors examined in this section are essentially prudential in nature. To be sure, the competitive nature of several of the various practical and normative factors considered below arises only because the political and institutional status or legitimacy of the judiciary—the paradigmatic focus of prudential analysis—is implicated through their juxtaposition with one or more of the pro-candor rationales. They are raised here, however, for the very reason that their prudential nature is generally not explicit, but arises by necessary implication. The prudentialism discussed in Part IV, by contrast, is offered as an extrinsic source of decision that need not, but arguably should, be imposed upon the judicial decision whether to use or to avoid candor. Third, I recognize that some readers may reject the direct influence of prudential considerations on candor outright, either because they believe that prudential considerations rank low among the possible extrinsic considerations that should influence the use or avoidance of candor or, more fundamentally, because they envision a particular function of the courts that conflicts with such influences.\textsuperscript{243} Finally, the reader should keep in mind that the scope of these extrinsic considerations, like that of the pro-candor rationales, should extend no further than their logic and underlying reasoning would permit.

A. Practical Constraints

1. Limited Foresight.—A failure to be completely candid may result from a lack of perfect information or full cognizance by judges concerning future circumstances that may affect the subsequent nature and needs of the law. Particularly in dynamic areas of law, such as those whose contours reflect the current state of technology, judges may be understandably hesitant about over-addressing the subject matter of the case before them so as not to bind the hands of future judges and impede the law’s development.\textsuperscript{244} Among other things, this may lead a court to modify the

\textsuperscript{242} See, e.g., infra 353-358 and accompanying text (noting this phenomenon in several works).

\textsuperscript{243} See, e.g., Saphire, supra note 87, at 795 & n.59 (discussing Professor Michael Perry’s proposal, within the context of institutional reform, that a court should be fully candid, even if “its ability to secure compliance [with its remedial orders] is sometimes weak” (quoting PERRY, supra note 66, at 162)).

\textsuperscript{244} As stated by Professor Gilmore:

[C]onfusion is more than an undesirable concomitant of desirable progress; it has its own real use and merit. In trying to understand the process of legal change, it is essential to
breadth of its holding, to adjust the nature and volume of its dicta, or to consider more carefully the use of separate opinions, all in order to prevent the short-sightedness of the present from hindering the progress of the law in the future. As the Supreme Court has itself recognized, "Obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases." Moreover, excessive candor in such cases may not only create bad rules, but may actually interfere with a court's ability to correct these rules down the line. "[T]he premature adoption of a rule," suggests Judge Posner, "may prevent the courts from obtaining the information they need to make a sound rule." Finally, as was observed in the earlier critique of the notice-based rationale for candor, excessive judicial expression may serve to make the law unclear or uncertain to the point that legal actors may experience as much difficulty in ordering their affairs as if judges had said nothing at all.

Of course, limited information should not create a complete bar on judicial speculation or theorization, especially to the extent one finds the long-term development rationale, discussed in section II(A)(8), persuasive. But perhaps judges in such circumstances should consider seriously the variety of ways to speak candidly—the numerous variations in medium and manner discussed in section I(A)(3), including the use of extrajudicial, nonprecedential forums such as law review articles—and the possibility of balancing the demand for candor with the need to prevent encumbering the courts of the future with overbroad holdings or excessive and troubling dicta.

2. Relative Inefficacy.—Another practical limitation on the use of candor is its potential inefficacy. This may be relevant in at least two ways. First, the advisability of judicial candor may depend on the ability or willingness of the judge's audiences to comprehend and respond to that candor. Implicit in the notice rationale discussed in section II(A)(6), for example, is the premise that there is a meaningful correlation between judicial candor and reader apprehension and utilization—or more formally

---

keep in mind that, although we may recognize that we are moving and can see where we have come from, we can never know how far along the road our destination lies. . . . It is the part of wisdom to keep our generalizations incomplete and open-ended, our definitions a little unclear, our categories blurred and fuzzy at the edges.


246. POSNER, supra note 30, at 245.
247. See supra section II(A)(6).
the fictitious presumption that citizens know the law—and yet we know that empirically this premise is debatable. Consequently, judges may believe that disclosure which is both thorough and sound, but which falls entirely on deaf or disinterested ears, is perhaps not worth making at all. Second and more importantly, even if the capacity and willingness of the audiences are adequate, the institutional realities of the situation nevertheless may render the value of candor minimal. For example, a judge who believes strongly in a particular position or principle, but who knows that her view was recently and flatly overruled or will never be adopted, may find that the candid exposition of that view is simply not worth the effort, particularly if she takes into account considerations of individual and institutional legitimacy.

3. Consensus-Building.—The avoidance of candor may also result from the fact that a court is not a single organism, but rather a composite of its individual members. As a result, the candor of its opinions may be circumscribed by the need to reach a consensus among factions within any given case. Full candor may simply be impossible due to internal disagreement as to the precise grounds on which the outcome of a decision should rest. One commentator describes the process as follows:

Inasmuch as most opinions have to be hammered out on the anvil of compromise, the net result is a document which is satisfactory to

248. See supra notes 147-50 and accompanying text; see also Grossman, supra note 86, at 835 (arguing that the public in general would likely not benefit from less judicial secrecy, and that only the "elites already in the know would know a little more"); Zeppos, supra note 8, at 401 n.278 (questioning the value of the claim that greater candor would allow for greater external critique, because scholars perform the critiquing function well, whether or not judges are candid).

249. Of course, the argument from efficacy is limited by the degree to which the judges' audiences, or the judges themselves, are incompetent, disinterested, or disaffected. And for those who cannot transform "is" into "ought"—even in the face of extreme judicial incompetence—it is hardly an argument at all. But enough "is's" cannot simply be ignored, and any theory of judicial candor must take into account the fact that judges and their audiences are entirely composed of human beings, each with her own level of minimum fallibility and maximum competence. To unloose a requirement of full candor into such a world is potentially to ignore this fact; to take this fact into account is potentially to condone something less than full candor.

250. See Schlaefer, supra note 151, at 7-9 (discussing several Supreme Court Justices' views on dissenting opinions); see also infra section III(B)(2).

251. See Hans A. Lindo, Courts and Torts: "Public Policy" Without Public Politics?, 28 VAL. U. L. REV. 821, 828 (1994) ("Opinions for the court cannot be expected to include all the diverging beliefs, sympathies, and habits of thought that motivate its individual members and that are implied by a demand for 'candor.' The point of naming a single author is to let others join an opinion if they agree with its general conclusions, though they would write differently."); Shapiro, supra note 2, at 734 ("An accusation that a court is lacking in candor sometimes overlooks the special problems of collegiality that arise in a multi-member appellate tribunal.").

252. See, e.g., Gewirtz, supra note 2, at 670-71 & n.231 ("Some deception may be needed . . . to forge a majority opinion . . . or . . . a unanimous one . . . ."); Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 COLUM. L. REV. 982, 1007-08 (1978).
more than one . . . but which, as a consequence of getting such agreement, displays either the ambiguities of language settled on by compromise or a watered-down substitute for a strong statement of principle. 253

In short, there may often be a direct conflict between the values of candor, inherent in one or more of the pro-candor rationales, and the reality of the decisionmaking dynamics within multimember courts. This may be particularly true with regard to the Supreme Court, which often has to make effectively final decisions on some of the nation's most difficult moral and social issues. As Professor Michael Gerhardt observes, "greater candor on the [Supreme] Court might complicate or hinder coalition building, and thereby inhibit and weaken the Court's ability to issue rulings more quickly, or possibly at all, on such politically divisive or contentious subjects as abortion or economic regulations." 254 Even one of the stronger advocates of candor, David Shapiro, has recognized the significance of this conflict. "Surely it is not deceptive," he suggests, "for a majority to adopt a rationale that does not go as far as some of its members are willing to go." 255

Thus, like limited judicial foresight and potential inefficacy, the multimember nature of courts and the need to forge majority consensus may often conflict with the demand for candor. This conflict is particularly acute, moreover, to the extent that these practical constraints are essentially entrenched within the institutional nature of the judicial process as it is currently structured. And unless and until that process is altered, we must recognize that candor may often need to be sacrificed in order to accommodate these constraints, even if the logic of one or more of the pro-candor rationales would appear to mandate a different result. 256

254. Gerhardt, supra note 162, at 138; see also Blackman, supra note 204, at 509 (discussing examples of "shelling" in two Supreme Court cases). To some extent, of course, this concern begs the more basic question of whether the Court should be deciding such cases in the first place. If indeed no consensus can be forged without a drastic loss of candor on the part of certain or all Justices, then perhaps the Court should be deemed institutionally incompetent to address the question at all.
255. Shapiro, supra note 2, at 736. It is for this reason that David Shapiro, in the same article, criticizes Martin Shapiro's criticism of the Warren Court's lack of candor in apportionment cases such as Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964). Shapiro, supra note 2, at 735. David Shapiro argues that Martin Shapiro's criticism is flawed because "it speaks of the Court as though it were a single human being with a single, unswerving purpose throughout the period of these decisions" and because he gives "insufficient heed to the mathematics and the dynamics of forging a majority for a result and a rationale." Id. at 735-36.
256. Still another practical constraint is that of scarce judicial resources and the resultant need for judges to allocate these resources, especially time, in ways they think most productive. See Leflar, supra note 2, at 741 ("Overcrowded dockets in today's appellate courts make good opinion writing increasingly difficult. Ample time for thoughtful consideration and reconsideration is scarce."); Selya, supra note 107, at 409-14 (advocating decreased publication of opinions as a means to lessen existing
B. Normative Constraints

In addition to practical constraints on the exercise of judicial candor, we must also recognize the existence of certain normative constraints or competing values—principles and ideals that may warrant the avoidance of candor even though such candor may appear compelled by the logic of the pro-candor rationales. Specifically, I have in mind three such competing values: moral exigency, institutional legitimacy, and need to use legal phraseology. Of course, we have already encountered a number of competing values in the main analysis. In Part II(A), for example, we saw that the rationales of accountability and limited power were in tension with the principle of independence, while the rationale of guidance to the public and the legal community harbored an internal competition between the value of providing full information (which may be ambiguous or tentative) and the value of articulating clear and certain rules of law (which may mask this ambiguity or tentativeness). Likewise, in the preceding discussion of practical constraints, we observed at least the implication of certain competing values. The importance of achieving majority opinions, for example, derives in large part from certain value-laden public and legal expectations as to the ideal or proper form of judicial pronouncements. The competing values to be discussed at this point, however, are qualitatively different from those examined earlier. For one thing, they do not possess a natural relationship to the internal logical validity of one or more of the pro-candor rationales (that is, they are truly in competition with those rationales). For another thing, they are not so imbedded within the institutional structure and dynamics of judicial decisionmaking as are the so-called practical constraints; accordingly, they can more readily be subordinated in the name of candor should that turn out to be appropriate. With these distinctions in mind, let us now examine the first of these competing values.

1. Moral Exigency.—Philip Bobbitt and Guido Calabresi, in their book *Tragic Choices*, argue that a lack of judicial candor may be justifiable as a means to mask a fundamental value conflict. As Calabresi explains in a later work:

---

257. See supra notes 93-105, 122-23 and accompanying text.
258. See supra notes 182-84 and accompanying text.
259. See supra section III(A)(3).
261. See id. at 17-28, 78-79, 146.
The most important . . . kind of subterfuge [frequently used in law] is that designed to hide a fundamental value conflict, recognition of which would be too destructive for the particular society to accept. Dishonesty, whether chosen or through a failure to look far enough into dark corners, is preferred because total candor is given less weight than the other values involved in the conflict, one of which would be undermined by honesty. . . . It is too damaging to admit that jails are so bad that some recidivist rapists are willing to be castrated to get out of jail; yet society is not willing to improve jails sufficiently to make castration a choice rapists would abjure. So we lie and say that those prisoners who opt for castration cannot be exercising a free choice, even though, if we but looked, we might see that the convict preferred castration to jail and would not subsequently regret his choice.262

According to these authors, dishonesty in such circumstances amounts to a type of legitimate “subterfuge” warranted by the exigency, by the tragic moral nature, of the situation. As David Shapiro points out, the prescriptive validity of Calabresi and Bobbitt’s theory, especially in comparison to its descriptive accuracy, is potentially highly debatable.263 In particular, Shapiro suggests that the use of subterfuge may be both unproductive and not entirely necessary, because there may be accommodating alternatives to complete deception.264 In addition, one could argue that Calabresi and Bobbitt do not give sufficient credit to the ability of the public and the legal community to handle candor, even in its most disturbing forms.265 Nevertheless, even Shapiro, one of the strongest pro-candor commentators, does not appear to reject their thesis entirely; he simply suggests that its application may be narrower than Calabresi and Bobbitt propose.266 Moreover, Shapiro himself offers a closely related scenario, based on the writings of Ronald Dworkin, in which he believes

262. CALABRESI, supra note 8, at 172-73. For further application and analysis within the specific context of race-conscious admissions, see Guido Calabresi, Bakke as Pseudo-Tragedy, 28 CATH. U. L. REV. 427 (1979) (arguing that the opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), was unnecessarily, and thus tragically, uncandid).

263. Shapiro, supra note 2, at 748.

264. See id. at 748-49; see also Gewirtz, supra note 2, at 672-74 (setting forth and rejecting tragic choice analysis in the context of desegregation remedies).

265. Actually, there is significant debate over whether and to what extent the public could handle truth in judging. Compare Forrester, supra note 90, at 1214 (arguing that “the American people can handle it psychologically”) with Book Note, supra note 15, at 794 (“[I]f, in the interest of candor, the [Supreme] Court concedes the consideration of politics in its decisionmaking, then it will lose the legitimacy required to demand adherence to its most controversial decisions.” (footnote omitted). See also Shapiro, supra note 2, at 744-47 (critiquing the position that avoidance of candor is warranted if “truthfulness would adversely affect the person addressed or would cause an undesired kind of behavior”).

266. Shapiro, supra note 2, at 749.
There is no escape from an obligation to lie.\textsuperscript{267} This is the situation in which a judge is confronted with a conflict between a legal right and a moral right—between essentially positive law and higher law. Whether formulated in Calabresi and Bobbitt's terms or in Shapiro's, however, the basic idea remains salient: cases of moral exigency may render candor less than wholly desirable, and the avoidance of candor may then be preferable, notwithstanding the logic of the pro-candor rationales.

2. Institutional Legitimacy.—A second category of competing values or normative constraints concerns the institutional legitimacy of the judiciary. Earlier it was suggested that one possible justification for a candor requirement is judicial authoritativeness—that judicial pronouncements will not be fully authoritative if they lack candor.\textsuperscript{268} In critiquing that rationale, I noted that if authoritativeness is truly a concern, then we must further recognize that authoritativeness, or the related concept of institutional legitimacy, may also be significantly preserved through the avoidance of candor.\textsuperscript{269} To the extent that this is correct, institutional legitimacy must then be properly understood as yet another competing value vis-à-vis the rationales for candor. In particular, I wish to discuss three factors potentially affecting judicial legitimacy and their relationship to two meanings of the concept of "institutional legitimacy." These three factors are unanimity or near unanimity in decisions, professional civility in opinions, and continuity of the law over time. The two meanings of "institutional legitimacy" are, first, with regard to the particular judicial institution making the decision to use or avoid candor, and second, with regard to the overall enterprise of judging. Oftentimes, the interests at stake with regard to each institutional perspective will be the same; in other instances, they will differ.\textsuperscript{270}

The first potential source of institutional legitimacy—or, if absent, a potential source of diminished legitimacy—is unanimity or near unanimity in judicial opinions. It was noted earlier, when discussing the practical constraints arising from the multimember nature of courts, that candor is often forsaken in the process of amassing the votes necessary for a majority, or in some cases plurality, opinion.\textsuperscript{271} We return at this point

\textsuperscript{267} Id. (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 326-27 (rev. ed. 1978)).
\textsuperscript{268} See supra notes 142-45 and accompanying text.
\textsuperscript{269} See supra text accompanying note 150.
\textsuperscript{270} Likewise, any particular judge's interests may often be distinct from those of the court on which she sits, thus creating the need for some type of ethic of institutional responsibility. For a discussion of institutional responsibilities and the federal courts, see POSNER, supra note 30, at 226-46.
\textsuperscript{271} See supra section III(A)(3); Thurman Arnold, Professor Hart's Theology, 73 HARV. L. REV. 1298, 1312, 1310-14 (1960) (noting that "compromise in the form of ambiguity may be inevitable... in order to avoid provoking a dissent or a concurring opinion").
to the phenomenon of amassing votes not for the mere subsistent purpose of achieving a necessary majority, but for the more difficult purpose of achieving unanimity or near unanimity in situations in which judges believe that a simple majority, let alone a plurality, would not be sufficient. Judge Posner, for example, describes a scenario—one involving a claim not only of legitimacy, but also of inefficacy—in which a judge contemplates writing separately because he disagrees with the majority and does not want to be put into the target area of criticisms directed at an opinion that he voted against. 

[S]uppose that although he thinks he is right and the majority wrong, he also thinks it unlikely that his or any other court will, or perhaps even should, reopen the question in the foreseeable future. The case may involve one of those frequent questions where it is more important that the law be settled than that it be got just right. In such a case a dissent will communicate a sense of the law's instability that is misleading; the decision is as solid a precedent as if it had been unanimous. From an institutional perspective it is better for the disagreeing judge not to dissent publicly in such a case, even though such forbearance will make it more difficult for someone to write the judge's intellectual biography.

One of the most notable illustrations of this phenomenon can be seen in the Supreme Court's early desegregation decisions of the 1950s. In both *Brown v. Board of Education* and *Cooper v. Aaron*, the Justices (or at least Chief Justice Warren) deemed it necessary both to the legitimacy of the Court at that time as well as to the legitimacy of the

---

272. There is some debate as to the precise relationship between institutional legitimacy and the production of separate opinions. *Compare* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807-11 (1982) (arguing that divided decisions go hand in hand with attempts at reasoned explanation) *with* POSNER, *infra* note 30, at 227 (lamenting the fact that "when each appellate judge [on a particular court] speaks with a separate voice, there is judicial cacophony") and *id.* at 239-43 (critiquing Easterbrook's analysis) *and* Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72 (1980) ("Continuous fragmentation could well diminish not only the influence of the Court but the ideal of the rule of law."). *See also* D'Amato, *infra* note 19, at 115 ("Would-be dissenting judges probably are subjected to collegial pressure to change their intended negative vote to a positive recorded vote, so that the opinion of the court will appear less controversial, more authoritative, more constrained by the law."); Gerhardt, *infra* note 162, at 138 (noting that while "a proposal for greater candor might have the effect of increasing respect for the [Supreme] Court by providing an outlet for the reasoned differences among the Justices . . . [t]his suggestion can . . . overlook that respect for the Court might just as easily depend on the Justices' submergence of their personal views . . . for the sake of consensus or stability").


federal courts in general to pronounce the unconstitutionality of racial segregation through a single, undivided voice\textsuperscript{276}—precisely because the holdings were thought by some to be constitutionally suspect\textsuperscript{277} and because the political atmosphere was atypically hostile. Indeed, in \emph{Cooper}, although Justice Frankfurter filed a concurring opinion, the opinion was jointly signed by each Justice—a feat unprecedented before \emph{Cooper} and not repeated since.\textsuperscript{278} Nor was the desire for unanimity unique to the Warren Court. To be sure, it reaches back to the earliest period of the Court’s history, in which one finds Chief Justice Marshall attempting to produce single opinions for the entire Court (and, concomitantly, making separate opinions extremely unwelcome) during a political era when the legitimacy and position of the Court were relatively uncertain.\textsuperscript{279} According to Supreme Court historian Bernard Schwartz,

\begin{quote}
The change from a number of individual opinions to the Court opinion was admirably suited to strengthen the prestige of the fledgling Court. Marshall saw that the needed authority and dignity of the Court could be attained only if the principles it proclaimed were pronounced by a united tribunal. To win conclusiveness and fixity for its decisions, he strove for a Court with a single voice.\textsuperscript{280}
\end{quote}

In the process of invoking the technique of the unanimous opinion, however, courts necessarily forgo or at least discourage the expression of the individual judges’ views. That is to say, unanimity in the name of legitimacy (or in the name of any other goal) may incur a serious loss of candor. The most extreme variation of this technique occurs when a court deliberately attempts to forestall the writing of one or more separate

\begin{flushright}
\textsuperscript{276} In order to achieve unanimity in \emph{Brown}, Chief Justice Warren ultimately had to prevail upon certain members of the Court not to write separately. For a discussion of Justice Frankfurter, see RICHARD KLUGER, SIMPLE JUSTICE 683 (1976). For a discussion of Justice Reed, see BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 293-98 (1993). For a more recent analysis of the events leading up to and surrounding the \emph{Brown} decision, see Mark Tushnet & Kayta Lezin, \emph{What Really Happened} in \emph{Brown} v. Board of Education, 91 COLUM. L. REV. 1867 (1991). For a discussion of Warren’s efforts at unanimity in \emph{Cooper}, see Dennis J. Hutchinson, \emph{Unanimity and Desegregation: Decisionmaking} in the Supreme Court 1948-1958, 68 GEO. L.J. 1, 73-86 (1979).
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{278} The most recent manifestation of this technique occurred in the equally or more controversial context of abortion. In Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (plurality opinion), Justices O’Connor, Kennedy, and Souter each signed the so-called joint opinion, presumably to demonstrate their undivided and strong commitment to the principles and holding announced in the case.
\end{flushright}

\begin{flushright}
\textsuperscript{279} See SCHWARTZ, supra note 276, at 39.
\end{flushright}

\begin{flushright}
\textsuperscript{280} \emph{Id}.
\end{flushright}
opinions, particularly dissents, as was the case in Brown. This occurs, of course, because dissents and certain concurrences indicate, simply by their existence, the presence of division within a court and thus potential instability or uncertainty in the law, and because separate opinions are likely to lay out in no subtle terms the shortcomings of the majority opinion. To some extent, this is merely a variation on a court's multimember nature—at bottom, it is nothing more than coalition-building and compromise on a much grander scale. It differs from simple majority-building, however, insofar as it consciously and deliberately quashes alternative voices for the less measurable purpose of maximizing legitimacy. In the case of forging a majority, by contrast, disagreeing voices are not so much quashed as they are melded and accommodated; indeed, they may have never even entertained the possibility of dissenting or writing separately, let alone expressly stating that possibility to the majority.

The second influential factor in relation to institutional legitimacy is the concept of judicial civility—professional courtesy and respect among judges, or rather the responsibility not to engage in speech or conduct that demeans the judicial institution or its members. One of the most obvious and effective mediums of discourtesy, though, is candor, particularly candor displayed in separate written opinions or extrajudicial writings. According to Judge Posner, an increasingly common manifestation of excessive judicial self-assertion is the abuse—often shrill, sometimes nasty—of one's colleagues. Such criticisms figure ever more prominently not only in dissenting and concurring opinions but in majority opinions as well, now that it is the fashion for the author of the majority opinion, usually in footnotes, to attack the dissenting opinion (and sometimes even a concurring opinion).

281. See Leflar, supra note 21, at 818 (noting the potential for deletion in the process of forestalling dissent).
282. See supra note 276.
283. See POSNER, supra note 30, at 239-40 (arguing that the concurrences which vary significantly from the majority make courts appear less "institutional than individual"); D'Amato, supra note 19, at 115 ("[A] dissent can be perceived as chipping away at the court's legitimacy.").
284. See Schaefer, supra note 151, at 11 ("Dissenting and specially concurring opinions . . . detract from the intrinsic value of the precedent."). This point is directly related to the concern about the use of certain and confident language in opinions as a means to project a stable image of the law and of judicial decisionmaking. See supra text accompanying notes 167-71; see also Greenawalt, supra note 18, at 388 (noting that some students of the judicial process "might argue that the need for clear guidance and relative certainty should lead courts to be as unanimous as possible in important cases").
285. For a recent article exploring this concept, see Edward M. Gaffney, Jr., The Importance of Dissent and the Imperative of Judicial Civility, 28 VAL. U. L. REV. 583, 623-44 (1994) (discussing at length what he calls the "imperative of judicial civility").
286. POSNER, supra note 30, at 232-33.
As he further notes, "[n]othing is less helpful, less convincing, or less edifying to the professional readers of judicial opinions (including other judges) than denunciations of a disagreeing colleague." 287 Gratuitous deprecations and _ad hominem_ remarks, such as calling a fellow judge a "schmuck," or a "stealthy assassin"—displaying the occasional "vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir"—are institutionally irresponsible, causing readers to be distracted and to think less of either the abusive author or the court as a whole. 291 And yet, all of these comments amount to candor, and all of these expressions of candor are in some way relevant to the case, if only because they may help lawyers understand the dynamics within a court (and thus better predict the course of the law, or at least prepare a case before that court), or perhaps because the public should, as a matter of judicial accountability, be apprised of whether their judges are being impartial and professional and whether their courts are operating smoothly. Clearly, then, there is a fundamental normative tension between the demand for candor, under these or other rationales, and the widely recognized importance of maintaining an image of legitimacy. 292

The third and final competing value under the heading of institutional legitimacy is continuity, which is often perceived to be positively correlated with the professed adherence to precedent. 293 Yet, as David Shapiro

---

287. _Id._ at 232; _see also_ COFFIN, _supra_ note 50, at 219 (decrying the use of "corrosive language"). Judge Posner's own court, the U.S. Court of Appeals for the Seventh Circuit, recently adopted a set of rules concerning civility, which among other things provide that "[w]e [the judges] will be courteous, respectful, and civil in opinions" and that "[[i]n all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge." _Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit_, 143 F.R.D. 441, 451-52 (1992).


289. PANNICK, _supra_ note 288, at 25.


291. _See_ POSNER, _supra_ note 30, at 232-34. Judge Posner suggests, however, that "[s]ince feelings do run high in some cases, the abusive dissent—at least the abusive dissent that conveys the judge's real emotions—is, if inexcusable, at least understandable." _Id._ at 234. I should note that discourtesy, and concerns regarding restricted expression when discourtesy is prohibited, are not limited to intracourt situations; considerations of vertical and horizontal comity among different courts may also implicate these issues. _See, e.g._, Anthony G. Amsterdam, _Perspectives on the Fourth Amendment_, 58 MINN. L. REV. 349, 351 (1974) (arguing, in the context of Supreme Court confession cases, that "deNorm and the necessity of encouraging better performance by state judges in the enforcement of federal rights forbade the Supreme Court Justices 'to put their brethren of the state judiciary on trial'" (quoting City of Greenwood v. Peacock, 384 U.S. 808, 828 (1966))).

292. _See_ Gaffney, _supra_ note 285, at 583 (concluding that "the imperative of judicial civility toward other judges must be held in tension with the duty of appellate judges to account candidly for their differences in carefully written dissents").

293. _See_ Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-09 (1992) (plurality opinion) (explaining that when the Supreme Court considers overruling a prior case, its judgment is informed by pragmatic considerations).
notes, in an analysis of this argument, "[a] certain amount of conscious dissembling, it is sometimes suggested, is [itself] an appropriate, even a necessary, way of maintaining a sense of our connection with the past." Consider, for example, the judicial treatment of prior cases that, for whatever reason, stand in the way of a doctrine or policy that a court now wishes to advance. The purist would likely recommend that the court employ full candor, denouncing the precedents as wrongly decided or no longer applicable and articulating the new doctrine in their place. According to this view, legitimacy inheres in honesty and forthrightness, and courts in the long run would be better off simply to overrule cases and abandon doctrine whenever and at whatever frequency they deem appropriate. In addition to facing several problems noted earlier, however, this approach plainly ignores the legitimacy that attaches to a jurisprudence of consistency, even if that consistency is more apparent than real. While it may be true that legitimacy attaches to honesty and confidence in one's present actions, the explicit rejection of prior cases necessarily brings with it the strong implication that the prior court committed some form of error, and error—no matter how honestly it is conceded—is generally not the precursor to institutional legitimacy. In his study of the evolution of free speech doctrine, for example, David Cole has argued that, on the whole, our legal culture actually seems to prefer continuity of case law—what he calls the "misreading" of precedent—to sudden doctrinal shifts, and that some of our most celebrated judges are also some of our most adventuresome misreaders. According to Cole:

The specific character of legal misreading suggests that as a matter of ideology, we assign more importance to legitimacy than to greatness, even as legal structure and language leave room for both. Unlike the poet, the judicial misreader can never admit that he misreads; the attempt to be great must be shrouded in the language of precedential legitimacy. We have made a choice, like the brothers in Freud's parable, to privilege social cohesion and order over individual initiative. But our choice, like theirs, is fraught with ambivalence; we respect legitimacy, but celebrate greatness.

Of course, Cole's thesis does not enjoy universal acceptance. Indeed, in a critique of the argument from continuity, David Shapiro offers almost exactly the opposite thesis—that openness is the hallmark of great judging today as evidenced "by the wide respect accorded to those

294. Shapiro, supra note 2, at 739.
295. See supra notes 146-53 and accompanying text.
296. Cole, supra note 104, at 905; see Blackman, supra note 204, at 504-07 (labelling as "spinning" the process by which a Justice summarizes in a more appealing way a precedent with which she disagrees).
twentieth-century judges whose opinions are especially notable for their candid recognition of the difficulties of decision and the strength of competing arguments."Regardless of who is ultimately correct, Cole or Shapiro, I think the larger point remains intact—that the demand for continuity may at times call into question the need for candor, even if candor may otherwise be theoretically warranted.

3. Legal Phraseology.—The third and last type of competing value is the need for legal phraseology. Earlier, I discussed the relationship between the concept of notice and the need for judges to cast their pronouncements in certain terms, and the significance of this relationship with regard to judicial candor. At this point, I wish to raise a similar kind of consideration, one that is conceptually related to the need for legal certainty, but that does not obviously undermine the internal logical structure of any of the major pro-candor rationales. This is the demand, placed on judges by our legal culture and on that culture by a variety of social and historical forces, to phrase a case and its resolution in distinctly legal terms. It is the demand that judges essentially transform the diversity of the human condition and the process of human experience, including the judge's own initial intuitions, into the specific grammar of the law. Considerations of fairness or hate or love, for example, are translated and thus transmuted into attenuated legal analogs—due process or bad faith or charitability meriting a tax preference. In the process of conversion, however, lawyers and judges and other legal actors invariably incur certain losses of meaning; at the very least, they lose the capacity to say freely what they may actually be thinking or feeling or experiencing. As a consequence, the final products of the law—judicial opinions, as well as

298. Shapiro, supra note 2, at 740. As examples for his thesis, Shapiro cites Justices Robert Jackson and John Harlan on the United States Supreme Court and Judges Learned Hand and Henry Friendly on the United States Court of Appeals for the Second Circuit. Id.

299. See supra text accompanying notes 181-84.

300. This particular phenomenon is deceptively straightforward. Indeed, it is presented in the text as free-standing. In actuality, it is a gateway to more fundamental questions concerning the role of language as a basic mediating element of human existence and as the primary environmental influence on the nature and scope of human cognizance. In turn, the role of language can be linked with the related role of cultural understanding (e.g., about the judiciary and political reality) to create an analytical framework in which discourse on the propriety of judicial candor would take on drastically different dimensions, would turn on drastically different considerations, and would likely yield drastically different conclusions.

301. Cf. Leflar, supra note 21, at 817 ("[M]any opinion writers think their opinions ought to read like pure law undiluted by the facts of sociology and life. . . . When judges writing opinions narrowly omit such relevant factors, the lawyer reader has to read between the lines and fill them in."). For a provocative article addressing similar phenomena in relation to the language of civil rights lawyers, see Herbert A. Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, 104 YALE L.J. 765 (1995) (arguing in favor of a manner of pleading that is "thicker" with the reality and tragedy of civil rights cases).
Judicial Candor

...statutes or IRS letter rulings or consent decrees—are in this sense less candid than they might have been absent the transformation. Whether or not such a transformation is ultimately desirable—some would argue that it is necessary to a rational legal regime, while some would argue that it involves gratuitous dehumanization—is not necessarily important. What is important is that we recognize and acknowledge that it occurs, often unconsciously and often subtly, that it may effectively result in a loss of candor (at least under an objective standard), and, therefore, that it may be in direct competition with the pro-candor rationales.

IV. A Prudential Theory of Judicial Candor

In this fourth and final Part, my goal is to present a normative theory of judicial candor that directly accounts for and addresses the many issues raised in the first three Parts of this Article. In particular, I will propose one approach to resolving the two principal questions raised thus far: (1) what ought a judge to do when none of the rationales clearly favors the use of candor, and (2) when, if ever, may a judge decline to employ candor even when one or more rationales are applicable? In the following pages, I contend that the question of candor in many such situations is ultimately a prudential one, the resolution of which must reside in the discretion of judges and may legitimately turn on various political and institutional considerations.

I present my theory in four sections. The first subpart describes the nature of prudentialism as a distinct theory of judicial reasoning or decisionmaking, while the second explains precisely why prudence, as a conceptual matter, is the appropriate key to resolving certain types of questions of judicial candor. The third subpart then addresses the actual application of a prudential model. The final subpart addresses several potential concerns or shortcomings associated with the use of this model.

A. The Meaning of Prudentialism

Before explaining why prudence is the key to a proper theory of judicial candor, and what such a theory might look like, it is necessary to speak briefly about the specific meaning of prudence in the context of judicial decisionmaking. Prudence has at least two meanings, one popular and the other political or legal. In popular discourse, prudence

302. Whether or not this amounts to an avoidance or lack of candor may depend on which standard of candor one chooses—subjective, objective, or some other variation. To the extent that judges are not aware that decisionmaking is necessarily a narrowing, channeling process, candor could be considered absent only according to an objective standard.

303. Professor Daniel Chow has noted that the term "pragmatic" likewise has both an informal or colloquial and a formal or legal meaning, which is not surprising given the relationship between...
essentially refers to wisdom or circumspection, or something akin to these qualities, and it is doubtful that anyone would argue that judges, or for that matter any person, should not act prudently in this sense of the term. The other meaning, by comparison, is specific to the political or legal realm, and it is this second meaning that provides the basis for the theory of candor here advanced. According to this latter definition, prudence describes a mode of approaching issues that takes full account of their political dimensions, of the need for institutional integrity and the means to attain or maintain it, and of the uncertainty and relativity inherent in any public policymaking process. A better term, in fact, is "prudentialism," indicating that it embodies a relatively systematic theory or mode of analysis and not simply a narrow, supplemental consideration.

Prudentialism, perhaps by its nature, is not easily captured in definitional terms. Indeed, as with its analog in popular discourse, often it is easier to detect its absence—to discern imprudence—rather than its presence, or to contrast it with other approaches such as doctrinalism. Nevertheless, two scholars have provided helpful descriptions of prudence that I believe capture several of its core aspects. The first comes from the work of Professor Martin Shapiro, who offers the following view of prudence as a political-administrative concept:

In Renaissance art there is a wonderful representation of prudence as a three-headed man looking to the left, the right, and straight out of the picture at the viewer. Prudence seeks to look at the present in light of what has gone on in the past and with an eye to the future. Prudence understands that, at any given moment, it must work with the set of limits and opportunities it has inherited from the past to reach future goals that themselves cannot be fully defined now. Our past is not simple enough to be reduced prudentialism and pragmatism. Daniel C.K. Chow, A Pragmatic Model of Law, 67 WASH. L. REV. 755, 757-58 (1992).

304. See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, supra note 24, at 1451 (defining prudence as "the state or quality of being prudent; the habit of acting with deliberation and discretion; wisdom applied to practice" and prudent as "capable of exercising sound judgment in practical matters" and "cautious or discreet in conduct; circumspect; sensible; not rash").


307. See, e.g., BOBBITT, supra note 306, at 66-72 (discussing the six modalities of constitutional argument, two of which are the prudential modality and the doctrinal modality).
Judicial Candor

completely to rules or principles. Our present is complex. Our future is uncertain. Mere technical knowledge is not enough. A sense of what is politically feasible and promising is also essential. That sense must be gained by practical experience in politics and in the complexities and uncertainties of the human condition.  

The second description comes from Professor Anthony Kronman, who offers the following view of prudence in relation to his study of Alexander Bickel:

By prudence I mean a trait or characteristic that is at once an intellectual capacity and a temperamental disposition. A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the "unruliness of the human condition," but is nevertheless able to devise successful strategies for the advancement (however gradual or slow) of his own favored principles and ideals. A prudent person is also one with a distinctive character—a person who feels a certain "wonder" in the presence of complex, historically evolved institutions and a modesty in undertaking their reform; who has a high tolerance for accommodation and delay and is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency; who values consent but is not demoralized by the process of irrational compromise that is often needed to achieve it.

308. SHAPIRO, supra note 72, at 136 (footnote omitted). Similar, though less elaborate, descriptions are provided by Philip Bobbitt and Alan Hirsch, both writing specifically about the constitutional decisionmaking of the Supreme Court. "Prudential argument is constitutional argument which is actuated by the political and economic circumstances surrounding the decision." BOBBITT, supra note 306, at 61. "Prudentiats see the Court as a political institution that must negotiate its way through a complex thicket in order to achieve socially beneficial results." Hirsch, supra note 15, at 863-64.

As an aside, my good friend and colleague Daniel Meyer informs me:

Shapiro's segue is laden with historical irony. The subject of the most famous example of that artistic technique—the Triple Portrait of Charles I (1635) by Antoon Van Dyck—acted with imprudence when assessing the Forced Loan of 1626. The loan, litigated in Darnel's Case (The Five Knights' Case), 3 How. S.T. 1 (K.B. 1627), led to a milestone of the English constitution—the first conferencing between Lords and Commons. At that conference, Sir Edward Coke, a justice noted for candor, furthered Parliament's constitutional aeneid by proposing the seminal Petition for Right (1628).


309. Anthony T. Kronman, Alexander Bickel's Philosophy of Prudence, 94 YALE L.J. 1567, 1569 (1985). Indeed, as far as Kronman is concerned, the "value of prudence as a political and judicial
In turn, notes Kronman,

It was Bickel's view that prudence is an indispensable condition for success in the activities of both the politician and judge. . . . By the same token, he considered the impatient, uncompromising, and overly philosophical insistence on principles for their own sake, which he regarded as the antithesis of prudence, to be a disabling vice in both statecraft and adjudication.  

From a normative perspective, a good portion of these two definitions should seem rather unobjectionable. Who, after all, would prefer for judges to ignore the place of the past, to lack a sense of the feasible, or to fail to grasp the complexity of a given situation? Yet, there is more to these definitions than a mere appreciation for historical and conceptual circumspection. There is an explicit recognition of the link between law and politics, or, in the case of judicial candor, an explicit link between the judicial decision to use or avoid candor and the influence of political and institutional considerations. In turn, a problem arises because there apparently remains a strong element implicit in our discourse, especially among the media and the public, that courts ought not to engage in political strategizing as such—that law is not politics and that judges ought not to be in the business of interpreting the law based on their own political or institutional interests.  

While I do not wish to ignore this potential problem, I would like to reserve consideration of it until after the main exposition of my prudential theory. Then, in subpart IV(D), we can return to this particular concern, as well as to the related concern that prudentialism invites excessive judicial discretion, for a closer analysis.

B. The Appropriateness of Prudentialism

In this section, I explain why prudential considerations constitute an appropriate source of decision in the choice for or against candor. There are, as noted, at least two distinct situations in which such a choice presents itself. The first is where the logic and reasoning of the pro-candor rationales themselves place internal limits on their scope, such that a realm of discretion is necessarily created. The second situation is where the logic
of one or more rationales appears to compel candor, but there exist one or
more independent reasons (practical or normative constraints) that cut
against candor.

In the first situation, a decision to use or to avoid candor arises
because none of the rationales can logically compel candor beyond certain
internally determined limits. In turn, it is necessary to advert to some set
of extrinsic normative principles as a source of decision. The case for
using prudential considerations to fill this role is strongest in this first
situation, both in comparison to using any other possible source of decision
in this situation and in comparison to using prudencialism in the second
situation (where logic appears to compel candor). This is so for at least
three reasons. Most importantly, the nature of candor and the nature of
prudencialism are substantially congruent with one another, thus indicating
that they are analytically compatible. Indeed, in many respects the candor
decision is the paradigmatic aspect of the judicial function for which
prudencialism is appropriate. Candor is by nature a contextual,
multivariable phenomenon, the value of which is primarily instrumental
and the propriety of which cannot be reduced to abstractions or absolutes.312 Likewise, prudencialism is by definition a mode of
approaching issues that emphasizes context and complexity and that looks
warily upon efforts to reduce judicial decisionmaking to abstract or
absolute terms. Thus, candor and prudencial analysis are inherently suited
for one another simply by virtue of their own intrinsic characteristics.

In addition, prudencialism is useful in this first situation because, by
its nature, it provides a background set of decisionmaking criteria that are
most appropriate when the primary or obvious sources of judicial
decisionmaking are unable to lend significant support to one outcome or
another. Thus, for example, Professor Bobbitt suggests that in the context
of substantive constitutional decisionmaking, prudencialism becomes
appropriate, at least from its adherents' perspective, when there are
"competing texts, and no text ... states the priority to give one over
others."313 Likewise, the fact that the pro-candor rationales have been
logically exhausted is analogous to a situation in which no plainly superior
source of legal authority governs. In this sense, prudencialism is a kind of
meta-theory, which mediates between or among other more substantive
sources of decision. Finally, as I will discuss in subpart IV(D), it is not
clear that any other sources of decision exist, or at least any comparable
ones, primarily because any such sources are likely to have been channeled
through the pro-candor rationales and thus rendered inapplicable when the

312. See supra sections II(A)(3)-(4).
313. BOBBITT, supra note 306, at 61 (emphasis in original).
logic of the rationales ran out. Prudentialism might be appropriate, in other words, if only because no other theory or mode of analysis is both suitable and available.

As for the second situation, in which the pro-candor rationales appear to warrant candor but certain practical or normative constraints suggest otherwise, I also propose the use of prudential considerations to inform the ultimate decision to employ or forgo candor. At the same time, however, the case for prudentialism is admittedly weaker here than in the first situation, and hence I do not recommend that prudentialism be the exclusive source of decision. Of course, the ideal analytical approach would be to rank the competing factors—the pro-candor rationales versus the practical and normative constraints—and to discern which side of the balance should prevail based on its relative importance. But this would amount to an enormously difficult undertaking, if only because it is unlikely that the legal community today could produce any kind of consensus on the relative value of each factor. More importantly, it may simply beg the question, because the whole process or concept of ranking demands the use of some extrinsic source of decision, and, therefore, we would still have to determine the identity of that source as well as its relationship, if any, to prudentialism.

As for that determination, once again the primary reason for adopting prudentialism is the close logical relationship between the nature of candor and the nature of prudential analysis. The characteristic complexity and variability of candor simply lend themselves to prudential analysis, regardless of whether practical or normative constraints are involved. The appropriate question, in fact, may not be whether prudential analysis should be involved, but rather how large a role it should play, because many of the practical and normative constraints by their nature implicate or consist of prudential considerations. 314

C. Prudentialism and Candor—A Preliminary Sketch

Providing a theoretical justification for a prudential model of candor is, of course, only the first half of my undertaking. The second, and in some ways more difficult, half requires describing that model and its actual operation in the real world of judging. Accordingly, the ensuing paragraphs set forth a preliminary sketch of the nature of such a model, both in abstract terms and through the use of particular examples.

314. It is for this reason that the “competing texts” justification for the use of prudentialism, see supra text accompanying note 313, would not be appropriate here. In this situation, prudentialism could not be properly considered a mediating meta-theory because it is implicated in at least one side of the balance.
As depicted above, prudentialism is a mode of analysis characterized by a substantive emphasis on the political and institutional aspects or consequences associated with any given decisional situation, particularly those aspects or consequences concerning legitimacy. At the same time, it is characterized by a corresponding analytical emphasis on several interrelated factors: (1) the inherent complexity and uncertainty of the situation (coupled with a distrust of abstraction or absolutism), (2) the importance of discerning and maintaining continuity among the past, the future, and the resolution of the present dispute, (3) the practical constraints facing the decisionmaker as well as those facing other actors involved in the situation, (4) the need to be sensitive to the sovereignty of other institutions, (5) the probable desirability of compromise and accommodation and the virtues of incrementalism, and (6) the realization that, above all, governance is a human activity and thus is animated yet constrained by the aspirations and irrationalities of the human condition. And if all of this sounds quite similar to pragmatism, it is only because prudentialism is in many ways pragmatism of a more political and perhaps conservative variety—quite literally, political pragmatism.

As for the proper analytical role of prudential considerations, judges should use essentially a three-stage process for determining the propriety of candor within any particular situation. Stage 1 asks whether and to what extent one or more of the nine pro-candor rationales should apply, based on a comparison of the nature of the situation and the reasoning of each rationale. Assuming that one or more rationales do apply and assuming that their logical reach can be ascertained, stage 2 then asks whether any of the independent reasons for the avoidance of candor—the practical and normative constraints—ought also to apply and, if so, what the priority-based relationship of those reasons is to the relevant pro-candor rationales. Drawing from, among other things, various prudential considerations, the decisionmaker must then choose the appropriate level of candor. Finally, and depending partly on the outcome or applicability of stage 2, stage 3 asks whether prudential considerations would favor the use or avoidance of candor within the realm of discretion created by the logical limitations of the initial pro-candor rationales identified at stage 1. If the prudential analysis counsels in favor of candor, then the judge should probably exercise candor; conversely, if the prudential analysis counsels against candor, then the judge should probably decline to exercise candor. With this broad overview in mind, let us now examine each stage more closely.

315. See generally Smith, supra note 162 (critiquing pragmatism as a theory of judicial decisionmaking).
The focus of stage 1 is the applicability and scope of the nine pro-candor rationales—accountability, limited power, improved decision-making, authoritativeness, duty to immediate parties, duty to all potential legal actors, judicial catharsis, long-term legal development, and moral duty. As demonstrated, the justificatory strength of a number of these supposed rationales is actually fairly weak, and a few contain serious logical or conceptual flaws that call into question even their most basic applicability. Nevertheless, to the extent that several of them remain capable of supporting some type of candor requirement, judges must look first to their relevance and scope. Thus, for example, if a judge is faced with the question of whether to disclose her growing dissatisfaction with a particular doctrine, she would first look to see if any of the rationales would support the disclosure. Assuming the most likely rationales are the duty to all potential legal actors and long-term legal development, the judge must then discern whether their logic and reasoning are of a sufficiently broad scope so as to require candor in the particular case.

That process of discernment should look something like the following. With regard to the duty-to-potential-actors rationale, for example, if several other judges are similarly dissatisfied, if together they have the power to alter the current doctrinal landscape, and if the disclosure would not create confusion in the state of the law (as opposed to clarification), then the disclosure would appear to be warranted. If, however, the judge is alone in her dissatisfaction, or if her dissatisfaction could not possibly affect current doctrine, or if the disclosure would in fact create confusion, then candor should not be compulsory. The same analysis would then be applied to the long-term-legal-development rationale. Thus, if the judge believes that the law should proceed in her favored direction (assuming that she has a proposal and not simply a protestation), if what she has to say has not already been said, and if her disclosure would neither run contrary to rules of restraint nor potentially create worse law through subsequent misappropriation, then candor would appear to be warranted. If, however, the judge either has no proposal or does not believe that it is best for her own position to be adopted, or if what she has to say has already been set

316. See supra subpart II(A).
317. This is a relatively simple and straightforward hypothetical. Those who seek a more challenging scenario might consider Professor Lon Fuller's fictitious case of the Speluncean explorers. Lon L. Fuller, The Case of the Speluncean Explorers, 62 HARV. L. REV. 616 (1949).
318. See supra section II(A)(6).
319. See supra section II(A)(8).
320. This, of course, raises an interesting concern about the function of candor among judges. For only if the other potentially dissatisfied judges have themselves been candid would the judge in question be able to address this particular consideration.
forth adequately in the case law or legal literature, or if there is a significant risk that her disclosure could backfire or be misappropriated, then the long-term-legal-development rationale would not seem to compel candor after all. The same analysis could then be applied to any of the other seven rationales until the initial relevance and logical limits of each are determined.

Assuming for the moment that some measure of candor is logically warranted by one or both rationales, the judge would then proceed to stage 2. The critical question at this second stage is whether independent or extrinsic reasons exist that may counsel against candor despite the logical force of the pro-candor rationales. If you recall, I divided these reasons into two categories: practical constraints and normative constraints. The first category includes limited judicial foresight, inefficacy, and the dynamics of multimember courts, while the second category includes moral exigency, institutional legitimacy, and the need to employ legal phraseology. In terms of the judge who is dissatisfied with current doctrine, the most relevant extrinsic considerations would appear to be limited judicial foresight, inefficacy, and institutional legitimacy.

Thus, if the judge’s ability to discern the future impact of her candor is seriously limited, or if her candor would fall on deaf ears or could not possibly effect doctrinal change, or if her candor might cause damage to the legitimacy either of her court or of the judiciary in general, then indeed there is a conflict between the mandate of the pro-candor rationales and the concerns raised by these various practical and normative constraints.

In attempting to resolve this conflict—in attempting to discern the relative priority of each element on each half of the balance—the judge may properly look to, among other sources, prudential considerations. Because many of the practical and normative constraints themselves rest on prudential considerations, the judge should probably first attempt to isolate these considerations and to evaluate their comparative and independent importance. She should then look to each of the other prudential considerations set forth above—the institutional needs of the judiciary, including those of her own court and position, the demands of other governmental institutions and their relationship to the status of the judiciary, the uncertainty inherent in the decision she faces and the resultant need to proceed cautiously, the importance of continuity and

321. See supra Part III.

322. The other considerations may also be relevant, but they are not obviously so. The multimember court issue, for example, is not clearly applicable because we do not know enough about the dynamics of, and the judge’s position within, the court. Likewise, there is no indication that this situation involves a fundamental value conflict (moral exigency) or that the need to use legal phraseology would somehow affect her decision either to disclose or not to disclose her views.
public confidence in law, and so forth—as well as various other nonprudential considerations that she believes are relevant to the question of candor. Only upon an evaluation of all these factors, and of their relationship to the initial pro-candor rationales, should the judge reach her decision whether or not to make the disclosure. Indeed, because this decision effectively allows the judge to override an otherwise justifiable candor obligation and thus asks her to assume the persona of public fiduciary, she must approach it with due caution and with a full appreciation of the practical dangers of miscalculation.

Of course, the forgoing analysis is necessary only if there exist applicable pro-candor rationales, as well as a conflict between those rationales and one or more of the practical or normative constraints. What if the judge, however, finds herself in a situation in which the pro-candor rationales are not applicable, either because they are inapplicable on their face or because their logical limits have been reached? In this situation, the judge would then enter stage 3 and proceed directly to a purely prudential analysis of the choice for or against candor. That analysis would essentially ask whether, on balance, the use of candor is favored or disfavored in light of the full range of prudential considerations and without regard to the pro-candor rationales. Once again, these considerations might include the need to maintain political legitimacy (of her own position, of her court, of the judiciary, or of the legal system as a whole), the need to preserve doctrinal and philosophical continuity in the law, the recognition of uncertainty and the need to proceed with moderation, and the importance of respecting the sovereignty of other institutions (as embodied, for example, in the principles of federalism and separation of powers). If candor is favored by this analysis, then the judge probably should employ candor. Conversely, if candor is disfavored, then the judge probably should forego candor. Again, this assessment is clearly a matter of context and degree—as prudential judgments by definition are—and therefore judges should necessarily proceed with a deliberate awareness of the likelihood and costs of miscalculation. In contrast to considerations implicated in stage 2, however, the judge’s decision in stage 3 cannot offend either the principles or the logic of the pro-candor rationales, for those rationales simply do not apply.

Although the idea of explicitly subjecting questions of candor to a purely prudential analysis is basically a new proposal, it is possible to find others who have essentially used this analysis to assess the propriety of using or avoiding candor in particular situations. For example, one author

323. See supra subpart IV(A) and text accompanying note 315 (delineating the central characteristics of prudential decisionmaking).
324. See supra notes 66-70 and accompanying text.
Judicial Candor recently argued that the Supreme Court in the desegregation decision of *Cooper v. Aaron*\(^{325}\) properly avoided candor on largely prudential grounds when, among other things, it substituted the word “desegregation” for the more controversial term “integration”:

The significance of *Cooper* is that it tested the Court’s authority during the critical nascent stages of the civil rights movement. Although the Court had to be conscious of the limits of its authority and of the very real possibility that neither compliance with nor execution of its decree would be forthcoming, it also had to be careful not to reveal its vulnerability. Any such admission would have invited white Southerners to defy the decree and its wavering language. Furthermore, it is unclear whether a principled distinction between “integration” and “desegregation” had fully emerged by the time *Cooper* was decided. The prime focus at the time was on striking down segregation; it was another sixteen years before the Court finally put its imprimatur on a strategy for mandating integration. *Cooper* demonstrates both that principles are . . . historically contingent . . . and that the Court must sometimes act politically in order to establish an enduring constitutional principle such as the one set out in *Cooper*.\(^{326}\)

Whether the Court was actually “correct” in its prudential analysis is difficult to say.\(^{327}\) Likewise, whether the Court was properly operating within stage 2 or stage 3 is not entirely clear.\(^{328}\) What ultimately matters is that such an analysis is practically possible\(^{329}\) and, more importantly, that it is theoretically legitimate as long as it is grounded—as the three-stage analysis offered here attempts to be—in various principles or conceptions that are congruent with the philosophy and structure of our legal and political order. And therein lies the catch: the avoidance of candor, and the analytical use of prudentialism, are legitimate only to the extent that they do not transgress their underlying logical and philosophical justifications and do not thereby become a license for judicial arbitrariness.

\(^{325}\) 358 U.S. 1 (1958).

\(^{326}\) Book Note, *supra* note 15, at 797.

\(^{327}\) The purist would not accept the propriety of such analysis from the outset. *See*, e.g., GOLDSHIN, *supra* note 4, at 45-55 (taking a highly critical view of the Court's lack of candor in *Cooper*).

\(^{328}\) My own sense is that the Court was operating almost entirely, though not necessarily consciously, in the realm of stage 2, balancing the practical and normative constraints on candor against the perceived reasons as to why candor might have been logically warranted.

\(^{329}\) Two abortion cases to which one could comparatively apply this prudential analysis are *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (plurality opinion), and *Roe v. Wade*, 410 U.S. 113 (1973). What I think one would likely conclude is that *Casey* was a prudentially sound decision overall—although its specific instances of candor might not have been too prudent—while *Roe* was overall a prudential failure, both in substance and in candor. For a concurring view, at least as to this characterization of *Casey*, see KRONMAN, *supra* note 70, at 3.
or abuse. Just as an indeterminate text need not give rise to an interpretive free-for-all, so too an opportunity not to employ candor—as when no rationale supports candor—need not, and indeed should not, be an invitation for chaotic or indiscriminate judicial decisionmaking.

All of which brings us to an interesting empirical question: would this Article’s prudential theory of candor, if employed consistently, lead to more or to less candor overall on the part of judges? Indeed, once the conventional wisdom is effectively renounced, would it not be the case that judges would basically avoid candor at every turn by construing their remaining obligations narrowly and their prudential interests broadly? Clearly this may happen, and to the extent it does, I believe we must understand it as being simply one of the costs of using a more honest or rigorous approach to the subject of candor in judging. And yet it need not happen. Indeed, paradoxically, the adoption of a prudential theory of judicial candor may actually bring about an effective resurrection of the conventional wisdom insofar as judges, upon having their prudential concerns effectively vindicated, may discover that the most prudent course of action—and I mean that in both senses of the term—is generally to be candid, or at least to create that appearance. This is especially true if the consensus among the public and the legal community is really the conventional wisdom as I have described it—that judges ought generally and fully to be candid. For under a prudential model, judges would then have to take this consensus expectation into account in their decisionmaking and would thus realize that it may often be in their institutional self-interest to be candid so as to avoid the loss of legitimacy that might result from the revelation that they are being anything less than candid. The conventional wisdom would become valid, in other words, only because prudentialism would permit judges to be influenced by the expectations of those who embrace it.

The suggestion that a prudential theory of candor may lead us right back to the conventional wisdom is not, moreover, some sort of semantic

330. See Kutz, supra note 170 (arguing that skepticism is not incongruent with, and indeed may bring about, a rational and reflective legal culture); id. at 998 & n.5 (noting the view, held by pragmatists such as Judge Posner, that while law may be moderately indeterminate, “right” answers may still be reached through consensus).

331. For this reason, I raise the possibility in subpart IV(D) that we might wish to impose a general obligation of candor on judges despite its theoretical indefensibility—but only to the extent we are willing to acknowledge that the candor requirement would rest partly on fiction. See infra text accompanying note 342.

332. See supra text accompanying notes 303-06.

333. Martin Shapiro, for example, has stated that “a reputation for candor” is itself a “precious political asset” to the Supreme Court. MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 252 (1964). To the extent he is correct, a prudential analysis by the Court, if not other courts, would presumably encourage the protection of this reputation, which may in turn create more candor, or at least its appearance.
or analytical ploy. Nor does it suggest that the analysis thus far has been for naught. To the contrary, it is highly significant that, should the conventional wisdom remain intact, at least we would more fully understand the foundation on which it rests. Of course, whether or not this foundation is legitimate is a different matter altogether. After all, a public-perception-based justification for judicial decisionmaking is a special, indeed peculiar, kind of justification, and it is certainly not the "principled" sort of rationale to which judicial or constitutional theorists are normally accustomed. To be sure, there is a distinct difference between, on the one hand, grounding a rule of judicial decisionmaking in principles or theories that embody our collective political and constitutional traditions and, on the other hand, grounding such a rule in the naked expectations of the people. Nevertheless, even a public-perception-based justification is better than no justification at all. That being said, let us now proceed to the final section and examine two of the major potential objections to the prudential theory of judicial candor set forth in the preceding pages.

D. Two Problems with Prudentialism

At the very least, a proper critique of legal prudentialism must begin by recalling the experience of the late legal scholar, Alexander Bickel. For the initial academic response to Professor Bickel's advocacy of prudential decisionmaking by the Supreme Court in the federal jurisdictional context was unabashedly critical. The notion that between principled decisionmaking and expedient political strategizing there might exist a prudential realm, in which constitutional lawmaking appears to collapse into politics and yet still remains legitimate, was a bit too dicey for a generation of constitutional theorists committed to either explaining or exposing the seemingly boundless progressivism of the Warren Court. Today, that initial critical reaction has arguably widened, manifesting itself in an effective, if only implicit, rejection of Bickelian prudential philosophy in general. Professor Kronman, in fact, suggests that Bickel's lack of influence is due not to doubts about the coherence or consistency of Bickel's work (as is commonly proposed), but rather to a fundamental aversion to the prudentialist perspective. "Today," says Kronman, "prudence is an embarrassed virtue"—the result of the rationalist domination of academic legal discourse.


335. Kronman, supra note 309, at 1568.

336. Id. at 1571-72.

337. Id. at 1607.

338. Id. at 1571-72, 1605-07.
Insofar as Kronman is accurate in his analysis of contemporary legal culture, it is necessary in this final section to confront the possible shortcomings of the theory offered in this Article. Granted, there may be some reason to think that prudentialism is not as discredited today as it was even a decade ago (when Kronman made his diagnosis); nevertheless, I believe that a pervasive, albeit subclinical, distrust of prudentialism festers within contemporary legal culture. Even if Kronman's diagnosis is incorrect, moreover, and even if the experience of Bickel could somehow be overlooked, I would still be obliged to discern and to address various potential objections to my theory. For it is in fact the case that the use of prudential considerations in judicial decisionmaking does present its own set of costs and difficulties. In the following pages, I address two such potential objections, one basically practical (i.e., that prudentialism creates too much judicial discretion), the other basically conceptual (i.e., that prudentialism presents too great a threat to the ideal of a conceptual dichotomy between law and politics, at least for those who adhere to such an ideal). Although several aspects of these objections are confronted directly, a few are left standing because they are not so much objections to my analysis in Parts II, III, and IV of the Article, but rather objections to the foundational postulates upon which much of this Article rests.

339. First, there has been some scholarship (in addition to Kronman's) suggesting that we, as a legal culture, may wish to reconsider the role of prudence in judicial decisionmaking. See, e.g., Chow, supra note 303, at 785-822 (advocating a jurisprudential theory that incorporates many of the values and insights of prudentialism); Christopher L. Eisgruber, Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence, 43 DUKE L.J. 1, 14-18 (1993) (arguing that prudence should be treated as an ingredient of constitutional theory rather than as a restraint thereof); Hirsch, supra note 15 (recognizing prudential limits on the substantive constitutional decisionmaking of the Supreme Court). Second, insofar as prudentialism is intellectually or logically related to pragmatism—some might even consider them synonymous or consider prudentialism to be a subcategory of pragmatism—the prospects for the former should look relatively good, because the latter has apparently undergone some kind of "renaissance." See Smith, supra note 162, at 409-10 (recognizing the modern rise of pragmatism, although concluding that pragmatism's main function is exhortational rather than meaningfully substantive). See generally Symposium, The Renaissance of Pragmatism in American Legal Thought, 63 S. CAL. L. REV. 1569 (1990).

340. I should note that Professor Kronman, in his own piece on Bickel, likewise raised and confronted a number of potential objections to Bickel's proposed philosophy: (1) that prudence is simply a means of justifying and preserving the status quo, see Kronman, supra note 309, at 1608, 1608-10 (questioning whether "[a] prudentialist . . . [is one who] simply prefers to keep things the way they are and chooses his political philosophy because it excuses inaction on the grounds that it is virtuous to do little, and more virtuous to do nothing at all"); (2) that prudence unjustifiably ignores the increasing rationalization of law and politics, see id. at 1610-12 (examining the view that prudence will lose its utility and be replaced by the laws of social engineering as more of life becomes subject to rational control); (3) that prudence does not take rights seriously enough, see id. at 1612-14 (examining the view that prudentialism would delay or deny the full protection of absolute rights simply to avoid an unpleasant social conflict); and (4) that prudence, by its very nature, cannot be considered a coherent legal or political philosophy, see id. at 1614, 1614-15 (questioning whether a "philosophy of prudence" is "a contradiction in terms" because prudentialism embodies qualities that reflect a skeptical mistrust of philosophical argument). These are important concerns. Because their relevance
1. The Magnitude of Judicial Discretion.—Excessive governmental discretion is almost always a frightening prospect. Unfettered power combined with the darker nature—some would say depravity—of the human being poses many risks to our freedom and to our more noble aspirations. This is a reality, to be sure, that has shaped much of our political and legal development: the establishment of a written constitution, the formal separation of governmental powers, the growth of procedural and substantive due process, and the creation of constraining mechanisms on the administrative state, just to mention a few. Indeed, while we may not agree with Lord Acton entirely, there is ample truth in his oft-quoted admonition that “[p]ower tends to corrupt, and absolute power corrupts absolutely.”\textsuperscript{[1]} In light of this concern, it is likely that one objection to a prudential theory of judicial candor, and for that matter to a prudential theory of any sort, is that it invariably endows judges with too much discretion and thus too much power. I will address this objection first with regard to the candor decision in cases in which the logic and reasoning of the pro-candor rationales have been exhausted (“stage 3 decisionmaking”), and then with regard to the candor decision in cases in which they have not (“stage 2 decisionmaking”).

First, let us evaluate this objection in the context of candor decisions made at stage 3 of the proposed analysis. At one level, of course, this “objection” may not be an objection at all, but simply a lamentation over the potentially vast discretion flowing from this Article’s claim that the case for candor is logically limited. To those who protest on such grounds, I can offer no satisfactory response other than to insist that these readers must take issue directly with that claim, not its consequences. Alternatively, some readers who accept my critique of the conventional wisdom may nonetheless be concerned that judges will be unable to discern when each rationale has run out, thus creating the risk that candor will be avoided when in fact the logic of one or more rationales dictates that it be employed. After all, can we genuinely trust that judges will know at what point, for example, enough guidance to the public and legal community has been given or enough candor has been employed to ensure the quality of
to my thesis is questionable, however, I believe it is unnecessary to re-address directly any of these hypothetical objections, at least as Kronman has formulated them. To be sure, Kronman was advocating a much broader use of prudentialism than that set forth in this Article. While I am simply arguing for the use of prudentialism in situations in which the logic of the pro-candor rationales is exhausted, and perhaps to temper the logic of those rationales in certain situations even if not exhausted, Kronman was proposing a generally applicable philosophy of prudence, confined neither to a specific context such as candor nor, for that matter, to judicial decisionmaking. Consequently, his hypothetical objections are inherently much broader, and thus less specifically relevant, than what is necessary to respond to the model proposed in this Article.

their decisions? In turn, this concern may suggest that it is better to draw a bright line at full candor, despite the theoretical indefensibility of this position, than to risk erroneous decisionmaking as a consequence of giving judges a choice in the matter. With this objection (and proposed remedy), I have no quarrel. As long as we recognize that the conventional wisdom would exist as a fiction, employed to prevent judges from making bad estimates regarding the need for candor, and would not be understood to be a fully theoretically defensible principle of judicial decisionmaking, it is not of great concern if the realm which I propose be governed by prudential considerations is instead effectively eliminated for process or administrative reasons. (It would be rather ironic, however, if our policy of candor were itself to rest on fiction.) As a practical matter, of course, judges might still advert to prudential reasoning to justify an avoidance of candor (just as they would likely advert to it even when logic compels candor), but I believe it would be entirely legitimate to attempt to steer judges away from this tendency out of a concern that the risk of error outweighs the benefits of discretion.

Still another discretion-related objection concerns my particular choice to use prudentialism, as opposed to some other source of judicial decision, in dealing with stage 3 decisionmaking. That is, even if the reader accepts the claim that the conventional wisdom is only partially defensible (thus creating a realm of discretion) and nevertheless rejects the proposal to adopt the conventional wisdom out of a concern for erroneous judicial calculation, the reader may still believe that prudentialism ought not to be the proper source of decision in that realm. After all, the objector might ask, why choose prudentialism when there are available a variety of other bases for deciding the propriety of candor? Does not prudentialism, of all available approaches, effectively maximize discretion and thus minimize the probability that judges will ever actually be candid? The problem with this objection is that I am not sure whether alternative principles or theories are in fact appropriate and available. The nine enumerated pro-candor rationales themselves embody several potential principles—political accountability, due process or rule of law, morality, and so on—yet my previous discussion of these principles demonstrates that their applicability to the question of candor may be limited substantially. Indeed, were I asked to discern an acceptable alternative theory or mode of decision-making, I would likely recommend one that looks conceptually a great deal like prudentialism, such as pragmatism. It is entirely possible, of course, that I am blinded by my own belief in the propriety of prudentialism. In

---

342. Cf. Shapiro, supra note 2, at 738 (suggesting that a policy based on rule-utilitarianism might be appropriate in the judicial candor context, in which candor is the general rule even if that rule seems insupportable in particular instances).
all candor, however, I simply cannot discern a better source of decision, at least as far as stage 3 decisionmaking is concerned.

The more difficult objection, in fact, concerns my advocacy of prudentialist thinking not in stage 3 decisionmaking, but in stage 2 decisionmaking, involving those situations in which the logic and reasoning of the pro-candor rationales have not yet run out. In these situations, I identified two categories of extrinsic considerations that are likely to impinge on a pro-candor position: practical constraints (limited judicial foresight, inefficacy, and the multimember nature of courts) and normative constraints (moral exigency, institutional legitimacy, and the need to use legal phraseology). In turn, I argued that any of these considerations might be sufficient to warrant overriding one or more of the pro-candor rationales even if those rationales are otherwise applicable and, further, that prudentialism may properly play a role in a judge's decision in such situations. I can think of at least three objections to this proposed analysis: (1) even if prudential thinking is justified in stage 3 decisionmaking (if only because no other authoritative source of decision is available), there is no basis for using it in stage 2 decisionmaking because the pro-candor rationales would be both applicable and authoritative; (2) the balance I have set up between the pro-candor rationales and the extrinsic considerations is hopelessly indeterminate, in part because I have not explained either the degree to which prudentialism should be considered or the relative weight of prudentialism vis-à-vis other possible sources of decision; and (3) even if prudentialism is legitimate and the balance could somehow be made more predictable, the use of prudentialism in evaluating the relative importance of the extrinsic considerations would ultimately give undue weight to prudential concerns because many of these considerations are themselves prudential in nature. Admittedly, these are serious concerns, and to the extent one is genuinely troubled either by the prospect of an indeterminate analysis or by the explicit use of prudentialism in judicial candor decisions, there is little more that I can say at this point to rebut these objections. My sole response is that our failure to acknowledge the inherently prudential nature of judicial decisionmaking and our reliance thus far on formalism and fiction in the context of judicial candor (as manifested in the conventional wisdom) must not be allowed to remain intact, and that this Article's proposed analysis provides at least some effort to move us in a more realistic and honest direction.

Finally, regardless of whether we are speaking of prudentialism in stage 2 or stage 3 decisionmaking, there is one additional discretion-related objection that merits examination. Specifically, there may be some who, even though they accept and perhaps even champion judicial discretion in substantive decisionmaking, may have great difficulty with a prudential theory of candor because they believe candor is simply different. Discretion regarding the choice of substance, according to this argument,
is both necessary and desirable insofar as there are almost always competing substantive considerations and the judge must be permitted to attempt to choose the best considerations and to reach the best outcome. Discretion regarding the choice for or against candor, however, is necessary only if we allow the judge to have such a choice—if we create the option to choose against candor—and is desirable only if we agree that it furthers values which we regard as important. This is a highly significant objection because it implicates nothing less than the nature of candor and the nature of the judicial role. It is really a claim about first principles, especially of the judicial process, and thus cannot truly be rebutted. Clearly, I would disagree with one who holds such first principles, but that disagreement would probably have less to do with minor logical errors and more to do with fundamentally different visions of the judicial process and of American government.

2. The Merger of Law and Politics.—Some may also object that the explicit invocation of prudential considerations—whether or not limited to the context of candor—would jeopardize, if not undermine, a popular conception of the judiciary as a relatively apolitical institution. Prudential considerations, after all, seem a far cry from what we normally think of as legal principles, and may strike some simply as politics by another name—a bridge between principle and expediency that invariably leads one to the latter.343 While it is true that many no longer accept a conceptual distinction between law and politics,344 and thus no longer possess a vision of courts as something above or apart from politics (in the slightly pejorative sense of the term),345 these ideals nevertheless persist, particularly outside of the legal academy. Even within the academy,

343. Likewise, Professor Gunther once stated that Bickel's attempt to justify prudential decisionmaking by the Court through various jurisdictional devices—to avoid expediency by deciding, on political grounds, not to decide—was essentially “100% insistence on principle, 20% of the time.” Gunther, supra note 148, at 3. Importantly, Professor Gunther was disturbed not by the lack of candor that Bickel's model appeared to require of the Court, but by the motivation and nature of the Court's actions, whether or not accompanied by candor. Id. at 3-5. “For Gunther, the relevant judicial virtue was not candor; it was obedience to clearly applicable statutory commands of jurisdiction and constitutional commands of substantive law.” Weisberg, supra note 8, at 250.

344. See, e.g., Solum, supra note 70, at 1735 (“A contemporary reaction to the realist insight by critical legal scholars is expressed in the slogan ‘Law is politics.’”); see also Book Note, supra note 15, at 796 (stating the position that no clear distinction exists between “articulable constitutional principles” and “tactical, ‘political’ choices”).

345. Compare Allan C. Hutchinson, Democracy and Determinacy: An Essay on Legal Interpretation, 43 U. MIAMI L. Rev. 541 (1989) (arguing that law and politics are hopelessly intertwined and, therefore, that “the law is irredeemably indeterminant”) with Perry, supra note 108, at 201-04 (stating the position that constitutional adjudication is both law and politics) and Perry, supra note 43, at 141 (“Words such as ‘political,’ ‘bargaining,’ and ‘strategy’ need not connote smoke-filled back rooms and shady deals. Politics, after all, only means that values are being authoritatively allocated.”).
moreover, I suspect that many retain these ideals in at least their aspirational form.\textsuperscript{346} That is, the dichotomy between law and politics persists as a source of institutional orientation and symbolic or rhetorical value—a desire for judges to avoid as much as possible the parochial, short-term interests that are more traditionally the concern of legislators\textsuperscript{347}—rather than as a genuine description of reality. For these people as well, prudentialism poses a threat either to the actual legitimacy of courts\textsuperscript{348} or, at the very least, to the idea that courts should not be self-identifiably political beings, even if such an idea would accurately describe the reality that courts are often political beings in fact.\textsuperscript{349}

Because I am relatively sympathetic to the dichotomy between law and politics in its aspirational form (though admittedly I am a bit skeptical of it as a matter of logic and extremely skeptical of it as a matter of empirical reality), I do not take lightly the objection that prudentialism may engender a kind of conceptual or rhetorical harm. Ultimately, however, a prudential theory of candor and the dichotomy between law and politics need not be construed as hopelessly irreconcilable. First, it is highly significant that a large part of my model of candor (stage 1) is not open to prudential considerations, but rather is constituted and defined by various established principles (the nine rationales) in combination with certain plausible conceptions of the nature both of candor and of the judiciary. Judges may

\textsuperscript{346}See Hutchinson, \textit{supra} note 350, at 548 ("[T]here is still a fervent commitment and aspiration to the possibility of resisting the radical claim that ‘law is politics.’").

\textsuperscript{347}Joel Levin observes that politics in the context of the jurisprudential debate covers tremendous ground. In the broadest sense of being concerned with the workings of the state or the science of government, politics includes law by definition. In the narrowest sense of partisan interest for narrow constituencies, the goal of attaining some tangible and parochial short-term end, law (or at least the judicial system) is hardly political. Levin, \textit{supra} note 41, at 28; see also Leflar, \textit{supra} note 2, at 740 (noting the “traditional distinction, repeated by lawyers and laymen alike, between ‘legal reasoning’ and ‘political reasoning’” and pointing out the difference between politics as “the realistic reconciliation of claims to justice in our society” and politics as simply “backroom venality or the buying of votes”). It is with reference to this latter, narrow sense that I believe the aspirational commitment to the dichotomy between law and politics is both most common and most feasible.

\textsuperscript{348}The standard position in this regard is that a discernible difference between the judicial and the political—between law and politics—is necessary for the legitimacy of courts. See, \textit{e.g.}, Zeppos, \textit{supra} note 8, at 406 (“As long as courts cultivate the perception that they are constrained and distinguishable from the political branches, their legitimacy will remain intact.”).

\textsuperscript{349}One commentator suggests, in regard to Bickel’s proposal that the Supreme Court may choose not to reach constitutional issues on prudential grounds,

\textit{Let the cat of prudentialism out of the bag, and the people will have very little reason to accept the Court as an authoritative expositor of fundamental values superior to contemporary majority consensus. . . . If the Court is free to compromise principle and virtue by bowing to the will of a current majority, even if only to the extent of exercising discretion not to decide, it becomes institutionally similar to the United States Senate.}

turn to prudential considerations only when the internal logic of these rationales is exhausted (in stage 3 decisionmaking), or, perhaps, when countervailing values are sufficiently strong that they may outweigh one or more of these basic rationales (in stage 2 decisionmaking). Thus, any role for prudentialism would be either necessary or secondary and, in most cases, may often turn out to be quite modest. Second, the specific dimension of judicial decisionmaking to which prudential considerations would be applied—the decision to employ or forego candor—is not normally considered central to the dichotomy between law and politics. The classic threat, to be sure, is one involving the substantive decisionmaking of courts—is a court merely legislating its preferences through the medium of constitutional or statutory interpretation? Consequently, the risk of conceptual or rhetorical harm may be relatively minor, at least insofar as the realm of candor is not understood as a critical locus of distinction between the decisionmaking of courts and that of the so-called “political” branches. Third, the express use of prudentialism in the particular realm of candor, far from transforming the bench into some type of political being, may actually serve to emphasize that much of the courts’ other business is not political as such. In other words, the clear delineation of a role for political considerations—in this case within a particular realm (candor) and only in certain circumstances—paradoxically may serve to reinforce the distinctly legal nature of the judiciary’s other aspects and functions.

Finally, to the extent that prudential considerations are in fact necessary or inevitable in certain circumstances—to the extent that the frequently prudential behavior of judges is really not news to the legal community—\(^{350}\)—the only sound course of action, it would seem, is to be candid about judicial candor and to face the reality that judicial decisionmaking does in fact contain political dimensions, that many of these dimensions are ineradicable,\(^ {351}\) and that we may not truly wish to eradicate them even if we could.\(^ {352}\) The simple truth is that an ideal of

\(^{350}\) It does not, however, seem to be news that the legal community regularly shares with the general public. See Frederick Schauer, Constitutional Positivism, 25 CONN. L. REV. 797, 817 n.48 (1993) (noting the importance attached to the public myth that judges make decisions unconstrained by prudential reasons).

\(^{351}\) As a practical matter, the conduct of judges is undeniably subject to a wide variety of pressures—institutional, social, political, psychological, and the like—which cause them to incorporate prudential thinking into their decisionmaking. See Wasby, supra note 87, at 216-19 (both discussing various sources and forms of judicial accountability, including socialization, threat of reversal, organizational constraints, selection and removal processes, public opinion, and the possibility of resistance); Abrahamson, supra note 36, at 982-83 & nn.52-56, 986-87 & n.64, 992-93. In turn, there is little reason to think that judicial decisions to either employ or forgo candor would be immune from these pressures.

\(^{352}\) For two statements of the position that explicitly political influences on judicial decisionmaking are proper and perhaps desirable, at least in the constitutional context, see Robert F.
Judicial Candor

full disclosure, even if entirely defensible in theory, simply cannot pass muster in the real world of law—where judges, lawyers, and the public are frequently less than rational; where courts are invariably subject to a host of complex political and institutional dynamics; where full cognizance, let alone perfect information, is not often to be had; and where the nature of law and the first principles of the social and political order are ever-shifting. The irony, of course, is that at some level, this is probably what many of us believe. Indeed, I suspect there is often a significant disparity between what we say in the abstract about how judges should act and how we actually believe judges should act based on the outcomes they can achieve by acting prudentially. This is, in many respects, nothing more than the basic tension between purism and prudentialism, and this Article has simply argued that in seeking to preserve the aspirational significance of the former, we not ignore the value and the reality of the latter.

V. Conclusion

In their recent and quite useful text on constitutional theory, Professors Michael Gerhardt and Thomas Rowe devote several pages to what they call the “problem of judicial candor.” After a string of introductory questions, most of which seem unanswerable, the authors note with some solemnity that “[t]he problem of judicial candor is not a simple one.” Following this prefatory caveat are excerpts from two articles, one by David Shapiro and the other by Henry Monaghan, that basically, and not surprisingly, begin with the premise that candor is a good thing which ought generally to be pursued. In turn, the core of each piece is devoted to an exposition on the ways candor can be achieved or, especially in Shapiro’s case, on the possible narrow circumstances that might warrant a deviation from the pro-candor norm.

By now, of course, there is something terribly familiar in the analytical framework that Gerhardt and Rowe offer, particularly their characterization of judicial candor as a seemingly irresolvable problem. Lurking not far below the surface, in fact, is the conventional wisdom. For judicial candor is indeed a problem, and an unusually formidable one at that, whenever we begin with the notion that candor is presumptively


353. GERHARDT & ROWE, supra note 84, at 32-37.
354. Id. at 32.
355. Id. at 32-36 (quoting Shapiro, supra note 2, at 731-32, 736-39, 742-43, 747-50).
356. Id. at 36-37 (quoting Monaghan, supra note 4, at 22-26).
357. Id. at 32.
desirable—that a "lack of candor is in itself always harmful"—only to realize the existence of certain circumstances which seem to call that desirability into question, but which are difficult to articulate or defend in light of the strong pro-candor presumption. If at the outset, however, we are able to deny the full authority of the conventional wisdom—if we are willing to expose the conventional wisdom as only partially defensible—then we are significantly freed from this confining and frustrating predicament. It is true, of course, that we still must decide whether and when the logic of the case for candor should be overridden, and by no means is this an easy task. However, upon realizing that the pro-candor rationales are subject to internal limitations, our focus shifts, or at least expands, to the vast realm of judicial discretion created by these limitations. And the largest problem, then, is neither moral nor legal nor political as such, but rather conceptual. It is not the prospect of certain values in tension with the conventional wisdom, but the realization that the conventional wisdom itself—our very conceptual foundation—has turned out to be more apparent than real.

Much of this Article has been devoted to systematically confronting this conceptual problem, to removing this obstacle that so easily prevents us from dealing fully or effectively with the issue of judicial candor. As a consequence, even those readers who disagree with my conclusions, my recommendations, or even parts of this Article's analysis should nevertheless find helpful my attempt to discern and gather together the elemental reasons why candor may be desirable as well as the host of reasons why it may not. In this regard, it is instructive to close (or at least to move towards closure) by considering the words of Robert Leflar, who has served in his life both as a state supreme court justice and as an insightful scholar and teacher of the judicial process. "Candor," he said,

is a virtue, in judicial opinions as elsewhere, and we need much more of it. But to "tell all," with complete and unmitigated candor, is not always a virtue in judicial opinions or elsewhere. Restraint may be a virtue too, for reasons sometimes of decency and sometimes of wise planning.

We may ultimately agree with this statement, or we may not. Or, as lawyers are wont to do, we may find ourselves divided as to one or more of its premises, logical moves, or consequences. The one thing we can no longer do, however, is to take it at face value. For if this Article has revealed anything, it is that we need to dig deeper—to ask why candor is a "virtue"; to determine why and in what instances we "need much more

358. CALABRESI, supra note 8, at 174.
359. Leflar, supra note 21, at 819.
of it”; to examine the meanings of “restraint,” “decency,” and “wise planning” in the unique context of candor; and to ascertain for what reasons and in what ways these considerations should legitimately affect a judge’s choice for or against candor. These are the real questions in the debate over judicial candor. Only when we openly and rigorously address these questions—only when we avoid the twin pitfalls of fiction and formalism—will we truly do justice to the debate.