ESSAY

A THEORY OF JUDICIAL CANDOR

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This Essay seeks to reframe a longstanding debate by propounding a novel theory of judicial candor. Previous commentators on judicial candor have failed to draw a crucial distinction between obligations of candor, breaches of which constitute highly culpable failures, and ideals of candor that even the best judges fail to satisfy fully. This Essay argues for a theory of judicial candor that defines both minimal obligations and aspirational ideals and that explains the linkages between the two.

This Essay's potentially larger contribution lies in its provision of a template for thinking about judicial candor. Different people begin with different understandings or intuitive conceptions. To arbitrate among rival perspectives, this Essay posits that discussion needs to begin with familiar patterns of linguistic usage, but insists that analysis cannot stop there. Against the background of linguistic and theoretical disagreement, intellectual progress requires examination of why we have reason to care about judicial candor in the various senses in which that term can be used. At the last stage, the selection of a conception of judicial candor must turn on normative considerations. Consistent with that credo, this Essay not only explains, but also justifies, its conclusions about what judicial candor minimally requires and about the further ideals that it embodies, even if fallible and time-pressed human judges understandably fall short of ideal candor in many cases.

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INTRODUCTION

Judicial candor can be a baffling concept. A large literature characterizes an obligation of candor as a defining element of the judicial role.[1] As Professor David Shapiro writes in a classic article entitled *In Defense of Judicial Candor*, "[W]ho, after all, would be Grinch-like enough to argue for lack of candor?"[2] The answer is: almost no one, though perhaps more than one might expect.[3] The more vexing question is one of definition.

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1. See, e.g., Scott Altman, Beyond Candor, 89 Mich. L. Rev. 296, 296–99 (1990); Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307, 1309 (1995); Robert A. Leflar, Honest Judicial Opinions, 74 Nw. U. L. Rev. 721, 737–38 (1979); Micah Schwartzman, Judicial Sincerity, 94 Va. L. Rev. 987, 997 (2008); David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 736–37 (1987) [hereinafter Shapiro, Judicial Candor]; Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353, 358–59 (1989); see also Suzanna Sherry, The Four Pillars of Constitutional Doctrine, 32 Cardozo L. Rev. 969, 972 (2011) (describing candor as "[o]ne of the most important aspects of judicial craftsmanship").

2. Shapiro, Judicial Candor, supra note 1, at 738.

3. See Idleman, supra note 1, at 1309 (characterizing the view that judges "should neither omit their reasoning nor conceal their motives" as "the conventional wisdom" and

What exactly is the judicial "obligation of candor,"[4] as Shapiro calls it, and what (if it exists) does it require?

Professor Shapiro's article exposes the question's difficulty. In his formal answer, Shapiro, who champions the importance of candor, defines judicial candor largely as the avoidance of deliberate falsehoods: "The problem of candor . . . arises only when the individual judge writes or supports a statement he does not believe to be so."[5] But Shapiro also hints at a more expansive position when he writes, "My thesis is supported, I think, by the wide respect accorded to those twentieth-century judges whose opinions are especially notable for their candid recognition of the difficulties of decision and the strength of competing arguments."[6] In this formulation, candor encompasses far more than refraining from knowing untruths. It calls for searching forthrightness in analyzing hard legal questions.[7] As a first approximation, we might say that Shapiro defends a narrow conception of judicial candor as avoidance of prevarication, defined as knowing utterance of propositions that one believes to be false or misleading, but that he occasionally assumes a broader meaning. Under the more expansive definition, candor demands that judges not only avoid deliberate falsehoods, but also make forthright disclosures concerning vulnerabilities in, and possibly psychologically motivating influences on, their chains of formal legal reasoning.

To sharpen the distinction between a narrower and a broader conception of judicial candor, consider whether judges breach an obligation of candor when they provide reasons for their decisions but give little or no explanation of why they view those reasons as sufficient. Suppose a judge purports to justify a result by writing simply "Plaintiff wins because *Marbury v. Madison*[8] so dictates," with no supporting analysis of how or why *Marbury* bears on the case, when informed observers might think *Marbury*'s pertinence debatable. Viewed from one perspective, the judge's reasoning is honest and transparent: She truly believes (let us

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as "virtually unassailable"). But cf. Schwartzman, supra note 1, at 988 ("[T]he idea that judges must adhere to a principle of sincerity is surprisingly controversial."); Michael L. Wells, "Sociological Legitimacy" in Supreme Court Opinions, 64 Wash. & Lee L. Rev. 1011, 1051 (2007) [hereinafter Wells, Sociological Legitimacy] (arguing judges should sometimes subordinate candor to the imperative of achieving "sociological legitimacy" for judicial decisions); Zeppos, supra note 1, at 358–59, 402–06 (asserting judges' adherence to a strict obligation of candor would make it impossible for courts to perform important judicial functions in interpreting statutes). Much of Shapiro's article sought to refute a few iconoclasts who have tried to excuse judicial dissembling in some cases. See Shapiro, Judicial Candor, supra note 1, at 739–49 (rejecting four arguments on behalf of "some form of selective deception, or at least nondisclosure, in the plying of the judge's trade").

4. Shapiro, Judicial Candor, supra note 1, at 732, 737; see also id. at 750 (referring to a judicial "obligation to candor").

5. Id. at 736.

6. Id. at 740.

7. See Schwartzman, supra note 1, at 994–95.

8. 5 U.S. (1 Cranch) 137 (1803).

assume) that *Marbury* controls. From another perspective, however, the opinion is opaque. Certainly the judge has provided no "candid recognition of the difficulties of decision and the strength of competing arguments."[9] We might even suspect that she has willfully refused to do so. Perhaps she thought the legal arguments in the case so nearly in equipoise that she was entitled to choose both an outcome and a rationale from among a set of legally plausible alternatives and that, in her mind, *Marbury* controls only because she opted to say so in her opinion. What should we conclude about whether the judge has satisfied her obligation of candor under these imagined circumstances?

If that example seems farfetched, consider partly analogous cases that arise routinely in the Supreme Court. Because the Justices have no strict obligation to follow precedent, they frequently need to make methodological choices.[10] And their choices in particular cases can leave lawyers and lower court judges scratching their heads about how one or more of the Justices selected the premises upon which they rested their conclusions. Sometimes the Justices base their decisions on what they characterize as the Constitution's plain language.[11] Sometimes, however, all of the Justices treat precedent as determinative even when it appears to contradict historical evidence concerning the Constitution's plain language or original meaning.[12] Are the Justices candid if they fail to explain why some cases are controlled by plain language and original historical meanings and others by precedent?

If the Justices fall short when they fail to explain outcome-determinative methodological choices—and thus leave their "real"

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9. Shapiro, Judicial Candor, supra note 1, at 740.

10. The literature on the force of precedent in the Supreme Court is voluminous. E.g., Michael J. Gerhardt, The Power of Precedent (2008); Randy J. Kozel, Settled Versus Right: A Theory of Precedent (2017); Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1 (1989); Randy E. Barnett, Trumping Precedent with Original Meaning: Not as Radical as It Sounds, 22 Const. Comment. 257 (2005); Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68 (1991) [hereinafter Gerhardt, Role of Precedent]; John Harrison, The Power of Congress over the Rules of Precedent, 50 Duke L.J. 503 (2000); Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23 (1994); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723 (1988); Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1 (2001); Michael Stokes Paulsen, Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535 (2000); Michael Stokes Paulsen, The Intrinsically Corrupting Influence of Precedent, 22 Const. Comment. 289 (2005); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571 (1987).

11. See, e.g., INS v. Chadha, 462 U.S. 919, 951–59 (1983) (refusing to allow deviation from the "single, finely wrought and exhaustively considered, procedure" for legislation prescribed by the Constitution).

12. Richard H. Fallon, Jr., Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence, 86 N.C. L. Rev. 1107, 1129–32 (2008) [hereinafter Fallon, Constitutional Precedent]; Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 658 (1999).

grounds for decision undisclosed—the failing is common and cuts across ideological divides.[13] And one need not impute deviousness or willful misrepresentation to explain why a Justice might think that the issues in one case required a different approach from those in another. Nonetheless, the question arises whether candid decisionmaking would require an explanation.

Especially but not exclusively in cases involving unexplained methodological choices, that question leads to another. A number of skeptical observers specifically maintain that a crucial, material omission in many Supreme Court opinions involves the Justices' failure to indicate the role that their moral, political, or policy views may have played in their decisionmaking.[14] Here we can ask: Have Justices who refuse to disclose such motivations, when they have them, satisfied their obligations of judicial candor?

I was once disposed to say that they had not. I would have taken the same position regarding Justices who lack a consistent interpretive methodology and whose opinions furnish no informative reasoning concerning their adoption of a particular methodology in disputed cases. But reflection has led me to a more nuanced view. To think clearly about judicial candor, we need a distinction that leading contributors to the literature have failed to recognize so far—a distinction between the *obligation* of judicial candor and the *ideal* of judicial candor. Justices who write and join opinions of the kinds described above—those who offer what look on the surface to be reasons for their decisions but provide scant insight into their actual reasoning or the difficulty of a legal problem—fall far short of the ideal. Nonetheless, in the absence of either a willful effort to deceive or the utter unintelligibility of proffered legal reasoning, the kinds of opinions just imagined normally do not breach an obligation of candor.

In the view that this Essay advances and defends, we should regard judicial candor as existing along a spectrum. Along that spectrum, one crucial marker defines minimal obligations. A judge or Justice who fails to satisfy those requirements commits a serious, culpable breach of norms of acceptable judicial conduct. But the minimal obligations mark a point at some distance from the ideal, which the Justices can approach more or less closely. Professor Shapiro's article picks out as exemplars Justice Robert Jackson, Justice John Marshall Harlan, and Judge Henry

13. See infra notes 95–103 and accompanying text.

14. See, e.g., Altman, supra note 1, at 296–97 (describing it as the "consensus position" among academic commentators that judges "should become aware of and disclose the real reasons for their decisions"); Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 32 (1984) ("It is understandable that the more controversial and politicized the decision, the more a court will want to appear above controversy. Such false appeals to neutrality are, nonetheless, illegitimate."). For a defense of judicial nonintrospection, but not of dissembling, see Altman, supra note 1, at 351.

Friendly.[15] More ordinary judges can satisfy their obligations of candor without approaching the standard that those eminent jurists set.

The distinction between obligations and ideals of judicial candor represents this Essay's first significant contribution to the existing literature. Its second and more ambitious innovation is to introduce a conceptual apparatus for appraising judicial candor in a range of contexts. Among the central challenges for a theory of judicial candor is to arbitrate among disparate linguistic and conceptual intuitions. If I say that judicial candor means or requires one thing, and someone else says that it is or demands something else, it is not clear what we are arguing about or how, even in principle, we could resolve our differences. The concept of "judicial candor" is largely the invention of lawyers and law professors who understand and apply it in quite different ways—as exhibited in debates in the literature—either to praise judicial behavior that they approve or to criticize judicial behavior that they disapprove. Under these circumstances, it is tempting to conclude that debates about what judicial candor is, means, or requires are wholly semantic and ultimately pointless, with the only real dispute involving how judges ought to behave.

Plainly, however, the parties to the debate believe that something is at stake. So do a number of judges with whom I have discussed judicial candor. Far from regarding contestation about judicial candor as pointless, those who take stands about the meaning of judicial candor think it worth contesting how we *ought* to employ the term. Some may recognize that the entrenched connotations of "judicial candor" carry a rhetorical punch and believe that its effects in shaping attitudes ought to be put to the best use.[16] Others may think that there is a morally correct or optimal way to understand or interpret judicial candor, partly independent of any rhetorical advantages that it might confer.[17] Without entering into metalinguistic and metaphysical controversies,[18] my strategy in this Essay will be to assume that debates about judicial candor have an irreducible normative element but that they begin with, and must remain sensitive

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15. See Shapiro, Judicial Candor, supra note 1, at 740.

16. Cf. David Plunkett & Tim Sundell, Disagreement and the Semantics of Normative and Evaluative Terms, Philosophers' Imprint, Dec. 2013, at 1, 21, 24 (describing a class of disputes about evaluative concepts as involving "metalinguistic negotiations" about how a term ought to be used in light of its "functional role in thought and practice," including its positive or negative connotations).

17. Cf. Ronald Dworkin, Justice for Hedgehogs 6–7, 166–70 (2011) [hereinafter Dworkin, Justice for Hedgehogs] (discussing "interpretive concepts," the best or correct specifications and applications of which require normative judgments and depend partly on coherence with other wholly or partly normative concepts).

18. For discussion of how debates about the appropriate usage of evaluative terms implicate such issues, and of the issues' relationship to one another, see generally Alexis Burgess & David Plunkett, Conceptual Ethics II, 8 Phil. Compass 1102 (2013); David Plunkett & Timothy Sundell, Dworkin's Interpretivism and the Pragmatics of Legal Disputes, 19 Legal Theory 242 (2013).

to, anchoring patterns of linguistic usage and linguistic intuition. Proceeding accordingly, I propound a framework for meaningful debate about what judicial candor is or requires. More specifically, this Essay proposes that participants in debates about judicial candor should distinguish and answer five questions:

> (1) What do most people, or different groups of people, characteristically mean when they talk about judicial candor (even if different people use the term in different ways)?;
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> (2) What good reasons do we have, if any, to care whether judges exhibit judicial candor within one or another plausible usage of that term?;
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> (3) Should the kind of judicial candor that we have good reason to care about be conceived as defining (a) an obligation, any breach of which is highly culpable, (b) an ideal, possibly situated among other ideals, of which even very good judges will sometimes fall short, or (c) both?;
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> (4) In light of answers to the foregoing questions, what substantive content should we assign to the concept of judicial candor?; and
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> (5) To the extent that we have good reason to regard judicial candor as either a moral or a legal obligation, is it ever subject to override in exceptional cases?

Although others might formulate the relevant questions slightly differently, analysis of any shared concept must begin with patterns of linguistic usage.[19] And when differences about actual or proper usage emerge, there is no hope of rational arbitration among contending claims without asking what reasons we might have to prefer one sense or usage to another—my second question. Otherwise debate would be pointless. Close analysis of leading positions in the debate then reveals the crucial salience of the third and fourth questions. The fifth question is one that any comprehensive theory of judicial candor almost self-evidently needs to answer once it is raised.

The next five parts of this Essay address my five questions, each in turn, with reference, when relevant, to the question whether a judge or Justice who writes shallowly reasoned and relatively uninformative opinions satisfies appropriate norms of candor. By the end, this Essay will have defended the conclusion that I stated at the outset: We should think of judicial candor as defining both an obligation and an ideal.

As a first approximation, judges and Justices have obligations to advance only arguments that they believe to be valid, to avoid deliberately misleading the readers of their opinions, and to strive to make it intelligible to a reasonable reader how they could regard the reasons that they offer in support of a conclusion as legally adequate under the

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19. For an explication and defense of conceptual analysis, see generally Frank Jackson, From Metaphysics to Ethics: A Defence of Conceptual Analysis (1998).

circumstances.[20] But judges' failures otherwise to disclose even outcome-dispositive aspects of their actual thinking normally breach no duty. By contrast, the ideal of judicial candor comprises further elements, including disclosure of motivating moral and policy judgments, objectively informative reason-giving, and candor in inquiry, defined to call for searching interrogation of legal and factual arguments. Failures fully to achieve the ideal are common, breaches of judicial obligation rarer. We should ask our judges and Justices to do better, but with an awareness of why they may be unlikely ever to realize the ideal of judicial candor fully.

I. WHAT DO PEOPLE MEAN WHEN THEY TALK ABOUT JUDICIAL CANDOR?

In discussing judicial candor, we should begin by considering how people—in this case, mostly lawyers, law professors, and law students—ordinarily use the term. In doing so, we should expect considerable, but not total, convergence. John Rawls's famous distinction between concepts and conceptions provides a helpful point of comparison for understanding the domains of agreement and disagreement.[21] In Rawls's terms, a "concept" marks a broadly shared idea or value, the precise contents of which may be disputed.[22] Rival "conceptions" are competing theories about how best to specify the content of the disputed term. In Rawls's view, particular conceptions of normative concepts require normative defense.[23]

Although Rawls's distinction between concepts and conceptions provides a starting point for analysis, judicial candor occupies an odd status. It is not a technical legal term. It neither appears in the Constitution or statutory judicial codes[24] nor has a traditional legal meaning.[25] Nor is it a term of common parlance. In order to apply the concept of judicial candor, we need to know something about judges, the judicial

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20. For a more precise statement, see infra notes 121–123 and accompanying text.

21. See John Rawls, A Theory of Justice 5–6 (1971) [hereinafter Rawls, Justice].

22. See id.

23. See id. at 6, 17–21.

24. See Idleman, supra note 1, at 1375; cf. John. J. Kircher, Judicial Candor: Do as We Say, Not as We Do, 73 Marq. L. Rev. 421, 432 (1990) (proposing "that codes of judicial ethics mandate that the highest appellate court of a jurisdiction refrain from changing any established legal principle without either expressly overruling or distinguishing past precedent that is pertinent to the issue at hand").

25. Although judicial candor is not a traditional legal concept, candor has a legally developed meaning in corporate law as an aspect of the duty owed by fiduciaries. See, e.g., Del. Code Ann. tit. 8, § 144 (2017) (codifying the fiduciary duty of candid disclosure previously developed at common law); Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (discussing the stringent disclosure requirements implicit in the fiduciary's "duty of candor"); see also Ethan J. Leib, David L. Ponet & Michael Serota, A Fiduciary Theory of Judging, 101 Calif. L. Rev. 699, 738–40 (2013) (characterizing the principle of judicial transparency in terms of the fiduciary duty of candor).

role, and the American legal system.[26] Debates about judicial candor draw their meaning from within that framework.

Later Parts of this Essay will enter those debates by arguing for a preferred conception or theory of judicial candor. The central aims of this Part are more descriptive and analytical than normative. My main aspirations here are to describe the currently leading conceptions of judicial candor, to clarify the terms on which argument has proceeded in the past, and to identify potentially generative foundations for future normative argument.

A. *The Relation of Candor in Nonlegal Contexts to Judicial Candor*

Outside of law, we talk about candor—which a leading online dictionary defines as "the quality of being open, sincere, and honest"[27]—in varied settings. When we do so, we characteristically have a specific subject in mind. We are typically concerned about openness and sincerity in disclosing information concerning particular matters, not in revealing facts or opinions about everything. As referred to in ordinary conversation, moreover, candor is not always a virtue, much less a moral requirement or ideal. In some contexts, we might speak of people's displaying an excess of candor—for example, if strangers tell us more than we think discretion would permit about their intimate relationships or the peccadillos of their spouses or professional superiors.

These reference points from extralegal linguistic usage mark several ways in which the concept of judicial candor is distinct from candor in other roles or nonjudicial contexts. To begin with, nearly everyone who talks or writes about judicial candor assumes it to be a virtue.[28] This

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26. Norms of judicial candor in the United States might differ from those in other, more avowedly "formalist" legal systems, such as France's. For discussion of the contrast between French and U.S. judicial opinions, see, e.g., Bernard Rudden, Courts and Codes in England, France and Soviet Russia, 48 Tul. L. Rev. 1010, 1021–23 (1974); Michael Wells, French and American Judicial Opinions, 19 Yale J. Int'l L. 81, 113–20 (1994). But see Mathilde Cohen, When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach, 72 Wash. & Lee L. Rev. 483, 489 (2015) ("[D]espite their very different sets of institutions and dissimilar positive law traditions, the United States and the Council of Europe's judiciaries deal with this tension [between judicial candor and other competing values] in increasingly similar ways."); Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 134 (1990) (comparing the practice of civil and common law courts and concluding that "just as the separate opinion is making inroads in the civil law world, so United States appellate judges might profitably exercise greater restraint before writing separately").

27. Candor, Merriam-Webster Learner's Dictionary, http://learnersdictionary.com/definition/candor [http://perma.cc/X2Z9-86ZE] (last visited Aug. 8, 2017).

28. See, e.g., Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 Colum. L. Rev. 810, 819 (1961) [hereinafter Leflar, Some Observations] ("Candor is a virtue, in judicial opinions as elsewhere, and we need much more of it."); Shapiro, Judicial Candor, supra note 1, at 738 (posing the quasi-rhetorical question "who, after all, would be Grinch-like enough to argue for lack of candor?").

assumption implies important limitations on the concept's extension.[29] If we assume judicial candor to be virtue, then we must also assume that a judge who speaks too freely about some matters does not display judicial candor, albeit in excess, but manifests an attribute that requires description in different terms.[30] Justice Ruth Bader Ginsburg's highly publicized criticisms of then-presidential candidate Donald Trump, for which she subsequently apologized, illustrate the point.[31] The criticisms did not reflect judicial candor, in the sense in which Professor Shapiro and others use the term, but candor of a different kind, or in a different role, that was unfitting for a Justice to exhibit.[32] We might draw the pertinent contrast as follows: Judicial candor—in the sense in which most legal commentators use the term—involves candor with respect to issues that judges need to analyze in order to resolve the cases in which those issues arise and in which they have or assume an obligation to give reasons for their decisions.

The last qualification, involving obligations of reason-giving, merits highlighting.[33] The Supreme Court affirms repeatedly that lower federal courts have no duty to write opinions in all cases.[34] Indeed, the Court itself almost never explains its decisions to grant or deny certiorari.[35] In cases decided by written opinions, individual Justices occasionally note that they concur only in the judgment, or even record dissents, without further indication of their reasoning.[36] As a result of docket pressure, the

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29. Cf. Leflar, Some Observations, supra note 28, at 819 ("[T]o 'tell all,' with complete and unmitigated candor, is not always a virtue in judicial opinions or elsewhere.").

30. Cf. Aristotle, Nicomachean Ethics bk. II, ch. 6, at 34–35 (Robert C. Bartlett & Susan D. Collins trans., Univ. of Chi. Press 2011) (c. 349 B.C.E.) (defining virtue as the "middle term" between "the excess and the deficiency").

31. See Michael D. Shear, Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump, N.Y. Times (July 14, 2016), http://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html (on file with the *Columbia Law Review*).

32. But see Nancy Gertner, Remarks of Hon. Nancy Gertner, 64 N.Y.U. Ann. Surv. Am. L. 449, 449–50 (2009) (vehemently opposing attempts to limit the freedom of judges to express their views publicly).

33. See generally Cohen, supra note 26, at 525–36 (emphasizing that federal courts have no general obligation of reason-giving); Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633 (1995) (exploring why judges are required or encouraged to give reasons in some contexts but not in others).

34. See Cohen, supra note 26, at 528; see also Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972) ("We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions.").

35. See, e.g., William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1, 5–9 (2015). The Court frequently also acts without written opinions when issuing "orders" that deal with procedural matters, and that sometimes "stay" or postpone the effect of lower court rulings, in cases subject to its review. See id. at 3–9.

36. See, e.g., Franchise Tax Bd. v. Hyatt, 136 S. Ct. 1277, 1283 (2016) (Alito, J., concurring in the judgment). See generally Greg Goelzhauser, Silent Concurrences, 31 Const. Comment. 351, 352 (2016) (exploring reasons for silent concurrences).

number of cases that courts of appeals resolve without written, explanatory opinions has increased steadily over time and apparently continues to grow.[37] We can postpone the question of whether ideals or obligations of judicial candor apply more broadly than is widely assumed—for example, to cases that judges now resolve without any written opinions at all. For now, the crucial point is simply that judicial candor is an obligation or virtue most commonly taken to attach only in judicial contexts in which judges purport to render reasoned explanations for their decisions or have legal duties to do so.

B. *Subjective and Objective Conceptions*

When we begin to speak of the standards that define judicial candor in the provision of reasons for reaching conclusions, we encounter divisions in the scholarly literature. One divide, as noted above, pits defenders of a conception of judicial candor as non-prevarication against those who insist that judges have further obligations to disclose difficulties in or psychological influences on their chains of reasoning.[38] Another division involves whether to define candor in "subjective" or "objective" terms.[39]

This section highlights the distinction between subjective and objective conceptions of candor. According to subjective conceptions, in order to know what candor requires a judge to do, we need to know (or refer to) what she individually and subjectively thinks, feels, or believes. Examples would be conceptions that require judges not to misstate their beliefs or, more affirmatively, insist they disclose thoughts that they would otherwise prefer to conceal. By contrast, objective conceptions rely on an external standard to define what candor would require of any judge, irrespective of that judge's psychological beliefs, motives, or thought processes.[40] For example, an objective conception might require a judge to ask and answer those legal and factual questions that any reasonably honest and searching analysis would divulge. Even if not everyone distinguishes subjective from objective conceptions, we can gain analytical clarity by prying the two apart. Having done so, we can then consider the possibility of theories of judicial candor that include both subjective and objective elements.

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37. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 45 (7th ed. 2015) (noting that increases in the volume of cases have "triggered large changes in courts of appeals' traditional procedures," including an increase in "the proportion of cases decided without any opinion, or by per curiam opinion").

38. See supra notes 7–8 and accompanying text.

39. See Idleman, supra note 1, at 1317–18.

40. Cf. id. at 1320 ("Many definitions seem to attempt to have it both ways, blending the subjective (the status quo) and objective (the aspirational) into an indeterminate middle position.").

1. *Subjective Conceptions of Judicial Candor.* — The dependence of subjective conceptions on a judge's mental state is conceptual, not evidentiary.[41] Efforts by third parties to identify a judge's thoughts or psychological attitudes obviously need to rely on objective, publicly available evidence.[42] In imputing beliefs or emotional attitudes to people in nonlegal contexts, we rely on a mix of evidentiary factors to reach judgments in which we frequently have justified confidence. Both the criminal and the civil law take a similar approach when they attach legal significance to people's motives or intentions.[43]

Subjective conceptions of judicial candor vary from the less to the more demanding. The less demanding focus on judges' sincerity or good faith in saying what they say and in refusing to say more than they say in analyzing legal issues. The more demanding impose norms of mandatory disclosure involving judges' private or subjective thought processes.

Professor Shapiro exemplifies the former, more minimalist approach. As noted above, he initially posits that "[t]he problem of candor . . . arises only when the individual judge writes or supports a statement he does not believe to be so."[44] Shapiro then expands that position only slightly when he maintains that a judge must not say anything (even if she believes it) that she subjectively realizes might prove misleading.[45] Nor, Shapiro adds, should a judge fail to disclose something if she knows that her omission would create a false understanding.[46] He elaborates:

> [F]ailure to disclose may in some circumstances be designed to leave the wrong impression about what has been said. This last aspect seems critical: does the speaker intend—or is he indifferent to the fact—that the omission will render the statement he has made misleading in some material way?[47]

A more robustly demanding subjective conception of judicial candor would highlight judges' forthrightness, or lack of forthrightness, in disclosing their thoughts about matters of legal or psychological relevance to their decisions. According to a leading commentator, "[t]he intuitive definition" of judicial candor would imply "that judges, in their

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41. Cf. Richard H. Fallon, Jr., Constitutionally Forbidden Legislative Intent, 130 Harv. L. Rev. 523, 541 (2016) (distinguishing subjective from objective conceptions of legislative intent).

42. See id.

43. See Alice Ristroph, State Intentions and the Law of Punishment, 98 J. Crim. L. & Criminology 1353, 1365 (2008) (noting "fact-finders are typically making guesses about an individual's mental state . . . without too much handwringing" in the criminal law context).

44. Shapiro, Judicial Candor, supra note 1, at 736; see also Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861, 1880 (2014) [hereinafter Re, Narrowing Precedent] ("Candor means characterizing the law in a way that is consistent with the judge's subjective understanding.").

45. Shapiro, Judicial Candor, supra note 1, at 732.

46. See id. at 733.

47. Id. at 732–33.

written or oral opinions, should thoroughly reveal all considerations bearing on the resolution of a dispute."[48] Broadly construed, this definition could require the disclosure of all factors that exerted any psychological influence on a judge, as well as judges' anxieties about the persuasiveness of their legal reasoning.

However intuitively appealing a demand for "full disclosure" might be, critics insist that defining judicial candor in these terms would ask too much.[49] At the very least, the critics are right that such a standard would require a great deal. To take one example, a vast and growing mound of books and articles has sought to reveal ever more details concerning the various Justices' complex, often-shifting thinking in *Brown v. Board of Education*.[50] If the Justices had felt obliged to tell all, they likely would have required nine opinions, not one, with many of those opinions being very lengthy. Perhaps no one could reasonably be asked to tell everything that matters in some degree to the resolution of a complex issue. But there is no need to prejudge whether we should embrace a conception of judicial candor that imposes sweeping demands for forthright disclosure. For now, it suffices to recognize that some would define judicial candor in such terms.

2. *Objective Conceptions of Judicial Candor.* — Objective conceptions of judicial candor "calibrate[] the meaning of candor to one or more external criteria of assessment such as truth, logical validity, or factual or empirical accuracy."[51] With regard to matters of reason-giving or disclosure, one possible objective conception would require judges to identify all legally relevant considerations, as defined by a standard of objective reasonableness, and to discuss these considerations in ample detail to satisfy further standards of objective validity or reasonableness in explaining their decisions.[52] But no prominent commentators appear actually to endorse this view.[53] A definition of candor in these terms would stray too far from ordinary linguistic practice. Both legal and linguistic intuitions suggest that judges can be candid, yet still not be good judges in other important respects, including in the quality of their legal reasoning. If this premise is correct, a judge who reasons

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48. Idleman, supra note 1, at 1316 (footnote omitted).

49. See, e.g., Shapiro, Judicial Candor, supra note 1, at 732.

50. 347 U.S. 483 (1954). For an especially distinguished contribution with endnotes citing to prior contributions, see Michael J. Klarman, From Jim Crow to Civil Rights 290–321 (2004).

51. Idleman, supra note 1, at 1317.

52. See id. at 1318 ("[A]dherence to a hopelessly mistaken model of constitutional interpretation . . . or to an erroneous paradigm about judging . . . could amount to a problem of judicial candor, even if the judge is not personally cognizant of the idea's unsoundness and thus may have no intent to deceive or mislead her readers.").

53. Although Professor Scott Idleman offers a sympathetic exposition of a conception of judicial candor along roughly similar lines, he ultimately disavows it and adopts a subjective formulation. See id. at 1321.

fallaciously obviously deserves criticism, but not necessarily for lack of candor.

A more limited objective conception—hinted at by Professor Shapiro's praise for "judges whose opinions are especially notable for their candid recognition of the difficulties of decision and the strength of competing arguments"[54]—might situate the notion of judicial candor in the context of judicial inquiry, as well as legal opinion-writing, and define candor as involving the pursuit of hard and sometimes uncomfortable questions about the adequacy of asserted legal reasons. It would be plausible to think that a judge failed to live up to legal ideals, and even that she breached a judicial obligation, if she failed to ask searching questions in her appraisal of legal and factual arguments. Here we might think of such notorious cases as *Plessy v. Ferguson*[55] and *Korematsu v. United States*.[56] In *Plessy*, the Court credited assurances that the challenged statute mandating racially segregated railroad cars implied no stigmatization of nonwhites.[57] In *Korematsu*, the Court brushed aside suggestions that "prejudice" might have influenced the government's decision to exclude citizens (as well as others) of Japanese descent from the West Coast and relocate them to special camps.[58] Having done so, the Court's majority accepted proffered justifications for the challenged exclusion order without probing their foundations.[59] In such cases, we might think of the defects in the Justices' performance as at least partly involving a failure to conduct a candid legal analysis, as measured by an objective standard of reasonableness, in asking relevant questions and in analyzing legal and factual claims.

Another plausible touchstone for an objective conception of judicial candor might reside in standards of reasonable disclosure—as measured from an external perspective—concerning the details of judicial reasoning. Consider again the case of a judge who purports to justify a result by writing simply: "Plaintiff wins because *Marbury v. Madison* so dictates." If a reasonable and informed lawyer would find it mysterious how the judge might have concluded that *Marbury* resolves a case, we might see an

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54. Shapiro, Judicial Candor, supra note 1, at 740.

55. 163 U.S. 537 (1896).

56. 323 U.S. 214 (1944).

57. See *Plessy*, 163 U.S. at 551 ("[P]laintiff's argument [errs in] . . . assum[ing] that the . . . separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

58. See *Korematsu*, 323 U.S. at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race.").

59. For historical discussion of *Korematsu*, see Peter Irons, Justice at War: The Story of the Japanese American Internment Cases 320–45 (1983). For biting criticism of the role played by the Supreme Court, see Jerry Kang, Denying Prejudice: Internment, Redress, and Denial, 51 UCLA L. Rev. 933, 936–37 (2004).

objective shortfall with regard to judicial candor, even if the judge who wrote the opinion believed what she said and had no subjective intention to mislead anyone. As a preliminary formulation of an objective conception of judicial candor that imposes minimal demands for informative judicial reasoning, we might say this: Candor requires a judge to disclose enough about the details of her legal analysis to make it intelligible to a reasonable observer how or why the judge could have thought her stated reasons were legally adequate in the face of contrary arguments.

Reliance on standards of objective reasonableness or the perspective of a reasonable observer would undoubtedly require contestable decisions in some cases. But problems in specifying the outlook or demands of a reasonable person are common, and commonly accepted, in law. For example, lawyers and judges frequently equate the meaning of legal texts with what a reasonable observer would take those texts to mean in the context of their promulgation.[60]

3. *Hybrid Conceptions.* — Although it is analytically valuable to distinguish subjective and objective conceptions of judicial candor, there is no reason why a sensible theory could not include *both* subjective and objective elements. Indeed, it is common for legal concepts to have both subjective and objective aspects. This is true, for example, of the concept of "loyalty," as it functions in fiduciary law,[61] and of "good faith," as it features in contract law.[62] With regard to candor, nearly everyone would

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60. See, e.g., Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) ("In their full context, words mean what they conveyed to reasonable people at the time they were written . . . ."); Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1250–51 (2015). Dean John Manning illustrates this point nicely:

> Textualists give primacy to the *semantic* context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words. Purposivists give precedence to *policy* context—evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy.

John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 91 (2006).

61. See, e.g., Paul B. Miller & Andrew S. Gold, Fiduciary Governance, 57 Wm. & Mary L. Rev. 513, 556–64 (2015) ("Th[e] conception of loyalty as pertaining to motive or subjective purpose is especially prominent in Delaware corporate law, where the duty of good faith has been incorporated into that of loyalty."); Lionel Smith, The Motive, Not the Deed, *in* Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn 53, 67 (Joshua Getzler ed., 2003) (describing as "incomplete" any attempt "to understand obligations [entirely] in terms of prohibited results . . . because there is more to the fiduciary obligation," which also encompasses motive).

62. See, e.g., Paul MacMahon, Good Faith and Fair Dealing as an Underenforced Legal Norm, 99 Minn. L. Rev. 2051, 2060–61 (2015) (recounting the development of the modern notion of "good faith" as a "compromise" including both objective and subjective elements); Robert S. Summers, Good Faith Revisited: Some Brief Remarks Dedicated to the Late Richard E. Speidel—Friend, Co-Author, and U.C.C. Specialist, 46 San Diego L.

probably agree that a judge would fail to exhibit due candor if she wrote an opinion relying centrally on arguments that she believed to be legally unsupportable.[63] But many might additionally affirm that a judge could fall short if she failed to meet one or another objective standard. To take just one example, some might find an absence of objective candor if a judge did not say enough to make her chain of legal reasoning intelligible to a reasonable observer, not because she sought affirmatively to mislead, but because she failed—out of laziness or incompetence—to make the grounds for her decision even moderately clear.[64]

Perhaps, in the latter case, we might say that the test of candor that applies to judges, rather than to their opinions, lies in a *subjective* effort to meet an *objective* standard: A candid judge must believe psychologically that she has said enough to make her chain of reasoning clear or at least intelligible to a reasonable person. Alternatively, we might say that judicial candor requires a judge both to meet a subjective standard (for example, of neither speaking falsely nor misleading intentionally) and a further objective standard of sufficiency of detail in the laying out of reasons to make her rationale for decision intelligible to a reasonable reader or listener.

II. WHY SHOULD WE CARE ABOUT JUDICIAL CANDOR?

Although Part I's survey of possible conceptions of judicial candor did not wholly exclude evaluative commentary, it did not attempt any overall appraisal. The groundwork for assessing competing conceptions remains to be laid. In order to determine how we should define or conceptualize judicial candor, we need to consider what our evaluative criteria ought to be, and why. This Part begins the requisite inquiry.

Rev. 723, 726 (2009) (describing "the general obligation of good faith" as the most important requirement "in all of the U.C.C. and in general contract law").

63. Although it might often be difficult to tell whether a judge fell afoul of this standard, the same is true with regard to many other moral and some legal standards. For example, it may sometimes be difficult to know whether someone has deliberately lied or, instead, has made objectively erroneous statements with an innocent intent. But this difficulty does not cause us to abandon the view that deliberate lies breach obligations that some innocent misrepresentations would not breach.

64. See, e.g., Schwartzman, supra note 1, at 994–95 ("Even a speaker who means what she says may not say everything necessary for her to be considered candid. Whereas sincerity merely requires intentional correspondence between belief and utterance, candor demands a certain measure of affirmative public disclosure on the part of the speaker."). The same analysis would not necessarily apply to a Supreme Court Justice who noted that she either concurred in or dissented from a judgment but wrote no opinion explaining the grounds for her judgment. I say "would not necessarily apply" based on the premise that judges and Justices need not always write any opinions at all and that obligations of candor may attach only after they have assumed the obligation of reason-giving. See supra notes 33–37 and accompanying text. I shall say more about the necessary occasions of candor below.

As the Introduction emphasized, ordinary linguistic usage is relevant to, but cannot settle, what judicial candor is or demands. There is too much disparity in usage, at least on the surface. Under these circumstances, we might worry that there is no persuasive basis for resolving how people *should* use the term "judicial candor." If we can make further progress, it will come from asking the question: *What good reason do we have to care about whether judges exhibit the kind of judicial candor that different, subjective or objective, conceptions would call for?* This Part considers first why we might care whether judges satisfy subjective standards of candor. It then pursues similar inquiries with regard to objective standards and possible hybrid conceptions. The answers that emerge here will serve as building blocks for further investigation in subsequent Parts. If we regard judicial candor as valuable because (and presumably insofar as) it serves deeper values, we will have good reason to define judicial candor in light of those deeper values.

A. *Subjective Candor*

In thinking about the values that underlie subjective conceptions of judicial candor, we can start with the relatively minimal conception that Professor Shapiro defends, focused on considerations of non-prevarication and good faith. Throughout human affairs, we have general interests in not being lied to or misled.[65] These interests assume a special sharpness, moreover, in cases involving the potentially coercive exercise of power by governmental officials, judges among them.[66] As democratic citizens, we view ourselves as partners in collective self-government, entitled to decide for ourselves, albeit collectively, how our country should be governed. We also view public officials, including judges, as our servants, not our rulers. Lies or manipulation by political officials, including judges, demean our status as partners in self-government and treat us more nearly as subjects, ruled unaccountably by others.[67] Official lies and

65. See Shapiro, Judicial Candor, supra note 1, at 736–37. Professor Shapiro's analysis relies heavily on the perceptive analysis of Sissela Bok, Lying: Moral Choice in Public and Private Life (1978).

66. See Shapiro, Judicial Candor, supra note 1, at 737.

67. See, e.g., Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 215–21 (1972) (defending a theory of freedom of expression rooted in a conception of democratic citizenship that includes a right to freedom from governmental manipulation through denial of access to ideas); Bruce M. Selya, The Confidence Game: Public Perceptions of the Judiciary, 30 New Eng. L. Rev. 909, 915 (1996) (asserting that "candor is central to any relationship based on trust and respect"); Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371, 1372 (1995) (arguing judges must explain the reasoning behind their opinions in order to "reinforce our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do").

attempts to mislead also undermine trust[68] and, with it, the moral legitimacy of governmental claims to authority.

In my view, the considerations that support a prohibition against judicial prevarication are so powerful that any plausible conception of judicial candor would need to accommodate them.[69] In other words, a defensible conception of judicial candor must have a minimal subjective component, barring lies and deliberative efforts to mislead, even if it might also include further elements. Arguments to the contrary either fail entirely or establish at most that the obligation of judges not to lie or deliberately mislead might be defeasible or subject to exception in extreme cases.[70] I shall take up the possibility of exceptions to an obligation of candor in Part V.

Different considerations come into play when we appraise more robust subjective conceptions of judicial candor, such as those that demand full disclosure of a judge's train of reasoning or of all influences that bear psychologically on a judge's decision. If we ask why we might want to insist—under the heading of judicial candor—that judges should disclose all of the factors that enter their thinking, the answer seems plain: We care about whether judges' articulated reasoning satisfies the concerns that lead us to want reasoned judicial decisions in the first place.

One concern involves democratic accountability. To ascertain whether judges exercise their power lawfully and legitimately, we would need more information than a bare prohibition against prevarication would ensure. Legitimacy in judicial decisionmaking depends partly on the quality of judicial reasoning and on the fairness of judicial deliberation.[71] In light of these and related considerations, Rawls advanced a "publicity principle," which demands disclosure of the terms on which officials, and especially judges, exercise public power.[72] When judges or Justices rely on moral or

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68. See Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 23–25 (2014) (describing lying as "frustrat[ing] achievement of the compulsory moral ends associated with mutual understanding and cooperation").

69. See Shapiro, Judicial Candor, supra note 1, at 736–37; see also Schwartzman, supra note 1, at 1013–15.

70. E.g., Schwartzman, supra note 1, at 1026 (arguing that the values that support a "principle" of judicial "sincerity" provide strong reasons for judges not to violate that principle); accord Shapiro, Judicial Candor, supra note 1, at 738–49.

71. See Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1817–20 (2005) [hereinafter Fallon, Legitimacy] (explaining judicial legitimacy as a legal concept). Legitimacy is a complex concept that I cannot seek to plumb here. For present purposes, suffice it to note that the criteria of legitimacy are multifarious, involving substantive, procedural, and democratic elements, and that for legitimacy to function as an analytically helpful concept in assessing judicial decisions, it cannot be a synonym for correctness. See id. As reflection on common usage will corroborate, judicial decisions can be erroneous without deserving condemnation as illegitimate.

72. See Rawls, Justice, supra note 21, at 133; Schwartzman, supra note 1, at 990 ("[Judges'] decisions are backed with [force], the exercise of which requires justification. It must be defended in a way that those who are subject to it can . . . understand and

policy considerations to determine their selection among otherwise legally eligible outcomes,[73] principles of accountability and publicity might support a mandate that they should so disclose. The mandate might seem equally clear if self-interested factors influence a decision. Among other benefits, a requirement of candor in the sense of full disclosure might have a valuable, disciplining effect on official decisionmaking.

With regard to reasons for wanting a standard of judicial candor that would require full disclosure of a judge's thought processes, however, we should not move too quickly. Professor Shapiro adduces a practical argument for embracing a less demanding conception: We should not impose unreasonably upon judges by subjecting them to endless demands for ever "deeper" reasons for their decisions.[74]

Other concerns may emerge when we consider how judicial candor, and the specific values that support demands for judicial candor, relate to other values, some of which may be more important or fundamental. Of perhaps foremost importance is the concept of moral or political legitimacy. Legitimacy is a heterogeneous ideal with multiple components.[75] But a pervasively relevant concern is whether political authorities make good or sound decisions. A claim of legitimate authority almost inherently involves a claim of practical competence in making decisions of a particular kind.[76]

When the pertinence of good decisionmaking comes into the picture, it is plausible to believe that judges might sometimes make better decisions if they were not under obligations of candor to explain all aspects of their reasoning in great depth and detail. Cases of judicial compromise furnish one possible example. Consider *Craig v. Boren*, in which the Supreme Court first articulated a standard of intermediate scrutiny to test the permissibility of gender-based discriminations under

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accept. To determine whether a . . . justification satisfies this requirement, judges must make public the legal grounds for their decisions.").

73. Many if not most theories of legal interpretation acknowledge that moral or policy considerations appropriately influence judicial decisionmaking under some circumstances, despite notorious disagreements about the proper occasions and mechanisms of influence. For example, even many originalists now recognize that in cases of linguistic and historical indeterminacy, judges must engage in "construction" to give determinate meaning to otherwise vague or ambiguous constitutional provisions. See, e.g., Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 100–09 (2004); Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 1–15 (2004); Randy E. Barnett, Interpretation and Construction, 34 Harv. J.L. & Pub. Pol'y 65, 65 (2011); Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 457–58 (2013).

74. See Shapiro, Judicial Candor, supra note 1, at 732.

75. See Fallon, Legitimacy, supra note 71, at 1847–53 (describing legitimacy as including substantive justice, fairness in the allocation of political power, and procedural fairness).

76. See Joseph Raz, The Problem of Authority: Revisiting the Service Conception, 90 Minn. L. Rev. 1003, 1035 (2006) ("It seems implausible to think that one can be a legitimate authority however bad one is at acting as an authority.").

the Equal Protection Clause.[77] Prior to *Craig*, the Court had never recognized a tier of scrutiny between strict scrutiny and rational basis review in equal protection cases. Justice Brennan, the author of the Court's opinion in *Craig*, believed that gender-based classifications ought to incur strict judicial scrutiny, but he could not muster five votes for that conclusion.[78] He altered his position in *Craig* in order to win the agreement of Justices Stewart and Powell and thereby create a Court majority for a compromise standard—which he never described as such—that has subsequently stood the test of time. A demand for judges to articulate all aspects of the compromises that they make and their grounds for accepting them might impair or embarrass sound decisionmaking more than abet it.[79] Among other things, full disclosure in such cases might impair public confidence in, or the sociological legitimacy of, the judicial process.[80]

Even apart from cases of explicit judicial compromise concerning the appropriate rule of decision, Professor Cass Sunstein offers an important argument that multimember courts will often reach better decisions if they are permitted to provide only shallow, surface-level

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77. 429 U.S. 190, 197–99 (1976).

78. See Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (Brennan, J.) ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

79. See, e.g., Gerhardt, Role of Precedent, supra note 10, at 138 ("[G]reater candor on the Court might complicate or hinder coalition building, and thereby inhibit and weaken the Court's ability to issue rulings more quickly, or possibly at all, on such politically divisive or contentious subjects as abortion or economic regulations."); Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982, 1006–13 (1978) [hereinafter Greenawalt, Enduring Significance] (discussing "occasional[]" circumstances in which "compromises with the aim of neutral principles may actually further some of [the judicial process's] goals better than would a judge's candid statement of all the reasons for his decision"); Idleman, supra note 1, at 1384 ("[A] court is not a single organism, but rather a composite of its individual members. As a result, the candor of its opinions may be circumscribed by the need to reach a consensus among factions within any given case."). Some go even further in embracing practices of judicial compromise. See, e.g., Evan H. Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297, 2300 (1999) (describing the "[p]revailing consensus" that "[c]ertain forms of strategic behavior, such as insincere voting to forge a majority or unanimous coalition, are routinely practiced and viewed as permissible, perhaps even obligatory to some unspecified degree"); Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Calif. L. Rev. 1, 55 (1993) (noting times when a "judge will discover that by supporting an outcome or rationale with which she disagrees, she can prevent . . . adoption of some other outcome or rationale that she thinks worse either for justice in the case before her or for the state of the law").

80. See Wells, Sociological Legitimacy, supra note 3, at 1014. The question of sociological legitimacy, involving people's actual respect for or disposition to accept and obey judicial decisions, is partly distinct from issues of moral legitimacy, as gauged by objective standards of justice, procedural fairness, reasonableness in deliberation, and the like. See Fallon, Legitimacy, supra note 71, at 1794–801 (distinguishing among sociological, moral, and legal legitimacy).

reasons for their decisions.[81] When judges with different perspectives converge on a conclusion, Sunstein argues, we may have increased confidence in the wisdom of their shared judgment. In cases in which the otherwise converging judges cannot agree on or explain the deep, theoretical foundations for the conclusion that they reach, Sunstein believes that we should settle for and even applaud judicial opinions that reflect "incompletely theorized agreements."[82]

Indeed, even when judges make decisions for themselves alone, we might plausibly anticipate that their training and experience better suit them to making good case-by-case judgments—possibly on the basis of a "situation sense" that is more tacit than articulate[83]—than to providing deeply theorized justifications for their conclusions.[84] If judges self-consciously settle for less than complete analytical rigor in their reasoning, forcing disclosure might, once again, do more to subvert or embarrass than to promote good, legitimacy-promoting judicial decisions.

There is obviously another side to this debate: Some think that deeper and more transparent reasoning would improve, rather than diminish, judicial analysis and decisionmaking.[85] I shall say more about how to appraise the competing arguments below.[86] For now, suffice it to say that any plausible conception of judicial candor would contain at least a minimal subjective component, but that the good reasons supporting a broader demand for subjectively defined candor—such as one that would require judges to disclose all aspects of their legal reasoning in depth and detail—are matched by significant competing considerations.

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81. See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 11–14 (1999) [hereinafter Sunstein, One Case]; Cass R. Sunstein, Commentary, Incompletely Theorized Agreements, 108 Harv. L. Rev. 1733, 1738 (1995) [hereinafter Sunstein, Incompletely Theorized Agreements].

82. See Sunstein, Incompletely Theorized Agreements, supra note 81, at 1746–54, 1767.

83. See generally Dan M. Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. Pa. L. Rev. 349, 410–22 (2016) (exploring the plausibility and limits of the thesis that judges exhibit a form of good practical judgment that is aptly described as "situation sense").

84. See Sunstein, Incompletely Theorized Agreements, supra note 81, at 1749. Sunstein's defense of judicial minimalism encompasses two dimensions: breadth and depth. See Sunstein, One Case, supra note 81, at 10–14. Here I am concerned only with the issue of the depth of the actual and articulated judicial reasoning that supports a decision. I agree with both Sunstein, see id. at 4–6, and Shapiro, see Shapiro, Judicial Candor, supra note 1, at 736, that judges often have good reasons to write or join narrow, relatively fact-specific opinions.

85. See, e.g., Sherry, supra note 1, at 980–81 (explaining how nontransparent overruling of precedent—"stealth overruling"—leads to a lack of accountability, disingenuous claims of judicial minimalism, and unclear doctrine).

86. See infra Part IV.

B. *Objective Candor*

As my discussion above may have indicated, objective conceptions of judicial candor are more elusive than subjective ones. But the supporting justification for any plausible objective conception inheres in ideals of objectively good judicial decisionmaking, as judged from the perspective of a reasonable observer who has no direct access to a judge's mental state but can appraise judicial conclusions and reasoning on other, objective grounds. Defenders of objective theories of judicial candor begin with the premise that when we assess the justice of our legal system, the correctness and justifiability of the decisions that the system reaches matter much more than the private, subjective thoughts of its judges.[87] If the balance of legal considerations adequately supports a judge's decisions, we should be satisfied, on this view, even if the judge might have entertained inappropriate thoughts or experienced base psychological impulses.

Against this backdrop, we can grasp the allure of objective conceptions that define candor at least partly in terms of objectively searching judicial inquiry. We value penetrating inquiry because we think it conduces to objectively better judicial decisions and reasoning than shallower analysis would yield. Today, nearly every reader of *Plessy v. Ferguson* likely shudders at the Court's credulous denial that "the enforced separation of the two races stamps the colored race with a badge of inferiority," followed immediately by the explanation that "[i]f this be so, it is . . . solely because the colored race chooses to put that construction upon it."[88] Whatever else one might say about the *Plessy* Justices, they failed to make an objectively adequate inquiry into the tenability of the premises on which their decision rested.[89]

There are also potential benefits to another objective conception, or element of an objective conception, that would construe the demands of candor as requiring judges to explain their decisions in sufficient detail to make it intelligible how they could have thought their articulated grounds for decision legally adequate. Though this is a low bar, Supreme Court Justices have sometimes failed to meet it, including in important cases. In *Pennsylvania v. Union Gas Co.*,[90] a four-Justice plurality issued a fully, even deeply theorized rationale for its conclusion that Congress, when legislating under the Commerce Clause, could strip the states of

87. See Schwartzman, supra note 1, at 999–1001. See generally T.M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame 8–36 (2008) [hereinafter Scanlon, Moral Dimensions] (distinguishing between a person's subjective intentions or motivations in taking an action and the more objective reasons or considerations that determine the moral permissibility of those actions).

88. 163 U.S. 537, 551 (1896).

89. See Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 422 n.8 (1960) (asserting that "[t]he curves of callousness and stupidity intersect at their respective maxima" in the *Plessy* opinion).

90. 491 U.S. 1 (1989), overruled by Seminole Tribe v. Florida, 517 U.S. 44 (1996).

the sovereign immunity from suit in federal court that they otherwise would have possessed under the Eleventh Amendment.[91] Justice Byron White cast the fifth and decisive vote for the Court's ruling. In doing so, he wrote, without further explanation: "I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning."[92] It is hard to imagine a purer exemplar of uninformative opacity.

Opinions must be minimally informative in order to satisfy the concerns that lead us to want reasoned judicial decisions in the first place. An objectively specified demand that judges make their legal grounds for decision intelligible to reasonable readers would of course not ensure provision of all information that the concerned public would want to have—pursuant to the Rawlsian publicity principle, for example—if all relevant information would come cost-free. But in a world in which a demand for "full disclosure" would have serious costs—as well as some potential benefits—insistence that judges meet an objective standard in making their legal grounds for decision intelligible might emerge as the best available option, all things considered.[93]

On the cost side of the ledger, equating candor with norms of searching inquiry and objectively intelligible reason-giving might risk packing too many desiderata of good judging into the concept of candor and thereby obscuring important distinctions among judicial virtues. For example, if we reserved the term candor as a measure of judges' subjective efforts to avoid lies and attempts to mislead, we could employ another rubric to characterize success, or its absence, in conducting searching legal inquiries or articulating objectively comprehensible grounds for decision. Enhanced analytical clarity might result.

C. *Hybrid Conceptions*

Given that we have good reasons to care about the values that support both subjective and objective conceptions of judicial candor, I emerge fortified in the provisional judgment that we should continue to

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91. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. On the tangled history and modern state of the law of state sovereign immunity, see generally Fallon, Manning, Meltzer & Shapiro, supra note 37, at 905–86.

92. *Union Gas*, 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White devoted most of his opinion to arguing that Congress had not intended to subject the states to unconsented suit under the statute at issue, but he recognized that a majority of his colleagues had concluded otherwise on that point, "accept[ed] that judgment," and therefore came to and announced his controlling vote regarding the constitutional question. Id.

93. See Shapiro, Judicial Candor, supra note 1, at 732–33.

explore a hybrid that includes elements of both. Nevertheless, the analysis in sections A and B of this Part has revealed important reasons for caution in determining exactly which subjective and objective standards, if any, we ultimately ought to adopt. Before coming to a conclusion, we should ask whether, in pushing further with inquiries into judicial candor, we should aim to specify the content of an obligation, an ideal, or both.

III. JUDICIAL CANDOR AS OBLIGATION OR IDEAL?

Many references to judicial candor display ambiguity concerning whether it is an obligation, any breach of which is highly culpable, or an ideal, possibly situated among other ideals, that even very good judges will sometimes fail to live up to.[94] Speaking prescriptively, we have good reasons to use the term in a way that both recognizes and bridges the dichotomy. Ordinary language use does not mark "judicial candor" as limited exclusively to one or the other form of appraisal. Both are important, albeit in different ways.

Sometimes we regard the absence of judicial candor as an egregious default. Most of us would feel this way if we knew that a judge placed the central weight of a decision on an argument that she believed to be fallacious or if she deliberately misled readers with regard to her beliefs. To cite two controversial examples, some critics expressed outrage at *Bush v. Gore*[95] by claiming that the Justices in the majority demonstrably did not believe in the broad interpretation of the Equal Protection Clause on which they based their ruling.[96] Another example comes from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[97] in which Justices Kennedy, O'Connor, and Souter relied heavily on the doctrine of stare decisis to explain their decision to adhere to the "essential holding" of *Roe v. Wade*,[98] apparently despite their misgivings concerning whether *Roe* was rightly decided in the first instance. In doing so, they emphasized that the "factual underpinnings"[99] of *Roe* had not changed, nor had its guiding premises become "unworkable,"[100] and that the "decision to

94. See infra notes 107–108 and accompanying text (describing Professor Shapiro's apparent conflation of obligations and ideals of judicial candor). Professor Micah Schwartzman's important and illuminating article is similarly ambiguous. Through most of his article, he seems concerned with what is obligatory, but he notes in isolated passages that further judicial disclosure might be "supererogatory" or "commendable." Schwartzman, supra note 1, at 1018, 1025.

95. 531 U.S. 98 (2000).

96. See, e.g., Alan M. Dershowitz, Supreme Injustice: How the High Court Hijacked Election 2000, at 174 (2001) ("[T]he majority justices violated their own previously declared judicial principles—principles they still believe in and will apply in other cases.").

97. 505 U.S. 833, 846 (1992).

98. 410 U.S. 113 (1973).

99. *Casey*, 505 U.S. at 864.

100. Id. at 855, 860.

overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[101] Justice Scalia expressed caustic doubts in *Casey* about whether his colleagues actually believed in the premises about the force of stare decisis on which their judgment appeared to rest.[102] He continued to question his colleagues' adherence to the principles that they upheld in *Casey*, and, at least implicitly, to accuse them of a lack of good faith when he thought that they deviated from those principles in subsequent cases.[103]

To be sure, some observers depict judicial lies and deception as commonplace.[104] But those who propound this view do so mostly for the purpose of unmasking what they take to be disturbing truths about the ways in which courts exercise and maintain judicial power.[105] Given their polemical aims, these critics have largely abandoned any interest in gauging the seriousness of some failures to display judicial candor in comparison with others.[106] For those of us who maintain higher expectations, some shortfalls belong in a category of especially disturbing seriousness. We should think of that category as involving failures by judges to satisfy a minimal *obligation* of candor, which roughly marks a threshold beneath which we would expect no decent judge to sink. Defining obligations of judicial candor does not, of course, guarantee that judges will meet their obligations. But clarifying that some shortfalls constitute breaches of minimal judicial duty should help to sharpen the thinking of both judges and those who evaluate judges' performances.

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101. Id. at 864.

102. See id. at 997–98 (Scalia, J., dissenting) ("The only principle the Court 'adheres' to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about) but a principle of *Realpolitik* . . . .").

103. See, e.g., Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (asserting "we should be consistent rather than manipulative in invoking" stare decisis and arguing the Court's approach in overruling Bowers v. Hardwick, 478 U.S. 186 (1986), was inconsistent with "the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood v. Casey*").

104. See, e.g., Eric J. Segall, Supreme Myths: Why the Supreme Court Is Not a Court and Its Justices Are Not Judges 1–9 (2012); Martin Shapiro, Judges as Liars, 17 Harv. J.L. & Pub. Pol'y 155, 156 (1994) [hereinafter Shapiro, Judges as Liars]; see also Louis Michael Seidman, Substitute Arguments in Constitutional Law, 31 J.L. & Pol. 237, 240, 290–92 (2016) (arguing that deceptive "substitute arguments" are pervasive and "crucial to our practice of constitutional law," but that imagining an alternative state of affairs requires an exercise in utopian political theory since "the Constitution's ultimate purpose is to avoid foundational arguments about questions that arguments cannot resolve").

105. See, e.g., Shapiro, Judges as Liars, supra note 104, at 155–56 (insisting courts "must always deny that they are wielding political authority when they in fact *do* wield political authority" and observing that others "may call this justificatory history, but I call it lying").

106. Id. at 156 ("Lying is the nature of the judicial activity. One must get over the moral *angst* about that and quarrel instead about what law judges make, when, and how fast.").

When we speak of judicial candor as a virtue, however, we do not always seek to mark a categorical distinction between acceptable and unacceptable conduct. Sometimes we wish to differentiate among judges, some of whom perform better and some worse, and to single out for praise those who come especially close to an ideal. Professor Shapiro takes this approach when he notes that some of the most widely admired Justices are admired in part for what he characterizes as their candor.[107] In support of this observation, Shapiro quotes a tribute to Justice John M. Harlan:

> [T]he very students who more often than not regret the Justice's position freely acknowledge that when he has written a concurring or dissenting opinion they turn to it first, for a full and candid exposition of the case and an intellectually rewarding analysis of the issues. They sometimes regret that their heart's desire has not been supported with equal cogency in the Court's prevailing opinion, sharing as they do an aversion to what a certain English judge called well-meaning sloppiness of thought.[108]

In appraising the threads of Shapiro's analysis that associate judicial candor with searching honesty in inquiry and forthrightness in analytical exposition, we should recognize that even the most admirable judges and Justices sometimes fail to meet the standards that their best opinions establish. If nothing else, pressures of time would make it impossible for judges to lavish their analytical and expository skills as fully on all cases as they do on some. No judge, moreover, has ever possessed the breadth or depth of aptitudes that Professor Ronald Dworkin attributed to his ideal judge Hercules, "a lawyer of superhuman skill, learning, patience, and acumen."[109] To capture our interests in employing judicial candor as a marker of excellence that even the best judges sometimes fail to attain, we need to conceptualize judicial candor as not only a minimal obligation but also—in a different but related sense—as an *ideal*.

Parallel distinctions are familiar in moral philosophy. Moral philosophers often inquire whether actions are permissible or impermissible.[110] Within this framework, it is not only possible, but also familiar, for actions to be morally permissible but less than admirable. In the domain of morals, we are interested both in minimal obligations and in ideals.[111]

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107. See Shapiro, Judicial Candor, supra note 1, at 740.

108. Id. (quoting Paul Freund, Foreword to The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan, at xiv (David L. Shapiro ed., 1969)).

109. Ronald Dworkin, Taking Rights Seriously 105 (1977) [hereinafter, Dworkin, Taking Rights Seriously].

110. See, e.g., Scanlon, Moral Dimensions, supra note 87, at 8–36.

111. See, e.g., John M. Doris, Persons, Situations, and Virtue Ethics, 32 Noûs 504, 511 (1998) ("[I]t may be argued that the virtues are extremely rare, not widely instantiated, traits."); Gopal Sreenivasan, Errors About Errors: Virtue Theory and Trait Attribution, 111 Mind 47, 57 (2002) ("[I]n my own view, the correct theory of virtue is a theory of what

When we distinguish moral obligations from moral ideals, we characteristically use different terms and thus make clear which we have in mind. By contrast, in the case of candor, people commonly employ the same term to denominate both an obligation and an ideal. Admittedly, this dual service might encourage confusion. That said, the double usage is probably ineradicable. Certainly it lies beyond my ability to reform entrenched patterns of thought or speech in this respect.

In any event, for the same term to mark both a threshold requirement and an ideal is by no means unique to candor. The concept of political legitimacy offers a close analogue. In the literature on the legitimacy of governments and legal regimes, some theorists treat legitimacy as an ideal so stringent that no perfectly legitimate regimes may ever have existed.[112] By contrast, others equate legitimacy with a minimal standard and ask, for example, whether a constitution is "sufficiently just" or "just enough" to command respect or obedience "in view of the circumstances and social conditions,"[113] despite possibly serious deficiencies. Looking at these alternative conceptions, we should recognize that, as a matter of ordinary linguistic practice, many if not most of us sometimes employ the word "legitimacy" to mark an ideal that can be approached more or less closely and sometimes to denominate a minimal standard for respect-worthiness that governments either satisfy or do not.[114]

If we reflect on our practical interests in using the concept of legitimacy in one way or the other, moreover, we discover good reasons to care about both of two questions. It matters whether political regimes satisfy minimum standards of substantive justice, fairness in the distribution of political power, and procedural fairness. If a government does so, many of us believe, then those subject to its authority have moral duties to obey or respect its dictates, even if they justifiably decry the government's deficiencies in some respects.[115] But we also have good reasons to care how closely political regimes approximate ideal standards. Rather than

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Aristotle called full virtue, which only some people need have. These people are models of virtue and ordinary people will only approximate them in varying degrees, including zero." (footnote omitted)).

112. See, e.g., A. John Simmons, Justification and Legitimacy, 109 Ethics 739, 769 (1999) ("I . . . believe that no existing states are legitimate . . . .").

113. John Rawls, Reply to Habermas, 92 J. Phil. 132, 175 (1995).

114. See Fallon, Legitimacy, supra note 71, at 1796–801. I do not claim that everyone so uses the term.

115. This is "[t]he traditional view." David Copp, The Idea of a Legitimate State, 28 Phil. & Pub. Aff. 3, 10 & n.11 (1999). A lesser and perhaps minimal moral consequence of the conclusion that a government possesses moral legitimacy would be that it has a "right to govern," even if its citizens do not have a duty to obey. See, e.g., Kent Greenawalt, Conflicts of Law and Morality 48–51 (1987); Christopher H. Wellman, Liberalism, Samaritanism, and Political Legitimacy, 25 Phil. & Pub. Aff. 211, 211–12 (1996) (equating political legitimacy with permissible coercion and maintaining that "political legitimacy is distinct from political obligation").

postulating that legitimacy exclusively defines either a minimum standard or an ideal, a maximally illuminating theory or conception of legitimacy would offer criteria for defining both a threshold and an ideal and would explain how the minimum and the ideal relate to one another.[116] We may engage in similarly dualistic usage of such other legal and moral concepts as the rule of law,[117] reasonableness,[118] loyalty,[119] and good faith.[120]

As it is with legitimacy and these other concepts, so it is with judicial candor. We have good reason to seek a conception of judicial candor that identifies both a minimum and an ideal, that specifies the content of both, and that explains the connections between them.

IV. FIXING THE CONTENT OF A DUALISTIC, HYBRID CONCEPTION OF JUDICIAL CANDOR

This Part picks up the challenge that Part III defined. It seeks to give content to a dualistic conception of judicial candor as simultaneously a minimal obligation and a hard-to-achieve ideal. In doing so, moreover, it pursues the strategy that emerged from Part II of seeking to combine subjective and objective conceptions of judicial candor, or some components of such conceptions, into a hybrid.

A. *Obligations of Candor*

Following Professor Shapiro, I believe that the minimal obligations of judicial candor are best defined in relatively narrow, subjective terms, though my specifications go further than his in significant respects.[121] We minimally should demand that judges (1) make only arguments that they believe to be valid when they write opinions for themselves alone, and

116. See Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court (forthcoming 2018) (manuscript at 22) (on file with the *Columbia Law Review*).

117. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 9 (1997) (characterizing the rule of law as an "ideal" that legal systems can approximate to a greater or lesser degree).

118. See, e.g., Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311, 313 (1996) (analyzing the "divergence between the . . . ideal [of the duty of reasonable or due care] and the practical prescriptions that economists use to determine the level of care that would-be injurers owe would-be victims").

119. See, e.g., Lyman Johnson, After Enron: Remembering Loyalty Discourse in Corporate Law, 28 Del. J. Corp. L. 27, 37–38 (2003) (differentiating between "minimal" and "maximum" conditions of loyalty, the former consisting primarily in avoiding outright betrayal and the latter involving "affirmative duties of devotion").

120. See, e.g., Andrew S. Gold, The New Concept of Loyalty in Corporate Law, 43 U.C. Davis L. Rev. 457, 469 (2009) (distinguishing a narrow understanding of good faith, limited to the avoidance of "conscious wrongdoing, or an intentional failure to act in the face of a known duty," from a "broader" standard that would also protect against "actions that reflect a conscious disregard" of duties).

121. For Professor Shapiro's formulation, see supra notes 44–47 and accompanying text.

not author or join majority opinions that lack what they believe to be arguments capable of sustaining the conclusions that they reach;[122] (2) not deliberately mislead or make assertions that they know are likely to mislead those who read their opinions; and (3) strive conscientiously to make it intelligible to a reasonable reader who was acquainted with relevant law, including conventions of legal reasoning, how they could regard the reasons that they adduce in support of a decision as legally adequate under the circumstances.[123]

To carry my burdens of argument and persuasion, this section begins by presenting and defending the affirmative aspects of my claims about the minimal obligations of judicial candor. It then justifies the most potentially controversial omissions from my specification. Of these, one may particularly stand out: my failure to insist that the minimal obligations of candor require judges to disclose moral or policy calculations that may furnish the "real" or psychological ground for their decisions to embrace one plausible legal argument in preference to another (though, for reasons to be explained, some may need to do so in order to avoid misleading their readers). Also requiring defense is my omission of any undiluted objective requirements, despite my insistence that candor requires judges to strive conscientiously to meet an objective standard of sufficiency in reason-giving.

One more preliminary point may be in order regarding the stakes of judgments that judges either have or have not breached an obligation of candor. Sometimes no sanctions may ensue, unless one counts merited criticism, when it occurs, as a sanction. No statute proscribes or punishes violations of the obligation of judicial candor (or of many other norms of judicial conduct). Nor should we assume that every breach of an obligation of candor is an impeachable offense. The question involves what judges minimally owe the public in order to vindicate the trust that the public has placed in them. Conscientious judges have reason to care whether they meet their obligations, wholly as much as the public has reason to care. As Part V will discuss, obligations of judicial candor are normally moral as well as legal obligations.

1. *Sincere Belief in Arguments and Conclusions.* — No meaningful obligation of judicial candor could fail to bind judges to make only arguments that they honestly believe to be valid ones when writing opin-

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122. In referring to legal arguments as ones that a judge regards as "valid," "sufficient," or "adequate," I mean to avoid as many controversial jurisprudential issues as possible at this point, including issues about whether all legal questions have one "right answer," see, e.g., Ronald Dworkin, Seven Critics, 11 Ga. L. Rev. 1201, 1241–50 (1977), and about whether judges sometimes have discretion or choice concerning which result to reach. I mean only to assume that a judge believes that no other legal arguments deserve to defeat hers as a matter of law.

123. Cf. Schwartzman, supra note 1, at 996 (attributing to Idleman, supra note 1, at 1316, the view that "Judge *J* is candid if and only if *J* discloses all information that *J* believes is relevant to a legal decision").

ions for themselves alone. In ordinary conversation, we would regard an interlocutor who advanced arguments in which she did not believe as dishonest, insincere, or failing to show good faith.[124] We rightly resent being lied to and manipulated and typically find it impossible to trust those whom we know to be liars. Against this background, we should minimally demand that our judges argue sincerely when they assert the legal bases for their exercise of governmental power.[125] There may be rare cases in which a judge or Justice could be excused for not being candid—a possibility to which Part V returns. But rare, isolated exceptions to a general obligation do not defeat claims that a general obligation of judicial candor exists and requires sincerity in judicial argumentation.

Although holding judges and Justices to firm standards of honesty and sincerity in argument is important, we should take note, when defining those standards, of institutional pressures that confront judges on multimember courts.[126] The institutional context makes it important for judges to produce majority opinions when they reasonably can. Given the need for compromise, we should distinguish between a judge's obligations when she (a) writes for herself, and when she either (b) writes for a fragile majority or (c) joins a majority opinion that another judge wrote.

When a judge must frame an opinion that will hold together a majority coalition, I do not believe that she violates her obligations by including arguments that other judges endorse, but that she thinks would be inadequate to sustain the judgment if standing alone, as long as the opinion includes arguments that she regards as legally sufficient. Nor does a judge always commit a culpable breach by accepting and defend-

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124. On arguing in good faith, see generally Richard H. Fallon, Jr., Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium, 84 U. Chi. L. Rev. 123 (2017) [hereinafter Fallon, Arguing in Good Faith]. On the antithetical notion of arguing about law in bad faith, see generally David E. Pozen, Constitutional Bad Faith, 129 Harv. L. Rev. 885 (2016).

125. I have no way of gauging how frequently judges or Justices may breach any of the obligations of judicial candor that I define in this section, including the obligation to argue sincerely when asserting the legal bases for their decisions, including and perhaps especially when they write for themselves alone. Judicial opinions and surrounding literature include some asserted examples in addition to those discussed in the text. For example, Shapiro, Judicial Candor, supra note 1, at 743, suggests that "Justice Douglas was on the wrong side" of the ethical line in Baker v. Carr, 369 U.S. 186 (1962), because Douglas's "opinion contains language strongly suggesting that in his view there is a good deal of room for 'weighting' of votes under the equal protection clause—language he never saw fit to explain in later cases in which he joined in the enunciation of the one person, one vote rule." In another possible example, Justice Jackson accused the majority in *Zorach v. Clauson* of engaging in unpersuasive reasoning "almost to the point of cynicism" to produce a judgment that "will be more interesting to students of psychology and of the judicial processes than to students of constitutional law." 343 U.S. 306, 325 (1952) (Jackson, J., dissenting). Whatever the relative frequency, I am confident that it is not great enough to establish that the judicial role includes a conventionally understood exception from obligations of truth-telling analogous, for example, to that which would apply to actors playing a role.

126. For discussion, see, e.g., Shapiro, Judicial Candor, supra note 1, at 734–36.

ing standards of decision that she believes less than optimal. Consider again *Craig v. Boren*, in which Justice Brennan justified and applied an "intermediate" rather than a "strict" standard of judicial scrutiny for gender discrimination cases,[127] despite his apparent belief that the latter would be preferable.[128] It was valuable for the Court to agree on a generally controlling standard. More important for gauging candor, there is no reason to doubt that Brennan believed the legal arguments that he adduced in *Craig* to be valid ones in establishing that courts should subject gender-based classification to a standard at least as stringent as that which *Craig* imposed.

Minimal requirements of judicial candor may be slightly looser for a judge who joins a majority opinion that another judge has authored than for a judge who writes an opinion of her own: A judge does not breach her obligation of candor by joining an opinion that includes arguments that she regards as weak or possibly even fallacious, provided that the opinion also advances arguments that the judge believes adequately support the judgment.[129] Some flexibility on this point would seem especially important with regard to opinions that rely on a conjunction of factors to support a result.[130] A concurring judge could, of course, tick off the paragraphs or sentences with which she disagreed, but the exercise would typically serve no good point.[131] What should matter most to parties, litigants, and the public in the kind of case I have in mind is that the court rested its opinion on a combination of arguments that, overall, provided legally adequate support for the court's judgment, even if no

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127. 429 U.S. 190, 197 (1976).

128. See supra note 78 and accompanying text.

129. See Ginsburg, supra note 26, at 150 (arguing appellate judges who "live daily with the competing claims or demands of collegiality and individuality . . . might serve the public better" if they restrained themselves from writing unnecessary separate opinions in "appreciation of the values so prized in the civil law tradition: clarity and certainty in judicial pronouncements"). But see Schwartzman, supra note 1, at 1020–21 (maintaining that a duty of judicial sincerity forbids judges to concur in any part of an opinion containing purported reasons with which they disagree, even if this practice "leads . . . to a fractured opinion, weakened precedent . . . , and possibly a loss of collegiality among the judges").

130. See, e.g., United States v. Comstock, 560 U.S. 126, 133 (2010) (relying "on five considerations, taken together," to conclude that Congress acted within the authority conferred by the Necessary and Proper Clause).

131. But sometimes it may. An example may involve textualist judges and Justices who refuse to join portions of opinions that cite legislative history to support a conclusion that the textualists think is adequately supported on other grounds. See, e.g., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring, joined by Thomas, J.) (refusing to join a portion of the majority opinion discussing legislative history that in Justice Scalia's opinion was "unnecessary to the decision . . . [and that] serves to maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent makeweight"). In this kind of situation, a refusal to acquiesce or appear to acquiesce in the reliance on legislative history clearly signals that a judge's or Justice's opposition to invoking legislative history is principled and consistent, not opportunistic.

one argument necessarily sufficed by itself to determine the conclusion. I shall say more about several of these points below when discussing other elements of the obligation of candor. For now, I would simply note once again that judges can fall significantly short of an ideal of candor without breaching their minimal obligations.

Nevertheless, the obligation that this subsection defines and defends—requiring that a judge sincerely believe that an opinion reaches the proper legal result in the dispute between the parties before her, based on adequate, stated legal reasons—is a significant one. It is one that some of the majority Justices in *Bush v. Gore*[132] and *Planned Parenthood v. Casey*[133] are alleged to have breached. If the allegations are correct, the offending Justices should be ashamed, and we should judge them harshly for their lapse. To take a factually plainer example of a sincerity requirement's potential bite, historical evidence indicates that Justice Stanley Reed joined the Supreme Court's opinion in *Brown v. Board of Education*[134] solely to permit the Court to speak unanimously, despite his continuing personal belief that the decision was incorrect and its reasoning erroneous.[135] Under my proposed standard, Justice Reed breached his obligation of candor unless an exception applied—a possibility that Part V will explore.

Less easy to document than the case of Justice Reed is a situation that some judges on courts of appeals have described to me in informal conversation as arising recurrently. Perhaps partly because of docket pressures, norms of collegiality discourage judges on courts of appeals from writing dissenting opinions that then require responses.[136] And judges sometimes know that if they choose to dissent, their dissenting opinions would provoke majority responses that would result in the making of worse law—in the form of a clearer articulation of a broader rule of decision—than would emerge if they joined a majority opinion supporting a result with which they actually disagree.[137] However one

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132. 531 U.S. 98 (2000).

133. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

134. 347 U.S. 483 (1954).

135. See Klarman, supra note 50, at 302.

136. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, Why (and When) Judges Dissent: A Theoretical and Empirical Analysis, 3 J. Legal Analysis 101, 103–04 (2011).

137. Supreme Court Justices may sometimes face a similar dilemma. The notorious case of Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), which purported to hold that African Americans could not be citizens of the United States and that Congress lacked authority to ban slavery in federal territories, may furnish a historical example. According to multiple accounts, the Justices were initially disposed to resolve the case on narrow jurisdictional grounds: Because the law of Missouri, in which Dred Scott resided, authoritatively determined his noncitizenship and status as a slave, Scott was not a citizen of the United States and thus was not entitled to sue in federal court to establish that he became a free man while traveling in a free territory. See, e.g., Robert G. McCloskey, The American Supreme Court 61–62 (Sanford Levinson ed., 4th ed. 2005); see also Barry

ultimately appraises a judicial decision to acquiesce under circumstances such as these, it seems impossible to characterize a judge who does so as satisfying her obligations of judicial candor in the terms in which I have begun to define them. If so, the question, once again, will be whether obligations of judicial candor can ever be outweighed, either morally or legally.

2. *Prohibition Against Misleading*. — The demand that judges not deliberately mislead nor make assertions that they know are likely to mislead requires little explanation. Deliberate deception is a serious fault on the part of officials who assume burdens of public justification. Failure to take reasonable steps to avoid foreseen and likely misapprehension is scarcely less culpable.

Admittedly, this formulation of judges' minimal obligations includes a fringe of contingent circularity: What will mislead or is likely to mislead readers depends partly on what readers reasonably expect in light of prevailing norms of judicial conduct. *Craig v. Boren* again provides an example. Writing for the Court majority, Justice Brennan characterized prior cases as having "establish[ed] that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[138] In fact, no prior case had explicitly framed such a standard, which Brennan minted in *Craig*. Nevertheless, I would not hold Brennan guilty of deliberately misleading the readers of his opinion. As Chief Justice Rehnquist once explained, "Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions."[139] The conventions of legal argument invite purposively motivated characterizations of prior cases as long as plain holdings are not distorted.[140] In *Craig*, no informed reader should hold Justice

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Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 111 (2009). According to McCloskey, Justice McLean's determination to dissent, and to argue that Scott became free when traveling in territory denominated as free by Congress, helped provoke his colleagues to produce a broader ruling than they might have otherwise: "A majority of [McLean's] fellow judges believed in fact that [federal legislation banning slavery in the territories] was invalid, and they were unwilling to let McLean go unanswered, if the question was to be posed at all." McCloskey, supra, at 62. Even on this account, other pressures and hopes may have contributed to the majority's ultimate decision to resolve the case on broad rather than narrow grounds.

138. Craig v. Boren, 429 U.S. 190, 197 (1976).

139. Butler v. McKellar, 494 U.S. 407, 415 (1990).

140. See, e.g., Greenawalt, Enduring Significance, supra note 79, at 1011 (acknowledging that "it is hard to deny the grain of truth" in the view that judicial opinions should not always "be taken literally" in their characterization of certain sources and arguments as "dispositive"); cf. Shapiro, Judicial Candor, supra note 1, at 734 ("[T]here are times when a precedent cannot be distinguished away even under the narrowest approach consistent with fair argument, and . . . other times when no controlling or even persuasive precedent can be found no matter how broadly the existing decisional corpus is viewed. I think most judges would agree.").

Brennan guilty of a breach of obligations of candor, even if one of Professor Shapiro's exemplars of candor in judicial analysis might have acknowledged the analytical leaps that made *Craig* pathbreaking in articulating a new, controlling test for future application.

Nor, given current conditions, should a reasonable reader be misled into believing that a judge who joins or even authors a majority opinion necessarily regards every argument in that opinion as independently strong enough to justify, or even lend much support to, the judgment. An example comes from *Brown v. Board of Education*, in which the Court supported its conclusion that racially segregated public schools are inherently unequal partly by relying on controversial psychological studies showing that segregation "has a tendency to [retard] the educational and mental development of negro children."[141] The Justices who joined the majority opinion in *Brown* may have ascribed varying degrees of significance to the cited studies. For all we know, some may have regarded those studies skeptically.[142] Even if they did, the cultural significance of segregation in marking African Americans as inferior to whites should have sufficed to support the Court's conclusion that racially separate schools were inherently unequal.[143] Under these circumstances, if a Justice thought other arguments in the Court opinion

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141. 347 U.S. 483, 494 (1954) (alteration in original) (quoting a finding of fact from the Kansas case later consolidated for Supreme Court hearing) ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority."); see also id. n.11 (listing several studies purporting to demonstrate the psychological effects of segregation on students).

142. For contemporary criticism of the Court's reliance on this evidence, see, e.g., Edmond Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157–68 (1955); see also Klarman, supra note 50, at 355 ("The judicial power of the United States . . . does not extend to the enforcement of Marxist socialism as interpreted by Myrdal, the Swedish Socialist." (internal quotation marks omitted) (quoting South Carolina Judge George Bell Timmerman's response to *Brown*)).

143. See Black, supra note 89, at 424:

> [I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.
>
> Here I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of "equality" is just about on a level with the fiction of "finding" in the action of trover. I think few candid southerners deny this. Northern people may be misled by the entirely sincere protestations of many southerners that segregation is "better" for the Negroes, is not intended to hurt them. But I think a little probing would demonstrate that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future.

adequate to support the judgment, a sensibly specified obligation of judicial candor would not have required him to protest the inclusion of this one.[144] Although doubtful Justices would have displayed greater candor if they had registered their doubts or disagreements, ideals and obligations are partially distinct.

Finally, within the traditions of our system, a judge should not be deemed to mislead her audience by writing or joining an opinion that purports to leave open an issue on which she has already made up her mind.[145] Judges should often be applauded, not pilloried, for writing narrow opinions. New facts and new arguments might cause a judge to change her mind before a need to decide arises.[146] Context matters. We might feel misled by a friend who reported that she had not made up her mind about something even though, we subsequently learned, she was ninety-nine percent sure when she spoke to us and failed to disclose her leanings. But we should not feel deliberately misled by judges who decline to announce conclusions that are unnecessary to the decision of the cases before them. To the contrary, the norms of our legal system encourage judges to write narrow opinions, especially in constitutional cases, to which the long-established principle of "constitutional avoidance" applies.[147]

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144. To offer a more modern example, if a majority opinion relied principally on textual grounds to support its interpretation of a statute but added that legislative history also supported the conclusion, a judge or Justice who did not have a principled objection to reliance on legislative history, but was doubtful that it provided much if any support in a particular case, would not breach an obligation of candor by failing to register disagreement on this point. On the different circumstances of a judge or Justice who has principled objections to reliance on legislative history, see supra note 131.

145. See generally Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis (1957) (collecting separate opinions that Justice Brandeis may have chosen not to publish out of deference to his colleagues).

146. See Shapiro, Judicial Candor, supra note 1, at 734–36 (supporting the action of a judge who "does not go as far as he might be willing to go if the case before him does not require it"). In *United States v. Windsor*, which invalidated a provision of the federal Defense of Marriage Act that denied federal recognition to same-sex marriages that were valid under state law, 133 S. Ct. 2675, 2696 (2013), Justice Scalia's dissenting opinion appeared to present a subtler charge. Although the Court formally bounded its holding in a way that left open whether the states were constitutionally required to permit same-sex marriage, see id., Scalia protested that the opinion included language that effectively resolved the question and thus left the Court speaking out of both sides of its collective mouth, id. at 2709–10 (Scalia, J., dissenting). As Scalia recognized, however, lower court judges could find plausible bases to distinguish *Windsor*. See id. at 2709. It was also imaginable that one of the majority Justices might have changed her mind about whether there is a right to have states license same-sex marriage before that question actually came before the Court. If Justice Scalia meant to level a charge that the majority Justices deliberately sought to mislead their audience, I do not agree, even on the assumption that all of the majority Justices had tentatively made up their minds on the issue that they formally reserved.

147. In his nearly canonical formulation of the doctrine of constitutional avoidance in *Ashwander v. Tennessee Valley Authority*, Justice Brandeis wrote that the federal courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 297 U.S. 288, 345–48 (1936) (internal quotation marks omitted)

3. *Conscientiousness in Making Reasoning Intelligible.* — The third prong of the minimal judicial obligation—involving a demand for judges to strive conscientiously to make it intelligible to a reasonable reader how they could think their asserted reasons legally adequate—will often prove crucial. To recur to a hypothetical framed in the Introduction, in some imaginable situations a judge might satisfy this obligation by writing solely: "Plaintiff wins because *Marbury v. Madison* so dictates." But in other situations that explanation would not plausibly suffice. For instance, if neither of the parties had thought *Marbury* relevant enough even to cite it, a judge who wrote no more should know in some cases that a reasonable reader would be baffled as to how the judge might have thought the invocation of *Marbury* adequate to support her legal conclusion. An even clearer, real-world example lies in Justice White's outcome-determinative opinion concurring in the constitutional ruling in *Pennsylvania v. Union Gas Co.*, in which his closest approximation of a reasoned explanation lay in an averment that although he agreed with the conclusion reached in Justice Brennan's opinion, he did "not agree with much of [Brennan's] reasoning."[148]

Finally, we come to what I take to be the harder case, also presented in the Introduction, involving a Justice who offers a kind of reason that she sometimes regards as legally authoritative, but sometimes does not, without explaining why she views the cited reason as controlling in a particular case. In *Clinton v. New York*, for example, Justice Stevens wrote the Court opinion invalidating the Line Item Veto Act.[149] Justice Stevens reasoned that its provision for the President first to sign a bill and then to "cancel" particular provisions was inconsistent with "[t]he procedures governing the enactment of statutes set forth in the text of Article I," which "were the product of the great debates and compromises that produced the Constitution itself."[150] In other cases, however, Justice Stevens followed Supreme Court precedents without responding to the protests of dissenting Justices that those precedents deviated from the Constitution's original meaning.[151] To take just one more example, Justice Scalia professed himself both a textualist[152] and

(quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)). See generally Fallon, Manning, Meltzer & Shapiro, supra note 37, at 77–81 (discussing aspects of the doctrine of constitutional avoidance and citing relevant literature).

148. 491 U.S. 1, 57 (1989) (White, J., concurring in the judgment in part and dissenting in part); see also supra note 92 and accompanying text.

149. 524 U.S. 417, 420–49 (1998).

150. Id. at 439.

151. See, e.g., Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail.").

152. See, e.g., Scalia & Garner, supra note 60, at 15–16, 82–92; Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitutional Laws, Tanner Lectures on Human Values at Princeton University 79 (Mar.

an originalist.[153] But in his Court opinion in *Printz v. United States*, Justice Scalia began by acknowledging that no plain text applied to the case at hand and then cited other considerations to invalidate a federal statute that compelled state and local officials to assist in the enforcement of federal law.[154] Given Scalia's announced methodological commitments, one might have expected him to view the absence of a textual prohibition as decisive of the case's proper outcome, not as a reason to examine other factors.[155] Justice Scalia also appeared to deviate from originalist precepts, without pausing to explain, in *Adarand Constructors, Inc. v. Pena*,[156] which subjected a federal affirmative action program to strict judicial scrutiny under the Due Process Clause of the Fifth Amendment.[157] In support of the Court's holding, Justice O'Connor's majority opinion, which Scalia joined without protest on this point, affirmed that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable,"[158] even though the Fifth Amendment's Due Process Clause includes no reference to the equal protection of the laws, and even though no one appears to have thought in 1791, when the Due Process Clause was enacted, that it barred race discrimination.[159]

8–9, 1995) [hereinafter Scalia, Common-Law Courts], https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf [http://perma.cc/WFE7-V2WJ].

153. See, e.g., Scalia & Garner, supra note 60, at 92; Scalia, Common-Law Courts, supra note 152, at 79; see also Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862 (1989).

154. 521 U.S. 898, 905 (1997) ("Because there is no constitutional text speaking to this precise question, the answer to the [petitioners'] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.").

155. See, e.g., Vicki C. Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2192 (1998) ("Although he is usually a constitutional originalist, Justice Scalia's discussion of text, history, and structure is largely defensive and at best inconclusive.").

156. 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

157. Id. at 227 (majority opinion).

158. Id. at 217.

159. Similar questions arise when Justices sometimes take a very broad view of what relevant precedents have established—for example, by treating dicta as authoritative—but then, on other occasions, adopt a narrow view and distinguish cases that other Justices consider nondistinguishable. See generally Karl N. Llewellyn, The Bramble Bush 74–75 (Oxford Univ. Press 2008) (1951) (distinguishing a narrow doctrine of precedent, involving permissible distinctions of cases, and a broader doctrine, involving acceptable reliance in support of a conclusion). For a critical discussion of the Justices' candor in the treatment of precedent, see, e.g., Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1, 15–16 (2010) (criticizing the Roberts Court for "stealth overruling" of precedents, defined as "drawing distinctions that are unfaithful to the prior precedent's rationale" or limiting "a precedent to essentially nothing, without justifying its de facto overturning," that amounts to "'dissembling'"); Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 666 (1983) ("[J]udges are frequently dishonest in the reading of prior cases and the treatment of precedent . . . .").

In many cases of this kind, a Justice may have argued in good faith, with no intent to deceive or manipulate. To my knowledge, Justice Stevens never suggested that original meanings either always or never controlled the outcome of modern cases. And Justice Scalia specifically acknowledged that original meanings should sometimes yield to stare decisis, though he further acknowledged that it could be difficult to say when and that reasonable people might disagree.[160] Other Justices have shown wariness about embracing any sort of reasonably determinate interpretive theory, deviations from which might invite charges of bad faith.

Nonetheless, even if we assume that a Justice's arguments in a particular case are sincerely believed, a two-part question may remain about her conscientiousness in making her reasoning intelligible in adopting one methodological approach rather than another to resolve the case at hand. In cases of the relevant kind, we have to ask first, as a subjective matter, whether the Justice (or judge) thinks she has done enough to make her reasoning intelligible in the eyes of a reasonable observer who understands the relevant legal context. If so, we then need to ask, second, whether the obligation of candor requires disclosure of moral or policy considerations that influence the Justice's legal thinking about the appropriate analytical framework.

Depending on further facts, I reluctantly conclude that a Justice might plausibly believe that a thinly reasoned opinion would suffice to make her analysis both legally intelligible and legally adequate in the eyes of a reasonable observer. Although I would find the Justice's reasoning to be frustratingly uninformative if she failed to explain her choice of analytical premises, a widely credited theory of constitutional interpretation holds that a judge satisfies her obligations to supply legally sufficient justifications for a judgment if she adduces adequate arguments *within* any valid "modality" of constitutional argument, even if arguments within a different modality would point to a different conclusion.[161]

The best-known proponent of a modality-based theory, Professor Philipp Bobbitt, lists six categories of argument: historical, textual, structural, doctrinal, ethical, and prudential.[162] In his view, these modalities—and judges' reliance on them to justify constitutional conclusions—need no normative defense: We argue sensibly about what constitutes a good legal argument within our practice, but not about whether our modality-

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But see Re, Narrowing Precedent, supra note 44, at 1865–66 ("'[S]tealth overruling' is actually neither stealth nor overruling but just a pejorative term for an underappreciated mainstay of modern Supreme Court practice.").

160. See Scalia & Garner, supra note 60, at 411–14.

161. See Philip Bobbitt, Constitutional Fate: Theory of the Constitution 3–8 (1982) [hereinafter Bobbitt, Constitutional Fate] (describing multiple alternative "modalities" of constitutional interpretation); Philip Bobbitt, Constitutional Interpretation 12–13 (1991) (same).

162. See Bobbitt, Constitutional Fate, supra note 161, at 3–8, 93–94.

based practice (as Bobbitt believes it to be) is itself well justified.[163] Under Bobbitt's approach, Justice Stevens offered adequate textual arguments to support his decision in *Clinton v. New York*, and Justice Scalia owed no apology for deviating from strict textualism in *Printz* or originalism in *Adarand*. Moreover, even if one believed that an uncompromisingly intramodality-based approach to judicial reasoning required a justification, Professor Cass Sunstein's defense of "incompletely theorized agreements" would offer a promising starting point.[164] It might suggest that judges are better at identifying the modality of legal argument most apt for the resolution of any particular case than at offering theoretical, second-order justifications for the correctness of their choices. Justice Scalia sometimes hinted that he held a view consistent with this one, at least in cases that required courts to choose between originalist and textualist premises, on the one hand, and reasoning based on stare decisis, on the other.[165] He described stare decisis as an exception to his generally applicable interpretive theory, not a component of it.[166] In extrajudicial writing, Scalia also suggested that he could devise no clear and consistent standards for determining when stare decisis justified or required deviations from the Constitution's original meaning.[167]

For my own part, I find Professor Bobbitt's position that arguments within any of the modalities are always equally legally available to judges and Justices to be unpersuasive. In my view, his stance ignores the permeability of first-order constitutional argument to second-order debate about appropriate grounds for decision within our existing constitutional practice.[168] Methodological argument about the premises that should control constitutional decisionmaking is familiar and intelligible, even if not typically framed as involving a choice among "modalities." At the very least, a Justice who felt no obligation to defend her choice of interpretive premises or to rely on one modality rather than another in a particular case could say so. An acknowledgment along these lines would greatly clarify the minimal significance of her appeals to interpretive premises, which would imply no general commitment to adhere to those premises in future cases.

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163. See id. at 6–8, 233–40. For a defense of Bobbitt's stance on this point, see Dennis Patterson, Wittgenstein and Constitutional Theory, 72 Tex. L. Rev. 1837, 1838–40 (1994). For an alternative account of relevant modalities, see Jack M. Balkin, The New Originalism and the Uses of History, 82 Fordham L. Rev. 641, 658–61 (2013).

164. See Sunstein, Incompletely Theorized Agreements, supra note 81, at 1745–57; see also supra note 81 and accompanying text.

165. See, e.g., Scalia & Garner, supra note 60, at 411–13 (discussing the relevant factors in determining whether to use stare decisis as opposed to originalism).

166. See id. at 413–14.

167. See id. at 412–13 (listing multiple factors bearing on the application of the principle of stare decisis but offering no formula for balancing them and recognizing that "[d]ifferent proponents of originalism will weigh these various factors in different ways").

168. See Fallon, Constitutional Precedent, supra note 12, at 1144–46.

Accordingly, when one party challenges an asserted ground for decision as legally inadequate in light of other competing considerations—and maintains, for example, that precedent should prevail over the best available evidence of original public meaning (or vice versa)—I believe that the *ideal* of judicial candor, as supported by an ideal of argument in good faith,[169] calls for judges to respond. In ordinary, extralegal conversation, we would regard an interlocutor who argued from an interpretive premise in one case, but then dismissed that premise as merely optional in another, as failing to argue in good faith. In my view, a Justice who argued that the original meaning of constitutional language controlled one case, but said no more in another case than that "this time the original understanding does not matter," would raise similarly justified questions about her good faith in constitutional argumentation.[170]

But my judgment on this point is, obviously, debatable. At the very least, my preferred standard would require judges and Justices to be more forthcoming in disclosing the justifications for their methodological choices in particular cases than many and perhaps most would think necessary today. So recognizing, I hesitate to predicate serious charges of breach of minimal judicial obligation on a ground that might make such breaches relatively commonplace if I am correct that Justices frequently fail to explain why, for example, they regard precedent (or original meaning) as controlling in some cases but not in others, or seemingly clear textual meanings as only sometimes dispositive.[171] Again, however, we should not confuse obligations with ideals. We can criticize judges or Justices for not coming closer to satisfying an ideal of judicial candor while withholding the conclusion that they have breached an obligation. Accordingly, I adhere to the subjective standard that I framed at the outset of this section: If judges strive conscientiously to offer reasons that they regard as legally adequate, and that they think others reasonably ought to recognize as legally adequate, they have done minimally enough.[172] And if they believe it legally adequate to rely on one chosen modality of argument in a particular case despite their reliance on other modalities in other cases, and further believe (based

169. See generally Fallon, Arguing in Good Faith, supra note 124 (developing an ideal of good faith in constitutional argument that requires participants to develop, articulate, and consistently apply their interpretive methodologies in response to challenges presented by new and sometimes unforeseen cases).

170. See generally id.

171. For a collection of cases involving deviations from the most natural meaning of constitutional language, many of them now ensconced in settled doctrine, see David A. Strauss, The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?, 129 Harv. L. Rev. 1, 2–4 (2015) [hereinafter Strauss, Foreword]. A familiar example involves the application of the First Amendment, which begins with the words "Congress shall make no law," to bar certain infringements on free speech by the judicial or executive branches. See U.S. Const. amend. I; see also Strauss, Foreword, supra, at 4.

172. Cf. Schwartzman, supra note 1, at 1017 ("The principle of judicial sincerity only requires judges to offer what they believe is a sufficient reason to justify a decision.").

on their understandings of American constitutional practice) that it should be intelligible to others how they could think reliance on alternative modalities legally permissible and sufficient, then they have satisfied their minimal obligations.

It is a partly overlapping but partly separate question whether the obligation of judicial candor, when defined subjectively, should require all judges and Justices always to disclose any influence that moral values or policy considerations may have had on their legal judgments. The Rawlsian publicity principle and related considerations of judicial accountability might appear to support an affirmative answer: If judges base their decisions partly on moral and policy considerations, we have good reason to want to know what those reasons are, and how large a role they play. As Professor Shapiro emphasizes, however, practical considerations necessitate an end to demands for judges to provide ever "deeper" explanations of their thinking on pain of breach of legal obligation.[173] To ask for disclosure of every thought and motivation that entered into a complex decision would be to ask too much. Many judges and Justices might be incapable of satisfying the demand if it were made. According to cognitive psychologists, "motivated reasoning"—which involves the effects of wishes, biases, and preferences on our processing of arguments and information—often operates more at the unconscious than at the conscious level.[174] Under these conditions, we define judges' absolute obligations stringently enough if we demand conscientious efforts to furnish intelligible legal justifications that the proffering judges sincerely believe to be adequate to support their judgments.

It is yet another question, however, whether a judge who believes that moral or policy considerations matter legally to how some issues should be resolved, and who relies on such considerations to settle an otherwise contestable point, has an obligation of candor so to disclose. Theories that require judges sometimes to make moral or policy judgments in order to resolve cases include Professor Dworkin's theory that judges should adopt the best "moral reading" of constitutional language,[175] Professor David Strauss's common law theory,[176] and possibly originalist theories that call for judges to engage in constitutional "construction" in cases in which the original public meaning of constitutional language is indeterminate in its application to a particular

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173. See supra note 74.

174. See Dan M. Kahan, The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 Harv. L. Rev. 1, 7 (2011) ("Motivated reasoning refers to the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand.").

175. See Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7–10 (1996).

176. See David A. Strauss, The Living Constitution 35–46 (2010).

case.[177] If a judge believes that any set of stated reasons would not be legally adequate in the absence of relevant moral or policy considerations, the duty of candor would apply.[178] For a judge not to disclose a consideration that she believed legally necessary to justify her decision would foreseeably mislead readers of her opinion, who otherwise would be entitled to assume that she believed her stated reasons legally sufficient. We should recognize, however, that the resulting obligation of candor will affect only a subset of judges and Justices in a subset of cases. Many will believe in good faith that legal reasons that are independent of their moral and policy views adequately sustain their judgments. If so, they have no obligation of candor to disclose their moral and policy beliefs, even though others may suspect that those views furnish the "real" reasons behind the judges' legal conclusions.

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Although my argument in this section has taken a number of turns, its conclusion should be clear. Minimal obligations of judicial candor are best specified in exclusively subjective terms. Those obligations generally forbid deliberate falsehoods and knowingly misleading statements. More affirmatively, judges have an obligation of candor to strive to make it intelligible how they could regard their stated reasons for a decision as legally sufficient.

B. *Judicial Candor as an Ideal*

Insofar as the ideal of judicial candor is concerned, we appropriately measure our judges against more stringent specifications than those that establish minimal obligations. Judges exercise coercive political power on behalf of the legal system. As wielders of public power who purport to speak in the name of the law, judges would ideally make transparent the full chains of reasoning (not including considerations put aside as legally and morally irrelevant) by which they move from legal premises to legal conclusions.[179] If moral or policy considerations play a role in that chain, or if judges rely on such reasons in the belief that the law has run out and that they are therefore legally entitled to decide on such grounds, then judges ideally would so disclose. Only under these conditions could

177. See supra note 73 and accompanying text.

178. The obligation should extend only to a statement of moral reasons. It should not encompass a disclosure of the psychological factors, if any, that a judge thinks might predispose her to embrace the moral positions that she thinks morally best supported. See supra note 72 and accompanying text.

179. See supra note 72 and accompanying text.

the public fully evaluate their claim to have reasoned correctly and to have exercised their power legitimately.[180]

Even so, I do not believe that judges, even ideally, would divulge every thought or impulse that crossed their minds as they deliberated about a case as long as they are satisfied that undisclosed matters did not influence their decisions. Apart from concerns of practicality, specifying the ideal of judicial candor as requiring maximal disclosure of thoughts that judges entertained but put aside as legally and morally irrelevant could encourage judges to report musings or attitudes that would needlessly undermine public confidence in the fair administration of justice. For example, no one needs to know if a judge has passing thoughts, which she dismisses as irrelevant, that one of the parties or lawyers in a case is personally obnoxious.

Objective standards should also have a place in defining the ideal of judicial candor. In particular, we should develop and apply objective metrics concerning candor in judicial inquiry. A judge who asks only easy, shallow questions in conducting legal analysis and who rests content with surface-level answers performs poorly when tested against applicable criteria of excellence, even if she behaves throughout with complete sincerity and subjectively good intentions.

Distinguishing between obligations and ideals of judicial candor also provides a fresh perspective on and a reply to Professor Sunstein's concern that demands for searching judicial inquiry and fully theorized opinion writing might lead to worse judicial decisions in light of institutional pressures to compromise and plausible assumptions about judges' cognitive capacities. As Sunstein puts it, "highly abstract questions can be too hard, large, and open-ended for legal actors to handle."[181] If so, we should allow some discretion to judges whose legal instincts and "situation sense" give them confidence in judgments for which they can provide reasons, but not deeply theorized explanations. Nevertheless, even if we should accept less depth and rigor of judicial analysis in order better to realize other desiderata, we should acknowledge a corresponding loss. The ideal of judicial candor—understood as embracing objective standards of searching inquiry and of intelligible articulation of chains of legal reasoning in response to the issues that inquiry discloses at every step—remains an ideal even if most judges cannot satisfy it fully and even if none could do so in all cases.[182] A perfect judge, such as

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180. An ideally candid judge is not necessarily a perfect judge. Candor in inquiry and analysis does not necessarily guarantee either correctness in resulting analysis or practical wisdom in reaching legal or moral conclusions—as signaled by Professor Paul Freund's tribute to Justice Harlan. See Shapiro, Judicial Candor, supra note 1, at 740; see also supra note 108 and accompanying text.

181. Sunstein, Incompletely Theorized Agreements, supra note 81, at 1759.

182. See, e.g., Altman, supra note 1, at 351 (offering an ambivalent defense of judicial nonintrospection).

Professor Dworkin sought to model in Hercules,[183] would not cease to reason articulately at the point where reasoning exposed hard issues. Among other things, our best gauge of the correctness of a legal or moral judgment typically involves the persuasiveness of the reasoning that supports it.[184] In addition, Rawls's publicity principle and the ideal of perfectly legitimate and accountable decisionmaking would require judges to disclose any moral or political considerations that influenced their decisions.[185]

With the ideal of judicial candor understood to encompass norms of broad disclosure of motivating considerations, including moral and policy judgments, as well as objective components of candid inquiry and informative reason-giving, we can return, once more, to the examples with which this Essay began. A judge who simply writes "Plaintiff wins because *Marbury v. Madison* so dictates" in any case in which *Marbury*'s relevance is reasonably contestable performs far less than optimally when tested against the ideal of judicial candor, even if it is minimally intelligible how the judge might have thought *Marbury* controlling. A Justice who fails to explain why she engages in legal formalist reasoning based on the Constitution's purportedly plain text or original meaning in one case, and who similarly fails to explain her treatment of judicial precedents as furnishing an authoritative gloss on the Constitution's meaning in other cases, similarly comes up short—even if her shortfall results in no breach of a judicial obligation.

V. ARE BREACHES OF OBLIGATIONS OF JUDICIAL CANDOR EVER JUSTIFIED?

We come now to a final question, involving whether *obligations* of judicial candor—understood in the minimal, nonideal terms that I have proposed—bind categorically or whether exceptions apply. Once more, we need to begin with conceptual unpacking. In particular, we need to ask whether obligations of judicial candor are moral obligations, legal obligations, or both.

A. *The Relation of Judicial Candor to Moral Obligations to Obey the Law*

In his article on judicial candor, Professor Shapiro considers the case of a judge who is asked to enforce a severely unjust law.[186] To illustrate the resulting issues, Shapiro postulates a statute that invidiously discriminates on the basis of race in a jurisdiction where "there is no constitutional provision under which the statute may be [truthfully] held invalid."[187] In a case of this kind, Shapiro suggests that a judge encoun-

183. See supra note 109 and accompanying text.

184. See Dworkin, Justice for Hedgehogs, supra note 17, at 6–7, 166–70.

185. See supra note 72 and accompanying text.

186. Shapiro, Judicial Candor, supra note 1, at 749.

187. Id.

ters a conflict between legal duty and moral duty and that a moral obligation not to enforce the law trumps the legal obligation of judicial candor.[188]

Professor Shapiro's prescription concerning what the judge ought to do in his imagined case seems to me to be correct under appropriately specified assumptions: If the judge can avert a very grave injustice by refusing to enforce the statute in an opinion that relies on spurious legal arguments, but cannot achieve the same effect by any other means, she ought to make those spurious arguments.[189] Real examples may include criminal cases involving African American defendants, some subject to the death penalty, that came to the Supreme Court from what the Justices reasonably could have supposed to be racially biased state courts during the Jim Crow era. In a number of these cases, the state courts invoked state law grounds—which, as a technical matter, would ordinarily lie beyond the capacity of the Supreme Court to review—to refuse even to adjudicate the claims of federal right that the defendants presented.[190] In some, the Court asserted jurisdiction anyway, based on analytically dubious applications of jurisdictional rules.[191] In the judgment of the preeminent federal courts scholar Henry M. Hart Jr., rendered in comment on one case in which the Justices relied on legally dubious if not untenable reasoning to reverse a state court conviction, "[S]ometimes, you just have to do the right thing."[192] I concur in Hart's conclusion, as I do in Professor Shapiro's. In my judgment, however, we go wrong if we characterize cases such as Shapiro imagines as presenting a simple conflict between law and morality. Complexity enters the picture because obligations of judicial candor normally are moral as well as legal obligations.

As pointed out earlier in this Essay, any plausible conception of judicial candor requires support by moral arguments. "Judicial candor" is not a technical legal term with a meaning specified by statutes or the Constitution. Accordingly, when we make arguments about judges' obli-

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188. See id. (discussing "a conflict between legal and moral right").

189. The question is complex in part because the judge's choice will often not be binary: "[J]udges must decide whether to apply the law faithfully, openly reject it, resign, or subvert the law by making insincere assertions about what it actually requires." Schwartzman, supra note 1, at 1026.

190. See Fallon, Manning, Meltzer & Shapiro, supra note 37, at 524–46 (discussing state procedural grounds that are adequate and inadequate to bar Supreme Court review of state courts' judgments).

191. See, e.g., Douglas v. Alabama, 380 U.S. 415, 422–23 (1965) (rejecting a state court's insistence that a defendant forfeited claimed rights by failing to repeat constitutional objections after every question to a witness); Reece v. Georgia, 350 U.S. 85, 88–90 (1955) (rejecting the State's argument that the defendant's claim of grand jury discrimination could not be heard because it was not timely raised in state court).

192. William N. Eskridge, Jr. & Philip P. Frickey, An Historical and Critical Introduction to The Legal Process, *in* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process, at li, cxiii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

gations of candor, we assert claims about what judges morally ought to do in their role as judges. The next section will say more about why judges may indeed have legal as well as moral obligations of judicial candor and about the ways in which legal obligations may generate moral obligations. For now, it is enough to recognize that judges' obligations of candor, as described above, have an irreducible moral dimension. Implicitly so assuming, I have not tried to link my arguments tightly to legal texts of any kind. Neither have the most distinguished contributions to the literature on judicial candor.[193]

From the proposition that judicial obligations of candor are normally moral obligations, it does not necessarily follow, however, that moral obligations of candor bind categorically. Not all moral obligations are absolute. Some are pro tanto obligations: They obligate unless countervailing factors displace them.[194] In addition, so-called "threshold deontologists" maintain that otherwise-categorical duties must yield in rare cases in which strict adherence to moral norms would occasion severely adverse consequences.[195] Recognizing that not all moral obligations are absolute, we should conclude that judges have moral as well as legal obligations of candor in cases involving severely unjust laws, but that other moral considerations sometimes possess greater significance.

My insistence that obligations of judicial candor are moral as well as legal may seem hair-splitting, but a distinction between absolute and nonabsolute moral duties should anchor our understanding of the relationship between law and morality. Many and perhaps most of us believe that judges have a *general* moral obligation to obey the law.[196] The

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193. See, e.g., Schwartzman, supra note 1, at 1012–19; Shapiro, Judicial Candor, supra note 1, at 736–38.

194. See, e.g., Shelly Kagan, The Limits of Morality 17–19 (1989) ("A pro tanto reason has genuine weight, but nonetheless may be outweighed by other considerations."); William A. Edmundson, State of the Art: The Duty to Obey the Law, 10 Legal Theory 215, 215–16 (2004) (stating that a pro tanto duty is generally regarded "as one that is ordinarily decisive and as one toward which deference is worth cultivating").

195. See, e.g., Charles Fried, Right and Wrong 10 (1978) (explaining even absolute norms have boundaries and exceptions); John Rawls, Fifty Years After Hiroshima, *in* Collected Papers 565, 566–67 (Samuel Freeman ed., 1999) (noting that even under a "strict interpretation," human rights might give way "in times of extreme crisis"); Michael S. Moore, Torture and the Balance of Evils, 23 Isr. L. Rev. 280, 323 (1989) (finding "an exception to the norm against torturing" and other bad acts when their commission "is the only means to prevent the death or injury of others").

196. As explained, this is the "traditional" view with respect to the obligations of all citizens, even though a number of theorists have rejected it in recent years. See supra note 115 and accompanying text. See generally Edmundson, supra note 194 (assessing the state of the debate). But even those who otherwise reject the traditional view might conclude that judges have a general obligation to obey the law, possibly arising from their judicial oaths. See David Lyons, Ethics and the Rule of Law 202 (1984) ("An official can be morally obligated, by virtue of his undertaking to apply the law as he finds it, to adhere to the law even when he judges (perhaps soundly and with justified confidence) that the law is defective."); Richard M. Re, Promising the Constitution, 110 Nw. U. L. Rev. 299, 303

adjective "general" indicates that the obligation holds even in many cases in which the law is unwise, foolish, or mildly unjust.[197] If so, the best explanation of the difference between these cases and cases involving extremely unjust laws posits that although judges have a general moral obligation to obey the law, the obligation does not extend to or hold in extreme cases. To avoid confusion and inconsistency, we should apply the same analysis when more compelling moral duties displace moral obligations of judicial candor. The controlling moral duties may also override legal obligations, but that is a partly separate matter, to be taken up next.

B. *Legal Duties of Candor and Possible Exceptions Thereto*

Although there are moral duties of judicial candor, the foundations for those moral duties may sometimes lie in a judge's legal obligations: There is a legal obligation of judicial candor, rooted in the nature of the judicial role within the American legal system. No federal constitutional or statutory provision explicitly articulates or defines that obligation. Nor do I know of canonical judicial opinions that seek to elaborate and defend the kind of general obligation of judicial candor that commentators discuss. Nevertheless, we can draw inferences about the judges' legal obligations from the roles that they inhabit, as defined by law, and from custom, experience, and the norms that are widely recognized in relevant practice.

The justification for this methodological approach begins with the foundational assumption that American constitutional law is a practice, constituted by widely shared understandings and expectations among judges, other officials, and ultimately the public.[198] To employ the vocabulary of Professor H.L.A. Hart's classic practice-based account, "rules of recognition" that are validated by "acceptance"[199] among judges and Justices mark the core legal duties of candor that Part IV defined. For example, judges overwhelmingly accept that they have obligations not to lie to or deliberately mislead readers of their opinions, as evidenced by their protests when they believe that other judges have violated these minimal norms.[200] Professor Dworkin's jurisprudential theory, although diverging from Hart's in important respects, points to a similar conclusion concerning the existence of legal obligations of judicial candor. According to Dworkin, law is an "interpretive practice," in which judges and others identify legal requirements through "constructive interpretation" that employs twin, sometimes competing criteria

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(2016) (arguing "[t]he oath supplies an obvious candidate" to the problem of grounding the Justices' constitutional duties).

197. Nearly all agree that if a general obligation of obedience exists, it is defeasible in the case of seriously unjust laws. See, e.g., Edmundson, supra note 194, at 228.

198. See Fallon, Constitutional Precedent, supra note 12, at 1118–21.

199. See H.L.A. Hart, The Concept of Law 79–110 (Paul Craig ed., 3d. ed. 1994).

200. See supra notes 95–103 and accompanying text.

of "fit" with past authorities and settled understandings and of normative attractiveness.[201] The application of Dworkin's criteria, which call for casting existing practice in the morally best light, would almost undoubtedly identify legal obligations of judicial candor. For present purposes, moreover, we need not choose between the Hartian and Dworkinian accounts. As Hart insisted in a postscript to his jurisprudential classic *The Concept of Law*, it is possible for the rule of recognition in a legal system such as ours to prescribe the use of normative criteria—analogous to those that Dworkin commended and to those on which earlier parts of this Essay relied—to resolve otherwise-unsettled questions about the scope of legal rights and obligations.[202]

For the most part, it would not, in my opinion, be a helpful exercise to try to define the legal obligation of judicial candor and then to chart precisely how the legal obligation relates to the moral obligation. No formal sanctions may be available in either case. In the absence of criminal or civil penalties for breaches of the obligation of candor, our primary concern in deploying the concept—as assumed throughout this Essay—lies in identifying the moral obligations of candor that judges assume in virtue of their official roles. Nevertheless, it would be fallacious to conclude that judges can have no legal obligations in the absence of legal penalties for breach of those obligations.[203] To take an intuitively plain example, nearly all of us rightly assume that judges have legal obligations to decide cases based on the law and the facts, even if there would be no available legal penalty for a judge who reached her decisions without reading the parties' briefs, instructed her law clerks to develop a legal rationale for her rulings, and took no further role in crafting opinions that issued in her name. If we assume that judges have legal obligations of candor, and focus distinctively on those obligations, we can ask whether judges' legal duties—like the moral obligations with which we are more customarily concerned—admit of (legal) exceptions or can be subject to override as a matter of law. In the case of the racially discriminatory, severely unjust law that Professor Shapiro imagines, my earlier discussion accepted his stipulations concerning other elements of the legal background, which seemed to preclude any question concerning the judge's ultimate legal (as distinguished from moral) obligation. In principle, however, there is no categorical reason why a legal obligation—including a judge's obligation of candor—could not include exceptions or be subject to override in extraordinary cases, just as moral obligations can.

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201. See Ronald Dworkin, Law's Empire 45–53, 243–47 (1986).

202. See Hart, supra note 199, at 247.

203. Id. at 218 ("[O]nce we free ourselves from the . . . conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions."). Legal obligations may normally be backed by sanctions. See Frederick Schauer, The Force of Law 1 (2015). But what is normally the case is not always the case.

A well-recognized and largely noncontroversial example comes from the doctrine of judicial necessity.[204] That doctrine, which apparently dates from the fifteenth century, provides that "[i]f no judge can be found who possesses the requisite degree of impartiality in regard to a particular case, [then] the original judge assigned to the case need not be disqualified despite his or her partiality."[205] In a number of cases, the Supreme Court has applied the rule of necessity despite the resulting tension with fundamental due process norms.[206]

Cases resolved under the doctrine of judicial necessity form an interesting contrast with those in which Professor Shapiro portrays a judge as confronting a conflict between a legal duty and a moral duty. In necessity cases, a palpable tension exists, but it is partly internal to the law, which recognizes both a vitally important norm of judicial impartiality and an even more compelling imperative that some judge must be available to resolve a case. With the analogy of the rule of necessity in mind, we can ask whether there might be cases in which legally grounded imperatives justify or excuse a judge in failing to satisfy the legal obligation of judicial candor.[207]

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204. See, e.g., United States v. Will, 449 U.S. 200, 213–16 (1980) (discussing the doctrine and its roots).

205. Charles Gardner Geyh et al., Judicial Conduct and Ethics § 4.04 (5th ed. 2013).

206. E.g., *Will*, 449 U.S. at 210–17 (applying unanimously the "time-honored Rule of Necessity," to allow judges to preside over challenges to the statutory reduction of judicial salaries, even though "the District Judge and all Justices of this Court have an interest in the outcome of these cases"); Evans v. Gore, 253 U.S. 245, 247 (1920) (denying judicial disqualification in a case challenging the taxation of judicial salaries, because while the Court "cannot but regret that its solution falls to us . . . jurisdiction of the present case cannot be declined or renounced"), overruled on other grounds by United States v. Hatter, 532 U.S. 557 (2001).

207. There are several potentially relevant legal categories. To begin with the obvious, legal rules, duties, and principles are often subject to "exceptions." See generally Frederick Schauer, Exceptions, 58 U. Chi. L. Rev. 871, 871–72 (1991) (highlighting the wide range of exceptions in various legal contexts). For example, laws that prohibit the carrying of concealed weapons may recognize exceptions for on-duty law enforcement officers and for permit holders. Potentially distinguishable from legal "exceptions" are the categories of "justification" and "excuse." See, e.g., Model Penal Code and Commentaries art. 3, intro. at 3 (Am. Law Inst. 1985); Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 Colum. L. Rev. 1897, 1897–99 (1984); Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis, 82 Colum. L. Rev. 199, 213–29 (1982). In the somewhat technical parlance of the Model Penal Code, for example, "To say that someone's conduct is 'justified' ordinarily connotes that the conduct is thought to be right, or at least not undesirable." Model Penal Code and Commentaries, supra, art. 3, intro. at 3. Pursuant to this definition, a person who kills in self-defense or in defense of another may be legally justified. See, e.g., id.; Robinson, supra, at 235–36. The law also acknowledges the existence of legal "excuses," but defines them differently: "[T]o say that someone's conduct is 'excused' ordinarily connotes that the conduct is thought to be undesirable but that for some reason the actor is not to be blamed for it." Model Penal Code and Commentaries, supra, art. 3, intro. at 3. Within this framework, duress is an excuse, but not a justification. See, e.g., id. § 3.02 cmt. 2 at 15–16; Robinson, supra, at 227–29. Some jurisdictions also recognize a defense of "necessity," under which a legally

As a first illustration of this possibility, let me offer a strong interpretation—which may, admittedly, constitute an over-reading[208]—of Professor Alexander Bickel's famous thesis that the Supreme Court, for "prudential" reasons, should sometimes manipulatively deploy jurisdictional doctrines to avoid deciding constitutional cases on the merits.[209] In Bickel's view, when the Supreme Court resolves a constitutional claim on the merits, it has an absolute obligation to do so on the basis of "principle."[210] According to Bickel, however, a Court confronting a constitutional challenge has three options: (1) it can invalidate a challenged statute; (2) it can uphold and thereby "legitimate" the law; or (3) it can decline to rule one way or the other.[211]

Professor Bickel maintained that "prudence" sometimes dictates that the Court adopt the third course. Some issues, including those bearing directly on war and peace, he thought generally inapt for judicial resolution, despite serious arguments that a constitutional violation has occurred or is imminent.[212] In other cases, he thought that the Court should avoid articulating an applicable constitutional principle until the time grew ripe.[213] The issue of the constitutionality of government-mandated segregation, which the Court confronted in *Brown v. Board of Education*, may have furnished his paradigm. If the Supreme Court had ruled segregation unconstitutional at an earlier time, Bickel appears to have believed that popular and political resistance would have frustrated the enforcement of the antisegregation principle that *Brown* correctly articulated—and that this result would have represented a moral and constitutional tragedy.[214] In cases in which prudential considerations dictate that courts should stay their hands, Bickel, on one plausible interpretation,[215] thus argues that courts should not only decline to exercise their jurisdiction, but also, if necessary, twist the applicable law when

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forbidden act may be justified or exculpated if no other course of action would avert seriously harmful consequences. See, e.g., Model Penal Code and Commentaries, supra, § 3.02 cmt. 1 at 9–11.

208. See infra note 215 and accompanying text.

209. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 132–33 (2d ed., Yale Univ. Press 1986) (1962) [hereinafter Bickel, Least Dangerous Branch]; Alexander M. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 41–42 (1961).

210. See Bickel, Least Dangerous Branch, supra note 209, at 23.

211. Id. at 69.

212. See id. at 130–33.

213. See id. at 169–70.

214. See id. at 24–28.

215. See Gerald Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 10 (1964) ("At times, but only at times, Bickel recognizes that these devices are not 'available at will,' that there are limits to their use, 'limits that inhere in their intellectual content and intrinsic significance.'" (quoting Bickel, Least Dangerous Branch, supra note 209, at 170)).

purporting to justify their decisions.[216] Under appropriate circumstances, one might further understand him as arguing that a *legal* dispensation from ordinarily applicable obligations of judicial candor applies.

Although highly controversial, Professor Bickel's claim that there are legal exceptions to the obligation of candor—or possibly legal justifications or excuses for deviating from it—is entirely intelligible against the background of leading jurisprudential theories, especially Hart's. Within a Hartian framework, a disciple of Bickel could point to enough instances of arguably prudential manipulation of otherwise-applicable jurisdictional law[217] to argue that the legally recognized obligation of judicial candor either runs out, admits of exceptions, or is overridden in exceptional cases. It would also be possible, albeit more difficult, to argue for the recognition of exceptions to the duty of candor within a more Dworkinian jurisprudential theory.[218]

For my own part, I am inclined to credit Professor Bickel's argument. More broadly, I am prepared to take seriously the possibility that deviations from the obligation of judicial candor might be legally (as well as morally) justifiable or excusable in rare cases in which adherence to the obligation would clash with other legal norms and would have severely adverse consequences for legally cognizable values.[219] The

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216. See Bickel, Least Dangerous Branch, supra note 209, at 132 (asserting that applications of avoidance techniques "cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled").

217. See generally Richard H. Fallon, Jr., *Marbury* and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension, 91 Calif. L. Rev. 1, 27 (2003) (identifying a longstanding prudential strand in judicial decisionmaking); Laura E. Little, Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions, 46 UCLA L. Rev. 75, 81 (1998) (asserting that obfuscatory language appears much more often in opinions addressing federal jurisdiction than other issues).

218. Within a Dworkinian framework, the legal principles that control in one case can sometimes be outweighed in another. See Dworkin, Taking Rights Seriously, supra note 109, at 26. Accordingly, it might be possible to adopt the main elements of Dworkin's analytical approach, but to conclude that the principle that mandates judicial candor could be outweighed, and that the obligation of judicial candor could thus admit legal exceptions, when prudential considerations are sufficiently urgent—provided, of course, that recognizing such exceptions would make American legal practice more morally attractive than it would be otherwise. I should emphasize, however, that I do not mean to suggest that Professor Dworkin himself held such a view. Among other potentially relevant considerations, he characterized the Supreme Court as a "forum of principle," see Ronald Dworkin, A Matter of Principle 33–71 (1985), and insisted courts should normally base legal interpretations on judgments of principle, as distinguished from "policy," see Dworkin, Taking Rights Seriously, supra note 109, at 22–23.

219. See Richard A. Posner, Divergent Paths: The Academy and the Judiciary 294 (2016) ("[T]here is no general duty of candor. Judges shouldn't lie, *pace* Calabresi, but they need to balance the public interest in candor on the part of public officials against competing interests . . . ."). In my view, the exception could apply only to a narrower category of cases than parties to the dispute about Professor Bickel's thesis have often recognized. In many cases in which Bickel's counsel of judicial prudence would apply, a threshold question is whether the law flatly requires a court to exercise jurisdiction in the first place. With regard to the question of when grants of jurisdiction imply a categorical

circumstances of Justice Reed in *Brown v. Board of Education*—as described in Part IV—offer a possible illustration. By the time that he became the last holdout to join the Court's opinion, Reed knew that *Brown* would become the law, with or without his vote. In light of the legal as well as moral obligations of Supreme Court Justices to cooperate with one another in developing and enforcing a coherent body of doctrine, I incline toward the view that the anticipated costs of his filing a dissenting opinion sufficed, as a legal matter, to excuse him from the legal obligation to disclose his candid analysis of the legal issues that *Brown* presented.[220] In law as in morals, there may be truly extraordinary cases in which ordinarily applicable norms cease to control.

Another testing example emerges from situations, also discussed in Part IV, in which appellate judges believe that their dissent from a majority decision would likely provoke a stronger, clearer articulation of a holding to which they object, and in which they therefore conclude that acquiescence in the majority opinion would minimize the precedential damage that the case before them would do. Is a judge in this situation legally excused from an obligation of judicial candor that otherwise would apply? I think not. Based on an all-things-considered moral or ethical analysis, I could imagine conscientious judges sometimes deciding—whether rightly or wrongly—that they ought to concur silently in an opinion with which they disagree. But if the legal obligation of judicial candor is to be meaningful, it cannot be subject to relatively ad hoc legal override or exception in any but extremely rare, high-stakes cases—of which *Brown* may be one, but most cases involving most issues in the courts of appeals would not.

My principal point here, however, is general, not specific. Regardless of how we ultimately judge Professor Bickel's arguments about the proper role of prudence in judicial decisionmaking, appraise Justice Reed's decision to concur silently in *Brown v. Board of Education*, or think about whether appellate judges sometimes ought to withhold their actual views in order to limit the harms that their colleagues' opinions perpe-

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obligation of courts to exercise the jurisdiction granted, the most illuminating analysis of which I know comes from another article by Professor Shapiro. See David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 545 (1985). In *Jurisdiction and Discretion*, Shapiro argues that when the Constitution and a variety of jurisdictional statutes are properly interpreted, they often authorize courts to exercise a principled discretion in declining to exercise jurisdiction in some cases. Id. If Shapiro's thesis is correct, as I believe it to be, many instances of Bickelian prudential decisionmaking would come within it and thus present no occasion for judicial dissembling.

220. See generally Stephen Ellmann, The Rule of Law and the Achievement of Unanimity in *Brown*, 49 N.Y.L. Sch. L. Rev. 741 (2004) (considering and ultimately endorsing Justice Reed's vote to join the majority in *Brown* despite the obvious tension with the principle of judicial candor). But see Schwartzman, supra note 1, at 1023 ("[T]he argument that the Court's unity helped to secure compliance with its decision[] in *Brown* . . . cannot withstand scrutiny in light of all that we know about massive resistance.").

trate, we should recognize that legal obligations are in principle subject to exceptions or override, just as moral obligations are. And no a priori considerations exclude the obligation of judicial candor—understood for the moment as a legal duty—from this generalization. As in so many other arguments about the requirements of judicial candor, analysis cannot stop with definitional claims or with unreflective intuition, whether semantic or legal. We need to clarify what is most important, and why, and to support our claims about whether there are exceptions to the legal obligation of judicial candor, or legal justifications or excuses for deviating from it, with legal and normative arguments.

CONCLUSION

This Essay has presented a theory of judicial candor. At the theory's substantive core lies a distinction, which previous theories have failed to develop and exploit, between candor as a judicial obligation and candor as an ideal. Accordingly, the theory developed in this Essay has dual aspects. The first specifies the obligations of judicial candor, any breach of which would constitute a serious betrayal of public trust. Defined subjectively, the obligation of candor requires judges and Justices, in their official roles, not to utter deliberate untruths and not to make knowingly misleading statements. Judges also bear an affirmative obligation to strive conscientiously to make it intelligible how they could regard their stated reasons for deciding cases as legally adequate. In a second, ideal dimension, judicial candor calls for searching inquiry into all relevant claims of law and fact in disputed cases and for full disclosure of moral and policy considerations that weighed on a judge's decision. As a practical matter, however, the inherent pressures of time, among other considerations, would preclude any human judge from realizing the ideal in all cases.

This Essay's substantive theory of judicial candor includes a further element that also marks an innovation. The theory developed here clarifies the status of judicial candor as a moral as well as a legal concept, importing moral as well as legal obligations. Others have suggested that judges' legal obligations of candor must sometimes yield to more powerful moral obligations. Recognition that judges have moral as well as legal obligations of candor requires a reconceptualization of the obligation of candor—in both its legal and moral senses—as subject to exceptions.

A final component of the theory advanced in this Essay is a methodology for clarifying and improving debate about what judicial candor is and requires. Almost self-evidently, different people use the term "judicial candor" in different ways and also disagree about how it ought to be used. To arbitrate among rival perspectives, this Essay has posited that discussion needs to begin with familiar patterns of linguistic usage, but insisted that analysis cannot stop there. Against the background of disagreement, intellectual progress requires examination of why we have reason to care about judicial candor in any or all of the various senses in

which that term can be used. At the last stage, this Essay has maintained, the argument for any particular conception of judicial candor—and certainly for the conception that I have defended—must turn on normative considerations.

Even those who reject my substantive conclusions ought to embrace the framework for testing rival theories of judicial candor that this Essay has advanced. That framework not only clarifies how issues of semantics relate to issues of legal and moral substance. It also promotes needed discussion of how some conceptualizations of judicial candor might promote sharper moral analysis than would others.

The test of the theory presented here will involve its payoff in illuminating old debates, resolving longstanding issues, and framing new puzzles (such as whether, and if so when, legal and moral obligations of judicial candor are subject to legal and moral exceptions). I do not pretend to have offered the last word on judicial candor. I do, however, dare to hope that this Essay will push debates about judicial candor in new, more fruitful, substantive and methodological directions.