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ARTICLES

Notice-and-Comment Judicial Decisionmaking

Michael Abramowicz† & Thomas B. Colby††

Executive branch agencies typically use a process of "notice and comment" to permit the public to respond to the proposed text of rules. The legal literature has not considered whether a similar process would be helpful for the judicial branch. This Article argues that it would be. Neither the parties to a litigation nor third parties generally have an opportunity to comment on judicial opinions after they are drafted but before they are made final. As a result, judicial opinions often contain errors and frequently have far-ranging and unanticipated negative consequences. A notice-and-comment system could mitigate these concerns, and could also help to constrain judges to follow the rule of law and to improve the legitimacy of the judicial process.

INTRODUCTION

Last term, the Supreme Court made a high-profile and embarrassing error in the course of holding that the Eighth Amendment's Cruel and Unusual Punishments Clause precludes a state from imposing the death penalty for the crime of raping a child.[1] The Court based its holding on "evidence of a national consensus" that such a punishment is excessive,[2] and noted that, "[a]s for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain

† Professor, The George Washington University Law School.

†† Associate Professor, The George Washington University Law School.

In the spirit of its subject matter, this Article was made available for public comment, and we incorporated excellent suggestions from Steve Charnovitz, David Fontana, Fred Lawrence, Ronald Levin, Eric Lipman, Chip Lupu, and Richard Pierce.

1 See *Kennedy v Louisiana*, 128 S Ct 2641, 2664–65 (2008).

2 See id at 2653. The Eighth Amendment, the Court stated, "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Id at 2649, quoting *Trop v Dulles*, 356 US 86, 101 (1958) (plurality).

nonhomicide offenses; but it did not do the same for child rape or abuse."[3] A few days after the Court issued its opinion, a blogger pointed out that, contrary to the Court's implication that there is no provision for the death penalty for child rape in federal law, Congress revised the Uniform Code of Military Justice in 2006 to add child rape to the list of crimes that can trigger the death penalty under military law.[4] That blog post triggered substantial news coverage criticizing the Court for its glaring omission,[5] and it prompted law professor bloggers to ponder whether the Court could have avoided the mistake if it had taken advantage of "current social technologies"[6] to harness "the wisdom of crowds."[7]

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3 *Kennedy*, 128 S Ct at 2652.

4 See Dwight Sullivan, *Supremes Dis the Military Justice System*, CAAFlog (June 28, 2008), online at http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html (visited Sept 1, 2009).

5 *The New York Times* picked up the story the following week and explained that the parties had been entirely unaware of the new military law and had failed to call it to the attention of the Justices. See Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, NY Times A1 (July 2, 2008). Commentators, including some with misgivings about the death penalty, were critical of the Court. See, for example, Lawrence H. Tribe, *The Supreme Court Is Wrong on the Death Penalty*, Wall St J A13 (July 31, 2008).

6 Professor Tom Smith observed:

> It appears the law finding mechanism we use to inform the Court about what the law is [is] laughably inefficient in the era of the Web and the blogosphere. The Court is supposed to be, among other things, the really deep, really well informed body on our federal law, right? Yet they missed something a blogger came up with off the top of his head.
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> . . .
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> Is there a way that the Court could take advantage of current social technologies to dramatically improve its understanding of the relevant law in any given case? Of course there is, but I'm not holding my breath. You could, for example, post all of the briefs in wiki format, or something similar, and then sift through the results. But any procedure you could come up with could be gamed, and it seems unlikely the federal judiciary could ever bring itself to modify its procedures to really take advantage of Web 2.0 sorts of tech.

Tom Smith, *Jurisprudence and Information*, The Right Coast Blog (July 7, 2008), online at http://rightcoast.typepad.com/rightcoast/2008/07/jurisprudence-a.html (visited Sept 1, 2009).

7 Paul Cassell, *Should the Supreme Court Take Advantage of the Web?*, The Volokh Conspiracy Blog (July 9, 2008), online at http://volokh.com/posts/1215574584.shtml (visited Sept 1, 2009) (noting that, when he was a federal district judge, he sought to harness the "wisdom of crowds" by "circulat[ing] 'tentative' written rulings to the parties before holding oral argument," and suggesting that the Supreme Court might consider doing the same). The "wisdom of crowds" is an allusion to James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations* (Doubleday 2004). These ideas are not entirely new. Another blogger made a similar suggestion a few years earlier. See Jason Mazzone, *SupremeCourtOfTheUnitedStates.blogspot.com?*, Concurring Opinions Blog (Dec 17, 2005), online at http://www.concurringopinions.com/archives/2005/12/supremecourtoft.html (visited Sept 1, 2009):

> The Supreme Court should operate a blog to generate input on the Court's opinions before they are published. The postings could range from limited issues ("if we decide in the petitioner's favor, is it better to remand to the lower courts?") to entire drafts of opinions and requests for comments.

This was hardly the first, or even likely the most consequential, error that the Court has made that could have been caught by public input.[8] It is thus not surprising with the rise of the Internet, and particularly "Web 2.0"[9] technologies incorporating user input, that legal commentators would at least fleetingly consider the possibility of integrating such technologies into the practice of judicial opinion writing. These possibilities, however, have received no sustained scholarly attention, perhaps because the idea of the *United States Reports* being replaced by something like the *United States Wiki* is simply beyond the pale. Still, putting that sort of hyperbole to the side, an intriguing core idea remains: courts could make draft opinions available to the public for comment before issuing them in final form. This Article proposes that the courts do just that.

Although it would represent a significant change to judicial culture, this proposal is not as wacky as it might first sound. Indeed, a variant on this system, in which draft opinions are distributed to the parties prior to oral argument, is already practiced in some California and Arizona courts.[10] This approach is a start, but inadequate. It allows input only from the parties, and it may not always be feasible for litigants to offer a sufficiently developed critique of a tentative opinion

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And in his famous administrative law treatise, Kenneth Culp Davis once suggested, without elaboration, that notice and comment be used for both administrative and nonadministrative adjudication. See Kenneth Culp Davis, *Administrative Law Treatise* § 14.6 at 29–30 (K.C. Davis 2d ed 1980) (suggesting that the procedure be used only where new law is being created).

8 For example, in one apportionment case, despite having received briefing focusing on a technical issue, the Court apparently still made a critical technical error on the central issue in the case—an error that could have been clarified by the parties and the public had they been given the opportunity. See Paul H. Edelman, *Getting the Math Right: Why California Has Too Many Seats in the House of Representatives*, 59 Vand L Rev 297, 317–18 (2006) (discussing *United States Department of Commerce v Montana*, 503 US 442 (1992), in which the Court, because it misunderstood an affidavit submitted by a government expert, used a nonsensical denominator in calculating the proper apportionment of seats in the House of Representatives among the states).

9 This phrase refers to technologies such as social networking, blogs with comments, and the like, that allow individual users to contribute to the authorship of websites. See Lisa Veasman, Note, *"Piggy Backing" on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups*, 30 Hastings Commun & Enter L J 311, 314–15 (2008).

10 See Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 Santa Clara L Rev 1, 14–16 (1995) (chronicling the development of the Tentative Opinion Program); Mark Hummels, *Distributing Draft Decisions before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination*, 46 Ariz L Rev 317, 340–41 (2004) (arguing that providing a draft of the court's tentative ruling narrows the focus of parties and improves the quality of oral argument and judicial decisions). Outside of these courts, a handful of individual judges have adopted this practice on their own. See Richard C. Braman, *Prehearing Tentative Rulings Promote Intellectual Integrity in Judicial Opinions and Respect for the System*, 49 APR Fed L 50, 50 (2002).

in response to questions at oral argument, or for judges to appreciate nuances in these verbal responses.[11]

Under our proposal, the general public would be invited to comment, and responses would be submitted in writing. The practice would thus be similar to one routinely employed by another branch of government: notice-and-comment rulemaking by administrative agencies.[12] The fact that a similar practice has been in longstanding use in administrative law highlights three points. First, employing public comment to guide governmental decisionmaking is not revolutionary.[13] Second, the possibility of allowing public input into governmental decisions does not depend on the existence of the Internet; indeed, while the Internet may efficiently reduce costs of public participation, we are skeptical that opening government to those who cannot be bothered to stick a first-class stamp will meaningfully improve public contribution. Third, the administrative experience shows that the usefulness of public participation goes well beyond the correction of the occasional objective error.

In this Article, we argue that the case for notice-and-comment judicial decisionmaking is in most respects at least as strong as the case for notice-and-comment administrative rulemaking. In administrative law, the notice-and-comment process serves several related functions: providing information to decisionmakers, legitimating the

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11 See notes 215–18 and accompanying text. At the international level, tribunals do sometimes give parties a chance to comment on a pending opinion after oral argument. See, for example, World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Art 15 ¶ 1, 33 ILM 112, 122 (1994) ("Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing."); North American Free Trade Agreement (1993), annex § 1903.2 ¶ 4, 32 ILM 605, 608 ("Within 14 days of the issuance of the initial declaratory opinion, a Party to the dispute disagreeing in whole or in part with the opinion may present a written statement of its objections and the reasons for those objections to the panel."). Although this approach still falls short of what we have in mind, its existence does help to establish the plausibility of our proposal.

12 See 5 USC § 553.

13 Public comment also plays a role, albeit an informal one, in legislative decisionmaking. The text of bills pending in Congress is available to the public in searchable form on the Library of Congress's THOMAS website. See *THOMAS*, The Library of Congress, online at http://thomas.loc.gov (visited Sept 1, 2009). And, of course, members of the public have an opportunity to contact their representatives in Congress to express support for, or concerns about, pending legislation. See, for example, *Write Your Representative*, United States House of Representatives, online at https://writerep.house.gov/writerep/welcome.shtml (visited Sept 1, 2009). President Barack Obama has institutionalized a more formalized role for public comment in the presentment process. He has committed to making the text of bills sent to him for his signature available to the public for comment before he signs or vetoes them. See *Ethics*, Barack Obama, online at http://www.barackobama.com/issues/ethics/index_campaign.php (visited Sept 1, 2009) ("As president, Obama will not sign any non-emergency bill without giving the American public an opportunity to review and comment on the White House website for five days.").

decisionmaking process, and constraining decisionmakers by pushing them to confront arguments that point away from their preferred course of action. All of those functions could be served equally as well, if not better, in the judicial context. Generalist courts consisting of only a small number of judges may benefit from public provision of information even more than specialized agencies with many available contributing experts, especially when decisions touch on highly technical matters. Public participation through notice and comment would also help the courts overcome those objections to their legitimacy stemming from the fact that judges establish broad rules governing all of society in the process of resolving concrete (and often idiosyncratic) cases between individual parties. Finally, because the potential for political or ideological decisionmaking threatens judicial decisions as much as administrative ones, the need for constraint is just as critical in the judicial arena. And there is reason to believe that the constraining potential of notice and comment is as great or greater in the judicial context as in the administrative one.

In short, judges, like administrative officials, make generally applicable rules of law.[14] Whether there is something illicit about the way in which—or the extent to which—they do so is, of course, a subject of much disagreement,[15] on which we offer no opinion here. Our point is simply that, for better or for worse, judges make law, and so the usual arguments for (and against) notice-and-comment rulemaking apply. Yet notice and comment may be even more useful for judicial decisionmaking because legal reasoning follows interpretive conventions alien to raw policy analysis. This increases the danger that judges will resort to instinctive policy assessments when interpretation initially appears inconclusive (an information problem), that judges will make broad policy decisions under the guise of pseudo-interpretation (a legitimacy problem),[16] and that judges will make policy decisions that deviate from the outcomes permitted by the norms of legal interpretation (a constraint problem).

To be sure, the administrative notice-and-comment process is not without its critics,[17] who might well worry that its importation into the judicial context would make litigation too cumbersome. It is, for instance, easy to imagine the courts being inundated by largely worthless comments in high-profile, politically charged cases. Sufficiently

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14 See Part I.B.

15 See, for example, Sol Wachtler, *Judicial Lawmaking*, 65 NYU L Rev 1, 2 (1990) (inquiring whether lawmaking is a natural byproduct of dispute resolution, and, if it is not, whether the lawmaking role played by the courts of this country is legitimate and justified).

16 See Richard J. Pierce, Jr, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand L Rev 301, 308 (1988).

17 See notes 309–11 and accompanying text.

voluminous comments could impair both the informational and constraint functions of notice-and-comment decisionmaking, while greatly increasing the cost of responses. An effective mechanism for filtering out low-value comments would thus greatly increase the benefits of notice and comment. We argue that simplistic Web 2.0 approaches are unlikely to be effective, and more radical mechanisms are less likely to be adopted. Nonetheless, a low-tech approach—allowing parties and third parties to submit a primary set of comments strictly limited in length and requiring their attorneys to certify under threat of sanction that their comments are not redundant of others already submitted—would help identify concisely the most significant deficiencies of opinions.

Similarly, judicial importation of "hard look review,"[18] the doctrine enforcing agencies' responsibility to respond meaningfully to significant comments, would likely have costs swamping any corresponding benefits. Thus, we do not seek to impose an affirmative, enforceable obligation on judges to respond to comments, and we are not proposing that the failure to respond adequately to valuable comments should itself be reversible error. Rather, because reputation may be a more powerful motivator of judges than of administrative agency officials, notice and comment might provide genuine constraint benefits even without an enforcement mechanism. Alternatively, evaluation of judges' responsiveness to comments could be integrated into a broader program of judicial performance evaluation.[19] For example, after becoming final, a small percentage of opinions could be systematically reviewed by an independent panel of experts to determine if they fairly addressed strong arguments raised in the comments.

Admittedly, it is difficult to judge in a rigorous way whether the benefits of judicial notice and comment would be sufficient to justify the costs incurred by litigants, third parties, and judges. We believe that, on the whole, the increases in information, legitimacy, and constraint generally would be worth the costs. Our proposal would address an unmet need in our legal system, giving the parties and the public an opportunity to criticize the reasoning, and indeed the exact words, chosen by the court, and giving judges an opportunity to change their minds or refine their analysis once they are presented with particularized critiques of their tentative reasoning. Both the identification of weaknesses in a tentative opinion and the earlier anticipation that weaknesses would be highlighted will encourage judges to confront, and in some cases to accept, significant counterarguments.

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18 See notes 290–92 and accompanying text.

19 See Rebecca Love Kourlis and Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 Denver U L Rev 7, 8–9 (2008).

Our argument proceeds as follows. In Part I, we argue that the current practice of issuing opinions that are effectively final upon release has serious drawbacks in terms of the provision of relevant information to the courts, the legitimacy of the judiciary, and judicial constraint. Part II explains why existing mechanisms, such as rehearings and amicus briefs, only partially alleviate these concerns. It then argues that notice and comment could provide more information while increasing the legitimacy of the judicial process and helping to constrain judicial decisionmakers. Part III considers obstacles and objections, assessing the costs to the public and courts of making and considering comments, and elaborating on the differences between notice and comment in the administrative and judicial contexts that would make the latter less cumbersome. We conclude by addressing the concern that notice-and-comment deliberations might be seen to undermine judicial dignity.

I. CAUSES FOR CONCERN

The judicial practice of deciding cases after receiving written briefs and sometimes hearing oral argument means that participation by the parties (and sometimes the public) takes place in anticipation of possible decisional approaches rather than in response to a particular approach tentatively chosen by a court. This presents concerns for both third parties and litigants. Judicial opinions often effectively bind third parties who may not even have known of the existence of the case, let alone anticipated the exact contours of the ruling, before the opinion was issued. The parties to a litigation have greater participation opportunities, but are sometimes blindsided by unforeseen errors or misunderstandings in the court's opinion to which they had no effective opportunity to respond.

A. Current Parties

In drafting their briefs, the parties do their best to predict which issues, arguments, and facts the court will consider to be important. But often, when it drafts its opinion, the court goes off on its own, addressing matters not briefed by the parties. Sometimes the court will decide the case on the basis of "facts" in the record not addressed by the parties[20]—which means that the court's decision is driven by evi-

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[20] See, for example, *Elliott v City of Clarksville*, 2007 WL 470467, *22 (MD Tenn) ("[T]he Court still retains discretion to consider all facts presented by the parties, as well as any other facts apparent in the record that were not even addressed by the parties."); *Matter of Estate of Wagler*, 577 NE2d 878, 879 (Ill Ct App 1991) ("We hasten to point out, however, that this court may look to the record to discern facts not cited by the parties."). See also Thomas B. Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* 170–71 (Green-

dence that the parties never explained and the meaning or importance of which they never contested. If the court misconstrues this evidence, it can wrongly decide the case without hearing from the parties as to why its understanding is inaccurate. Other times, the court will resolve the case by employing legal reasoning and citing legal authorities not suggested by the parties[21]—which means that the parties were never able to challenge or criticize the legal reasoning that drove the court's decision. Appellate courts in particular often rely on numerous hours of research by law clerks, staff attorneys, and judges to ascertain the governing legal authorities.[22] This can lead to mistakes that the parties might have caught if given a chance.[23]

Sometimes, a court will even decide a case on the basis of an entire legal issue never raised or addressed by the parties[24]—which means that the court ends up resolving the dispute and making law without any input at all on how to craft the proper rule. This phenomenon can be seen in the application of specific rules of appellate law, such as the rule that appellate courts can affirm a judgment for any reason, even one that was not briefed to the appellate court or argued in the lower court,[25] and in the rule that federal courts have a duty to raise questions of subject matter jurisdiction sua sponte, even when

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wood 1978) (noting that appellate judges and their clerks often read the record and rely on facts not cited by the parties in deciding appeals).

21 Indeed, one study of 112 cases decided by a state supreme court in a single year found that approximately one half of all legal authorities cited by the court were not mentioned by counsel in their briefs or arguments. Marvell, *Appellate Courts and Lawyers* at 6, 133–36 (cited in note 20). In 25 percent of those cases, *none* of the legal authority relied upon by the court was cited by counsel. Id at 133. A similar study of thirty Sixth Circuit cases found that only 55 percent of the authorities cited, and only 65 percent of those emphasized, by the court had been included in the briefs. Id at 134–35.

22 See id at 135. Many law clerks use "the briefs hardly at all or only as a place to begin the research when writing draft opinions or memorandums. The law clerks or, increasingly, the staff attorneys do the great bulk of the research." Id.

23 Adam A. Milani and Michael R. Smith give a striking example in discussing *Poyner v Loftus*, 694 A2d 69 (DC 1997). See Adam A. Milani and Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn L Rev 245, 259–61 (2002). The case of *Poyner* involved a legally blind man who brought suit after he was injured when he fell from an elevated walkway. See 694 A2d at 69. The DC Court of Appeals based its affirmance of summary judgment for the defendants on authorities not cited by the parties: cases from other jurisdictions articulating a common law rule that a blind person is contributorily negligent as a matter of law if he walks without a cane or guide dog. See id at 72–73. What the court did not realize, however, was that that old common law rule had been abrogated by statute in a number of jurisdictions, *including the District of Columbia*. Milani and Smith, 69 Tenn L Rev at 260–61.

24 See, for example, US S Ct Rule 24(1)(a) ("At its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.").

25 See, for example, *Tahara v Matson Terminals, Inc*, 511 F3d 950, 955 (9th Cir 2007) ("Though the parties have not discussed § 928(c), we may affirm the district court for any reason supported by the record.") (citation and quotation marks omitted).

the parties have not addressed them.[26] But its application is sometimes much broader.[27] Among the many Supreme Court cases that decided fundamental issues without the benefit of briefing from the parties on those issues[28] are such landmark decisions as *Erie Railroad Co v Tompkins*,[29] *Mapp v Ohio*,[30] *Washington v Davis*,[31] and *Employment Division v Smith*.[32] And the Supreme Court is not alone in this practice; other courts frequently engage in similar behavior.[33] As a result, parties often lose cases on issues that they never briefed, denying them the opportunity to make persuasive arguments to the court, and in turn potentially undermining the quality of the decision rendered. As Judge Frank Easterbrook has written, "Resolving a case on a ground not presented . . . increases the risk that an uninformed opinion will impede rather than promote commerce. It is hard enough to navigate when the court sticks to questions fully ventilated by counsel."[34]

Also of concern to the parties is that a court might reach a decision without fully considering arguments that litigants in fact have made.[35] A decisionmaker might shirk the duty to analyze all relevant arguments, particularly in cases that receive little public attention. The judicial utility function does, after all, include leisure.[36] It takes less

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26 See, for example, *Andrus v Charlestone Stone Products Co, Inc*, 436 US 604, 607 n 6 (1978) ("Although the question of the District Court's subject-matter jurisdiction was not raised in this Court or apparently in either court below, we have an obligation to consider the question *sua sponte*.").

27 Although courts often find an issue not raised by a party to be waived, see, for example, *Marks v Newcourt Credit Group, Inc*, 342 F3d 444, 462 (6th Cir 2003) (holding that, according to the Federal Rules of Appellate Procedure, an appellant waives an issue by failing to present it in his initial briefs), they can offer new arguments on behalf of issues already raised, see, for example, *Eldred v Reno*, 239 F3d 372, 383–84 (DC Cir 2001) (noting that a court can reach beyond the parties' arguments with respect to issues before the court), and the definition of "issue" is sufficiently nebulous that courts often have considerable freedom to reach beyond what the parties contemplated.

28 See Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L Rev 1253, 1255–56 (2002); Milani and Smith, 69 Tenn L Rev at 245, 253–59, 311 (cited in note 23).

29 304 US 64 (1938) (abolishing general federal common law).

30 367 US 643 (1961) (applying the Fourth Amendment exclusionary rule against the states).

31 426 US 229 (1976) (rejecting disparate impact liability under the Equal Protection Clause).

32 494 US 872 (1990) (rejecting disparate impact liability under the Establishment Clause).

33 See Milani and Smith, 69 Tenn L Rev at 248 (cited in note 23) (noting that "raising issues sua sponte is not an uncommon practice"). Thomas Marvell's study of state supreme court decisions found that 16 of the 112 opinions studied resolved issues not raised by the parties. See Marvell, *Appellate Courts and Lawyers* at 122 (cited in note 20).

34 Frank H. Easterbrook, *Afterword: On Being a Commercial Court*, 65 Chi Kent L Rev 877, 880 (1989).

35 See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 Georgetown L J 121, 132 (2005).

36 Judge Posner reminds us of this in his writing, though not by example. See Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 S Ct Econ Rev 1, 10–11 (1993) (suggesting that judges, since they are in a nonprofit sector, favor increased leisure over increased compensation).

time and effort to resolve a case after casually reviewing a few arguments than after carefully reviewing more of them. The failure to adequately consider relevant arguments can also stem from overconfidence. The cognitive psychology literature teaches that decisionmakers and other assessors of evidence will tend to assimilate information in ways that accord with their prior views, thus avoiding cognitive dissonance.[37] This is the bias of cognitive consistency: judges confronted with arguments against their pre-held or instinctive positions may dismiss these arguments too easily. And once the judges issue their opinions, it is too late for the parties to explain to the judges how they have failed to grapple adequately with important arguments.

B. Third Parties

However significant the foregoing concerns may be, they represent only the tip of the iceberg. The deficiencies in our current legal process have negative effects that extend well beyond the parties to the litigation—to third parties and society as a whole.

There was a time when judicial opinions were of little import. The conventional wisdom was that common law judges are bound not by the opinions issued in prior cases, but rather only by the outcome of those cases—the resolution of the dispute on the facts presented.[38] Because it was "the decision itself which must be followed and not the opinion,"[39] opinions were in some sense inconsequential.[40] Indeed, in the early years of the republic, courts often issued their opinions orally, rather than in writing.[41] They did not employ official reporters to transcribe, or even summarize, their opinions, and the unofficial reporters of decisions exercised significant discretion to exclude entire written or oral opinions, or portions thereof, from the published volumes.[42] And even those opinions that were published were not widely available to lawyers and judges.[43] What is more, in the days before Chief Justice John Marshall,

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37 For a discussion of cognitive dissonance in legal decisionmaking, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand L Rev 1499, 1505–06 (1998).

38 See, for example, Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of* Cooper v. Aaron, 58 U Det J Urb L 573, 576–79 (1981); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L J 161, 162 (1930) ("The reason which the judge gives for his decision is never the binding part of the precedent.").

39 Max Radin, *Case Law and Stare Decisis: Concerning* Präjudizienrecht in Amerika, 33 Colum L Rev 199, 210 (1933) (noting that opinions are not even legally required in most states).

40 See Peter M. Tiersma, *The Textualization of Precedent*, 82 Notre Dame L Rev 1187, 1190–1204 (2007).

41 See id at 1192, 1223.

42 See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 NYU L Rev 123, 128–29 (1999).

43 See id at 129–30.

appellate courts—including the Supreme Court—did not even issue majority opinions. Rather, they issued their opinions seriatim, with no single opinion purporting to speak authoritatively for the court.[44]

That time is long past. Although a number of legal theorists still consider opinions to be legally impotent,[45] and although in a number of technical ways the court's judgment, rather than its opinion, is the legally operative instrument of its decision,[46] today, it cannot be gainsaid that judicial opinions matter.[47] Cases are now generally understood to be more than simply a mechanism for resolving disputes between discrete parties. They also serve as a means of establishing rules that govern society.[48] Their role is to establish (or at least articulate) legal rules of general applicability,[49] and they fulfill that role through the mechanism of the written opinion.[50] As Frederick Schauer has explained, a judicial opinion is an effort to give a reason for a decision, and inherent in the act of giving reasons is articulating principles at a heightened level of generality. To issue an opinion is to give a reason for the decision that is necessarily broader and more general than the specific facts of the case, and "to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself."[51] Opinions thus "provide standards to guide lower courts in disposing of similar controversies that may arise in the future."[52]

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44 See Tiersma, 82 Notre Dame L Rev at 1230 (cited in note 40); Hartnett, 74 NYU L Rev at 133 (cited in note 42).

45 See, for example, Hartnett, 74 NYU L Rev at 126–36 (cited in note 42); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L Rev 43, 44 (1993) (arguing that for nonjudicial actors, judicial opinions are merely "legal essays that provide information useful in predicting what judgments courts will enter in future controversies"). See also Michael C. Dorf, *Dicta and Article III*, 142 U Pa L Rev 1997, 2036 n 143 (1994) (collecting authorities).

46 See Hartnett, 74 NYU L Rev at 126–28 (cited in note 42); Daniel John Meador and Jordana Simone Bernstein, *Appellate Courts in the United States* 75–76 (West 1994) ("The opinion of an appellate court is the explanation of what the court is deciding; it is not a legally operative instrument. The court's formal action is embodied in its 'judgment,' a separate document directing the disposition of the case.").

47 See Charles A. Sullivan, *On Vacation*, 43 Houston L Rev 1143, 1150 (2007):

> [I]t is increasingly common in this country to treat opinions as the operative act of the court. While judgments continue to concern the parties (both in resolving the immediate dispute and affecting future suits under doctrines of preclusion), the rest of us worry not about the judgment but about the law made in the opinion.

48 See Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv L Rev 4, 5–8 (1984) ("[T]oday cases are often just excuses for the creation or alteration of [societal] rules.").

49 This is especially true of the Supreme Court. See, for example, Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 Minn L Rev 1267, 1273 (2001) (quoting Chief Justice William Howard Taft) ("The real work the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it.").

50 See Sullivan, 43 Houston L Rev at 1161 (cited in note 47).

51 Frederick Schauer, *Giving Reasons*, 47 Stan L Rev 633, 641 (1994). Schauer elaborates: "When a court gives a reason, it typically either calls forth a preexisting rule that encompasses

Thus, today, "judges typically pay a great deal of attention to the words as well as the results of judicial decisions."[53] As a functional matter, judicial opinions themselves have the force of law.[54] The reasons that a court gives for its decision—the broader principles under which the court situates the facts and outcome of the case—are controlling on future courts. The issuing court itself must accord them substantial,[55] and in some cases complete,[56] deference under principles of horizontal stare decisis, and lower courts are effectively bound by them under principles of vertical stare decisis.[57] In addition, under the

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this case (as well as others) . . . or, if candidly acknowledging that it is making new law, it announces a new rule that includes cases other than the one at hand." Id at 640. See also James Boyd White, *What's an Opinion For?*, 62 U Chi L Rev 1363, 1366 (1995).

52 Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 Houston L Rev 1395, 1402 (2000). Karl Llewellyn elaborates: "In our law the opinion has . . . a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future." Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 26 (Little, Brown 1960).

53 Dorf, 142 U Pa L Rev at 2037 (cited in note 45). As Dorf notes, many of the most contentious disputes among Supreme Court justices take place in cases in which the justices agree on the result but differ sharply on the rationale for the decision. See id at 2037 n 145 (providing as an example *R.A.V. v City of St Paul*, 505 US 377 (1992)). The justices would not expend energy on those disputes if they understood only the result to make binding law. Similarly, the so-called *Marks* rule—that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'" *Marks v United States*, 430 US 188, 193 (1977) (citation omitted)—is premised on the notion that the reasons laid down in the controlling opinion have consequences for subsequent courts. See Maltz, 37 Houston L Rev at 1414 (cited in note 52) (arguing that the *Marks* decision demonstrates the Supreme Court's willingness to establish formal legal rules for both lower courts and nonjudicial actors).

54 See, for example, Erwin Chemerinsky, *Decision-makers: In Defense of Courts*, 71 Am Bankr L J 109, 111 (1997) ("Whether it is in the development of common law, in the interpretation of statutes, or in enforcing the Constitution, courts frequently issue opinions that have the force of law."). See also Tiersma, 82 Notre Dame L Rev at 1247 (cited in note 40) ("The language of opinions is increasingly being viewed as authoritative text, not all that different from statutes."); id:

> In the United States, . . . most lawyers have come to think of a precedent as something to be found in the text of a majority opinion. In fact, for many American lawyers the text of the majority opinion seems to have become synonymous with the notion of precedent. The outcome of the case is almost an afterthought, something that matters only to the parties.

55 See, for example, *County of Allegheny v ACLU*, 492 US 573, 668 (1989) (Kennedy concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

56 See, for example, 6th Cir R 206(c) ("Reported panel opinions are binding on subsequent panels.").

57 See, for example, *United States v Underwood*, 717 F2d 482, 486 (9th Cir 1983):

> The Supreme Court cannot limit its constitutional adjudication to the narrow facts before it in a particular case. In the decision of individual cases the Court must and regularly does establish guidelines to govern a variety of situations related to that presented in the immediate case. The system could not function if lower courts were free to disregard such guide-

Cooper v Aaron[58] principle of judicial supremacy, the opinions of the courts purport to be the "supreme law of the land," binding not only on other courts, but also on other branches of government.[59] And finally, the courts' opinions operate "as a rule of conduct as well, to be followed by individuals and entities rationally conducting their everyday affairs in ways they believe least likely to result in court-imposed penalties or most likely to result in court-bestowed gains."[60]

This creates a tension in our law.[61] Article III's case or controversy requirement precludes advisory opinions and requires courts to decide only concrete and narrow disputes between the litigants actually before the court.[62] Yet in deciding narrow disputes, judges issue opinions that are necessarily broader in scope than the specific facts of the case. And those opinions have the force of law, controlling the result in future cases, and requiring nonparties to alter their conduct to conform to the judges' pronouncements. In some sense, then, *every* opinion is an advisory opinion, insofar as it purports to, and functionally does, control other parties and other circumstances not actually before the court.[63]

It might be suggested that the holding-dicta distinction can ameliorate this concern. Perhaps statements in the opinion broader than necessary to the resolution of the case can be treated as nonbinding dicta. But, regardless of whether the notoriously elusive line between holding and dicta can sensibly be pinned down,[64] it is not likely to resolve the tension at hand. Even those propositions of law that are essential to the decision and would qualify as holdings under any reasonable definition of the term are of necessity broader than the narrow facts of the case and have the potential to dictate outcomes in

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lines whenever they did not precisely match the facts of the case in which the guidelines were announced.

See also Tiersma, 82 Notre Dame L Rev at 1233 (cited in note 40) ("[L]ower courts *must* follow the decisions of judges above them in the hierarchy. From the perspective of the lower court judges, the word of the higher courts—in particular, the written word—is law.").

58 358 US 1 (1958).

59 See id at 18 (holding that state officials must enforce the Supreme Court's earlier ruling in *Brown v Board of Education*, 347 US 483 (1954)).

60 Christopher J. Peters, *Adjudication as Representation*, 97 Colum L Rev 312, 361 (1997).

61 See, for example, Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 Colum L Rev 1, 4–5 (1985) (exploring different models of adjudication and the potential for tension when judges, who want to create forward-looking policy, are asked for a backward-looking resolution).

62 See *Flast v Cohen*, 392 US 83, 94–97 (1968).

63 See Schauer, 47 Stan L Rev at 655 (cited in note 51) ("[A] court giving reasons *is* deciding a class of cases not now before the court, and a class of cases for which the supposed crucible of experience is missing. Thus every time a court gives a reason it is, in effect, giving an advisory opinion.").

64 See Michael Abramowicz and Maxwell Stearns, *Defining Dicta*, 57 Stan L Rev 953, 1044–45 (2005).

other cases.[65] And in any event, many lower courts explicitly view themselves as bound by statements of dicta from higher courts.[66] In addition, private and nonjudicial governmental actors will generally alter their conduct as the result of dicta if for no other reason than that dicta strongly indicate how the courts are likely to rule on the issue in the future; in most circumstances, it would be foolish to ignore the considered dicta of a controlling court.[67]

The bottom line is thus that opinions issued in the narrow context of litigation have controlling effect well beyond the facts and the parties before the court. In Justice William Brennan's words, "While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large."[68] And yet, courts draft those opinions based typically on input only from the parties,[69] who may have a narrow, idiosyncratic view of the issue, or who may be affected by the resolution of the issue only in a peculiar way, or who simply may not be represented by particularly able counsel.

This presents interrelated fairness and functional concerns. First, there are due process implications. The Supreme Court has declared

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65 See Schauer, 47 Stan L Rev at 647–48 (cited in note 51).

66 See, for example, *McCoy v Massachusetts Institute of Technology*, 950 F2d 13, 19 (1st Cir 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings"); *Lewis v Sava*, 602 F Supp 571, 573 (SDNY 1984) ("This court need not decide whether the statement in *Chadha* is dicta. Even if it is, in the absence of any clear authority to the contrary, the court is obliged to follow it."). See Sullivan, 43 Houston L Rev at 1183–84 (cited in note 47); Maltz, 37 Houston L Rev at 1418–19 (cited in note 52) (arguing that "the lower courts have often treated dicta from the Supreme Court as controlling"); Dorf, 142 U Pa L Rev at 2026 (cited in note 45) (explaining that some lower courts follow the dicta of the Supreme Court); Frederick Schauer, *Opinions as Rules*, 53 U Chi L Rev 682, 683 (1986):

> Fine distinctions between holding and dicta are rarely relevant; indeed, the very question of what the Court held at all becomes increasingly less important as we follow an opinion down the hierarchy. For when we are in the pit of actual application, we will discover that it is not what the Supreme Court held that matters, but what it *said*. In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding.

See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1177 (1989):

> Let us not quibble about the theoretical scope of a "holding"; the modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.

67 See Dorf, 142 U Pa L Rev at 2027–28 (cited in note 45).

68 *Richmond Newspapers, Inc v Virginia*, 448 US 555, 595 (1980) (Brennan concurring). See also *Hart v Massanari*, 266 F3d 1155, 1176–77 (9th Cir 2001) ("Writing a precedential opinion . . . involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants.").

69 The exception is amicus briefs, which we discuss in Part II.A.1.b.

that, when government bodies, including courts, "adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that" they afford those individuals basic due process rights.[70] Thus, for instance, the Court has been careful in developing the law of preclusion to insist that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."[71] And in developing the law of class actions, the Court has been careful to insist not only that, in order to meet the requirements of due process, class members who are not named plaintiffs "must receive notice plus an opportunity to be heard and participate in the litigation," but also that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class" by "opting out" of the litigation, and finally that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."[72]

But, in a real sense, every appellate case is a de facto class action,[73] insofar as it determines the rights and responsibilities of many persons or entities that are not named parties in the case. And yet those absent "class members" frequently are not adequately represented by the named plaintiff, nor do they have a right to notice and the opportunity to be heard or to "opt out" of the litigation so as to avoid being bound by it. This raises serious concerns about the fairness and legitimacy of the judicial process. Of course, we do not mean to argue that this *violates* due process; it would be quite radical to insist that our system of precedent violates our Constitution. Our point is simply that many of the legitimate concerns that have animated the due process cases have broader implications than the courts generally acknowledge.[74]

Second, functionally speaking, determining the rights of the many on the basis of a lawsuit between the few can produce bad results.[75]

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70 *Hanna v Larche*, 363 US 420, 442 (1960).

71 *Parklane Hosiery Co v Shore*, 439 US 322, 327 n 7 (1979).

72 *Phillips Petroleum Co v Shutts*, 472 US 797, 812, 820 (1995).

73 See Miller, 58 U Det J Urb L at 574 (cited in note 38). Chief Justice Fred Vinson once admonished lawyers arguing before the Supreme Court to remember that they represent "not only [their] clients, but tremendously important principles upon which are based the plans, hopes and aspirations of a great many people throughout the country," and thus that they are, "in a sense, prosecuting or defending class actions." Id.

74 Consider Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U Colo L Rev 1011, 1011–12 (2003) (arguing that a rigid application of stare decisis can deny due process to litigants who are bound by a prior case in which they had no opportunity to participate).

75 Our adversarial system is, of course, premised on the assumption that the opposite is true. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U Chi L Rev 883, 883 (2006) ("Moreover, so it is said, making law in the context of deciding particular cases produces lawmaking superior to methods that ignore the importance of real litigants exemplifying the issues the law must resolve.").

For one thing, if one or both of the parties' lawyers happen not to be particularly competent or are venturing beyond their area of expertise, then they may not give the court the best information and assistance in resolving the issue. Moreover, excellent attorneys serving their clients well are often inclined to ignore or downplay information about the effects of a particular rule on other parties: "[T]he attorneys' incentive is to present information designed to help win the case; so he may try to hide information [about adverse consequences of a proposed rule] or may not see the relevance of information needed for lawmaking."[76] In addition, cases where one party is particularly sympathetic and the other particularly unsympathetic (the type of cases often pushed for appellate decision by strategically inclined interest groups[77]) can generate rules that do more harm than good in the general run of cases.[78] Establishing broad rules in narrow contexts can lead to rules that appear to make perfect sense as applied to the facts at bar, but are broad enough to cover other dissimilar situations in which they make much less sense. "Hard cases," as the maxim goes, "make bad law."[79]

Tax lawyers and scholars, for instance, are famously fond of "complaining that the [Supreme] Court 'hates tax cases' and generally bungles the tax cases it does hear."[80] The problem, according to the tax bar, is that the Court simply does not understand the intricacies of the tax code—or even the fundamental underlying principles of tax law and policy.[81] Accordingly, it often issues opinions that might appear

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76 Marvell, *Appellate Courts and Lawyers* at 27 (cited in note 20).

77 See Neal Devins and Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 Fla St U L Rev 323, 326–28 (2005).

78 See Schauer, 47 Stan L Rev at 656 (cited in note 51) (noting that appellate cases involving particular circumstances can generate rule-based opinions "whose array of results is, on balance, more detrimental than the good produced by the right result in the original case, such that it would have been better to reach the wrong result in the original case").

79 *Northern Securities Co v United States*, 193 US 197, 400–01 (1904) (Holmes dissenting) (noting that the facts of the instant case can exert "a kind of hydraulic pressure" which "appeals to the feelings and distorts the judgment"). See also Marvell, *Appellate Courts and Lawyers* at 23 (cited in note 20).

80 See Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 Tax L Rev 171, 173 (2001). See also Martin D. Ginsburg, *The Federal Courts Study Committee on Claims Court Tax Jurisdiction*, 40 Cath U L Rev 631, 634–35 (1991) ("[P]ractitioners cannot expect, and surely, as rational men and women, practitioners ought not to hope, that the Supreme Court will take too many tax cases. It is, history teaches, not a job the high court performs superbly."); Charles L.B. Lowndes, *Federal Taxation and the Supreme Court*, 1960 Sup Ct Rev 222, 222 ("It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court.").

81 See, for example, William A. Klein, *Tailor to the Emperor with No Clothes: The Supreme Court's Tax Rules for Deposits and Advance Payments*, 41 UCLA L Rev 1685, 1688 (1994):

> What is it about the legal system that leads judges at the highest level, with the finest support from the smartest and best-trained of clerks and the elite players in the adversary sys-

plausible, but may actually reflect a deep misunderstanding of tax concepts. And those opinions often have sweeping and chaos-inducing effects well beyond the narrow circumstances of the case at bar.[82] Of course, the Court counts on the adversarial system to ameliorate these problems.[83] But all too often, that system fails.[84] The attorneys for the parties do not give the Court adequate information and guidance, either because they have no incentive to address implications of a possible decision beyond its effects on their clients,[85] because they are themselves unaware of the complexities of the case,[86] or simply because they do not anticipate the peculiar resolution that the Court will eventually choose and thus cannot identify its problems ex ante.

In some respects, these functional concerns may be reduced in less technical areas of law, where judges may have sound understandings of the relevant issues, and where it seems less likely that there are "right" and "wrong" doctrinal answers. But even in nontechnical cases, judges often mistakenly place too much emphasis on the peculiar facts of the instant case and end up formulating a suboptimal general rule.[87] Psychological research has confirmed that this is a manifestation of a well-documented cognitive bias: people form their first impressions of an issue based on the context in which they first confront it (in the case of judges, from the facts of the case at bar), and they have an ingrained tendency to overestimate the extent to which those circumstances are representative of the issue.[88]

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tem, to demonstrate such ignorance of, or disdain for, sound tax principles—principles that, once recognized, should be noncontroversial?

82 See, for example, Stark, 54 Tax L Rev at 256 (cited in note 80) (arguing that "the Supreme Court's role in the tax field" is characterized by "the cost, chaos, and additional litigation that often follow its decisions"); Laura Saunders, *The Agents Run Riot*, Forbes 144 (Nov 9, 1992) ("[W]hat has the tax world up in arms is the absurdly broad language the justices used to rule in the government's favor. . . . [T]he upheaval has created much uncertainty.").

83 See Bernard Wolfman, *The Supreme Court in the* Lyon*'s Den: A Failure of Judicial Process*, 66 Cornell L Rev 1075, 1075 (1981):

> Hardly an enclave of tax experts, the Supreme Court relies for illumination and protection on the validity of a basic assumption about the adversary process: that strong and effective advocates bring the issues into focus and marshal the strongest arguments for each side, thus educating the Court and helping it reach the best result.

84 See id at 1076 (arguing that botched Supreme Court decisions "cast[] some doubt on the adversary system itself as a reliable vehicle for attaining justice in tax disputes and for producing sound and authoritative interpretations of the Internal Revenue Code").

85 See, for example, Klein, 41 UCLA L Rev at 1725 (cited at note 81) (noting that the parties in tax cases focus on arguments based on existing precedents that will win the case; they have little incentive to offer more comprehensive and critical analysis).

86 See Wolfman, 66 Cornell L Rev at 1091–92 (cited in note 83).

87 See generally Schauer, 73 U Chi L Rev 883 (cited in note 75). See also Devins and Meese, 32 Fla St L Rev at 328 (cited in note 77).

88 See Devins and Meese, 32 Fla St L Rev at 331–34 (cited in note 77).

In addition, less technical areas present their own concerns, especially when the issues are ideologically charged. In the academic literature on judicial decisionmaking, including both the political science literature on judicial politics[89] and the law reviews,[90] there is widespread agreement that the political affiliation of judges is at least partially predictive of case outcomes. This does not mean that the legal system is hocus pocus, but rather that, at least on close issues, liberals and conservatives will sometimes favor different approaches. And especially in the lower courts, the political identity of judges deciding any particular case may be attributed substantially to chance. This augments concerns about the effect of judicial opinions: not only may they be decided without the input of the broader public that they affect, but they may also be written to reflect the ideology of judges who will not necessarily be politically representative of that public.

C. Legitimacy

Thus far, we have identified three significant weaknesses in our judicial structure: the lack of meaningful participation by many who will be affected by judicial decisions; potential deficiencies in the flow of relevant and timely information to the court; and a lack of adequate constraint on idiosyncratic or ideological judicial decisionmaking. These concerns, which adversely affect both the parties and the general public, threaten not only the quality of judicial decisionmaking, but also the legitimacy of the judicial process.

The judiciary, as Alexander Hamilton famously noted, has the power of neither the purse nor the sword.[91] In the Supreme Court's words, "As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy."[92]

That legitimacy is a tenuous commodity, particularly for unelected judges.[93] Recent studies suggest that the public has serious

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89 For a comprehensive overview, see Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 Just Sys J 219, 243 (1999).

90 See, for example, Gregory C. Sisk and Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 Nw U L Rev 743, 778 (2005) ("[T]hat ideology is a factor in judging, at least sometimes for some categories of cases and at least to some degree, has long been asserted by scholars and is further verified in recent studies.").

91 Federalist 78 (Hamilton), in *The Federalist Papers* 521, 523 (Wesleyan 1961) (Jacob E. Cooke, ed).

92 *Planned Parenthood v Casey*, 505 US 833, 865 (1992).

93 See, for example, Maimon Schwarzchild, *Keeping It Private*, 44 San Diego L Rev 677, 687 (2007) (arguing that the "problem of judges as lawmakers in a democratic society is a familiar one. Judges are not readily answerable to the electorate. Hence, judicial lawmaking is in tension with democratic legitimacy, if not at odds with it.").

doubts about the legitimacy of the courts.[94] Of course, those doubts have many causes, and indeed the entire notion of judicial "legitimacy" embraces a number of distinct concepts.[95] But at least some of the public's misgivings can be traced to the problems identified above, particularly the lack of meaningful participation by those who are affected by the court's decision.

Psychological and sociological research has suggested that the public's acceptance of the legitimacy of the decisions of governmental bodies, including courts, depends upon its evaluation of the fairness of the decisionmaking process.[96] Perceptions of procedural fairness, in turn, are highly dependent on whether those who are affected by a governmental decision feel that they were given an adequate "voice" in the decisionmaking process.[97] Thus, the public's perception of the fairness and legitimacy of the legal process turns, in substantial part, on whether the public believes that those who will be affected have a fair opportunity to have their voices heard and their arguments considered before the court reaches a final decision.[98]

When a court decides a case on the basis of issues, authorities, or facts never raised by the parties, it loses legitimacy in the eyes of the parties and their attorneys, who feel that they have not had a fair opportunity to be heard.[99] Likewise, when it ignores seemingly persuasive arguments or authorities relied upon by the parties, it undermines its

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94 See, for example, Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DePaul L Rev 661, 692 (2007).

95 See Richard H. Fallon, Jr, *Legitimacy and the Constitution*, 118 Harv L Rev 1787, 1827–33 (2005).

96 See, for example, Tyler, 56 DePaul L Rev at 663 (cited in note 94).

97 See id at 664 (identifying factors that the public considers when evaluating the fairness of procedural justice). See also Tom R. Tyler, *Why People Obey the Law* 163 (Princeton 2006):

> One important element in feeling that procedures are fair is a belief on the part of those involved that they had an opportunity to take part in the decision-making process. This includes an opportunity to present their arguments, being listened to, and having their views considered by authorities. Those who feel that they have had a hand in the decision are typically much more accepting of its outcome, irrespective of what the outcome is.

98 See Tyler, 56 DePaul L Rev at 664–67, 673–75 (cited in note 94); Marvell, *Appellate Courts and Lawyers* at 25 (cited in note 20).

99 See Miller, 39 San Diego L Rev at 1303 (cited in note 28). See also Milani and Smith, 69 Tenn L Rev at 284 (cited in note 23):

> Sua sponte decisions work against such litigant and societal acceptance . . . because the losing party will feel that he has not been given a fair opportunity to present his case when he had neither notice of, nor the chance to present[] arguments on[,] the issue that the court found determinative.

Indeed, one study found that even *winning* lawyers feel that a court acts illegitimately when it decides in their favor based on an issue not raised by the parties. See Marvell, *Appellate Courts and Lawyers* at 125 (cited in note 20).

legitimacy in their eyes by silencing their voices.[100] And more generally, when a court sets a precedent that binds third parties who never had an opportunity to shape the governing rule, it risks losing legitimacy in the eyes of the broader public.[101]

The information and constraint problems that we have identified also contribute to doubts about judicial legitimacy. Studies have found that public perceptions of judicial legitimacy also depend in part on whether the public believes that the court "gets the kind of information it needs to make informed decisions,"[102] and it has long been understood that perceptions of governmental legitimacy turn in substantial part on whether the government body is perceived to act arbitrarily.[103] Accordingly, both the deficiency in information flow to the courts and the lack of adequate constraints on idiosyncratic or ideological judicial decisionmaking pose additional threats to the legitimacy of the judiciary.

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100 See Oldfather, 94 Georgetown L J at 172 (cited in note 35). Chad Oldfather adds that the failure to explain why the parties' arguments were rejected undermines "adjudicative legitimacy on a more global level" by failing to assure the public that future litigants will have their arguments taken seriously. Id.

101 Christopher Peters has argued that the active, participatory role of the parties in choosing the issues to raise and the authorities upon which to rely—and thus in shaping the court's decision—confers legitimacy on the courts with respect to the participating parties. See Peters, 97 Colum L Rev at 347 (cited in note 60). He further argues that the common law method, pursuant to which stare decisis binds subsequent litigants only to the extent that they are similarly situated to the parties in the precedential case, such that their interests were adequately represented by the original parties, confers legitimacy on the courts with respect to third parties. See id. As Peters himself recognizes, however, his theory of judicial legitimacy depends upon three necessary conditions: first, that the court's decision is actually the result of the choices of the parties as to which facts, issues, and authorities to emphasize; second, that a "precedential decision binds only those future parties who are similarly situated to the original litigants in every material way"; and third, that "the conduct of the parties in litigating the original precedential opinion meets a threshold standard of adequacy." Id at 375–76 (emphasis omitted). The failure to meet any or all of those conditions, explains Peters, undermines the judiciary's claim to legitimacy. See id. Likewise, he argues, courts undermine their legitimacy whenever they "attempt to articulate general rules that will govern future cases," id at 400, 402, 410, and whenever they issue broad decisions in constitutional cases "of tremendous import," id at 412. As the foregoing discussion illustrates, Peters's necessary conditions are often not met in the real world of contemporary judicial decisionmaking, and courts often engage in the very practices that he identifies as undercutting his defense of their legitimacy.

102 See Tyler, 56 DePaul L Rev at 680–82, 681 n 126 (cited in note 94).

103 See, for example, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State,* 78 NYU L Rev 461, 492–503 (2003) (arguing that concerns about government arbitrariness are central to the constitutional structure and to the legitimacy of administrative agencies); Scalia, 56 U Chi L Rev at 1178 (cited in note 66) (arguing that the same is true of the judiciary).

II. INADEQUATE EXISTING MECHANISMS AND THE NOTICE-AND-COMMENT ALTERNATIVE

In Part I, we identified concerns that judicial decisions might be made on the basis of imperfect information, for idiosyncratic or ideological reasons, or with affected parties having had insufficient opportunity to shape the rules that effectively bind them. A number of existing mechanisms help to answer these concerns, but, we argue in Part II.A, they are only partly successful. In Part II.B, we explain how a notice-and-comment regime might work and how this regime would be more responsive to the concerns identified above.

A. The Inadequacy of Existing Mechanisms

A number of existing mechanisms do give parties and nonparties opportunities to participate in litigation, helping to inform, constrain, and ultimately legitimate the judiciary. These mechanisms succeed to a substantial degree. Nonetheless, both alone and in combination, they are incomplete, and this incompleteness detracts from judicial efficacy and legitimacy. Part II.A considers a number of existing mechanisms, including litigant and third-party participation, aspects of judicial deliberation, and review of judgments, and explains why they are inadequate to the task of informing, constraining, and legitimating the judiciary. In Part II.B, we explain how notice and comment addresses these limitations.

1. Litigant and third-party participation.

a) Parties' briefs. The most significant mechanism for providing information to the court about the relevant facts and authorities, and about the best rule of decision, is the parties' briefs. The briefs are also the most important mechanism for giving the parties a voice in the decisionmaking process. Their informational and legitimacy-conferring value is thus powerful, but it is nonetheless limited.

The parties use their briefs to try to steer the court in a particular direction. But sometimes the court ends up going somewhere else altogether. In drafting its opinion, the court might seize upon facts, legal authorities, issues, or arguments that the parties did not anticipate.[104] When that occurs, the already-filed briefs are of no use in informing the court of reasons why those facts, authorities, or arguments are invalid or inapposite. At that point, the briefs: fail to provide the information necessary for the best resolution of the dispute; fail to provide legitimacy in the eyes of the parties, who were given no voice in

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[104] See Part I.A.

the actual grounds of the court's decision; and fail to constrain the court because it felt no obligation to confine itself to the issues and authorities relied upon by the parties.

In addition, the parties' briefs are often systematically deficient in providing the court with information necessary for its lawmaking function—its effort to articulate rules to govern third parties.[105] As noted above, skillful lawyers, who are concerned more with obtaining a successful resolution of the instant dispute than with establishing a sensible norm to govern future interactions among persons whom they do not represent, will often downplay information about the dubious effects of a proposed rule on other parties.[106]

To make matters worse, lawyers are not, of course, always particularly skillful. As Judge Irving Kaufman once remarked,

> In our adversary system, the quality of justice dispensed by the courts is ultimately dependent on the quality of advocacy provided by the bar. If lawyers fail as advocates for want of skill or dedication, then judges will surely fail as well, and the coin of justice will be debased beyond recognition.[107]

To hear judges tell it, the debasement is rampant. Studies have found that judges as a whole "are not at all pleased with the general run of briefs,"[108] and judges often find that the briefs do not provide adequate information to resolve the case.[109]

Worse still, the quality of lawyering is often uneven: one lawyer is more skilled than the other. As a result, the court is provided with lopsided information, which often leads to skewed results.[110] From the standpoint of the party with the better lawyers, that may not be so bad: the whole point of hiring the best and the brightest lawyers is to maximize the chance of winning.[111] But from the standpoint of third parties who are affected by the court's ruling, such imbalances are less tolerable. It

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105 See Marvell, *Appellate Courts and Lawyers* at 47 (cited in note 20) ("Lawyers in normal appeals often incompletely inform the courts; yet the cases are decided and law is made.").

106 See note 76 and accompanying text.

107 Irving Kaufman, *The Court Needs a Friend in Court*, 60 ABA J 175, 175 (1974). See also Marvell, *Appellate Courts and Lawyers* at 28 (cited in note 20) ("[A]ppellate judges often say that the quality of their work depends on greatly on the quality of counsel's work.").

108 Marvell, *Appellate Courts and Lawyers* at 29 (cited in note 20) (basing this conclusion on private interviews and published writings of appellate judges). The "great majority" of law clerks also find the parties' briefs "terrible, worthless," and "abhorrent." Id.

109 See note 22 and accompanying text.

110 See Marvell, *Appellate Courts and Lawyers* at 37–40 (cited in note 20) (concluding that there is a "strong possibility that the adversary system operates substantially in favor of lawyers who do a better job").

111 On the other hand, the fact that some parties can afford better, and more, lawyering than others can create imbalances that undermine the fairness of even the dispute resolution function of the courts. See, for example, David Luban, *Lawyers and Justice* 50–58 (Princeton 1988).

is difficult to see the virtue in, or legitimacy of, a legal system in which people are bound by a bad rule that was established only because some other party once hired an incompetent lawyer in a case in which those who are now bound had no involvement.

b) Amicus briefs. Of course, amicus briefs help to address the concerns of third parties, both in providing relevant information and in contributing to the legitimacy of a court's decision. A nonparty that fears that it might be adversely affected by a court's ruling is free to seek permission to participate as amicus curiae in order to provide relevant information to the court and have a meaningful say in the court's decision.

In many respects, amicus briefs have proven to be quite helpful in guiding and legitimating the court's lawmaking function. There has been no shortage of praise in the legal literature for the ability of amicus briefs to "inform the court of implications of a decision or to point out unintended consequences for people or groups not party to the suit."[112] Amicus briefs, it is said, provide relevant factual information not offered by the parties, bring to bear expertise that the parties and the courts do not have, address "points deemed too far-reaching for emphasis by a party intent on winning a particular case," and "explain the impact a potential holding might have on an industry or other group."[113] In short, they "give a voice to persons who are not parties but who may be affected by a decision,"[114] which helps to give broader legitimacy to the court's decision.[115] In addition, they "serve an important function in bringing social science evidence to the attention of the courts."[116]

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112 See Victor E. Flango, Donald C. Bross, and Sarah Corbally, *Amicus Curiae Briefs: The Court's Perspective*, 27 Just Sys J 180, 181 (2006). See also Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev Litig 669, 674 (2008) ("Insights offered by amici curiae tend to extend beyond the interests of the parties to the litigation . . . and are generally aimed at protecting the interests of individuals or organizations who are absent from the proceedings but whose interests are potentially jeopardized by the litigation."); James F. Spriggs II and Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 Polit Rsrch Q 365, 367 (1997):

> To fulfill their policy goals, the Court's members require information about the potential consequences of alternative decisions. Since litigants are more likely to be narrowly focused on the case outcome, the broader policy ramifications of the decision may not be discussed in their briefs. In contrast, amicus briefs may provide this information and help the Court's members understand the policy implications of their rulings.

(citation omitted).

113 Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J App Prac & Process 279, 281 (1999).

114 Id.

115 See Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla St U L Rev 315, 338–47 (2008); Peters, 97 Colum L Rev at 417–18 (cited in note 60).

116 Garcia, 35 Fla St U L Rev at 340 (cited in note 115).

On the whole, judges find amicus briefs helpful.[117] And one can surely point to examples of cases in which the additional information and perspective offered by amici appear to have affected a court's opinion.[118] For instance, the Supreme Court's decision in *Grutter v Bollinger*,[119] upholding the constitutionality of the University of Michigan Law School's affirmative action admissions program, appears to have been influenced by an amicus brief filed on behalf of retired military generals who argued that an adverse decision for the University of Michigan would put an end to affirmative action in higher education generally, which would undermine diversity in ROTC programs and the military academies, which in turn would exacerbate racial tensions between officers and enlisted ranks, which would ultimately threaten national security.[120] At oral argument, the justices posed nineteen questions about the generals' brief, and the Court ultimately cited and directly quoted at length from the brief repeatedly in its opinion.[121]

But it would be a mistake to read too much into these examples. In the general mine of cases, there are serious limits to the informational value of amicus briefs, particularly their ability to inform the court of the adverse consequences of its preferred course of action. Some empirical studies have found that "the amount of new information in . . . amicus briefs is quite limited,"[122] and others have found that the new information contained in amicus briefs generally does not

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117 See US S Ct R 37.1 ("An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court."); Simard, 27 Rev Litig at 690–93 (cited in note 112) (presenting the results of a survey of federal judges that found broad agreement that amicus briefs are useful in offering legal arguments that are missing from the briefs and in focusing the court's attention on the potential impact of the decision on nonparties); Flango, Bross, and Corbally, 27 Just Sys J at 187 (cited in note 112) (presenting the results of a survey of state high court judges and clerks that found that 95 percent of respondents believed amicus briefs to be useful in informing the court of policy considerations, and 75 percent of the respondents believed amicus briefs to be a useful source of social science research and data); *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, NY Times A17 (Feb 17, 1998) (quoting Justice Stephen Breyer) ("[Amicus] briefs play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.").

118 See, for example, *Brown v Board of Education*, 347 US 483, 494 n 11 (1954) (citing psychological studies on the effects of segregation on children that were called to the attention of the Court in the Brief of Amici Curiae ACLU, et al, *Brown v Board of Education*, *17–18 (US filed Nov 28, 1955)). See also Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath U L Rev 603, 603 (1984) ("Amicus Briefs have shaped judicial decisions in many more cases than is commonly realized.").

119 539 US 306 (2003).

120 See generally Consolidated Brief of Amici Curiae Lt Gen Julius W. Becton, Jr, et al, in Support of Respondents, *Grutter v Bollinger*, No 02-241 (US filed Feb 19, 2003).

121 See Richard J. Lazarus, *Advocacy Matters before and within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Georgetown L J 1487, 1544 (2008).

122 Marvell, *Appellate Courts and Lawyers* at 80 (cited in note 20).

tend to drive the court's decision or shape its opinion.[123] The fact that the public has a chance to participate as amici curiae is of limited value because amicus briefs—just like the parties' briefs—must be filed in advance of the court's drafting its opinion. Because the court may resolve the case in unanticipated ways, or employ unanticipated language, it can catch affected third parties by surprise. One often cannot know how (or even if) one will be affected by a judicial opinion until it is published—at which point, under our current system, it is too late to object.

For that same reason, the ability of amicus briefs to legitimate the court in the eyes of third parties is limited: nonparties are often affected by opinions in cases in which they had no impetus to participate, and even those nonparties who do participate as amici are often unable to anticipate and preemptively respond to the actual language or rationale employed by the court. That lack of legitimacy is compounded by the fact that, even when a case can be identified ex ante as potentially undermining third party interests, the ability to participate is not shared equally by all interests in society. Because it is costly to identify cases in which a court decision *might possibly* affect one's interests, and then to file amicus briefs preemptively in all of those cases, interests that are neither well-funded nor well-organized are much less likely to be able to have their voices heard through amicus participation.[124]

c) Joinder, intervention, and class actions. If amicus participation is inadequate, those who might be affected could seek a greater voice and an opportunity to participate through more direct participation or representation: either by joining or intervening in the case or through representation as absent class members in a class action.[125] But those mechanisms are generally not able to protect the interests of most third parties.

The Federal Rules of Civil Procedure[126] require a party to be joined in an action whenever "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in

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123 See Spriggs and Wahlbeck, 50 Polit Rsrch Q at 382–83 (cited in note 112).

124 See Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U Pa L Rev 743, 746–47 (2000) (noting that "well-organized interest groups will be more likely to file amicus briefs than will diffuse and poorly organized interests," and that "over-representation of well-organized interest groups through amicus filings may have an influence in the outcomes reached by courts").

125 See Peters, 97 Colum L Rev at 418 & n 372 (cited in note 60) (suggesting that liberal use of intervention and joinder can increase judicial legitimacy).

126 State procedural rules often closely resemble the federal rules, see generally John B. Oakley and Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash L Rev 1367 (1986), and even when a state's rules appear to be nominally different, in practice state courts generally employ the same basic procedural rules as the federal courts, see Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-state Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 Vill L Rev 311, 319 (2001).

the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest," so long as joinder is feasible.[127] Read literally, that might suggest mandatory joinder of any party who stands to be bound by any precedent that might be set in the instant litigation. But, of course, the rule could not be, and has never been, read in that manner. It applies, instead, only to circumstances in which the party has an interest in the actual factual dispute, rather than merely the underlying legal principles, at issue in the case.[128]

The Federal Rules further provide that a party has a right to intervene in an action if the disposition of the action "may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."[129] But that rule applies only if the party "claims an interest relating to the property or transaction that is the subject of the action."[130] The Rules do allow permissive intervention for any party who "has a claim or defense that shares with the main action a common question of law."[131] That rule is more lenient and "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation."[132] Commentators have thus suggested that intervention may be appropriate where the moving party "wishe[s] to avoid the creation of a precedent that might someday come back to haunt him."[133] But intervention is feasible only for a small number of parties, and it is appropriate only when the moving party has an actual, live, justiciable claim or defense against a party already involved in the case.[134] Most third parties who stand to be affected by the creation of a precedent do not fall into this narrow category, and thus cannot take advantage of intervention.

Similar problems limit the effectiveness of the class action as a means of protecting the interests of parties not actually before the court. The class action device is available to protect the interests of large numbers of parties when "there are questions of law . . . common

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127 FRCP 19(a).

128 See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 7 *Federal Practice and Procedure* § 1604 (West 3d ed 2001). The Rules also allow permissive joinder of plaintiffs or defendants if "any question of law" common to all plaintiffs or defendants will arise in the action, but only if the claims all "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences." FCRP 20(a).

129 FRCP 24(a).

130 Id.

131 FRCP 24(b).

132 See *SEC v United States Realty & Improvement Co*, 310 US 434, 459 (1940) (discussing the ability of a party to intervene in bankruptcy proceedings).

133 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 7C *Federal Practice and Procedure* § 1911 (West 3d ed 2007).

134 See id at §§ 1911, 1914.

to the class."[135] But a class action can be employed only when "the claims or defenses of the representative parties are typical of the claims or defenses of the class" and "the representative parties will fairly and adequately protect the interests of the class."[136] As such, the concerns addressed above—that often the claims of the parties to the case that sets the precedent are very different from the claims of those who will be bound by it, and that the parties often do not adequately represent the interests of everyone who will be bound by the rule—are not ameliorated by the class action. Indeed, in most cases, the vast majority of persons who will be affected by the precedent set in the litigation do not currently have justiciable claims against the actual parties in the case, and therefore could not possibly become members of the class.

d) Oral argument. Another source of information and potential participatory legitimacy for a court is oral argument.[137] In some respects, oral argument is an important supplement to briefing. Often, even after reading the briefs, judges "still face some degree of uncertainty regarding what are generally complex legal and factual issues."[138] They still "need an understanding of the legal status quo, the policy choices available to them, [and] the likely effect that different legal rulings will have on the litigants and other similarly situated parties."[139] Oral argument provides the judges with an opportunity to fill in these gaps in their understanding of the case.[140] And just as importantly, it provides the parties with an opportunity to become aware of, and to address, the judges' concerns. While the parties file their *briefs* in ignorance of the judges' actual thinking about the issues in the case, at oral argument, the judges sometimes inform the lawyers of their initial impression of the case. This gives the lawyers an opportunity to challenge the court's understanding and to provide relevant factual or legal authority that contradicts or alters it.[141] Not surprisingly, then, both

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135 FRCP 23(a). See also Thomas R. Grande, *Class Actions in State Courts—A Tool for the Trial Advocate*, 23 Am J Trial Advoc 491, 495 n 17 (2000) ("[T]he vast majority of state class action rules are modeled after Federal Rules of Civil Procedure 23.").

136 FRCP 23(a).

137 See Timothy R. Johnson, James F. Spriggs, II, and Paul J. Wahlbeck, *Oral Advocacy before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 Wash U L Rev 457, 459 n 8 (2007) (noting that "even though oral arguments may not control the outcome of a case in terms of changing votes, they may provide key information to the Justices").

138 Id at 462.

139 Id.

140 See William H. Rehnquist, *The Supreme Court* 245 (Knopf 2d ed 2001) ("One can do his level best to digest from the briefs . . . what he believes necessary to decide the case, and still find himself falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings.").

141 See, for example, Johnson, Spriggs, and Wahlbeck, 85 Wash U L Rev at 463 (cited in note 137) ("While the briefs may address almost every legal intricacy, counsel cannot always know what information the Justices want. It is only during oral arguments, then, that Justices can dis-

anecdotal accounts and empirical data show that oral argument can impact judicial opinions.[142]

Still, as an informational resource and a legitimating device, oral argument leaves much to be desired. To begin with, third parties generally cannot participate in oral argument, and thus have no ability to inform the court that, if it continues in the direction that it appears to be leaning, its decision might have far-reaching, undesirable, and perhaps unintended consequences. That is to say, oral argument does nothing to address the drawbacks associated with relying upon the parties to provide the court with knowledge of how its opinion could affect others—and it does nothing to address the concern that third parties have no say in the shaping of the rules that will bind them.

What is more, oral argument is not even a good mechanism for the parties themselves, acting in their own interests, to steer a misguided court in the right direction. The lawyers begin oral argument in the dark about the judges' views of the case.[143] Because they often did not anticipate the judges' questions, and because they are expected to come up with answers immediately, off the top of their heads, they generally do not offer the best responses.[144] Justice Robert Jackson—one of history's great appellate advocates prior to taking the bench—once remarked that, despite his herculean preparation, he invariably found his

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cuss with counsel those points that pique their interests."); Charles A. Rothfeld, *Avoiding Missteps in the Supreme Court: A Guide to Resources for Counsel*, 7 J App Prac & Process 249, 252 (2005) (quoting Justice Scalia) ("I use [oral argument] to give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'"); William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L Rev 1015, 1021 (1984) (noting that, at oral argument, "[c]ounsel can play a significant role in responding to the concerns of the judges, concerns that counsel won't always be able to anticipate in preparing the briefs").

142 See, for example, Johnson, Spriggs, and Wahlbeck, 85 Wash U L Rev at 499 (cited in note 137) (concluding on the basis of an empirical examination of Justice Blackmun's notes from oral argument that "oral advocacy has a generally large and robust effect on the way in which Supreme Court Justices vote"); Robert L. Stern, et al, *Supreme Court Practice* 671 (BNA 8th ed 2002) (quoting Justice Brennan) ("Often my idea of how a case shapes up is changed by oral argument."); David O'Brien, *Storm Center: The Supreme Court in American Politics* 282 (WW Norton 4th ed 1996) (quoting Justice Scalia) ("Things . . . can be put in perspective during oral argument in a way that they can't be in a written brief."); Robert H. Jackson, *Advocacy before the Supreme Court: Suggestions for Effective Case Presentation*, 37 ABA J 801, 801 (1951) ("I think the Justices would answer unanimously that . . . they rely heavily on oral presentations. . . . [Oral argument] is of the highest, and often of controlling, importance.").

143 See Hummels, 46 Ariz L Rev at 318 (cited in note 10) (noting that "advocates commonly enter argument at least partly guessing which issues the court finds most important, which cases the most relevant, and which arguments the most forceful"); Marvell, *Appellate Courts and Lawyers* at 78 (cited in note 20).

144 See Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L Rev 1, 24 (1986) ("Realistically, one should not expect the average attorney to respond effectively to unanticipated questions, relying solely on memory, without an opportunity to reflect on either the question or the response.").

oral arguments to be "disjointed" and "disappointing," and he only came up with the best answers to the judges' questions after the argument had ended.[145] For this reason, oral argument does not give the parties a particularly effective opportunity to address the concerns of the judges, and thus it often fails to provide the judges with the information that they need.[146] As Robert Martineau has written, "[A] short oral argument is hardly the most appropriate time to obtain a thoughtful response from counsel about a novel idea. Attorneys will be far more likely to give a reasoned response if given the opportunity to reflect on the idea, review the record, and do additional research."[147]

Finally, even the best attorneys cannot anticipate at oral argument exactly how the court's opinion will eventually be written. As such, they cannot possibly inform the court of all of the unintended or undesirable consequences of its not-yet-crafted words.[148]

2. Judicial deliberation and work product.

a) Law clerks' and judges' research. Another source of information in our legal system is the research performed by judges, their law clerks, and staff attorneys. Judges and clerks can and often do uncover both factual and legal authorities that the parties and amici overlooked.[149] But in the face of ballooning dockets and crushing workloads, judges and their staffs simply do not have the time to do as much thorough research of the facts and the law as they might ideally prefer.[150] And, as the Supreme Court's *Kennedy v Louisiana* decision discussed at the outset of this Article reminds us, even the best judges with the best law clerks can sometimes fail to uncover important information.[151] What is more, to the extent that judges rely on their own research in lieu of the input of the parties, they exacerbate the legitimacy concerns that result when affected parties feel that their voices are not being heard in the decisionmaking process.

b) Opinions. A judicial opinion is not, of course, a source of information for the court; it is the work product that results when the court processes the information that it has received. But publishing an opinion can help ameliorate legitimacy concerns. The opinion allows

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145 Jackson, 37 ABA J at 803 (cited in note 142).

146 See Marvell, *Appellate Courts and Lawyers* at 75 (cited in note 20). See also id at 29, 33–34 (noting that judges are generally disappointed in the quality of oral advocacy in their courtrooms).

147 Martineau, 72 Iowa L Rev at 16 (cited in note 144).

148 See Stern, et al, *Supreme Court Practice* at 729 (cited in note 142) (noting that some opinions will have "unanticipated consequences," but "obviously, counsel cannot readily identify such cases in advance of the Court's action").

149 See Marvell, *Appellate Courts and Lawyers* at 88, 94–95, 133–36 (cited in note 20).

150 See id at 19–20.

151 See Introduction. See also notes 80–86 and accompanying text (discussing tax law).

the judges to explain their reasoning. If the parties see from the opinion that their arguments have been taken seriously, then they may be more likely to accept the result, even if it is an unfavorable one.[152]

An opinion also advances the goal of judicial constraint. It does so by limiting idiosyncratic or ideological decisionmaking in two ways. First, the mere act of drafting an opinion—crafting a coherent and believable explanation of how a decision flows from the relevant facts and legal authorities—can sometimes ensure that the decision accords with the governing law. Often, a judge will discover an error in reasoning when she realizes that the opinion "just won't write" as she had conceived it.[153] In this regard, the act of writing the opinion can help to overcome her cognitive biases[154] by forcing sufficient cognitive attention to counterarguments that she might otherwise have dismissed too quickly. Writing an opinion can prompt her to change the disposition of the case from her instinctively preferred result to one that is (or at least that she now believes to be) compelled by the law.

Second, the opinion can constrain the judge because she knows that others might dissect its reasoning. Professional pride may preclude her from deviating too far from the controlling authorities and the norms of legal decisionmaking. As Judge Patricia Wald once put it:

> [The opinion writing] process, more than the vote at conference or the courtroom dialogue, puts the writer on the line, reminds her with each tap of the key that she will be held responsible for the logic and persuasiveness of the reasoning and its implications for the larger body of circuit or national law.[155]

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152 Consider Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 Harv L Rev 410, 412 (1978) (noting that the norm that an "adjudicator should *explain* his decision in a manner that provides a substantive reply to what the parties have to say . . . help[s] to satisfy the loser that the decision is not arbitrary" and "giv[es] assurance that the adjudicator has in fact attended" to "what the parties have to say").

153 See Oldfather, 94 Georgetown L J at 178 (cited in note 35) ("[M]any judges have observed that a decision that once seemed perfectly reasonable can often turn out to be considerably less so following an attempt to write a justification."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U Chi L Rev 1371, 1374–75 (1995):

> Even when judges agree on a proposed result after reading briefs and hearing argument, the true test comes when the writing judge reasons it out on paper (or on computer). . . . It is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because "it just won't write."

See also Robert J. Traynor, *Some Questions on the Work of State Appellate Courts*, 24 U Chi L Rev 211, 218 (1957).

154 See note 37 and accompanying text.

155 Wald, 62 U Chi L Rev at 1375 (cited in note 153). See also David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv L Rev 731, 737 (1987) ("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."); Llewellyn, *The Common Law Tradition* at 26 (cited in note 52) (noting that a judicial opinion "serves as a steadying factor which

In this regard, opinion writing can reduce the risk "that there is a reason for the result, albeit a legally, socially or morally impermissible one."[156] A court is less likely, for example, to choose a path inconsistent with precedent when it has the obligation to explain its decision.

For these reasons, the mechanism of the written opinion presumably reduces the risk that judges will not notice an argument, will conveniently neglect to mention it, will gloss over it, or will reject it on spurious grounds. But the opinion does not eliminate those risks. The persistence of ideological decisionmaking in our judiciary,[157] despite the practice of opinion writing, shows that drafting opinions can do only so much to constrain judges. The law is often sufficiently unclear that the opinion "will write" either way, such that the judge fails to uncover potential pitfalls in reasoning in the course of drafting it. In law, it is often debatable what counts as a sufficiently rigorous argument, and cognitive consistency bias may lead the judge to offer simplistic answers to complex arguments in an opinion without anticipating the efficacy of future criticism.

For these same reasons, the opinion only incompletely remedies deficiencies in the court's legitimacy. When the parties are left with the impression that serious arguments were not taken seriously, they question the meaningfulness of their participation and thus the legitimacy of the decision.[158] That problem is more severe still in the many cases in which no opinion is written, or in which an opinion does not even purport to provide a fully explanatory legal analysis.[159] And when full

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aids reckonability," because "[i]f I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good").

156 Schauer, 47 Stan L Rev at 652 (cited in note 51).

157 See notes 89–90 and accompanying text.

158 See Part I.C.

159 See, for example, David A. Hoffman, Alan J. Izenman, and Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 Wash U L Rev 681, 682 (2007) (reporting the results of an empirical study of district court opinions that found that "only 3% of all orders, and only 17% of orders applying facts to law, are fully reasoned"). A court, for example, will often issue a summary opinion that does not fully explain why the arguments offered by a party have been rejected. See Caleb E. Mason, *An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L Rev 643, 644 n 2 (2008) (noting that over 80 percent of all opinions issued by the federal courts of appeals are unpublished); W. Warren H. Binford, et al, *Seeking Best Practices among Intermediate Courts of Appeal: A Nascent Journey*, 9 J App Prac & Process 37, 84 (2007) (noting similar percentages for state appellate courts); Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J App Prac & Process 141, 173 (2006) ("[W]hen an opinion is designated as 'not for publication,' the panel is permitted—and indeed often encouraged—to provide only a skeletal statement of the facts (perhaps not even that) and a conclusory statement of the rationale."); Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 Fla L Rev 743, 773 (2006) ("Not infrequently, the courts dispense with opinions altogether, simply issuing an order indicating that the lower court disposition is affirmed."); Arthur D. Hellman, *The View*

opinions *are* written, they have binding effects on third parties who had no say in shaping them, thus threatening the court's legitimacy in the eyes of the broader public.[160]

c) Multi-judge panels. Another possible source of judicial constraint is the use of multi-judge panels. Using *Chevron*[161] cases as their dataset, Frank Cross and Emerson Tiller have found that ideologically unified appellate panels (consisting of three Democratic-appointed or three Republican-appointed judges) are considerably more ideological than ideologically split panels.[162] Cross and Tiller theorize that the minority party judge may serve a "whisteblower" function—calling the majority judges out when they allow ideology to influence their legal analysis. In the *Chevron* context, majority judges might like to ignore the *Chevron* instruction to defer to reasonable agency interpretations, but the presence of a potentially whistleblowing minority party judge may deter this. More generally, panel diversity may moderate ideological decisionmaking in tension with legal requirements. Subsequent research has shown that both a judge's own political affiliation and the political affiliation of other judges on the appellate panel are significant predictors of that judge's vote (not just the decision of the panel as a whole).[163] Cognitive consistency bias can be overcome if another panel judge can point out the flaws in a judge's tentative analysis.

Recognizing the possibility that whistleblowing may usefully help thwart ideological outcomes, Cross and Tiller suggest that panels be selected in a way that ensures that there are never three Republican or three Democratic judges on a particular panel.[164] That proposal would increase the chance that judges will face exposure from another judge with a different ideological perspective if they take a position with weak support. But it is not the current practice. Trial courts typically consist of only one judge, and appellate panels are assigned

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from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice, 8 J App Prac & Process 141, 173 (2006) ("[W]hen an opinion is designated as 'not for publication,' the panel is permitted—and indeed often encouraged—to provide only a skeletal statement of the facts (perhaps not even that) and a conclusory statement of the rationale.").

160 See Part I.B–C.

161 *Chevron, U.S.A., Inc v Natural Resources Defense Council*, 467 US 837 (1984).

162 See Frank B. Cross and Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L J 2155, 2175–76 (1998).

163 See, for example, Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va L Rev 301, 305 (2004); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va L Rev 1717, 1718 (1997) (exploring the partisan behavior of the DC Circuit in environmental cases and concluding that "a judge's vote (not just the panel outcome) is greatly affected by the identity of the other judges sitting on the panel; in fact, the party affiliation of the other judges on the panel has a greater bearing on a judge's vote than his or her own affiliation").

164 See Emerson H. Tiller and Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 Colum L Rev 215, 234 (1999).

without regard to ideology.[165] In addition, political party is only a very rough proxy for views in any particular case. Sometimes, even in a politically mixed panel, all three judges might favor a particular outcome, and there may be no judge on the panel who can point out and threaten to expose weaknesses in the argument for that approach.

3. Further review.

a) Rehearing. The only generally available mechanism in our current system for informing a court of problems with its written opinion is the petition for rehearing. If the parties find an error in fact or law, or perceive a problem with the phrasing of the opinion, or feel that their arguments have not been adequately rebuffed, they may petition the court for rehearing. Commentators have noted that rehearing might be appropriate when, for instance, the parties discover an unintended consequence of the court's opinion.[166] And it is not entirely unheard of for courts to issue amended opinions at least partially ameliorating the parties' concerns.[167]

But the rehearing mechanism provides no opportunity for affected third parties to object; only the litigating parties can petition for rehearing. And in any event, cases in which rehearing makes a difference are few and far between. In our legal system, rehearing simply is not granted except in truly extraordinary circumstances.[168] As Samuel

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165 See id at 216; Tracey E. George and Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 Vand L Rev 1, 32 (2008) ("[M]ost courts have instituted procedures that result in roughly random assignment of judges to cases. And some courts have promulgated local rules mandating random assignment with the usual constraints dictated by the location of oral arguments and availability of judges.").

166 See Stern, et al, *Supreme Court Practice* at 729 (cited in note 142) (noting that rehearing might be appropriate "where the unanticipated consequences of the Court's opinion are clearly explained only in the rehearing petition"); Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 16AA *Federal Practice and Procedure* § 3986.1 (West 4th ed 2008) ("Matters of genuine public importance might also qualify [for rehearing], particularly if the judgment is calculated to have a direct effect on nonparties.").

167 See, for example, *United States v Weitzenhoff*, 35 F3d 1275, 1279–81 (1994) (amending the opinion but denying the petition for rehearing). See also Stern, et al, *Supreme Court Practice* at 729–30 (cited in note 142) (noting that the Supreme Court will sometimes "make minor changes in its prior opinion to correct certain inaccuracies or omissions brought to light by a petition for rehearing," or will grant a motion to clarify or modify the opinion if the petitioning party is not seeking a change in the judgment); William F. Rylaarsdam, *The Crisis of Volume in California's Appellate Courts: A Reaction to* Justice in the Balance 2020 *and a Proposal to Reduce the Number of Nonmeritorious Appeals*, 32 Loyola LA L Rev 63, 86 n 114 (1998) ("After the court files the opinion, the losing party will frequently file a petition for rehearing. Such petitions are rarely granted but, based on the petition, amendments to the opinion may be prepared.").

168 See, for example, Stern, et al, *Supreme Court Practice* at 727 (cited in note 142) (noting that a rehearing petition in the Supreme Court following a published opinion on the merits has "hardly any chance of success"); Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 SC L Rev 567, 570 (1999) ("Writing a rehearing request may be good therapy for the losing lawyer, but such pleas are rarely granted. On rehearing petitions, responsible counsel's best advice to the

Esteicher and John Sexton have noted, "The simple truth is that, at present, if [an appellate] panel makes an error, there is no realistic chance that the error will be corrected by a motion for rehearing."[169]

It appears that judges become psychologically invested in their final opinions and are extremely resistant to making changes. To amend an opinion after it has become final—after the judges have fully committed to it in public without reservation—may appear to be a little too close to a public confession of ignorance or sloppiness for the judges' comfort.[170] This is likely an example of cognitive consistency bias. As Stephanie Stern explains, "Research shows that people do not change their minds as readily or as frequently as we would predict based on a 'rational actor' model of information processing. Rather, people often maintain their attitudes and beliefs in the face of explicit disconfirming evidence."[171]

This phenomenon is exacerbated when, as with judicial opinions, prior commitments are made public.[172] Once they have gone on record with their views, judges appear to convince themselves that their initial opinion was correct, and therefore rationalize away any contrary

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client, much more often than not, will be: save the money."); Marvell, *Appellate Courts and Lawyers* at 84 (cited in note 20) (noting that rehearing petitions in appellate courts are "very rarely successful"); Robert A. Leflar, *Internal Operating Procedures of Appellate Courts* 60 (American Bar Foundation 1976) ("In many appellate courts, a motion for rehearing has come to be regarded as little more than a formality designed to procure delay in enforcement of the judgment.").

169 Samuel Estreicher and John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 NYU L Rev 681, 810 n 582 (1984).

170 For courts that sit in panels, like the federal courts of appeals, it is possible that this concern could be ameliorated through rehearing en banc. Even when the original judges are unwilling to admit their mistakes, a petition for rehearing en banc allows the other judges on the court—who have no psychological investment in the erroneous opinion—to correct the error. But whatever its promise in theory, in practice, rehearing en banc, like panel rehearing, is extremely rare. See, for example, Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U Pitt L Rev 805, 831–32 (1993) (noting that, in 1991, rehearing en banc was granted in only 0.392 percent of cases); Estreicher and Sexton, 59 NYU L Rev at 810 n 582 (cited in note 169) (noting that there is "no realistic chance" of correcting errors through rehearing en banc). See also *Weitzenhoff*, 35 F3d at 1293 (Kleinfeld dissenting from denial of rehearing en banc) (noting that most appellate judges vote to deny rehearing en banc even when they believe that the panel decision was mistaken). Judges view excessive use of the en banc procedure as a threat to the collegiality of the entire court. See, for example, Douglas H. Ginsburg and Donald Falk, *The Court En Banc: 1981–1990*, 59 Geo Wash L Rev 1008, 1021 (1991).

171 Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U Pitt L Rev 589, 591 (2002). See also Devins and Meese, Fla St U L Rev at 332–33 (cited in note 77) (noting that psychological "studies show that individuals will 'anchor' their views of an issue or situation on their initial assessment, even if that assessment is based upon less-than-perfect information," and "once anchored, views or opinions are difficult to change, even if substantial information is adduced that tends to undermine the initial impression").

172 See Stern, 63 U Pitt L Rev at 616–20 (cited in note 171) (noting that consistency is viewed positively by society, which makes it hard to change one's mind after a commitment is made public).

evidence or argument raised in a petition for rehearing. Such evidence or argument might actually have led them to a different result (or at least a different rationale) had they been aware of it and forced to grapple with it at a time when their minds were still open and they had not yet made a final public commitment to a particular outcome.[173]

For example, in *Kennedy v Louisiana*, discussed at the outset of this Article,[174] the Supreme Court denied a petition for rehearing, despite the substantial omission in its opinion.[175] The justices justified that denial by claiming that they would have reached the same decision in their original opinion had they been aware of the recent military law provision.[176] Perhaps they would have, but neither we nor they can be certain of that.[177] After all, the Court was narrowly divided 5-4, and the majority placed substantial weight on its assertion that only six jurisdictions allowed the death penalty for child rape and that there was no significant legislative trend in the direction of wider acceptance.[178]

The fact that rehearing is virtually never granted also limits its ability to serve as a legitimating and constraining mechanism. Since rehearing petitions are generally understood to be largely pointless and futile,[179] parties do not see them as affording a genuine opportunity to raise concerns with the court's opinion and to have their voices heard and respected. And, of course, a correcting mechanism that is virtually never used cannot perform a significant constraining function.

b) Appeals. Because issuing courts generally will not correct their own erroneous or ill-advised opinions, our legal system forces us to look to the appellate process to rectify mistakes. If the appellate process did so in a reliable way, then it could mitigate our informational, legitimacy, *and* constraint concerns: the parties (and the public through amicus briefs) could provide the reviewing court with information that is necessary to correct mistakes; this opportunity could give parties and the public a genuine voice in the shaping of the final decision; and judges who knew that errors would be corrected on appeal would have a powerful incentive to think carefully about every

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173 See Hummels, 46 Ariz L Rev at 332 (cited in note 10) (noting that a survey of appellate judges and attorneys indicated that judges are more receptive to suggestions for changes in an opinion before a final version of the opinion has been issued).

174 See Introduction.

175 See generally *Kennedy v Louisiana*, 129 S Ct 1 (2008) (amending the opinion but denying the rehearing petition).

176 See id.

177 The Washington Post editorialized that the Court's explanation of why the military law provision would not have made any difference was "unconvincing and leave[s]—deservedly or not—the impression that a majority of the court refused to allow new facts to alter their positions." Editorial, *Case Closed*, Wash Post A22 (Oct 2, 2008).

178 See *Kennedy*, 128 S Ct at 2656–57.

179 See note 168.

argument and to avoid indefensible reasoning (and even if they failed to do so, a reviewing court could catch the error, constraining by force rather than incentive). But it would be a mistake to put too much faith in the appellate process.

To begin with, if a court's opinion contains a statement that will have adverse effects on third parties, but that does not bother the parties themselves,[180] the appellate process will be of no use. With very few exceptions, third parties cannot seek appellate review of a decision—even if they have already participated as amicus curiae, and even if they will be significantly affected by the decision.[181] Similarly, if the opinion contains language that the *prevailing* party finds problematic in terms of its effects on future transactions, the appellate process will also be unavailable. A prevailing party generally may not pursue an appeal.[182]

What is more, the appellate process cannot correct mistakes by high courts; when a *supreme* court makes an error, there is no higher court in which to file an appeal. And even when it is an intermediate appellate court that errs, the appellate process is unlikely to be of much use. In the modern era of discretionary jurisdiction, supreme courts do not consider themselves to be in the business of error correction.[183] Thus, although they might correct a statement in an appellate opinion that has serious and widespread consequences for third parties, supreme courts will not act to correct wrongs to the parties or dubious statements that will affect only a narrow group.[184]

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180 See Part I.B.

181 See *Marino v Ortiz*, 484 US 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."); Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U Balt L Rev 43, 43 & n 4, 45–46 (2005).

182 See Sloan, 35 U Balt L Rev at 48 (cited in note 181); Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 Ga L Rev 813, 882–84 (2004):

> Black letter law says that ordinarily prevailing parties cannot appeal, that courts review judgments, not opinions, and consequently that prevailing parties may not appeal reasoning, unfavorable findings of fact, unfavorable conclusions of law, unfavorable applications of law to fact, or a failure of the court to rule on the grounds preferred by the would-be appellant.

183 See US S Ct R 10 ("A Petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Ross v Moffitt*, 417 US 600, 613–15 (1974) (noting that state supreme courts likewise are often not in the business of error correction); Carolyn Shapiro, *The Limits of an Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 Wash & Lee L Rev 271, 279–80 (2006) (explaining the Supreme Court's explicit disavowal of an error correcting role).

184 See William H. Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L J 1, 2 (1925) ("The function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court.").

In addition, as judicial dockets continue to grow, and as supreme courts become increasingly selective in accepting cases for review, high courts are with growing frequency declining to correct even errors that have substantial effects on third parties. The US Supreme Court, for instance, now issues fewer than a quarter of the number of decisions on the merits that it issued a generation ago, notwithstanding a dramatic increase in the output of the lower courts.[185] The Court has chosen to focus its attention primarily on legal issues where there is a split of authority in the lower courts,[186] rather than on issues of great public importance. As one Court expert has explained, in the absence of a conflict, the Court will hear only cases of "*extraordinary* public importance."[187] The Court routinely declines to review important decisions, especially commercial law decisions that have profound effects on nonparties.[188]

Finally, the appellate process is becoming increasingly less effective as a method of correcting errors even by trial courts. Chad Oldfather explains that "the emergence of 'managerial judging' has resulted in a situation in which trial judges must deeply involve themselves in cases in the pretrial stage, as a result of which they are able to exercise considerable authority in ways that are beyond the reach of appellate scrutiny."[189] In addition, "appellate courts have systematically narrowed the scope of their review over a wide range of issues, leaving considerably greater discretion to trial courts and further diminishing the controls afforded by the appeal mechanism."[190] At least in the federal courts, the rate of reversal of trial court decisions by the courts of appeals has plummeted in the last half century.[191] The appellate process is thus becoming less and less willing to correct trial court errors.

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185 See Philip Allen Lacovara, *The Incredible Shrinking Supreme Court*, Am Lawyer 52, 53 (Dec 2003).

186 See Gregory A. Caldeira and John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am Polit Sci Rev 1109, 1120 (1988) (demonstrating empirically the importance of the presence of a genuine conflict in the granting of certiorari).

187 Stephen M. Shapiro, Jr, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 Litig 25, 29 (1998) (emphasis added).

188 See Lacovara, *The Incredible Shrinking Supreme Court* at 53 (cited in note 185). Interestingly, one of the factors that has influenced the Court's decisions to deny certiorari is the presence of "poor lawyering." Shapiro, 24 Litig at 30 (cited in note 187) ("[T]he Court prefers to grant review in cases involving experienced counsel who can brief and argue the cases in a sophisticated manner."). That suggests the appellate process does not rectify the problem of poor lawyering leading to poor decisions that end up binding parties who bear no responsibility for hiring the less competent attorneys.

189 Oldfather, 94 Georgetown L J at 135 (cited in note 35).

190 Id.

191 See id at 135 n 42 (noting a reversal rate of 27.9 percent in 1945, 24.5 percent in 1960, and 9.4 percent in 2003).

B. The Notice-and-Comment Mechanism

Because existing mechanisms are inadequate to redress the serious concerns that we have identified, a new mechanism would be helpful. Our proposal is a notice-and-comment procedure, which would be relatively straightforward to implement in the judicial context—whether it is imposed by statute, by systemwide or local court rule, or by the routine practice of individual judges. At base, the mechanism would look like this: Once the court has drafted an opinion, the court will withhold issuing the opinion in final form. It will instead make the opinion available in tentative form to the parties and the general public for comment (most effectively by posting it on the Internet). After a specified period of time, the court will review the comments, make any changes that it deems warranted, and then issue a final opinion and judgment. Or, if the court's changes are sufficiently dramatic, it might release the revised tentative opinion for another round of comments.[192]

This proposal is quite general and could be applied to trial, intermediate appellate, and supreme courts (and perhaps even to administrative adjudication[193]); to state and federal (and perhaps even foreign and international) courts; and to civil and criminal cases.[194] Later, we will imagine variations on this mechanism, such as incorporating an enforcement scheme like hard look review or adding a filtering mechanism that would highlight the most valuable comments,[195] but for now let us imagine a simple notice-and-comment system without any adornments.

1. Permissibility.

An immediate question is whether it would be permissible for individual judges to voluntarily offer tentative opinions for public comment, or for a court or legislature to institute a notice-and-comment approach systematically. We see no serious bar. Some courts and judges already release tentative opinions to the parties prior to oral argument.[196] The public, of course, has a First Amendment right to comment on any such materials released, and there have even been

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192 In administrative law, renoticing is required when a rule is not a "logical outgrowth" of the original notice. See, for example, *United Steelworkers v Marshall*, 647 F2d 1189, 1221 (DC Cir 1980).

193 See note 213.

194 We recognize, though, that the benefits and costs of notice and comment might vary across contexts. It might be argued, for example, that this procedure would be more useful in intermediate appellate courts than in supreme courts (which have fewer cases to consider and thus may make fewer errors) or trial courts (whose opinions generally lack precedential value).

195 See Part III.B–C.

196 See notes 10–11 and accompanying text.

reports of judges amending opinions in response to public criticism.[197] While the Model Code of Judicial Conduct prohibits a judge from "mak[ing] any public statement that might reasonably be expected to affect [a case's] outcome or impair [its] fairness," the rule explicitly notes that a "judge may make public statements in the course of official duties."[198] Release of a tentative opinion should be no more troublesome than an explanation by a judge in oral argument about the judge's tentative view of a particular question of law.[199]

It also seems reasonably clear that posting tentative opinions for public comment would not violate Article III's injunction against advisory opinions by the federal courts, even though the opinion is, at least temporarily, not binding. Since the tentative opinion is released during the pendency of a genuine case or controversy, it is not advisory.[200] The more difficult question is what happens if the case becomes

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197 See, for example, Howard Wasserman, *Someone is Reading the Blogs*, Concurring Opinions Blog, (Oct 14, 2008), online at http://www.concurringopinions.com/archives/2008/10/someone_is_read.html (visited Sept 1, 2009) (noting an email from Ninth Circuit Judge Raymond Fisher reporting that he had revised his opinion in an antitrust case in response to a blog post).

198 *Rule 2.10: Judicial Statements on Pending and Impending Cases*, ABA Model Code of Judicial Conduct Canon 24–25 (2007).

199 See note 141 and accompanying text.

200 See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 58 (Aspen 3d ed 2006) (explaining that an opinion is not advisory if (1) it is issued in the course of an actual case or controversy, and (2) there is a substantial likelihood that a favorable ultimate decision in that case or controversy will have some effect on the parties). It is sometimes said that advisory opinions are "opinions that are not in support of a judgment resolving a case or controversy before the court." Sullivan, 43 Houston L Rev at 1164 (cited in note 47). On that definition, a tentative opinion might indeed be advisory, since it would not (yet) be accompanied by a judgment resolving the case or controversy. But that definition seems clearly overbroad, as it would render all interlocutory opinions advisory; many opinions are issued during the course of a case or controversy that do not purport to be dispositive of it and that are not accompanied by a judgment, such as opinions resolving discovery disputes or denying summary judgment. It is sometimes also said that an advisory opinion is "a nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose." *Black's Law Dictionary* 1125 (West 8th ed 2004). This too raises concerns for tentative opinions, since they would be "nonbinding" until formally issued (either as is or with changes) at the close of the comment period. But to the extent that this definition implies that any nonbinding legal interpretation is advisory, it also seems clearly overbroad. If every nonbinding opinion is advisory, then a district judge acts unconstitutionally every time she tells the parties that she is inclined to rule one way or the other in an effort to get them to resolve an ancillary issue or to allow them to convince the judge otherwise. See, for example, Jon Heller, *Excerpts from the Civil Justice Expense and Delay Reduction Plans Pursuant to the Civil Justice Reform Act*, Q214 ALI-ABA 515, 574 (1993) (noting that the Eastern District of California enacted a "[p]re-argument notification program to advise parties of areas on which [a] judge would like oral argument to focus, or allow [a] judge to issue tentative ruling or take matter under submission"). Indeed, if this definition is correct, then decisions on motions in limine are unconstitutional. Consider, for example, *Luce v United States*, 469 US 38, 41–42 (1984):

> The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unex-

moot during the comment period—after the release of the tentative opinion, but before the release of the final opinion. Would it be constitutional for the court to go ahead and release a final opinion at the close of the comment period after the case is moot?

Of course, the court could simply withdraw the tentative opinion and decline to issue a final opinion. That would obviate concerns about advisory opinions, but the constitutional peace of mind would likely come at too steep a price. If the parties could settle the case during the comment period and thereby prevent the issuance of a binding precedent, there would be an incentive for the party that is on the losing end of the tentative opinion to do so, especially if it is a repeat player. Corporate defendants and interest groups, for instance, might be willing to pay a victorious plaintiff a premium—above what the plaintiff would receive under the tentative opinion—in order to keep the precedent off the books.[201]

The courts have already faced a variant of this problem. In the 1980s and early 1990s, the federal courts began to see an explosion of cases that settled during the pendency of a petition for rehearing or certiorari, or during the pendency of an appeal, with a stipulation that the prior opinion in the case be vacated.[202] These settlements were often the result of strategic decisions by repeat players and interest groups seeking to eradicate unfavorable precedents.[203] In 1994, the Supreme Court put an end to the practice of vacating opinions after settlement in a sternly phrased opinion that insisted that vacatur was inconsistent with "the public interest."[204] The Court explained that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants."[205] Allowing vacatur "would—quite apart from any con-

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pected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.

201 In *Piscataway v Taxman*, 522 US 1010 (1997), civil rights groups that feared an adverse affirmative action precedent paid a premium to the plaintiff in order to settle the case prior to oral argument in the Supreme Court. See Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and Its Lessons about Interest Group Path Manipulation*, 9 Geo Mason U Civ Rts L J 207, 215–16 (1999) (discussing the unusual dismissal of the *Piscataway* case just weeks before the Supreme Court oral argument). That phenomenon is relatively rare, due to the difficulty of predicting how courts will rule ex ante. But once a tentative opinion issues, the writing on the wall is suddenly much more legible.

202 See Judith Resnick, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L Rev 1471, 1472 (1994).

203 See Sullivan, 43 Houston L Rev at 1174–75 (cited in note 47); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 Harv CR–CL L Rev 109, 118–19, 137–38 (1995); Resnick, 41 UCLA L Rev at 1488–89 (cited in 200).

204 See *US Bancorp Mortgage Co v Bonner Mall Partnership*, 513 US 18, 26 (1994).

205 Id (quotation marks omitted).

siderations of fairness to the parties—disturb the orderly operation of the federal judicial system."[206]

Similarly, allowing the parties to avoid the making of precedent by settling during the comment period would undermine the public interest and the orderly lawmaking function of the courts, and would open the system of judicial lawmaking to abuse by private parties. For notice-and-comment procedures to be viable, then, there must be a way for the opinion to issue even if the case settles during the comment period, so as to eliminate the incentive for manipulative settlement.

One possibility would be to treat a tentative opinion as a published opinion of the court at the moment that it is issued, but subject to revision at the end of the comment period. That would preclude settling during the comment period to avoid making precedent, since the precedent has already been made, and it would not present any advisory opinion problems, since the opinion is binding the moment it is issued during a live case or controversy. In effect, the court would be issuing an opinion and inviting comments on the possibility of rehearing. A drawback, however, is that once an opinion has binding effect on the public, it may be disruptive to change it, and judges may be less willing to do so. Nonetheless, a judge who voluntarily seeks comments from the public might take this approach.

A better long-term solution would be for a rule implementing a systemic notice-and-comment procedure to provide that tentative opinions do not go into effect right away, but are automatically treated as final at the end of the comment period if not withdrawn or superseded by a separate final opinion. That way, if the case settles during the comment period, the court has two options. If it realizes from the public comments that there are problems with the tentative opinion, the court can withdraw it. (Amending the opinion would seem to be out of the question, as the case would now be moot, and the court would no longer have jurisdiction to take substantive actions.[207]) But if the court is happy with the tentative opinion, it simply does nothing, and the opinion will automatically become final. Because the court would be taking no action after the case became moot, it is hard to see any constitutional problem.[208]

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206 Id at 27. See also *Manufacturers Hanover Trust Co v Yanakas*, 11 F3d 381, 384 (2d Cir 1993) (refusing to "allow a party with a deep pocket to eliminate an unreviewable precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary's cooperation in a motion to vacate" because that would not be "a proper use of the judicial system").

207 See *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 192 (2000) (noting that courts have no license "to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest, as when the parties have settled").

208 In *Bonner Mall*, the Supreme Court explained that, if a case becomes moot, the "Court may not consider its merits, but may make such disposition of the whole case as justice may

2. Benefits.

What value would this notice-and-comment procedure add? In administrative law, it is generally understood that the notice-and-comment rulemaking procedure serves a variety of goals. Most important among them, at least for our purposes, are the following: (1) it allows the public to bring to the attention of the decisionmaker relevant information that otherwise may not have been considered;[209] (2) it affords the opportunity for public participation, which helps to legitimate the unelected administrative state;[210] and (3) "the very rigor of the procedural process may insure substantive results, because actions taken in opposition to choices suggested by publicly produced information could be construed as arbitrary and capricious."[211]

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require," 513 US at 21, quoting *Walling V. James v Reuter, Inc*, 321 US 671, 677 (1944), and may "enter orders necessary and appropriate to final disposition" of the case, *Bonner Mall*, 513 US at 22. *Bonner Mall* stands for the proposition that, when settlement moots a case, justice requires that the parties not be able to avoid the precedential effects of a judicial opinion—even if the mandate has not yet issued and the opinion has not yet been given the force of law at the time of settlement. See id at 26–29. Simply allowing the tentative opinion to become final serves the interest of justice, and it does not require the issuance of an order or the taking of any affirmative step at all after the case becomes moot.

209 See, for example, *Dismas Charities, Inc v DOJ*, 401 F3d 666, 680 (6th Cir 2005) (noting "the primary purpose of Congress in imposing notice-and-comment requirements for rulemaking—to get public input so as to get the wisest rules"); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich L Rev 520, 574 (1997) ("The primary reason that public participation leads to better rules is that it provides a channel through which the agency can receive needed education. Agencies are not omniscient and do not have all relevant economic and social data."); Richard J. Pierce, Jr, *Seven Ways to Deossify Agency Rulemaking*, 47 Admin L Rev 59, 86 (1995) (asserting that the primary benefit of notice-and-comment rulemaking lies in the fact that "[a]gencies are more likely to make wise and well-informed policy decisions if they solicit, receive, and consider data and views from all citizens who are likely to be affected by a policy decision"); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L J 1311, 1373 (1992) ("The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis.").

210 See, for example, Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 Admin L Rev 277, 289 (1998) ("Public participation is essential to sound agency decisionmaking because . . . it instills a sense of legitimacy in the public for the agency's decisions."); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw U L Rev 173, 187 (1997) ("Persons and entities subject to agency regulations are more likely to view agency decisions as legitimate if the procedures leading to their formulation provide for fair consideration of their views.").

211 Victor B. Flatt, *Notice and Comment for Nonprofit Organizations,* 55 Rutgers L Rev 65, 73 (2002). See also Rossi, 92 Nw U L Rev at 183 (cited in note 210); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va L Rev 253, 263 (1986) (arguing that "public participation," including notice-and-comment rulemaking, "has deterred the agencies from straying too far from their assigned missions").

That is to say, notice-and-comment procedures serve informational, legitimating, and constraining functions—the very functions that we have endeavored to show are not always well performed by existing mechanisms in our judicial system.[212] This Part addresses the possibilities and limits of employing notice-and-comment procedures to fulfill each of those functions in the judicial context.[213] It also explains why notice and comment is likely to be superior in each respect to a regime, like that in some California and Arizona courts,[214] in which tentative opinions are released to the parties before oral argument.

a) The informational function. We begin with the informational function—the effort to ensure that the court is fully informed of the relevant facts, legal authorities, and potential consequences of its decision, and that it is made aware of errors in its reasoning, understanding, or analysis. Notice and comment has significant potential to fill in the informational gaps identified above. It allows the parties to inform the court of mistakes or omissions in its opinion—after the opinion has been written, but before it is issued in final form. If the court misconstrues facts on which the parties had not focused, or decides issues that the parties had not briefed, or relies on authorities that the parties had not confronted, notice and comment gives the parties the meaningful opportunity that they currently lack to review the opinion carefully, to raise objections, and to steer the court in the right direction.

Notice and comment's use of a written, rather than oral, exchange to achieve this goal provides it a significant advantage over simply providing a copy of the court's tentative opinion to the parties prior to

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212 See Parts I and II.A.

213 Administrative law distinguishes between two fundamental categories of agency action: adjudication and rulemaking. See Bernard Schwartz, *Administrative Terminology and the Administrative Procedure Act*, 48 Mich L Rev 57, 65 (1949). Generally speaking, rulemaking involves the establishment of norms of general applicability and future effect, whereas adjudication resolves the specific rights of individuals in special circumstances. See Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 Wis L Rev 763, 769–70. Notice-and-comment procedures are generally employed for rulemaking, but not for adjudication. Compare 5 USC § 553 (rulemaking), with 5 USC § 554 (adjudication). The distinction between rulemaking and adjudication in the agency arena is not always a clear one, however. See David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv L Rev 921, 924 (1965). In reality, agency adjudications often have precedential value and establish generally applicable policy. See Rossi, 1994 Wis L Rev at 770–74. Our general proposal for notice and comment in the courts could thus sensibly be applied to agency adjudication as well. Consider id at 772 (arguing that "most administrative law commentators" have a "strong preference" for rulemaking over adjudication because of the informational and legitimating benefits of notice and comment, and lamenting that the courts do not force the agencies to make law only by rulemaking). Because we do not recommend applying hard look review in the context of adjudication, the agency's choice between adjudication and rulemaking would still affect the cumbersomeness of the notice-and-comment process.

214 See notes 10–11 and accompanying text.

oral argument. In the educational literature, there is some controversy over whether, in general, individuals learn better by reading than by listening to the same passage.[215] But in the context of judicial argument, it seems clear that the verbal presentation to a judge of a counterargument will rarely be as clear as an edited written presentation could be. Anyone who casually reads oral argument transcripts will recall passages in which either the judges' questions or the parties' responses are, on close examination, incomprehensible. It is true that oral argument allows for some back and forth, but we suspect that a deliberate review of a carefully crafted written comment will generally convey better information than verbal processing of off-the-cuff statements at oral argument.[216] Indeed, at oral argument, judges often cut off lawyers before they are able to offer a complete answer or to fully articulate a thought.[217]

There is a further substantial informational advantage of notice and comment over circulating tentative opinions to the parties before argument. Notice and comment allows *nonparties* who could be affected by the opinion to call information or unanticipated consequences to the court's attention: to inform the judges of how the opinion might have a negative impact in other situations; to help the judges to rephrase overly broad or vague statements and avoid unnecessary and potentially harmful dicta; to challenge weakly supported scientific, or other, conclusions;[218] and the like. Under a notice-and-comment system, interest groups and other organizations could peruse tentative opinions to look for language that might be problematic to them. They might even set up automatic searches of online databases to flag tentative opinions that might be of interest. Law professors and lawyers

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215 See, for example, Robert Q. Young, *A Comparison of Reading and Listening Comprehension with Rate of Presentation Controlled*, 21 AV Comm Rev 327, 334–35 (1973) (concluding that most subjects learn equally well from reading and hearing material, if the same amount of time is spent in learning).

216 See notes 143–47 and accompanying text. But see Paul D. Carrington, Daniel J. Meador, and Maurice Rosenberg, *Justice on Appeal* 17 (West 1976) ("Some judges assimilate ideas more readily by oral than by written transmission; and some ideas are more readily transmitted by oral means.").

217 See Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U Pa L Rev 1421, 1439–40 (2006); Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 U Rich L Rev 285, 298 (2000) (quoting Justice Harry Blackmun) (observing that oral argument "sharpens the focus of the case if we let the lawyers do that and don't interrupt them with constant questions. . . . It's hard to get everything out in thirty minutes, especially if Justices interrupt.").

218 Some have argued that amicus briefs may promote junk science because they are not subject to rigorous evidentiary requirements or peer review. See, for example, Simard, 27 Rev Litig at 704 (cited in note 112); Garcia, 35 Fla St U L Rev at 352 (cited in note 115); Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 NC L Rev 91, 94 (1993). That same risk might be posed by a notice-and-comment system, but this system at least allows responses and dialogue, so third parties could point out problems in social science and arguments raised by others.

could identify and discuss important tentative opinions at conferences and through online discussions. Bar association sections could circulate potentially important tentative opinions to their members. The Solicitor General's office could systematically review tentative opinions to see whether the federal government has an interest in commenting.[219] And so on. In short, notice and comment would fill a glaring hole in our legal system by affording the entire public a cost-effective opportunity to provide timely and targeted information to the court addressing the exact issues and language contemplated by the judges.

b) The legitimating function. Notice and comment could also help to legitimate the judicial system in the eyes of both the parties and the public. As noted above, studies have shown that the public's perception of the legitimacy of judicial decisions turns on whether affected parties have an adequate opportunity to participate in the proceeding[220] and whether the public believes that the court "gets the kind of information it needs to make informed decisions."[221] Notice and comment would plug informational gaps in our current system and make sure that the parties have a meaningful opportunity to address the actual reasoning and authorities harnessed by the court, even if the court pulled them out of the blue. And it would allow anyone who might be affected by the court's opinion to raise timely and meaningful objections at a comparatively low cost. In addition, studies have shown that public perceptions of judicial legitimacy also turn in part on whether those who are affected feel that they have an adequate opportunity to correct errors made by the court.[222] Here again, notice and comment could have a substantial legitimating effect.

By comparison, a practice of sending tentative opinions to the parties before oral argument would contribute considerably less to legitimacy, because it does not allow third parties to participate at all and it allows parties to respond only at oral argument, where they are often unable to best articulate their concerns. In addition, courts that have adopted the pre-argument tentative opinion model have often made substantial changes to the tentative opinion after oral argument, sometimes discarding it altogether and starting over.[223] As a result, in

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219 Consider 28 CFR § 0.20(b)–(c) (noting that the Solicitor General must authorize all appeals and all amicus briefs filed by the government).

220 See notes 96–101and accompanying text.

221 Tyler, 56 DePaul L Rev at 680–682, 681 n 126 (cited in note 94).

222 See Tyler, *Why People Obey the Law* at 137 (cited in note 97).

223 See Hummels, 46 Ariz L Rev at 331 (cited in note 10); id at 349 (noting that, in 2002, the Arizona Court of Appeals, Division Two, changed the result after oral argument in 11.7 percent of cases and made substantial modifications in another 26 percent of cases); Hollenhorst, 36 Santa Clara L Rev at 34–35 (cited in note 10) (noting that, over an eight-month period, the California Court of Appeal, Fourth Appellate District, Division Two, changed the result after oral

many cases, the court ends up issuing an opinion that the parties never had an opportunity to address. With a notice-and-comment system, if the court substantially rewrites the opinion, it can post the new draft for additional comments before issuing a final decision.[224]

Notice and comment may appear particularly central to the legitimacy of federal administrative agencies because of the uneasy place of administrative agencies in the constitutional structure. The Constitution does not clearly support the existence of an administrative state,[225] and "we might think that the [Supreme] Court sees administrative law as helping to reconcile the administrative state with the constitutional structure, and in this sense, as helping to promote the legitimacy of agency action."[226] A leading political science theory suggests that administrative procedures promote congressional control over administrative agencies.[227] At least when they engage in statutory interpretation, however, courts can also be seen as unelected agents of the legislature. Just as notice and comment can help alert Congress to instances of unfaithful agency by administrative bodies, so too can it perform this function for the courts.

Indeed, there are at least two respects in which notice and comment may be more useful in the service of legitimacy in the judicial context than the administrative one. First, agency decisions are subject to judicial review, and so there is already some check on administrative authority. Although a legislature sometimes overrides a final, nonconstitutional judicial decision,[228] judicial decisions are not systematically subject to review from another branch of government. Thus, public participation may be even more necessary to legitimacy. Second, one complaint about the administrative notice-and-comment process is

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argument in 3.5 percent of cases, substantially rewrote the opinion in 7.9 percent of cases, and made major changes in nearly 20 percent of cases); id at 331 n 108 ("On a number of occasions, this court has rewritten entire opinions after oral argument.").

224 See note 192 and accompanying text.

225 See Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 SLU L J 885, 888 (2005) (arguing that "virtually the entire structure of the modern administrative state is either suspect or flagrantly unconstitutional under any plausible formalist account").

226 Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum L Rev 1749, 1805 (2007). See also Bressman, 78 NYU L Rev at 546–47 (cited in note 103) (arguing that allowing agencies to develop policies through interpretive rules rather than rules subject to notice-and-comment procedures "jeopardizes administrative legitimacy").

227 See Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L, Econ, & Org 243, 244 (1987).

228 See Pablo T. Spiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions,* 16 Intl Rev L & Econ 503, 503–04 (1996) (providing a positive political theory account of legislative overrulings).

that, because private interest groups author many comments,[229] the process may foster private capture of administrative agencies.[230] Some critics have argued that courts too are subject to capture, for example by business interests,[231] but the conventional wisdom is that courts are significantly less subject to capture than are agencies.[232]

c) The constraining function. The legitimacy of a governmental process may also be a product of the degree to which it constrains the government from acting arbitrarily.[233] In the administrative law context, one aim of the notice-and-comment system is to constrain agency officials: to prevent them from acting arbitrarily or in a manner inconsistent with the law or the public interest.[234]

That aim could also be served in the judicial context. A notice-and-comment regime, providing an opportunity for the public and the litigants both to highlight arguments to which a court appears poised to give short shrift and to point out flaws in the opinion, would strengthen the judicial opinion as a tool of constraint. As one judge has put it, "You can't stand there as somebody is taking the opinion apart, and rightly so, and then send out the same opinion. If the criticism is valid, it forces us to address it."[235] A notice-and-comment requirement can force or at least encourage a judge to confront more directly overlooked arguments or weaknesses in the opinion.[236]

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229 See David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 Fordham L Rev 81, 85 (2005).

230 See, for example, Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security*, 10 Am U J Gender Socy Policy & L 381, 387–400 (2002).

231 See Donald J. Burnett, Jr, *A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 Fordham Urban L J 265, 273–76 (2007).

232 This conclusion flows in significant part from the facts that agencies usually have a somewhat narrow focus; that agency officials often come from, and plan to return to, the industry that they regulate; and that powerful interest groups can help to provide agency members with benefits that they prize (budgetary clout on Capitol Hill and future employment are the two most often cited). By contrast, judges have life tenure and thus less concern about their future employment, have salaries and budgets that are largely free from congressional meddling, and may have a greater desire for prestige (which powerful interest groups cannot easily provide). See Stuart Minor Benjamin and Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 Georgetown L J 269, 311–12 (2007). See also Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 Pub Choice 107, 129 (1983) (arguing that judges are generally less subject to capture because they seek to maximize their prestige).

233 See note 103 and accompanying text.

234 See note 211 and accompanying text. The existence of the "hard look" enforcement mechanism makes clear that constraint is one of the goals of notice and comment in administrative law. See notes 288–92 and accompanying text.

235 Hummels, 46 Ariz L Rev at 337 (cited in note 10) (quoting Justice Thomas E. Hollenhorst) (discussing pre-argument tentative opinions in California).

236 "Placing the draft opinion 'face up' on the table promotes accountability by making it harder for judges to remain intransigent in the face of persuasive arguments." Id at 347.

This consideration seems at least slightly stronger in the judicial context than in the administrative one. In both contexts, the person making the decision does not bear the full burden of the notice-and-comment process. Law clerks and administrative agency employees handle most of the work. Presumably, though, they will sometimes ask their bosses for their views on how to address the most compelling comments. That seems especially likely in a judicial chambers, where the relative flatness of the employment hierarchy and the traditional norms of in-chambers behavior[237] increase the chance that analytical problems will be brought to the judge's attention.

Anticipation of a notice-and-comment process can also improve work effort before the notice-and-comment period even begins. In the agency context, an employee (or group of employees) tasked with drafting a Notice of Proposed Rulemaking[238] may be embarrassed should substantial flaws in the Notice be identified. As such, she has a powerful incentive to eliminate or avoid those flaws before making the Notice public. This effect also may be somewhat stronger in the judicial context. Unlike an agency rule, a judicial opinion generally lists a sole judge as the opinion author, concentrating accountability for any superficial reasoning.[239] Similarly, when a judge delegates work to a law clerk, even though that clerk will be anonymous, the clerk might be embarrassed if commenters pointed out that he had inadequately responded to an argument made in the briefs or had otherwise mishandled an issue. Of course, even without notice and comment, judges and law clerks have an incentive to work carefully in order to avoid subsequent, embarrassing criticism of their opinions. But the fact that the criticism will be coming soon, in a systematic, public manner that is easy for all to discover, and from those who best understand the facts of the case and the controlling legal authorities, makes notice and comment a better motivator. That is especially so for those law clerks who would be forced to explain a mistake to their judges while still serving in their employ, and for those judges on multimember courts who would be forced to explain a mistake to the other

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237 See, for example, Rehnquist, *The Supreme Court* at 263 (cited in note 140) (noting that, when law clerks encounter problems in the drafting of opinions, they bring those problems to the attention of the judge); Marvell, *Appellate Courts and Lawyers* at 87–97 (cited in note 20) (discussing the relationship between clerks and judges and noting the extent to which clerks seek to bring the best information to the attention of their judges so as to facilitate informed decisions *by the judges* on all important matters).

238 See 5 USC § 553(b) (requiring a "notice of proposed rule making," which must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved").

239 Consider Hollenhorst, 36 Santa Clara L Rev at 13 (cited in note 10) (defending pre-argument tentative opinions on the ground that "the visibility of the draft opinion increases judicial vigilance" because the judge "may suffer embarrassment" if an error is pointed out).

panel members (who would also suffer embarrassment at having signed on to the opinion without catching the mistake).

Both the anticipation of a notice-and-comment period and the publication of comments may temper not only merely idiosyncratic or sloppy, but also ideological, decisionmaking, a problem present in the administrative context as well. It has long been clear that the Progressive Era vision[240] of an executive branch driven by disinterested scientific inquiry was, at least, incomplete.[241] This view failed to take sufficiently into account that those of different political persuasions might view policy issues differently, either because partisans fail to share goals or because they disagree on which means are most likely to achieve specific goals.

The recognition of politics' role, however, can provoke opposite reactions to the utility of notice-and-comment proceedings. In the administrative context, some argue that administrative law should tolerate ideological decisionmaking, while others insist on rigorous review of decisions to limit political influence. A seminal case on the hard look doctrine, *Motor Vehicles Manufacturers Association v State Farm Mutual Automobile Insurance Co*,[242] is illustrative.[243] In a separate opinion, then-Justice William Rehnquist observed that the agency had changed positions as a result of a change in political leadership with the entrance of the Reagan administration.[244] For Rehnquist, that should have been an acceptable basis for the agency's decision.[245] On this view, the notice-and-comment process can be a charade, a purported exercise in objective analysis that seeks to mask inevitably political choices.[246] It will often be possible to develop adequate justifica-

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240 See, for example, Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin L Rev 1111, 1131–32 (2000) (discussing the Progressive emphasis on apolitical, independent regulatory commissions staffed by experts).

241 See, for example, Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 Cal L Rev 919, 925 (1989) ("The views of Woodrow Wilson and the Progressive era theorists and James Landis and the New Dealers seem anachronistic in light of modern public law theories that view administrative agency decisionmaking as a complex amalgam of rational calculation, statutory interpretation, political judgment, and translation of values into public policy.").

242 463 US 29 (1983).

243 Id at 34 (holding that "the agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement" for cars).

244 See id at 59 (Rehnquist concurring) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party.").

245 See id ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

246 See, for example, Christopher F. Edley, Jr, *Administrative Law: Rethinking Judicial Control of Bureaucracy* 184 (Yale 1990) (characterizing Rehnquist's observation as being "that the boundaries among politics, science, and fairness are virtually unobservable in practice because any complicated problem will involve the integration of all three decision making paradigms; the

tions for a wide range of potential approaches to an issue, and so notice-and-comment requirements may serve to increase expense without eliminating ideology.

Rehnquist's approach, however, failed to command a majority of the Court, either at the time or in subsequent cases.[247] Defenders of the hard look doctrine do not claim that the doctrine will stamp out ideological influence. To the contrary, the hard look doctrine is supposed to be somewhat deferential.[248] But decisions must be justified on plausible, publicly acceptable grounds. This may place some decisions effectively out of bounds. For example, if the true motive behind a potential regulatory change is to satisfy a politically powerful interest group, and there is no public-spirited defense of the change, the notice-and-comment requirement might lead an agency not to pursue the change. Or if the agency does proceed with the initial proposal, a judge might use the hard look doctrine to reject the decision as too extreme.[249]

To the extent that moderating extreme decisionmaking is a legitimate goal of the notice-and-comment process, it is at least as salient in the judicial context as in the administrative one. Ideological decisionmaking by the executive branch may be considered undesirable in part because the legislature is viewed as the supreme policymaker.[250] But, as a matter of public choice theory, the superiority of the legislature as a political branch is contested, and some administrative law scholars insist that the political accountability of the president makes the executive branch a more effective locus of policymaking than the

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administrator cannot avoid deploying subjective preferences, even while making a putatively 'scientific' decision").

247 The Court did come around to the view that it must respect executive branch policy choices. See *Chevron*, 467 US at 866 ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."). But the Court still expects detailed justifications of such choices. See id.

248 The hard look doctrine may have been instituted in reaction to a period of more deferential review. See, for example, Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 Georgetown L J 2599, 2603 (2002) (noting that concerns about agency capture in the 1960s and 1970s likely led to closer examination of administrative behavior). But the courts have emphasized that they ought not substitute their policy views for an agency's. See *State Farm*, 463 US at 43 ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

249 See, for example, *The Supreme Court, 1982 Term—Standard of Review for Rescission of Agency Rule*, 97 Harv L Rev 230, 237 n 54 (1983) (suggesting that although the majority in *State Farm* "scrupulously avoided mention of the political overtones of [the National Highway Traffic Safety Administration's] actions, it may well have been reacting against them").

250 That is, policy judgments actually made by Congress, if found to be constitutional, are generally considered to be controlling. See, for example, Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 Case W Res L Rev 1129, 1142 (1992) ("[F]ew scholars and virtually no court opinion ever claims (openly) to favor violating legislative supremacy.").

legislature.[251] By contrast, there are fewer defenders of the courts as supreme policymakers. While Hamilton's famous admonition that the courts render "neither Force nor Will, but merely judgment"[252] may be viewed as naïve pre-realism, there is widespread support for the proposition that, at least at the subconstitutional level, the courts should not engage in general policymaking that defies the will of the legislature.

Perhaps one explanation is that, in the lower courts, judges are randomly selected; the ideology of any particular judge or panel will be largely a matter of chance.[253] As such, observers cannot necessarily attribute a particular judicial decision to a recent presidential election, as they might to explain executive branch policymaking. Another reason is that courts are politically insulated. The defense of agency policymaking on accountability grounds cannot be easily marshaled on behalf of judicial decisionmaking. The independence of the judiciary may be particularly well suited to the tasks of interpretation and rights protection, but not to policymaking.

It is difficult to gauge just how effective notice and comment would be as a constraining device. This depends on myriad factors, such as how useful third party submissions are, how much time judges devote to reading and considering comments, and how embarrassed judges would be if they ignored a comment that pointed out a significant flaw in reasoning. We have seen, however, that there is at least some empirical support for the proposition that judges are less likely to act ideologically when weaknesses in their arguments are relatively likely to be exposed.[254] If Cross and Tiller are correct in attributing their result to the anticipated effect of whistleblowing, then a notice-and-comment process could be helpful, serving a role similar to panel diversity. Anticipation of whistleblowing by the public may lead some judges to moderate their opinions, at least if there is an expectation that comments will receive significant attention.

It might be argued, however, that by the time judges issue a tentative opinion that they open to public comment, they are so cognitively committed to it that they will latch onto any imaginable strategy for defending their original arguments, which in turn suggests that the

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251 See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J L, Econ, & Org 81, 95–97 (1985).

252 Federalist 78 (Hamilton) at 523 (cited in note 91).

253 Some commentators have proposed instituting affirmative efforts to ensure ideological balance on a panel. See, for example, Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 NYU Ann Surv Am L 291, 304, 310 (2000) (criticizing random selection of panels and promoting balance based on party preferences for judges); Tiller and Cross, 99 Colum L Rev at 215 (cited in note 164) (advocating every panel have judges from both political parties as determined by the appointing president).

254 See Part II.A.2.c.

public comments would come too late to have a genuine constraining effect. Indeed, Stern has argued that in the administrative agency context, notice-and-comment decisionmaking may be counterproductive, "by encouraging agency 'lock-in,' or suboptimal change, through premature commitment to a proposal."[255] In the judicial context, however, notice and comment could not possibly increase lock-in relative to our current system. Under our proposal, judges would not stake out a tentative position until the point at which, under our current system, they stake out their *final* position. And it is likely that notice and comment would in fact decrease lock-in relative to the current system, in which judges are virtually deaf to arguments in rehearing petitions that they have made a mistake.[256]

In most contexts, including the administrative one, making a change in response to a comment carries a connotation of embarrassment—an admission of error. Stern explains that "[s]ocial pressures play an important role in the consistency-enhancing effect of public commitments. Experimental work shows that observers rate a person who changes his mind as weaker, more poorly-adjusted, more indecisive, and more insincere than a person whose attitudes remain constant."[257] Cognitive consistency is a subconscious effort to protect one's reputation against these perceptions.

Judicial reputation may, however, be different. To a substantial degree, the ideal judicial reputation is one of "impartiality and openmindedness."[258] A judge's decision to make changes on rehearing—after having made a public and final commitment to a particular position as the "correct" one—might make the judge appear weak and incompetent. But a judge's willingness to amend a tentative opinion on the basis of informative comments might well be seen as a sign of genuine impartiality and as proof that the judge's decisions are driven by the facts and the law, not by preconceptions and political commitments.[259] Indeed, those courts that have experimented with releasing tentative

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255 Stern, 63 U Pitt L Rev at 591 (cited in note 171). Stern explains that merely writing down preliminary views can contribute to lock-in. See id at 619.

256 See note 168–69 and accompanying text.

257 See Stern, 63 U Pitt L Rev at 616–17 (cited in note 171).

258 See *Republican Party of Minnesota v White*, 536 US 765, 802 (2002) (Stevens dissenting).

259 To the extent that cognitive consistency bias might still apply to tentative opinions, there are steps that could be taken to mitigate it. For example, studies suggest that when individuals write down their original opinions anonymously, they will be less intent on cognitive consistency. See Stern, 63 U Pitt L Rev at 617 (cited in note 171) (reviewing studies that show publicity results in cognitive commitment). At least in an appellate court, the opinion might initially be designated per curiam; the judges could decide later whether to name the opinion author in the final opinion. See Hollenhorst, 36 Santa Clara L Rev at 4 (cited in note 10) (noting that the practice in courts that release pre-argument tentative opinions to the parties has been to withhold the authoring judge's name).

opinions even earlier in the process—before oral argument—have found that judges are generally quite willing to make changes despite having expressed a tentative preference for a particular approach.[260]

Concerns about premature cognitive commitment do, however, illustrate the relative advantage of notice and comment over the practice of issuing tentative opinions prior to oral argument. Stern notes that in the administrative context, use of a tool like an Advance Notice of Proposed Rulemaking can serve as at least a partial antidote to cognitive commitment, encouraging the submission of arguments before decisionmakers have reached their conclusions.[261] The judicial context already includes a version of this tool by providing an opportunity to submit briefs. Unlike administrative officials, judges ordinarily consider briefs before making tentative commitments. Oral argument similarly is structured in a way that promotes consideration of issues without making commitments on those issues. It is a common practice for judges to play devil's advocate in oral argument, so questions that judges ask do not necessarily reveal their positions.[262] Indeed, judges insist that they often do not make up their minds until after oral argument.[263] Because of cognitive commitment, issuing tentative opinions before oral argument could undermine the effectiveness of this opportunity, as well as of the internal deliberations that generally take place among judges immediately after oral argument. As just noted, judges in courts that release pre-argument tentative opinions generally have been willing to make changes to their opinions based on the oral argument proceedings. Still, there is a risk that releasing pre-argument tentative opinions can make oral argument less effective.[264]

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260 See note 223. In the Arizona court, judges made at least minor changes in 100 percent of published opinions. See Hummels, 46 Ariz L Rev at 349 (cited in note 10).

261 See Stern, 63 U Pitt L Rev at 633 (cited in note 171). An Advance Notice of Proposed Rulemaking is issued earlier in the rulemaking process than a traditional notice of proposed rulemaking and is more open-ended, soliciting public comments on an issue generally, or seeking comments on a variety of alternative potential solutions. See id.

262 But see Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions during Oral Argument*, 6 J App Prac & Process 271, 272 (2004).

263 See David Lewis, *Survey Shows Preferences of Northeastern Judges at Appellate Argument*, 76 NY St B J 42, 42–43 (Oct 2004) (presenting results of survey that found substantial disagreement among judges about whether they have made up their minds on important issues prior to oral argument).

264 See Robert S. Thompson and John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way through the Forum*, 1986 Ariz St L J 1, 65:

> If a court has reached a conclusion, even one that is labeled "tentative," oral argument involves a process by which minds must be changed rather than open minds persuaded. If the minds have been made up by overlooking important information or approaches to the case, the task may be difficult indeed.

III. OBSTACLES AND OBJECTIONS

This Part considers a variety of obstacles and objections to our proposal. We first consider the question of cost, including costs to litigants and to the courts themselves. We next consider an intimately related question: whether it is possible or desirable to implement an enforcement mechanism for the notice-and-comment regime. The answers to both of those questions depend in part on the third question that we consider: whether it might be possible to devise a filtering mechanism that would narrow the number of comments that judges would need to consider. After considering a number of factors, we conclude that a simple filtering mechanism—requiring lawyers to certify that their responses are not duplicative and strictly limiting the length of responses—would considerably limit costs and make reputational enforcement more successful, thus obviating the need for a more formal enforcement regime.

A. Costs

The most obvious costs of a system of notice and comment stem from the time devoted to the new system, including both the cost of the effort itself and the cost associated with potentially delayed decisionmaking.[265] The effort that judges and law clerks spend scrutinizing comments is a cost borne directly by the taxpayer, assuming as is reasonable that this additional burden does not come entirely out of judicial leisure time. Presumably, greater workloads in the long run will necessitate more judges, and indeed the history of our courts is a history of steady growth in the number of judges and clerks with rising caseloads.[266] We doubt that it is possible to prove rigorously that an increase in the quality of the judicial work product would be worth the financial cost of an attendant marginal increase in the number of required judges. Our instinct is that if the notice-and-comment process focuses judges on vulnerable parts of their tentative approaches (rather than, for example, on comments of minimal value[267]), this would be a relatively good investment.

But we may not have to face that tradeoff. A notice-and-comment process might not, in fact, increase aggregate litigation expenses or judicial workloads. One consequence of an expensive legal

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265 Delay may be especially costly in the Supreme Court, which generally issues the last of a term's opinions by early summer, just before new clerks arrive. See Stern, et al, *Supreme Court Practice* at 9–11, 36–37 (cited in note 142). Delaying the release of opinions might mean that new clerks will need to learn details from cases already tentatively decided.

266 See *Authorized Judgeships*, online at http://www.uscourts.gov/history/allauth.pdf (visited Sept 1, 2009) (providing data on the number of authorized federal judgeships from 1789 to the present).

267 See Part III.C.1.

process is that litigants, fearful of the expense, are more likely to settle their cases.[268] Thus, if expenses per case increase, there are likely to be at least somewhat fewer cases. Under some models, a marginal dollar per case increase in litigation expenditure can even lead to a decrease in total expenditures across all cases.[269] Presumably we should not increase the expense of the legal process when doing so will not increase the quality of decisionmaking. But when increased costs per case yield better quality decisions, they often can be implemented without a significant corresponding increase in aggregate costs.

Indeed, in the long run, precisely because it will yield clearer and higher quality decisions, notice and comment may well reduce aggregate costs by reducing the volume of subsequent litigation.[270] The notice-and-comment process should be a particularly useful vehicle for informing courts about the implications of tentative decisions for future cases. Parties should be much better positioned to identify possible ambiguities once they know the specific language that a court seems poised to endorse, and the involvement of nonparties should be particularly useful in calling attention to possible effects of a decision. In addition, both parties and nonparties might point courts to potentially conflicting precedents, giving courts a chance to avoid splits of authority, including subtle tensions that might cause later litigation. In short, the notice-and-comment process seems likely to help courts tie up loose ends that they otherwise would need to address later in costly fallout litigation.

We do, however, concede that it is possible that whatever litigation savings accrue from adoption of notice and comment do not compensate entirely for the time and expense that commenters and judges will devote to the notice-and-comment process. What then would be lost, and would it be worth it? An increase in the number of judges seems unlikely to compensate entirely for any increase in the judicial burden. Historically, the number of cases processed per judge has been rising,[271] and at least in recent years, the number of law clerks has been relatively

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268 See, for example, Laura Inglis, et al, *Experiments on the Effects of Cost-shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 Fla St U L Rev 89, 90–91 (2005) (reporting that in a laboratory experiment simulating litigation, "increased court costs significantly improve pretrial settlement rates"); id at 116 (reporting a settlement rate of 58.7 percent with low costs and 77.7 percent with high costs).

269 See, for example, Alon Klement and Zvika Neeman, *Against Compromise: A Mechanism Design Approach*, 6 J L, Econ, & Org 285, 287 (2005) (noting that some models allow for this possibility, but presenting an alternative model that does not).

270 Consider Stark, 54 Tax L Rev at 256 (cited in note 80) (noting "the cost, chaos, and additional litigation that often follow" judicial decisions that were based on imperfect information).

271 See Richard A. Posner, *Demand and Supply Trends in Federal and State Courts over the Last Half Century*, 8 J App Prac & Process 133, 134 & 139 table 6 (2006) (illustrating trends in per judge caseloads and observing a "dramatic increase in federal appellate caseloads per judge").

fixed despite continued increases in caseloads.[272] This means that each judge must spend less time on average on each individual case. A judge devoting more time to comments might thus spend less time on other aspects of each case. For example, judges might spend slightly less time preparing for oral argument or crafting their initial opinions.

If this tradeoff did occur at the margin, we suspect that the notice-and-comment process would still be worthwhile. One can debate how much time a judge ideally would spend crafting an initial opinion and how much time he would spend considering objections presented by the public.[273] But the current approach, where the amount of time devoted to considering such objections is set at zero, almost certainly does not achieve a sensible balance. We cannot be sure that judges will allocate their time according to the social optimum (whatever it may be), but we doubt that judges generally will pay so much attention to comments that the balance will shift so far in that direction as to be worse than the status quo.

Much the same argument can be applied to litigants' time. We would be willing to accept, for example, a reduction in the maximum brief length of one thousand words if those one thousand words (or even a smaller number) could be used instead for comments. The principle of declining marginal returns suggests that it makes sense to reallocate some litigant effort from the front-end to the back-end.

In any event, it is quite possible that if the notice-and-comment process does, on net, demand some sacrifice in judicial time, that sacrifice will often be made across cases rather than within cases. Judges already spend considerably more time on cases in which they write detailed opinions than on cases resolved with brief per curiam or non-

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272 See, for example, Todd Peppers, et al, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 Alb L Rev 623, 628 (2008) (noting that since 1991, the number of clerks per federal district judge has been fixed at two).

273 Radically reducing the amount of time spent on the tentative opinion—on the theory that most of the serious thinking about the case can be done after the many resulting flaws are clarified through public comment—would defeat the purpose of notice and comment, which is designed to solicit public comments on the precise reasoning and wording contemplated by the court. But, at the other extreme, under our current system, because a "judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases," *Hart v Massanari*, 266 F3d 1155, 1176–77 (9th Cir 2001) (Kozinski), "writing an opinion is a tough, delicate, exacting, time-consuming process," Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 Fed Law 36, 39 (June 2004). It is possible that, with the backstop of notice and comment, a judge would sensibly spend a little less time on "the process of anticipating how the language of the disposition will be read by future litigants and courts, and how small variations in wording might be imbued with meanings never intended," a task that currently occupies a huge percentage of the judge's time. Id at 38–39. See also *Hart*, 266 F3d at 1176–77.

precedential opinions.[274] Judge Alex Kozinski estimates that on the Ninth Circuit, judges spend only "an average of five or 10 minutes" on cases with nonprecedential opinions drafted by staff attorneys.[275] Assignment of even a handful of additional cases to be handled by staff attorneys would free up ample time to engage in the notice-and-comment process for the remaining fully considered cases.

Of course, there are downsides to deciding cases by unpublished opinions.[276] And the forced shifting of more cases into the unpublished pile would seem to necessitate reduced attention to some cases that are currently understood to warrant more careful treatment. It is quite possible, however, that a notice-and-comment system would actually improve the functioning of the two-tiered system of case assignment. When a judge resolves a case summarily, it is presumably because the judge (or the court employee responsible for the initial assignment) believes that the case is straightforward. Judge Kozinski expresses confidence that the Ninth Circuit always reaches the right result in cases resolved summarily.[277] But because the court will not have undertaken as rigorous a review of the briefs and case law as with an obviously more difficult case, the court or its staff attorneys might have missed subtle issues.[278] There may also be a danger that a court might, for impermissible reasons such as ideology, strategically choose in which cases to write an opinion.[279] For these reasons, it would be useful for there to be an additional check on the court's initial classification.[280] Notice and comment could provide that check. The court could impose draconian length limitations for comments on those draft opinions that are tentatively designated as unpublished, forcing the liti-

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274 The trend has been toward increasing resolution of cases through unpublished decisions. See, for example, Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 L Libr J 475, 478 (2004) (documenting an increase in nonpublication rates in the US courts of appeals from about 50 percent in 1981 to about 80 percent in 2004).

275 Kozinski, 51 Fed Law at 38 (cited in note 273).

276 See, for example, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan L Rev 1435, 1471–74 (2004).

277 Kozinski, 51 Fed Law at 38 (cited in note 273) ("We are very careful to ensure that the *result* we reach in every case is right, and I believe we succeed.").

278 See Wald, 62 U Chi L Rev at 1375 (cited in note 153) (noting that without published opinions, there are "no backward looks or self-doubt").

279 See, for example, Hellman, 6 J App Prac & Process at 173 (cited in note 159) (noting that lawyers have "voiced the concern that unpublished opinions are used as a device to avoid controlling precedents"); Wald, 62 U Chi L Rev at 1374 (cited in note 153) (discussing the misuse of unpublished opinions to avoid making or following law). But see Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J App Prac & Process 325, 340–41 (2001) (arguing that judges do not generally engage in this behavior).

280 Judge Wald similarly argues, "There ought, in my view, to be periodic overviews of which kinds of cases get sent down one track rather than another. Danger signals include the presence of obviously difficult issues. . . ." Wald, 62 U Chi L Rev at 1376 (cited in note 153). But it is difficult to find such danger signals without a mechanism for pointing out problems before opinions issue.

gants to focus in the comment phase on a single discrete aspect of the case that the court might have missed.[281] This seems likely to be the best strategy to persuade judges who initially viewed the case as easy (or who relied on the judgment of a court employee to that effect) that they should pay it more attention, and perhaps even consider drafting a full opinion.[282] Concise comments identifying glossed over issues might also deter a court from strategic misclassification.

Of course, part of the cost of notice-and-comment review would come in the form of additional delays. Naturally, it is faster for a court simply to release an opinion than to give the public one or more rounds of comments on drafts. The appellate process in particular is already lengthy enough to provoke substantial criticism,[283] and, at first glance anyway, notice and comment would make it longer still. But if a court is willing to spend, for example, a year considering the issues in a case and drafting an opinion, why should it not be willing to spend a couple of additional months making sure that it did not make any mistakes? (To be sure, it would be wise to structure the process in a way that the court would have the discretion to curtail or eliminate it when time is of the essence.[284])

In any event, allowing notice-and-comment processes need not, in equilibrium, greatly lengthen case pendency. First, if courts adjust to increased amounts of work per case by fully developing fewer cases, then the total workload of courts need not increase. While the notice-and-comment period itself takes time, if courts have less other work, then the period between the submission of briefs and the issuance of the tentative opinion should be shorter. Second, studies have found no systematic relationship between judicial caseloads and queue length.[285]

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281 Those length limits would, in turn, ensure that the notice-and-comment procedure would not significantly add to the judicial workload for unpublished cases. (It seems unlikely that non-parties would be interested in commenting on opinions with little or no precedential value. To keep the workload under control, courts could even mandate that only the parties may comment on unpublished opinions.).

282 See Hollenhorst, 36 Santa Clara L Rev at 23 (cited in note 10) (noting that, in California, discussion of tentative opinions at oral argument sometimes convinces judges to change their minds about whether to publish the opinion).

283 See, for example, Hillary A. Taylor, *Appellate Delay as Reversible Error*, 44 Willamette L Rev 761, 787–89 (2008) (focusing on appellate delay in the criminal context).

284 Indeed, it would be wise to allow courts to skip notice and comment for any good cause, as is the case with notice and comment in the administrative rulemaking context. See 5 USC § 553 (b)(3)(B) (providing that the notice-and-comment requirements do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

285 See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 BU L Rev 527, 529–30 (1989) (reviewing studies of court congestion).

Increased delays lead to increased settlement, thus lessening delay, and so queuing time has proven relatively immune to attempts at intervention.[286]

B. Enforcement Mechanisms

In the administrative agency context, officials do not have merely an option of considering comments submitted, but an affirmative obligation to respond in detail to important comments. This obligation stems from both procedural and substantive provisions of the Administrative Procedure Act.[287] Courts have interpreted the Act's procedural requirement that agencies provide a "concise, general statement of the basis and purpose"[288] of a rulemaking to require a lengthy and specific statement.[289] And the substantive requirement that courts set aside agency action that is "arbitrary" or "capricious"[290] serves as an additional hook for judicial scrutiny of agency responses.[291] In enforcing this requirement, courts have developed a "hard look doctrine,"[292] through which they ensure that agencies have done sufficiently hard looking at the problem and the public's comments.

Any analysis of the cost and efficacy of notice and comment in the judicial arena must consider whether the procedure would include a mechanism, analogous to the hard look doctrine in administrative law, designed to enforce the expectation that judges will consider and respond to illuminating comments. While it is possible as a theoretical matter to imagine such a mechanism, if a legislature or the courts were

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286 See id at 539–56 (presenting a case study of whether "the decision to litigate or settle is sufficiently sensitive to changes in litigation delay to generate a congestion equilibrium").

287 Administrative Procedure Act, Pub L No 89-554, 80 Stat 381 (1966), codified as amended at 5 USC § 551 et seq.

288 5 USC § 553(c).

289 See, for example, *Automotive Parts and Accessories Association v Boyd*, 407 F2d 330, 338 (DC Cir 1968) (warning "against an overly literal reading of the statutory terms 'concise' and 'general,'" and noting that "[t]hese adjectives must be accommodated to the realities of judicial scrutiny"); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U Chi L Rev 1383, 1432 (2004) ("The 'concise general' statement of 'basis and purpose' that is to accompany the final rule has, in the hands of judges, turned out to be not at all concise.").

290 5 USC § 706(2)(A) (defining the scope of review).

291 Whether this is a plausible doctrinal hook is debatable. See, for example, Jack M. Beerman and Gary Lawson, *Reprocessing* Vermont Yankee, 75 Geo Wash L Rev 856, 882 (2007) ("Hard-look review may or may not be a correct or even plausible interpretation of § 706(2)(A)—a point on which the authors are not necessarily in full agreement.").

292 A helpful statement of this doctrine appears in *Greater Boston Television Corp v FCC*:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making.

444 F2d 841, 851 (DC Cir 1970).

so inclined, we believe it unlikely that any such mechanism would have much of a chance of actually being implemented. We think, however, that notice and comment would still prove effective even in the absence of a formal enforcement mechanism.

One possible enforcement mechanism would borrow from the administrative law rule that permits disappointed litigants to appeal judicial decisions not only on the basis of their substance but also on hard look grounds. An appellate court, for example, might consider first a contention that a trial judge had failed to address significant arguments made by a commenter. If the appellate court agreed with this assessment, then it would remand the decision (perhaps subject to the harmless error doctrine[293]) without regard for whether it agreed with the trial court's substantive conclusion or whether alternative grounds for affirmance existed.[294]

An alternative approach would be for judicial decisionmaking to be subject to a version of the *Chenery* doctrine,[295] under which the courts can affirm an administrative decision only on the actual basis used by the administrative agency to reach that decision. Under this approach, if the lower court failed to respond adequately to an insightful comment, the winning litigant below could not help its cause in its appellate brief by offering a response to a counterargument made by a commenter. No matter how persuasive, that response could not be used to defend the judicial decision if the lower court judge did not incorporate the response into the final opinion.[296]

These approaches have the potential to offer considerable benefits, assuming that judges seek to avoid being reversed or remanded.[297] The first approach would encourage judges to consider and respond directly to any arguments that a reviewing court might consider important. The second approach would similarly give courts some incentive to

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293 By limiting its scope to "salient" issues, see id, hard look review of administrative decisions already includes a rough equivalent to the harmless error doctrine. It is possible, however, to imagine that poor reasoning would be grounds for remand of a judicial decision even if there was an adequate ground for the decision.

294 Of course, this approach could not easily be applied to decisions of supreme courts. We could fancifully imagine a rule that decisions of the supreme court could be appealed to a panel of lower-court judges, who would be allowed to engage only in hard look review.

295 See *SEC v Chenery Corp (Chenery II)*, 332 US 194, 196 (1947).

296 This is, of course, not the current approach in the judicial context. See Kevin Stack, *The Constitutional Foundations of* Chenery, 116 Yale L J 952, 955 (2007) (contrasting the *Chenery* rule with the rule that an appellate court must affirm a correct lower court judgment even when the lower court relied upon an incorrect ground or reason).

297 See Posner, 3 S Ct Econ Rev at 14–15 (cited in note 36) (noting that judges do not like being reversed, but that appellate judges often do not care as much about reversal, because it usually results from differences in judicial philosophy). Reversal might be more of a concern to judges—including appellate judges—if based on the quality of an opinion rather than on its result, as under these enforcement mechanisms.

consider comments sufficiently important to potentially change a reviewing court's analysis of the merits, and it might sometimes even give a *prevailing party* an incentive to identify weaknesses in a court's tentative opinion. Nonetheless, the costs of these approaches would be extraordinarily high. Precisely because they fear reversal, lower courts might have an incentive to invest resources responding to every single comment and argument that might possibly catch the eye of the reviewing court. And reviewing courts would find themselves tasked with far more work as well. Particularly under the first approach, every case would suddenly have many more appealable issues, and indeed more could be manufactured through the submission of comments in response to the tentative opinion. Extending hard look review to judicial decisionmaking would thus demand a vast increase in judicial resources, one that almost certainly would not be justified. Whatever the ultimate cost-benefit balance, such a change seems extraordinarily unlikely.

Could we imagine enforcement mechanisms that would occupy less judicial time? One possibility would be a sampling mechanism: random selection of some percentage of cases (perhaps 1 percent or 5 percent) for some form of hard look review. After the notice-and-comment period and publication of a final opinion, a pseudo-random number generator would be used to determine whether hard look review would be appropriate in a particular case. So long as the percentage of reviewed cases is high enough to weigh on the judges' minds as they consider the comments, this system would provide incentives for careful consideration. But it too might encourage wasteful actions by reversal-fearing judges. And, in any event, we suspect that this too seems unlikely to be adopted. Randomization is hardly foreign to the judicial process; judges are assigned to cases at random,[298] as are judicial districts in some cases when multiple venues are possible.[299] But there would likely be considerable opposition to randomization determining the rights of litigants, even if the right at stake is quasi-procedural.

Perhaps more likely would be a random selection of cases for a hard look analysis that would have no direct consequences for the litigation itself. Such analysis could be integrated into a broader judicial performance evaluation program, like those existing in many states.[300] An independent group, consisting perhaps of respected senior attorneys and retired judges, would review randomly selected opinions

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298 See Orley Ashenfelter, Theodore Eisenberg, and Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J Legal Stud 257, 266–69 (1995) (offering an empirical analysis appearing to verify that judicial selection is genuinely random).

299 See 28 USC § 2112(a)(3) (requiring that the Judicial Panel on Multidistrict Litigation use random selection to designate courts of appeals to hear certain cases).

300 See Kourlis and Singer, 86 Denver U L Rev at 9 (cited in note 19) (noting that nineteen states have such programs).

after judgments became final to issue a public assessment of the quality of reasoning in light of the comments submitted. The costs of such a system would be relatively small, as long as the percentage of cases selected for review was sufficiently small. The benefits, meanwhile, would be relatively invariant to the percentage.

As with many judicial performance evaluation programs, the effect of the sanction would be reputational, and as long as a sufficient number of any judge's cases are sampled to make assessments statistically meaningful, the exact number sampled is of little consequence. An advantage over other judicial evaluation proposals is that this approach provides a systematic means of assessing judicial work product.[301] Because these evaluations, even in the absence of sanctions, would be assessing a judge's reasoning and professionalism rather than the merits of the case, they could have even greater reputational effects than ordinary appellate review. In our existing system, judges can chalk up a high reversal rate to differences in legal philosophy;[302] under this system, they could not.

These reviews should thus focus not on the merits, but on whether the judges have fairly considered and responded adequately to reasonable arguments, both in the original briefs and in the comments. It may not be possible for reviewers to place aside ideological considerations altogether,[303] but the goal should be to analyze judicial craft. In addition, the reviews should take into account that it will not generally be practical (or even desirable) for a judge to respond to all nonfrivolous arguments and comments. For example, a reviewer might well not penalize a judge for a brief discussion or no discussion at all of an issue if elaboration of that issue would have no reasonable chance of changing the conclusion, and a reviewer also might take into account the importance of an issue or the importance of a case. The notice-and-comment system cannot and should not lead judges to address in writing every conceivable issue, but it can seek to ensure that judges fairly address important and potentially dispositive ones.

Indeed, the possibility of reputational rather than formal sanctions for ignoring comments suggests that a notice-and-comment system could have a significant benefit in the judicial context even absent

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301 Kourlis and Singer suggest that an independent commission might evaluate a variety of data sources, including a "sample of written orders," but they do not indicate how this sample might be constructed. See id at 41. Moreover, opinions with comments may be easier to evaluate than if the commission is expected to undertake its own research into a case.

302 See, for example, Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 Or L Rev 405, 488 (1998) (concluding that the "high reversal rate of the Ninth Circuit is attributable to an ideological difference between the Supreme Court and the reversed panels on the Ninth Circuit"). See also note 297.

303 See notes 89–90 and accompanying text.

any enforcement mechanism. In the administrative context, we suspect that the reputational costs of negative hard look reviews are relatively small, though perhaps not altogether absent.[304] What matters most to agency heads is that such reviews block the rulemaking and waste the employees' time, either because the rulemaking is abandoned[305] or because further efforts must be made to address the court's concerns about reasoning deficiencies. In the courts, we suspect that these relative priorities would be reversed. It would be no great burden, if a full hard look review system existed, to amend a judicial opinion when an appellate court concluded that a judge had paid insufficient attention to a particular issue. But even without formal hard look review, a notice-and-comment system has the potential to embarrass, for example if commenters pointed out a glaring error or omission in the opinion, or a failure to confront a serious argument that had been made in the briefs.

At present, it is difficult for the public to assess the degree to which a judge confronts all relevant arguments and authorities. The notice-and-comment system makes it considerably easier than before; looking at comments and amendments to opinions can give someone scrutinizing a judge a sense of the degree to which the judge takes arguments in briefs and in the comment period into account, and the extent to which her reasoning is sound. A formal evaluation system would make it easier still, but is not essential for notice-and-comment procedures to have some constraining power.[306]

C. The Filtering Problem

One imagines that certain high-profile cases could produce a deluge of comments, mostly of little value, swamping the court with paperwork. In order to be most effective, a notice-and-comment system would need to develop some method for separating the wheat from the chaff. It is worth thinking about high-tech options for doing so, though such options are more fanciful than feasible, at least in the short run. Fortunately, however, it would be relatively simple to im-

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304 Commentators have discussed the impact of hard look review of administrative decisions on *judicial* reputation. See, for example, Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 Tex L Rev 483, 503 (1997) (suggesting changes to hard look review to "increase the reputational cost to judges" who perform badly). But we have found no sustained discussion of the effect of hard look review on agency officials' reputation.

305 An empirical study of all sixty-one DC Circuit remands of rules over a ten-year period ending in 1995 found that there were twelve remands that led to agency abandonment of the rulemaking, at least with respect to the points on which the courts based their remands. See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals through Informal Rulemaking?*, 94 Nw U L Rev 393, 433 (2000).

306 See Part II.B.2.c.

plement crude, low-tech options that would, we believe, achieve sufficient filtering to make our proposal viable.

1. The need for filtering.

The capacity of a notice-and-comment process to improve judicial decisionmaking may be inversely proportional to the number of comments submitted, particularly low-value comments. Some administrative rulemaking processes produce only a small number of comments,[307] and it is likely that many judicial proceedings, particularly on relatively low-profile cases in lower courts, would produce only a small number as well. But high-profile cases, like high-profile rulemakings, might invite a torrent of comments with little substantive value. Lost in the haystack is the needle, the occasional insightful comment. A judge will probably not be embarrassed by an insightful comment if no one notices it among the many less insightful ones. Indeed, a well-meaning and conscientious judge might miss the comment in the sea of useless hay, even if the judge would have been inclined to take it seriously.[308]

If there were an enforcement regime, even one that merely sampled a judge's decisions, judges would have some incentive to find the most meaningful comments. But a large volume of comments would make an enforcement regime all the more cumbersome. Indeed, the large number of comments submitted sometimes in the administrative context, many either of low value or cogent but targeting peripheral issues, contributes to a sense among many scholars that the rulemaking process is "ossified."[309] Tom McGarity argues that because agencies "can never know what issues dissatisfied litigants will raise on appeal, [agencies] must attempt to prepare responses to all contentions that may prove credible to an appellate court, no matter how ridiculous they may appear to agency staff."[310] Even Mark Seidenfeld, a skeptic on proposals to reduce ossification, acknowledges that "parties op-

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307 See Stuart Shapiro, *Two Months in the Life of the Regulatory State*, 11 Admin & Reg L News 12, 13 (2005) (reporting that the median number of comments in a sample of eighty-four rulemakings was one, and that "the distribution is quite skewed: a very few [rulemakings] receive a high percentage of the total").

308 Justice Ginsburg has noted that even "a gem" contained in an amicus brief can be missed because of the sheer volume of briefs. Simard, 27 Rev Litig at 700–01 (cited in note 112). Given the low cost of filing comments, relative to amicus briefs, one imagines that an unfiltered commenting system has the potential to generate a volume of comments in the Supreme Court in high profile cases that dwarfs the already substantial volume of amicus briefs.

309 See, for example, Pierce, 47 Admin L Rev at 59–60 (cited in note 209) (suggesting a number of methods to alleviate ossification); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process,* 41 Duke L J 1385, 1386 (1992).

310 McGarity, 41 Duke L J at 1412 (cited in note 309).

posed to an agency rule have every incentive to raise every issue and introduce every factor that undercuts the agency's decision."[311]

A large number of comments can inhibit not only the constraint function, but also the informational function, of notice and comment. Assuming that a judge genuinely wants to know about reasonable critiques of a tentative opinion released for comment, it will be helpful if the judge has some means of identifying the most relevant critiques. A judge can, of course, delegate the task to law clerks, in much the same way as an agency head can delegate the task to employees. But this does not necessarily lower the total costs of evaluation, and it increases the cost to the judge of monitoring judicial clerks, who sometimes may have incentives (conscious or subconscious) to conceal, or to treat as frivolous, criticisms of opinions that they have drafted.

Thus, notice and comment might be considerably more effective if there were a mechanism for filtering comments—keeping down the volume of unhelpful comments or identifying specific comments as the ones to which a court should pay close attention. Indeed, this would be useful in the administrative context as well. The current system in the administrative context might be seen as a form of ex post filtering, with the reviewing court determining which comments the administrative agency should have answered. What would be preferable is a system of ex ante filtering: an identification before the final decision issues of the comments on which the agency or judge should focus. This would increase the ability of the public to monitor the deliberative process of the decisionmakers, even without an enforcement regime. Agency officials could spend less time on relatively unimportant comments and more time on the more important ones, and they would avoid the danger that ex post evaluators might have a different view of their relative importance.

The task for both agencies and courts is not simply to weed out comments with no legal or policy content. Some comments may be lucid but peripheral. This could be so for at least two reasons. First, a comment might refer to a relatively unimportant aspect of a proposed decision. We do not mean to suggest that comments should be filtered down to the single most powerful discrete point. But filtering down to a relatively small number of the most important issues—taking into account both the immediate case and the opinion's impact on future cases—could simplify the decisionmaking process without significantly reducing the quality of decisions.

Second, sometimes it might be clear that a court or an agency could respond effectively to a comment, and the value in forcing the

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311 Seidenfeld, 75 Tex L Rev at 515 (cited in note 304).

court or agency to do so is low. Cognitive psychology suggests that decisions are generally based on a small number of salient arguments, rather than based on complex decision trees.[312] The details offered in a written justification of a decision are sometimes ex post rationalizations. Ideally, a filtering mechanism would identify comments regarding these details when they are powerful enough to unravel an entire argument, or when they have significant implications for later decisions. But where a comment points out some new line of analysis not considered, and it is apparent that reasonable decisionmakers could and likely would develop sufficient counterarguments to make rejection of this tangentially relevant analysis acceptable, and that the process of specifically writing down these counterarguments seems unlikely to change the decisionmakers' views, actually forcing decisionmakers through this process sometimes may not be helpful.

Indeed, doing so has the potential to be counterproductive. Decisionmakers, intent on achieving a particular resolution on a peripheral issue, might end up offering weak but detailed arguments that could have negative impact in future cases. For example, suppose that Precedents *A*, *B*, and *C* have facts quite analogous to those in the instant case, while Precedent *D*'s facts bear a weaker analogical relationship to the present facts. If a commenter presses the court on ignored Precedent *D*, the court might well offer an interpretation of Precedent *D* designed to provide a plausible answer to the comment, but this reading might have an impact on the future development of issues more closely related to Precedent *D*. This impact, moreover, might be negative if the court's analysis of Precedent *D* is driven by issues only tangentially related to that precedent. Ideally, the notice-and-comment process would not push a judge who simply ignored Precedent *D* to explain it, but would push a judge who misleadingly reads Precedent *D* to reconsider. Failure to address a tangential issue should not be seen as problematic, but superficial treatment of such an issue should be cause for concern because of effects on future cases.

A filtering mechanism, in sum, would be useful for three related reasons. First, the mechanism might help identify a useful comment undermining the disposition of the current case. Second, the mechanism might flag a comment identifying a portion of the court's reasoning that seems unlikely to affect the outcome of the case, but that

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[312] The literature shows that when making a complex decision, a person will not work entirely in a bottom-up manner, but will make an assessment based on a somewhat holistic sense of the evidence and then, if asked to make judgments on subissues, will generally ensure that those judgments cohere with the broader decision, even when they might not have had the same view taking the subissues in isolation. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U Chi L Rev 511, 523–33 (2004).

could present problems later. Third, the mechanism might identify some criticisms of an opinion as relatively unimportant, either because the criticisms easily could be rebutted or because the criticisms identify an issue that, though unaddressed by the court, seems unlikely to affect the case outcome. With a filtering mechanism, notice-and-comment procedures need not make opinions inexorably longer. In the long run, opinion writers might feel more comfortable omitting tangential analysis, while focusing more carefully on key points. Whether the end result would be opinions that are slightly longer or slightly shorter than they are currently, a filtering mechanism could ensure that the prose of judicial opinions becomes more relevant and more deliberate.

2. Web 2.0 possibilities.

Bloggers, we have seen, have suggested that Web 2.0 could help the Supreme Court,[313] but to be workable, this idea must be made more concrete. A website that merely collects comments might fit the Web 2.0 paradigm, but we doubt that such a website would provide much advantage in soliciting useful comments over a more conventional notice-and-comment process. A website that not only solicits comments, but also identifies the most important ones might have more potential. But how to set one up?

A hopeless approach would be to allow a wiki. Wikipedia is well known as the encyclopedia that everyone can edit. In theory, progressive editing by multiple users could gradually improve comments on a judicial case, in much the same way as progressive editing improves the completeness of a summary of an episode of *24*. One reason for Wikipedia's relative success is that a community norm promotes viewpoint neutrality, and while Wikipedia includes a simple adjudicative process for disputes, the arbitrators seek to avoid determining the truth about covered subjects.[314] Neither this community norm nor an adjudicative process seems likely to work effectively in a context as subjective as judicial opinion evaluation. A critical feature of Wikipedia is that users can "revert" the changes of others.[315] This may work when the vast majority of users have roughly similar standards, but a "revert war" between thousands of pro-choice and pro-life Internet users, for instance, would not seem conducive to development of a coherent judicial opinion in an abortion case.

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313 See notes 6–7 and accompanying text.

314 See David Hoffman and Salil Mehra, *Wikitruth through Wikiorder: Using Dispute Resolution to Generate Public Goods*, online at http://www.kauffman.org/ksli/resources.cfm (visited Sept 1, 2009).

315 See *Help: Reverting*, Wikipedia, online at http://en.wikipedia.org/wiki/Help:Reverting (visited Sept 1, 2009) (describing the process of reverting and characterizing as "harmful" "revert wars" in which users continually revert each other's edits).

Other Web 2.0 websites' filtering functions have somewhat more promise. For example, on Digg.com, users can "Digg" a blog post or other Internet content, indicating their approval of it, and when many users have "Dugg" an article in a short period of time, it may appear on the website's home page.[316] The site thus provides value not just by identifying all posts that users have found interesting, but by highlighting especially interesting posts. The possibility that a similar Web 2.0 mechanism could be used to filter information presented to the government is not entirely hypothetical. A pilot project affiliated with the US Patent and Trademark office, called "peer to patent,"[317] allows users to upload prior art claims. Users vote on individual prior art references to determine which ones end up in the "top ten" references that are forwarded to the patent examiner.[318] One can easily imagine analogues to this in the judicial context.[319]

We are doubtful that a mechanism of this type could serve as a sufficiently robust filtering mechanism, however. The patent validity inquiry is relatively systematic; judicial reasoning is much more open-ended. And while the patent inquiry itself is somewhat subjective,[320] the evaluation of the strength of many judicial arguments will be even more so. Finally, it is quite possible that interest groups will recruit voters to "Digg" advantageous (rather than legally sound) comments much in the way that interested websites link to online polls in order to try to skew the results. In our judgment, an online rating mechanism of this sort is not likely to add much value, and more broadly, Web 2.0 is unlikely to offer much of an improvement on Notice and Comment 1.0.

We do not mean to suggest that it is impossible to design an effective online filtering mechanism, only that any plausible mechanism would be sufficiently complex that it seems unlikely that it could be included in any notice-and-comment system introduced in the near future. An adequate mechanism would need to include at least two features: First, there would need to be incentives for accurately rating comments, presumably with governmental financial encouragement. (It might also make sense to provide financial incentives for producing comments that receive high ratings, thus ensuring that comments

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316 See *What is Digg?*, Digg, online at http://digg.com/about (visited Sept 1, 2009).

317 See *Peer to Patent*, online at http://www.peertopatent.org (visited Sept 1, 2009).

318 See id.

319 For an interesting assessment of how technology might be used to structure the notice-and-comment administrative rulemaking process and to foster the development of deliberative communities contributing to individual rulemakings, see Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 Emory L J 433, 480–92 (2004).

320 See Jeffrey A. Lefstin, *Claim Construction, Appeal, and the Predictability of Interpretive Regimes*, 61 U Miami L Rev 1033, 1036 (2007) (noting that many believe unpredictability in patent claim construction to be a serious problem).

do not come disproportionately from special interest groups, but also from thoughtful, disinterested experts.) Second, robust mechanisms for preventing manipulation by those submitting ratings would be required. The notice-and-comment system is designed to encourage submission of comments from interested parties, but if some type of rating system were to assess the quality of these comments, it is important that *ratings* based on self-interest are excluded from the cumulative rating. In other words, the *comments* will often be self-interested—seeking to achieve changes to the opinion that will benefit the commenter—but the *raters* must be interested only in identifying the best comments that are most likely to be of interest to the court. The raters' legitimate self-interest is only in receiving incentives (financial or otherwise) for identifying the comments that the court would consider most important; the raters must not be allowed to give high ratings to comments only because they have similar self-interest in the subject matter as the commenters.

In theory, it is possible that prediction markets could serve this role.[321] It is straightforward to subsidize participants in prediction markets,[322] and research suggests that prediction markets cannot be easily manipulated because traders have incentives to identify manipulation and trade against it.[323] A prediction market might be used, for example, to forecast the probability that, if a comment were highlighted,[324] the decisionmaker would respond to it in some way. Lawyers and law students might participate in this market in an effort to earn a profit or to gain some sort of a reputational boost. We will not offer a thorough analysis of such a possibility here. Indeed, we recognize that opposition to notice-and-comment judicial decisionmaking would likely be based in part on its unfamiliarity and the inevitable uncertainties about the consequences of new mechanisms, and those concerns would be much greater with a sufficiently advanced online filtering mechanism of this sort.

3. Simple mechanisms.

Nonetheless, it is easy to imagine simple, low-tech filtering mechanisms that could be incorporated into a rollout of even a simple version of a notice-and-comment system. One such mechanism would be to allow each party, as well as each amicus, to submit a brief comment strictly limited in length, perhaps even to just a couple of pages,

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321 See generally Michael Abramowicz, *Predictocracy* (Yale 2008) (providing an overview of the use of prediction markets by decisionmaking institutions).

322 See id at 41–46.

323 See id at 28–32.

324 Conditional prediction markets can be used to estimate the probability of one event only if some other condition is met. See id at 144–54, 199–204.

at the end of the public comment period. This comment might include its own analysis, or it might emphasize points from other comments submitted by the public that the party believes to be particularly helpful. This simple approach would force an interested party to hone in on the most important weaknesses of the judicial opinion. With this approach, the comment period would not simply amount to another round of briefing, though a party that wanted to might submit lengthier comments during the general public comment phase.

This approach would highlight a set of brief comments to which a court would be expected to give particular attention. There would also be some incentive for parties to read through the public comments in an effort to identify any important arguments that they might have missed. This is not a perfect system—sometimes, it might not be in any party's private interest to pass along a useful comment by a member of the public[325]—but it at least achieves a crude version of the filtering function.

An alternative (or perhaps additional) option might be for courts to require that parties or members of the public seeking to comment must do so through an attorney, who is required (subject to sanction under Rule 11 of the Federal Rules of Civil Procedure or its equivalent) to sign a statement indicating that the comment is germane, important, supported by the law[326] or the record, and is not duplicative of other comments already submitted. These requirements would reduce irrelevant, inflammatory, and duplicative comments, though admittedly the definition of duplicative would have to be sensibly spelled out and enforced. Combined with sensible length-limits, they would keep the court's workload reasonable. They would also provide some incentive for those who hope to receive credit for their comments to submit relatively early, lest work on the comments be wasted once someone else makes the same point. That, in turn, would encourage other would-be commenters not to waste time once others have already made the point that they were going to make.

CONCLUSION

Notice-and-comment judicial decisionmaking, we have argued, could help judges obtain information from both parties and nonparties, improve the legitimacy of judicial proceedings, and help constrain judges to follow the rule of law. As long as we do not also import hard look review into the judicial arena, the costs of the process may be surprisingly small, and a shift of some resources to this new final stage

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325 See note 85 and accompanying text.

326 Or is warranted by "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FRCP 11(b)(2).

of the judicial process would likely improve decisionmaking. We encourage courts and legislatures to consider formally implementing a simple version of this procedure. In the long term, further refinements, such as a system for reviewing randomly selected opinions or a sophisticated filtering mechanism that highlights especially strong comments, could be explored. In the short term, we would encourage individual judges to experiment with opening tentative opinions to public comment, even if that is not likely to be as effective as a more institutionalized approach. In sum, we see little downside to experimentation and expect that such experimentation would show that even a simple system of notice and comment could produce significant benefits.

We recognize, though, that there may be considerable resistance to our proposal. Skeptics might worry that notice and comment would open the "black box" of judicial decisionmaking, exposing as fraught with uncertainty a process that, for reasons of judicial dignity and legitimacy, is best shielded from public view.[327] That concern might have some validity if notice and comment exposed a court's inner deliberations, but a released tentative opinion would reflect the outcome of those deliberations, not their dynamics. The tentative opinion would tell us nothing about how the court reached its decision; it would only tell us what that tentative decision is. The process may be an invitation to a court to change its mind, but the judicial system already includes error-correction features, including appellate review and overruling of previous precedents. If the goal is to fool the public into thinking that courts always get things right the first time, the cat is already out of the bag.

A related, but more fundamental, concern is that the propriety of judicial lawmaking remains a subject of considerable dispute,[328] and we suspect that our proposal might be seen to take sides in the debate, and to do so in a way that calls unseemly attention to the controversial resemblance between the modern judiciary and the explicitly regulatory arms of government. But our proposal need not be taken to embrace judicial lawmaking. Notice and comment makes sense even if one believes, as is often the case, that legal authorities do dictate a "correct" answer, and that judges should do nothing more than apply the law to particular disputes. If a judge's job is simply to call balls and strikes,[329] then notice and comment provides slow-motion instant rep-

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327 See, for example, Adrian Vermeule, *Judicial History*, 108 Yale L J 1311, 1341 (1999) (discussing the view "that judicial deliberation requires extraordinary protection from the harms of publicity").

328 See, for example, Hartnett, 74 NYU L Rev at 126 (cited in note 42) ("Courts (or at least federal courts) do not sit to pronounce the law, but rather to decide cases and controversies.").

329 At his confirmation hearing to become Chief Justice, John Roberts said, "I will remember that it's my job to call balls and strikes and not to pitch or bat." Confirmation Hearing for John Roberts to the Chief Justice of the United States Supreme Court, Senate Committee of the

lay. That is to say, the comments submitted to courts will often be of a very different nature from the comments submitted to administrative agencies. In the judicial context, the value of notice and comment does not lie only in its ability to inform decisionmakers of the policy implications of their proposed rulings. It lies also in its ability to inform judges of relevant cases, regulations, statutes, facts in the record, and the like, so as to help ensure that judges decide cases in accordance with the governing legal authorities—to help ensure, that is, that judges properly *follow* (rather than make) the law.

In any event, even those who rail against so-called "judicial activism" now generally accept that judges sometimes make law.[330] That reality can be celebrated, or it can be lamented. (Again, we take no position here.) But it cannot be denied. Much of the most influential legal scholarship in recent decades has concerned itself with developing a judicial philosophy that seeks to protect against the downsides to judicial lawmaking identified in this Article. Cass Sunstein's "minimalism," for example, strives to mitigate the costs of judicial mistakes and misinformation, and to constrain ideological decisionmaking, by asking courts to decide cases on the narrowest possible grounds.[331] But those efforts, whatever their merits, depend on the good faith and self-restraint of individual judges to carry them out in each case.[332] Our proposal is institutional—seeking a systemic modification of the judicial process to make it more amenable to the judicial project. The decisionmaking process of our adversarial legal system arose in a bygone era when courts were understood only to resolve disputes by application of preexisting, discoverable law, not to announce rules of law.[333] In many ways, the venerable old judicial process is not well suited to the modern judicial task. We believe that it is time to consider modifying that process to incorporate from the world of administrative law a procedure that was sensibly crafted for precisely the rulemaking task that the judiciary is now generally understood to perform.

Judiciary, 109th Cong, 1st Sess (Sept 13, 2005), online at http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html (visited Sept 1, 2009).

330 See, for example, *James B. Beam Distilling Co v Georgia*, 501 US 529, 549 (1991) (Scalia concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law.").

331 See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv L Rev 4, 7 (1996).

332 Our proposal could be seen to complement a theory like Sunstein's, insofar as the comment period could be used to inform judges of instances in which they are poised to decide more than is necessary to the resolution of the dispute.

333 Consider Schauer, 73 U Chi L Rev at 883 (cited in note 75) ("The common law's methods and theory were developed at a time when most common law judges understood themselves to be discovering the law rather than making it.").