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JUDICIAL ACCOUNTABILITY TO THE PAST, PRESENT, AND FUTURE: PRECEDENT, POLITICS AND POWER

*Stephen B. Burbank**

Judge Arnold was proud of his ancestry, and sometimes had to be reminded by his brother, Morris Sheppard Arnold, also a United States Circuit Judge for the Eighth Circuit, that “those who talk too much about their ancestors are like potatoes: their best parts are underground.”¹

No doubt it expands the ego of a judge to look upon himself as the guardian of the general future. But his more humble yet more important and immediate task is to decide individual, actual, present, cases . . . Such judicial legislation as inheres in formulating legal rules is inescapable. But courts should be modest in their legislative efforts to control the future . . . The future can become as perniciously tyrannical as the past. Posterity-worship can be as bad as ancestor-worship.²

I. INTRODUCTION

It is a great pleasure to participate in this Symposium honoring Richard Arnold. As Richard said, “I know that this is a great law school, because you have invited me to speak.”³ I did not know Richard well, but I considered him a friend. Although I will often refer to him hereafter as “Judge Arnold,” particularly in these parts it can be confusing to do so. That is because Senator Hatch was not entirely consistent in his views about appointing judges from the same family. When administrations had changed, he said that the practice “smacks of elitism . . . concentration of familial control,”⁴ which prompted Senator Kennedy to remark, “I don’t know what’s wrong with a familial concentration of power.”⁵

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1. Obituary, *ARK. DEMOCRAT-GAZETTE*, Sept. 24, 2004, at 8B.

2. JEROME FRANK, *COURTS ON TRIAL* 287–88 (1949) (quoting *Aero Spark Plug Co. v. B.G. Corp.*, 130 F.2d 290, 295–96 (2d Cir. 1942) (Frank, J., concurring) (footnote omitted)).

3. Richard S. Arnold, *The Future of the Federal Courts*, 60 *MO. L. REV.* 533 (1995) [hereinafter *Future*]. See also Richard S. Arnold, *The Federal Courts: Causes of Discontent*, 56 *SMUL. REV.* 767, 768 (2003) [hereinafter *Discontent*].

4. Joan Biskupic, *Panel Votes on Mother-Son Judgeships; Professor Approved after Liberal Parent Agrees to Semi-Retirement*, *WASH. POST*, May 17, 1996, at A3.

5. *Id.*

Although I would like to think that I was selected to participate in this symposium on merit,⁶ my presence here is better explained by what Richard referred to as “cronyism, one of the values that has made America great.”⁷ The other judge in the family, Richard’s brother Morris—the one whose name Senator Hatch evidently thought was Arnold Morris—was once my colleague and has been a good friend to me and my family for more than twenty years.

Writing about judges can be a tricky business, particularly for one who believes that *nil nisi bonum* is not an appropriate scholarly predisposition about anyone or anything, dead or alive.⁸ It is particularly challenging for one who is tired of the platitudes so long and so often voiced about judicial independence and accountability in the legal literature. My response has been to seek refreshment in scholarship that is informed by other disciplines,⁹ a perspective that may help readers to understand why I chose the two facets of Richard Arnold’s career I discuss in this article and also what I have to say about them. I first take up Judge Arnold’s efforts to curtail the use of alternatives to the traditional model of appellate decisionmaking, including his opinion for a panel of the Eighth Circuit in the *Anastasoff* case.¹⁰ I then consider the role that politics played in his life as a judge.¹¹

6. See Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 22 (1995–96) [hereinafter *Money*] (“I was, in fact, appointed by the Chief Justice to this position precisely because I had been a legislative assistant to Senator Bumpers, who was then and still is a member of our Appropriations Subcommittee. I was appointed on merit, the same way I became a Federal judge.”); Richard S. Arnold, *Judges and the Public*, LITIG., Summer 1983, at 6 (“my merit, incidentally was that I was a friend of a senator”) [hereinafter *Public*].

7. Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 268 (1997) [hereinafter *Madison*].

8. See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1997) [hereinafter *Burbank I*].

9. Thus, the need I felt for insight into the psychology and motivations of judges led me to the work of Jermon Frank. See, e.g., Frank, *supra* note 2, and Richard Posner. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* (1995). The perception that the legal literature contained very little of use on issues of judicial independence and accountability in state courts led me to the political science literature for a 1999 article on the architecture of judicial independence. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 331–35 (1999) [hereinafter *Burbank II*]. And the knowledge resulting from that work and from discussions with Barry Friedman that there was not one literature on judicial independence and accountability but a variety of literatures, and that they were like ships passing in the night, led us to organize an interdisciplinary conference in 2001, which in turn yielded our co-edited book. See JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman, eds. 2002) (hereinafter *JUDICIAL INDEPENDENCE AT THE CROSSROADS*).

10. *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000).

11. The experience of broadening my horizons on judicial independence and judicial

A consideration of Judge Arnold's judicial and extrajudicial writings about alternatives to traditional appellate decisionmaking reveals that for him such practices represented a threat to judicial accountability, and hence to judicial independence, in two dimensions. First, by loosening the restraints of precedent and of the common law method of making law, they can dilute the judiciary's accountability to the past. Second, as a result of the processes used to determine which cases will be handled at which tier of appellate decisionmaking, norms concerning the care with which they will be handled, the division of labor in handling them, and rules about precedential status, dissemination and citation of decisions, alternatives to traditional appellate decisionmaking can dilute the judiciary's accountability to the present and the future. The empirical basis for trust in the federal courts of appeals not to manipulate the system is equivocal, and empirical support is probably of secondary importance in these days, when the courts are the center of partisan and issue-oriented political attention and controversy. Moreover, the alternatives in place in some circuits implicate the accountability of district courts, rendering appellate review an ever more impotent check on unacceptable judicial independence, and sending misleading signals to those litigants, district courts and academics who, in planning their behavior, making decisions and monitoring the courts, pay attention only to that which tradition taught them to regard as important.

Consideration of Judge Arnold's attitudes towards the politics of judging and the politics of the federal judiciary reveals not a sharp dichotomy between law and politics, but rather a keen sense of the importance of restraint in the exercise of judicial power and a commitment not to abstractions but to people. Judge Arnold recognized that institutional self-aggrandizement is inimical to the long-term ability of the federal courts to accomplish the roles envisioned for them in the Constitution, as he did the importance of respectful relations with the legislature and the executive. His was the politics of statesmanship and dialogue, a politics that is hard to see

accountability was sufficiently stimulating that I have been pursuing the same path in other work. Power has been my dominant concern as a scholar of federal practice and procedure for more than twenty years. See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) [hereinafter *Burbank III*]; Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513 (1996) [hereinafter *Burbank IV*]. For most of that time, however, I proceeded without systematically considering the literature that is centrally concerned with power: that of political science. I have recently sought to fill that gap, and the first installment of this work was published last year. Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004) [hereinafter *Burbank V*]. I am currently studying the role of interest groups in court rulemaking. William Howard Taft and Charles Clark, polar opposites politically but dancing cheek to cheek in their efforts to empower the judiciary through rulemaking, are spinning in their graves. See *Burbank IV*, *supra*, at 513.

in some of the current decisions of the Supreme Court, let alone in the ongoing debate about no-citation rules in the federal court of appeals.

Both facets of Judge Arnold's career reveal a person aware of the fragility of the independence of the federal judiciary and of the need for federal courts to be accountable—to litigants, to the other institutions of government and to other courts—if they are to continue to be able to fulfill their historic functions. Richard Arnold knew that, whatever scholars may say about the evanescence of distinctions between interpretation and lawmaking, judges who are eager lawmakers put at risk the reservoir of good will—or as he put it, the “continuing consent of the governed”¹²—upon which the judiciary must draw when hard decisions are not merely satisfying but necessary.

They reveal as well a person of surpassing intelligence and learning, from a privileged background, who nonetheless eschewed both the theory of the leisure class and the leisure of the theory class, and who was as confident of his own abilities as he was of the fact that judicial appointment does not confer moral superiority.¹³ In sum, they reveal the sort of judge of whom the federal judiciary has too few today, a time when the degradation of politics cries out for the qualities of patience, humility, and the willingness to engage in genuine dialogue that Richard Arnold exemplified.

II. TIERED APPELLATE DECISIONMAKING

For more than twenty years, in speeches, articles, and one famous opinion,¹⁴ Judge Arnold elaborated the reasons for his opposition to practices of federal appellate courts in disposing of cases by means other than the traditional signed, published, and precedential opinion.¹⁵ His was not the

12. *Public*, *supra* note 6, at 5. *See id.* (“and if we lose that consent for very long among a very large percentage of the governed then we are in deep trouble”); Richard S. Arnold, *Judicial Politics Under President Washington*, 38 ARIZ. L. REV. 473, 478 (1996) [hereinafter *Judicial Politics*] (“if their opinions and orders are not ultimately entitled to respect, they will, in the long run, not be obeyed, either because of open defiance or because of private evasion”). Judge Arnold was referring to what political scientists call “diffuse support,” that is support for the institution whether or not one agrees with particular decisions. *See* DAVID EASTON, *A SYSTEMS APPROACH OF POLITICAL LIFE* 273 (1965); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992).

13. *Public*, *supra* note 6, at 5 (“The holding of a commission signed by the president does not in and of itself confer moral superiority”).

14. *See, e.g., id.* at 6; *Future*, *supra* note 3, at 537–38; *Discontent*, *supra* note 3, at 777–80. The question decided in *Anastasoff* was raised in a short article published the year before. *See* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999) (“In other words, is the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?”) [hereinafter *Unpublished Opinions*].

15. In referring here and elsewhere to a “traditional” model of appellate decisionmak-

only note of alarm raised, as scholars and practitioners joined the chorus,¹⁶ and defenders of non-traditional dispositions, within and without the judiciary, took up the challenge to justify what the courts of appeals were doing.¹⁷

In the last two decades, these practices have become more common, and although both the frequency of departures, and the precise details of the modes of departure, from the traditional model vary among the circuits, it is safe to say that continued invocation of that model in describing the work of federal appellate courts can be as misleading as invoking the model of trial can be in describing the work of district courts.¹⁸ In any event, grouping the

ing, I do not mean to suggest that it was the model contemplated by the architects of the federal judiciary or that it has been practiced from the beginning of the Republic. Thus, for instance, systematically produced and distributed opinions are a nineteenth century development. See, e.g., Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 127–30 (1999). Lest it appear, however, that I am thus taking sides in the debate about the implications of Article III for the use of nonprecedential opinions, see *infra* text accompanying notes 22–25, I should make four points. First, the status of *opinions* at the time of the framing is hardly dispositive of the question whether a nonprecedential *judgment* is consistent with Article III. Professor Hartnett reminds us that “[i]t is the judgment, not the opinion, that ‘settle[s] authoritatively what is to be done’—and the only thing the judgment settles authoritatively is what is to be done about the particular case or controversy for which the judgment was made.” Hartnett, *supra*, at 128 (footnotes omitted). He took no position, however, on “questions surrounding the duty of courts to adhere to precedent.” *Id.* at 132 n.50 (emphasis in original). Second, as Professor Price reminds us, “[a]ccording to *Anastasoff*, courts are free to overrule or distinguish precedent, but they are not free to ignore it entirely.” Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 85 (2000). See *id.* at 105 (“[W]e tend to conflate the ideas of precedent and stare decisis. The two are not entirely the same, however.”). See also Stephen R. Barnett, *From Anastasoff to West’s Federal Appendix: The Ground Shift Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 9–12 (2002). Third, as indicated below, the implications of Article III for tiered appellate decisionmaking is not the question that interests me for present purposes. Fourth, even if it were, I would not rest with an originalist view of those implications, particularly in light of changes over time in the role and structure of the federal judiciary.

Note that Judge Arnold also expressed concern about the decline in the number of cases decided after oral argument. See *Future*, *supra* note 3, at 537. For the relationship between oral argument and publication, see Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 332–33 (2001) (Ninth Circuit data for 1998 “show that publication occurs in forty percent of orally-argued cases but in only three percent of those submitted on the briefs”).

16. See, e.g., Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); William M. Richman & William L. Reynolds, *Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004).

17. See, e.g., Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 NOTRE DAME L. REV. 135 (2001).

18. See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data*

practices under the term “unpublished opinions” is certainly misleading¹⁹ because advances in technology have enabled, and the E-government Act of 2002²⁰ now requires, the on-line availability of most opinions that are not published in bound volumes²¹ because practices vary concerning the status of such opinions as precedent and the permissibility of citing them and because in any event nontraditional opinions do not exhaust the means by which today’s appellate courts depart from the traditional model. For those reasons, I prefer the term “tiered appellate decisionmaking.”²²

Most discussions of tiered appellate decisionmaking have been traditional legal discourse consisting of policy arguments and, where facts might help (or get in the way), armchair empiricism. It is very hard to “win” such an argument, which may help to explain why Judge Arnold came ultimately to the position that Article III courts must heed (that is, treat as precedent)

and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court, 1 J. EMP. LEG. STUD. 571, 585 (2004) [hereinafter *Burbank VI*] (referring to “federal judges at first instance” because “trial judges have gone the way of ‘trial lawyers’”).

19. See *Unpublished Opinions*, *supra* note 14, at 219–20; Barnett, *supra* note 15, at 2 (publication of Federal Appendix “a startling action that drains the meaning from the terms ‘unpublished’ opinion”). For current practices see J. Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 98–99 (2005) (App. I). For the view that technological advances have not solved the problem of effective access to the lower tiers, particularly for those with limited resources, see Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1465–68 (2004).

20. Pub. L. No. 107–347, § 205(a)(5), 116 Stat. 2899, 2913 (codified at 44 U.S.C. § 3501). Federal courts are now required to establish and maintain websites that “provide access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.” *Id.* The official guidance provided by the Judicial Conference defines “written opinion” as “any document issued by a judge or judges of the court, sitting in that capacity that sets forth a reasoned explanation for a court’s decision.” Memorandum on Compliance with Website Requirements of the E-Government Act to All Chief Judges, United State Courts, from Leonidas Ralph Mecham 2 (Nov. 10, 2004) (on-file with author). The guidance further provides that “[i]n the courts of appeals, only those documents designated as opinions of the court meet the definition of ‘written opinion.’” *Id.* As of April 2005 nineteen of nearly 200 federal courts throughout the country reported that they were deferring compliance with the Act’s requirements as to the accessibility of written opinions in some respect. See *Federal Courts Respond to E-Government Act*, THE THIRD BRANCH, Apr. 2005, at 7.

21. Moreover, starting a few years ago many “unpublished opinions” have been available in bound volumes. See West’s Federal Appendix: Cases Argued and Determined in the United States Courts of Appeals (2001). See Barnett, *supra* note 15, at 2–3.

22. The argument that forcing courts to permit citation of all opinions might cause more of them to rely more heavily on judgment orders (no opinion) suggests that we should imagine a hierarchy of appellate dispositions. See Lee & Lehnhof, *supra* note 17, at 150; *id.* at 146 (“hierarchy of authority”). For a compromise position calling for the use of short published opinions, see Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2001). See also *infra* note 81 (proposals to deal with rules making a panel decision binding unless overruled by court en banc).

prior decisions, whatever label is attached to them. Although Judge Arnold's opinion in *Anastasoff v. United States*²³ and the court's judgment were vacated as moot,²⁴ the case has stimulated great interest. It also evidently made some judges who do not share Judge Arnold's legal or policy views nervous, prompting a panel of the Ninth Circuit, in an opinion by Judge Kozinski in *Hart v. Massanari*,²⁵ to respond in detail to Judge Arnold's central constitutional claim.

More interesting, I believe, than who is right about the implications of Article III for this question,²⁶ is the window that the discussion opens on conceptions of the judicial role. Moreover, once one takes the inquiry in that direction, it becomes apparent that the issues involve judicial independence and judicial accountability in ways both obvious and subtle.

In my prior work I have sought to demonstrate that judicial accountability is merely the other side of the coin from judicial independence (that the two are not at war with each other but rather complements); that neither is an end in itself but rather a means to an end (or variety of ends); that, at least with respect to federal arrangements, the relevant ends relate not primarily to individual judicial performance but rather to the performance of courts and the court system; and that there is no one ideal mix of independence and accountability but rather that the right mix depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system.²⁷

From these premises one can derive a number of propositions about judicial accountability that may be helpful in considering tiered appellate decisionmaking. The first proposition is that judicial accountability has as many roles to play as does judicial independence. As a result, judicial accountability should serve to moderate what would otherwise be unacceptable decisional independence (i.e., decisions unchecked by law as it is generally understood or, in the case of inferior courts, by the prospect or reality

23. 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

24. *Id.*

25. 266 F.3d 1155 (9th Cir. 2001).

26. See *supra* note 15.

27. See Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 9; Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323 (2003) [hereinafter *Burbank VII*]; Burbank II, *supra* note 9.

And finally, we must recognize that there is no single "problem of global accountability"; there are many. The point is not to design a comprehensive, ideal accountability system but, rather, to figure out how to limit abuses of power in a world with a wide variety of power-wielders and without a centralized government.

Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 41 (2005).

of appellate review). In addition, judicial accountability should moderate other judicial behavior (i.e., besides manifestations of "unacceptable decisional independence") that would be considered hostile to or inconsistent with the ability of courts to achieve the role(s) envisioned for them in the particular polity (for example, as to federal judges, conduct that is "prejudicial to the effective and expeditious administration of the business of the courts").²⁸

The second proposition is that, just as independence must be conceived in relation to other actors (independence from whom or what?), so must accountability (accountability to whom or what?). As a result, judicial accountability should run to (1) the public, including litigants whose disputes courts resolve, lawyers and those in law schools and other parts of the academy who critically appraise the judicial work product, (2) the people's representatives, whose laws the courts interpret and apply, and (3) courts and the judiciary as an institution. In each instance, proper regard for the other side of the coin requires that accountability not entail influence that is deemed to be undue.

Habit originally prompted me to say "the political branches" instead of "the people's representatives." That would have been unfortunate on this occasion for two reasons. First, my colleague Edward Rubin has made a powerful argument that preoccupation with judicial independence (or accountability) perpetuates an arboreal (that is, three branch) view of a landscape that was forever altered by the advent of the administrative state. According to Rubin, the independence/accountability problem is common to institutional architecture and should be so conceived.²⁹ Second, one need not (and I do not) accept the view that there are no differences between judges and the members of the legislature or executive³⁰ to believe that the traditional distinction between the judiciary and the "political branches" can be, at least in this context and even as to federal judges, tendentious.

Since, however, some judges are, at least for some purposes, some people's "representatives,"³¹ the distinction might be thought vulnerable because (in part) not a distinction at all. Judges accountable to judges? Well, yes, insofar as both courts and the judiciary as an institution are composed

28. 28 U.S.C. § 351 (2000).

29. See Edward L. Rubin, *Independence as a Governance Mechanism*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 9, at 56. See also Grant & Keohane, *supra* note 27, at 42.

30. "[M]any members of the public seem to feel that judges are just politicians in another guise. Sometimes some of us are, but we should not be." *Future*, *supra* note 3, at 545. Cf. *Adkins v. Children's Hosp.*, 261 U.S. 525, 569-70 (1923) (Holmes, J., dissenting) ("It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women . . .").

31. See *Chisom v. Roemer*, 501 U.S. 380 (1991).

of judges. Apart from the important role that judicial self-discipline plays in ensuring the necessary "reservoir of good will,"³² a measure of accountability is necessary to courts with respect to judicial decisions and to the judiciary with respect to non-decisional behavior. I have sought to make my claim in that regard clear by adding "courts and the judiciary as an institution" as a discrete category to which judicial accountability should run.

It appears to be the view of some who defend the turn to tiered appellate decisionmaking that (1) there is a carving joint between error correction and lawmaking, and (2) error correction is a role having no effect on, and of no interest to, any one other than the parties. I shall take up the first proposition shortly. As to the second, perhaps that is why Judge Kozinski views "[a]n unpublished disposition [a]s, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision."³³ If so, this view appears to me to reflect an impoverished conception of judicial accountability. Where it prevails the public must take it on trust either that (a) appellate courts would not manipulate the processes of tiered decisionmaking to reach results that are not in accord with the law as generally understood or would not do so often enough to prompt concern,³⁴ or that (b) other judges, the parties, their lawyers and others who have access to the fruits of the lower tiers will be able (and have the incentive) to blow the whistle.³⁵

Having noted the possibility of such manipulation, Judge Arnold was at pains to express his personal confidence that it would not occur.³⁶ In addition, published and forthcoming qualitative empirical research by Professor Stephen Wasby affords an independent basis for some comfort.³⁷ Yet, nei-

32. *Supra* text accompanying note 12. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002).

33. *Hart*, 266 F.3d at 1178.

34. Compare the Supreme Court's manipulation of its formally mandatory appellate jurisdiction. See, e.g., *Naim v. Naim*, 350 U.S. 891, 891 (1955) (dismissing appeal from conviction for violating anti-miscegenation statute); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1709 (2000).

35. Note that we cannot rely on most law professors to serve as academic whistleblowers because of the tenacity of their reliance on published opinions. See *infra* text accompanying note 53.

36. See, e.g., *Unpublished Opinions*, *supra* note 14, at 223; *Future*, *supra* note 3, at 537.

37. In asserting that "[s]ufficient restrictions on judicial decisionmaking exist to allay fears of irresponsible and unaccountable practices such as 'burying' inconvenient decisions through nonpublication," *Hart*, 266 F.3d at 1177 n.35, Judge Kozinski cited, together with another source, an article by Professor Wasby appearing in 2001. See Wasby, *supra* note 15. That preliminary work in fact provides little evidence justifying the judge's assurance. I have had the benefit of reading two additional and more recent articles by Professor Wasby that are richer in every respect and, although hardly uncritical, more reassuring. See Stephen L.

ther is a wholly satisfactory response. For, the results of the few quantitative empirical studies that have included lower tier opinions suggest possible reasons for concern about the fairness with which some litigants are treated in tiered appellate decisionmaking, and about the accuracy of a number of premises on which its practices are justified or defended.³⁸ They thus flag the need for more such research (as well as for more qualitative research), at least if one is really interested in bringing experience to bear on policy and can resist "the inclination of most mortals . . . to dismiss the results of empirical investigation that do not conform to their preconceptions."³⁹

In any event, confidence in commitment to the integrity of law on the part of judges may not necessarily be shared by members of the public, even those who are reasonable and reasonably well informed. That is a risk at a time when the judiciary has again become a political football,⁴⁰ thought by some to play on a field indistinguishable from those on which aspirants for judicial office all but make campaign promises on legal issues⁴¹ and by oth-

Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process* 14 S. CAL. INTERDISC. 67 (2004) [hereinafter *Process*]; Stephen L. Wasby, *Unpublished Dispositions: Are the Criteria Followed?*, 2 SETON HALL CIR. REV. ____ (forthcoming 2005) [hereinafter *Criteria*].

38. See Donald R. Songer et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963 (1989); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307 (1990); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001).

This literature is reviewed in *Process*, *supra* note 37, at 76–79. See also Cappalli, *supra* note 22, at 791–92; David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005). For arguments that tiered appellate decisionmaking had a disparate impact on "those most in need of judicial protection," see Richman & Reynolds, *supra* note 16, at 295–97, 316; Pether, *supra* note 19, *passim*.

39. *Burbank VI*, *supra* note 18, at 573.

40. This is hardly the first time, and it surely will not be the last. See, e.g., WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994). But the situation today seems unusually dangerous because charges (or efforts to persuade the public) that judges are part of ordinary politics are conjoined with efforts to enlist them in ordinary politics. See, e.g., *An Act for the Relief of the Parents of Theresa Marie Schiavo*, Pub. L. No. 109–3, 119 Stat. 15 (2005). The reported reaction of Richard Viguerie, "the strategist behind conservative direct mailings," to the district court's denial of relief in the lawsuit brought under this statute, was: "It is very dramatic proof of what we have been saying: that the judiciary is out of control." Carl Hulse & David D. Kirkpatrick, *Casting Angry Eye on Courts, Conservatives Prime for Bench-Clearing Brawl in Congress*, N.Y. TIMES, March 23, 2005, at A15. I certainly hope so. See *infra* text accompanying note 128 (distinguishing influence from control). The question is how long that will be true. See Grant & Keohane, *supra* note 27, at 32.

41. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); Dale Wetzel, *North Dakota Restrictions on Judicial Campaign Speech Ruled Unconstitutional*, ASSOC. PRESS, Mar. 23, 2005, at 1.

ers to be represented by *Bush v. Gore*.⁴² Which is to say that Judge Arnold's frank discussions of what a lawless court could do under a regime of tiered appellate decisionmaking—to say nothing of his comments about per curiam opinions—do not shock in a country that has seen a presidential election decided by a per curiam one way ticket.⁴³

Finally, in this aspect—and here we can perhaps discern the most important lesson of, if not the animating impulse behind, the court's invocation of Article III in *Anastasoff*—trust in government is easier when there are structural protections that mediate between independence and accountability.⁴⁴ According to Judge Arnold's account, the founders regarded the doctrine of precedent as both “a bulwark of judicial independence in past struggles for liberty,”⁴⁵ and as an inherent aspect of judicial power that “separate[d] it from a dangerous union with the legislative power.”⁴⁶

Even if one is not persuaded by Judge Arnold's view of the original understanding, recent scholarship suggests the importance of recognizing a middle ground between formal constitutional doctrine and institutionally self-regarding claims of power when considering questions of judicial independence and accountability. Thus, long-standing congressional customs and norms of forbearance in the use of tools available to ensure judicial accountability may in fact be more important to federal judicial independence than the comparatively weak protections reposing in constitutional text.⁴⁷ We should also consider whether long-standing judicial customs and

42. 538 U.S. 98 (2000).

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand in more admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

Id. at 111 (per curiam). But see Hartnett, *supra* note 34, at 1717 (“A Court that can simply refuse to hear a case can no longer credibly say that it had to decide it.”).

43. What better example of law “good for one place and time only,” *Anastasoff*, 223 F.3d at 904, could there be? And although not “underground,” *id.*, in the way Judge Arnold intended that word when discussing non-precedential opinions that could not (usually) be cited under the Eighth Circuit's rule, the Supreme Court's per curiam opinion shared some of the same defects from the perspective of judicial accountability. “That is the kind of thing that one individual judge ought to be willing to take responsibility for.” *Public*, *supra* note 6, at 6. See also Richman & Reynolds, *supra* note 16, at 283 (“In per curiam decisions, blame or praise is spread out among three judges with the pernicious consequence of diffusing the judges' responsibility and accountability.”).

44. Compare Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004) (“Ultimately, there is no choice but to trust the judges.”).

45. *Anastasoff*, 223 F.3d at 900.

46. *Id.* at 903.

47. See, e.g., Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 9, at 160; *Burbank VII*, *supra* note 27, at

norms of forbearance in asserting independence have not similarly been more important to the quality of independence in fact enjoyed than has the Article III protection of separation of powers.⁴⁸ In other words, one does not have to accept Judge Arnold's views about the meaning of Article III for this purpose to believe that an important check on judicial independence, and hence an important aspect of judicial accountability, is accountability to the past.⁴⁹

Tiered appellate decisionmaking also has obvious implications for the accountability of district courts, although the nature of the effects may depend on the precise nature of the tiering system in force, as also on the state of technology at the time (which is to say on the system's transparency). Because resources are spread thin in the courts of appeals, and (if) more and more responsibility for the lower tiers is given to law clerks and staff attorneys, the prospect of effective appellate review becomes ever more both a memory and a diminishing source of constraint on district courts determined to go their own way. For, even without considering tiered appellate decisionmaking,

it is hard to maintain that appellate review still provides effective structural assurance of judicial accountability. Not only have we abandoned a key check on the equitable discretion of federal trial judges by restricting interlocutory appeals, but we have broadened their discretion as to facts. Perhaps even more important, we have opened vast new vistas for the exercise of unreviewable discretion, and hence of power, by permitting,

336.

48. See *Burbank I*, *supra* note 8, at 2008-09; *Burbank V*, *supra* note 11, at 1679-89; Ferejohn & Kramer, *supra* note 32.

49. "The court must preserve its legitimacy and the ideal of law by invoking a majestic sense of continuity." Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 567 (1996).

Indeed, quite apart from distinctions between judgments and opinions and between an obligation not entirely to ignore prior decisions and a strict system of precedent, *see supra* note 15, both *Anastasoff* and *Hart* may be unsatisfactory for the reasons that originalist approaches to constitutional interpretation can be unsatisfactory, particularly with respect to any question better regarded as one of constitutionalism than as one of formal constitutional law. *Cf.* Price, *supra* note 15, at 94 ("when historians locate the beginnings of a strict, traditional doctrine of precedent only in the nineteenth century, they are not disputing what I term the core idea of precedent that *Anastasoff* claims"). It would be interesting in that regard to try to trace the extent, if any, to which a strong doctrine of precedent developed in part as a self-restraint when federal courts became more powerful (independent, if you will), garnering widespread acceptance first of judicial review and then of judicial supremacy. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

and indeed encouraging, trial judges to become actively involved in settlement.⁵⁰

In addition, respect for the sensibilities of their colleagues on the district courts, however admirable, may lead courts of appeals to commit to the lower tiers information about district court judgments or practices of which they disapprove and of which the bar and the public should be aware. Although Professor Wasby's qualitative empirical work has left him quite sanguine on the whole, he reports—and is less sanguine about—a number of instances where the appellate court apparently chose a lower tier in order to take some of the sting out of rebuke to a district court or prosecutor.⁵¹

Finally on the supposedly limited audience affected by or interested in error correction, to the extent that the cognitive significance of law is thought to repose in signals affecting behavior, both district courts and lawyers may shape their behavior and rulings in light of, or adjust them to, the misleading messages of the first tier,⁵² while watchdogs in the academy who should know better take those messages as the basis for assessing district court performance, piling one bias (from reliance only on published precedential opinions) upon another (from reliance only on cases that are appealed).⁵³

50. *Burbank I*, *supra* note 8, at 1987 (footnotes omitted). See Richman & Reynolds, *supra* note 16, at 295 ("It is not surprising, therefore, that the rate of reversal of district court judgment has been cut in half since 1960.").

51. See *Criteria*, *supra* note 37. In some cases, the technique may be akin to the use of informal rather than formal means to address non-decisional behavior. See Report of the National Commission on Judicial Discipline and Removal 124 (1993). To the extent that appellate messages concern district court decisions, however, the accountability calculus should give great weight to long-standing and robust norms and expectations concerning openness.

52. "The widespread misperception regarding the disposition of appeals of summary judgment may be due to the fact that reversals are much more likely to be reported in published opinions than affirmances, which frequently are disposed of by unpublished orders . . ." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). See also Pether, *supra* note 19, at 1457 (arguing that in the 1960's "the Fourth Circuit treated prisoners favorably in its unpublished opinions and unfavorably in its published opinions"); *id.* at 1496.

53. See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 603–05 (2004) [hereinafter *Burbank VIII*]; Merritt & Brudney, *supra* note 38, at 12 ("Today, a scholar who studies only published opinions from the United States Courts of Appeals does so at his or her peril."); Wasby, *Process*, *supra* note 37, at 79. Professor Wasby concludes:

With the increase in the proportion of cases receiving non-precedential dispositions, those which are published are disproportionately those in which the court of appeals disturbs the lower court's or agency's judgment and in which internal disagreement is manifest in concurring and dissenting opinions. Thus published opinions in *Federal Reporter* are an increasingly segregated set of cases with important policy content, through which the court of appeals performs its law-

I turn to the proposition that “there is a carving joint between error correction and lawmaking.”⁵⁴ This too has implications for judicial independence and accountability, albeit perhaps more subtle. Imagine a dispute resolution landscape in which Congress provided adequate judicial and other resources for the federal courts of appeals to decide most of their cases by signed precedential opinions.⁵⁵ Consider now why it is that Congress has not done so, and whether responsibility (or blame, if you will) lies solely in legislative halls. What has led some very prominent federal judges to oppose substantially increasing their number?⁵⁶ Is it a concern, if not for their own prestige, then for the institution’s prestige and hence its ability to attract talented new judges?⁵⁷ Does it reflect recognition that the addition of many more judges, at least to some courts of appeals, would lead to the creation of additional circuits, again diminishing prestige?⁵⁸ Should we see

making function while its error-correction work is heavily relegated to unpublished memorandum dispositions. That unpublished rulings contain many judgments disturbing lower court and agency rulings suggests that they are not all simple, routine, “cookie-cutter” cases.

Criteria, *supra* note 37 (footnote omitted).

54. *Supra* text accompanying note 33.

55. Presumably everyone agrees that there are some cases that do not merit more than the most abbreviated appellate disposition, although there is likely to be disagreement about what should be included in that category. See *Burbank VIII*, *supra* note 53, at 623 (“views of wheat and chaff can vary over time and . . . inevitably will do so in the minds of judges from different backgrounds and with different preferences—and who are subject to different caseload pressures—if those judges are undisciplined by higher authority”). In conversation, Judge Edward Becker has pointed out the difficulty of knowing in advance whether a case requires mere error correction or will contribute to the development of the law. See also Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Court of Appeals*, 29 VT. L. REV. 555, 598 (2005).

56. See, e.g., J. Harvie Wilkinson III, *The Drawback of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147 (1994); Jon. O. Newman, *Are 1,000 Federal Judges Enough? Yes, More Would Dilute the Quality*, N.Y. TIMES, May 17, 1993, at A17; *Future*, *supra* note 3, at 543. All of the arguments presented here, as well as some that are not, are discussed and rebutted in Richman & Reynolds, *supra* note 16, at 297–316.

57.

They say—you don’t hear this said out loud, but in the back rooms . . . —we won’t be as important. The more people there are who have a certain office, the less prestige there is for each person. That’s the worst possible reason for opposing something if what you are proposing is in the public interest. . . .

Some judges say that the people won’t be as good. If you have 2,000 judges, the quality on average will be lower than if you have 1,000. I suppose there is a theoretical point there, but this is such a big country, and there are so many able lawyers in the bar. I can’t believe we can’t find 2,000 or 5,000 if it came to that.

And remember that all of this is against the background of the state courts.

Future, *supra* note 3, at 543–44.

58. Cf. *Bills Introduced to Split Ninth Circuit*, THE THIRD BRANCH, Feb. 2005, at 3 (reporting statement by Rep. Mike Simpson (R-ID) that “house leadership will hold up the creation of any new judgeships until the Ninth Circuit is split”).

in the opposition concern about the negative impact that more appellate judges, let alone additional circuits, would have on the uniformity of federal law?

All are possible explanations for the position of those who would keep the federal judiciary at or close to its present size. It is also possible, however, that the position of some federal judges on that issue reflects their view of the current system of tiered appellate decisionmaking. The hypothesis is that for some that system is not simply to be defended but preferred (and secretly celebrated). Why? Because it allows them to spend most of their time on the issues (note that I did not say cases) they deem important (while staff lawyers and law clerks do most of the work on cases in the lower tiers). They are thus able to concentrate on making law, and the law they make, although regional only, is likely to endure in light of both absolute constraints on the capacity of the Supreme Court and that body's currently depressed appetite for work.⁵⁹

In his opinion in *Hart*,⁶⁰ Judge Kozinski asserted that "[w]hile federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished—and nonprecedential—dispositions to achieve the same end."⁶¹ It is possible that what is operating here, for some appellate judges, is not the necessity but the desire to mimic the Supreme Court⁶² by functionally creating a discretionary docket, focusing on issues rather than cases, and selecting issues according to the judges' desire to maximize opportunities to exercise creativity or power or both.⁶³

59. Cf. Richman & Reynolds, *supra* note 16, at 277 ("it is more rewarding professionally to deal with a major securities case than with the problem of yet another losing Social Security claimant"); Fox, *supra* note 16, at 1225 (suggesting that judges "should not facilitate underfunding of the judiciary by delivering second class justice"). What I here call the Supreme Court's "depressed appetite for work" may result in part from the attitudes of the justices regarding the nature of precedent and the judicial function in general and the Court's proper role in particular. See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U.L.Q. 389, 416–51 (2004).

60. *Hart v. Massanari*, 266 F.3d 1155.

61. *Id.* at 1177.

62.

[T]he Court's unbridled discretion to control its own docket, choosing not only which cases to decide, but also which "questions presented" to decide, appears to have contributed to a mindset that thinks of the Supreme Court more as sitting to resolve controversial questions than to decide cases.

Hartnett, *supra* note 34, at 1753.

63. See POSNER, *supra* note 9, at 121. Judge Kozinski has observed:

Most judicial work is routine and dull, involving issues that are of no consequence to anyone other than the parties. Only a few cases raise difficult and interesting issues—the kind of issues that make for an important judicial opinion. When lawyers seek appointment to judicial office, they generally think of the interesting cases as the core of judicial work; none I know seeks judicial office so

If so, one need not look for a presidential policy agenda in making federal judicial nominations, let alone one with a strongly ideological cast, to understand why traditional differences in the Senate's treatment of nominations to the courts of appeals and to the Supreme Court have greatly diminished in recent years.⁶⁴ Moreover, as I have previously observed in discussing summary judgment, the lawmaking disease—this appetite for making law on issues rather than deciding cases—may be spreading to the district courts.⁶⁵

"Writing an opinion," Judge Kozinski observed in *Hart*, "is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well."⁶⁶ He continued:

In writing an opinion, the court must be careful to recite all the facts that are relevant to its ruling, while omitting facts that it considers irrelevant The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants⁶⁷

he can spend his days, nights, weekends and holidays slogging through an unending stack of routine, fact-intensive and largely (in the grand scheme of things) inconsequential cases. Human nature being what it is, there is a strong tendency to devote a disproportionate amount of judicial time to the big cases and to give short shrift to the small ones. There's actually a lot to be said for this.

Kozinski, *supra* note 44, at 1097. A reader of this passage may be forgiven for thinking that the judge's additional observation—"Yet, the small cases, too have a legitimate claim to a fair share of judicial time and attention"—either lacks conviction or presupposes a "fair share" that is very small. *Id.* at 1098.

64. See Stephen B. Burbank, *Politics, Privilege and Power: The Senate's Role in the Appointment of Judges to the Federal District Courts and Courts of Appeals*, 86 JUDICATURE 24 (2002) [hereinafter *Burbank IX*].

65. See *Burbank VIII*, *supra* note 53, at 625; Cf. Jonathan Lear, *Whatever*, NEW REPUBLIC, Mar. 21, 2005, at 25 (reviewing HARRY G. FRANKFURT, ON BULLSHIT (2004)) ("This is the problem with bullshit: it is contagious. It invites us all to grow more detached from the real, to give up caring about what is true and what is false.").

66. *Hart*, 266 F.3d at 1176.

67. *Id.* at 1176–77. Cf. *Panel Discussion, Citation of Unpublished Opinions: The Appellate Judges Speak*, ___ FORDHAM L. REV. ___, ___ (forthcoming 2005) (Judge Pierre Leval)

It is worth repeating the last sentence of this quotation. "It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants." Substitute "legislative" for "judicial," and, as Judge Friendly might have observed, the good becomes the bad.⁶⁸ In any event, Richard Arnold had no such view of his role as a federal judge. Central to the disagreement between Judge Arnold and Judge Kozinski about tiered appellate decisionmaking is a difference of view about what courts do or should do.⁶⁹

Richard Arnold believed that courts exist not to make law *simpliciter* but to do so only as a byproduct of resolving disputes. In other words, for him lawmaking was not the *summum bonum* of the exercise of judicial power. Lawmaking was instead a necessary consequence of the exercise of the power, and the performance of the duty, to resolve concrete disputes brought to the courts by litigants.⁷⁰ Even as to that, although Arnold was clear that a federal judge must not shirk the duty to decide knowing that the decision will be unpopular, he was equally clear that federal judges must observe jurisdictional limitations (that unquestionably are) imposed on the exercise of judicial power by the Constitution and statutes.⁷¹

Judge Arnold was, in sum, the antithesis of the eager lawmaker, and hence the antithesis of his main judicial opponent in the debate about tiered appellate decisionmaking.⁷² He was the reluctant lawmaker. Ancestor worship may not be required by Article III, but we should not allow our judgment about formal constitutional requirements to obscure the implications

("it goes through thirty or forty drafts") [hereinafter *Panel Discussion*].

68. "Whoever first characterized the continental European system as 'inquisitorial' did a profound disservice to constructive legal thought. Substitute 'inquiring' and the bad becomes the good." *Hearings Before the Commission on Revision of the Federal Court Appellate System*, second phase, vol. I, at 205 (1974) (statement of Judge Friendly).

69. For a useful discussion of the characteristics of, and differences between, the "dispute resolution" (or "private rights") model and the "public rights" model of the judicial function, see RICHARD H. FALLON, JR. et al, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67-73 (5th ed. 2003).

70. "My position is that the function of the courts is to announce the law only as an incident to the resolution of disputes." *Future*, *supra* note 3, at 59. "Courts (or at least federal courts) do not sit to pronounce the law, but rather to decide cases and controversies." Hartnett, *supra* note 15, at 126 (footnote omitted).

71. See, e.g., *Future*, *supra* note 3, at 59. Cf. *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring) ("A timid judge, like a biased judge, is intrinsically a lawless judge.").

72. In fairness, it should be noted that Judge Kozinski's views about opinions, precedential and non-precedential, and about the judicial role are by no means universally held. For a radically different picture of both, see *Panel Discussion*, *supra* note 67, at ____ (Judge Edward Becker).

of its converse—what Jerome Frank called “posterity-worship”⁷³—for judicial independence and accountability.

A (self-styled) realist might say about the federal courts of appeals that, given the size of their dockets and resource constraints and given moreover the Supreme Court’s starvation diet (whether or not due to the justices’ own “posterity-worship”), law declaration *is* appropriately the first priority of those courts. The empirical component of such a view to the side,⁷⁴ even if, unlike certiorari, tiered appellate decisionmaking is not in tension with “the classic justification for judicial review,”⁷⁵ the notion that “the power to interpret is primary and the case deciding power is secondary . . . misinterpret[s] the Constitution and . . . confuse[s] cause and effect.”⁷⁶ Moreover, some of the law being declared seems increasingly divorced from flesh and blood disputes (the existence of which is a requirement of Article III),⁷⁷ a concern that has been forcefully advanced in opposition to the increasing reliance on summary judgment in federal civil cases.⁷⁸

In defending tiered appellate decisionmaking, Judge Boyce Martin emphasized the quest for a “cohesive and understandable”⁷⁹ body of law. Yet, what he fears as “muddying the water”⁸⁰ could be an important devel-

73. See *supra* text accompanying note 2.

74. Although the question of citation and the question of precedential status are separate, it would be interesting to explore the association, if any, between the views of a court of appeals on Proposed Appellate Rule 32.1 and its reputation as either an eager or a reluctant lawmaker. Such an inquiry should include attention to docket pressures, the hypothesis being that it is not just—indeed it may not be primarily—courts of appeals which are swamped with cases that appreciate the opportunities presented by tiered appellate decisionmaking to fashion a functionally discretionary docket. This is suggested by data indicating that the greatest number of comments opposing Proposed Appellate Rule 32.1 came from appellate judges in circuits (the Second, Seventh, Eighth, and Federal) that have workloads below the national average, as measured (except in the Federal Circuit) by terminations on the merits per active judge. By contract appellate judges in the three busiest circuits (the Fourth, Fifth, and Eleventh) submitted a total of two comments in opposition. See Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. ___, ___, (forthcoming 2005). Professor Schiltz concludes that “something other than concern about workloads must be animating judges.” *Id.*

75. Hartnett, *supra* note 34, at 1713–14 (footnote omitted).

76. John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 373 (1988). See Hartnett, *supra* note 34, at 1716.

77. Cf. Cappalli, *supra* note 22, at 765 (suggesting that those practicing tiered appellate decisionmaking “consider the precedential force field to be much wider than permitted by proper legal methodology; that is, they treat words, phrases, ideas, principles, tests, standards, and ratios as binding rather than persuasive”).

78. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1941–45 (1998); Burbank VIII, *supra* note 53, at 625; see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUD. 459, 525–31 (2004) (more general consequences of vanishing trials).

79. Martin, *supra* note 17, at 192.

80. *Id.*

opmental process, the urge to abort which may lead to rules that emerge prematurely and that are hard to change.⁸¹ Indeed, judges who are eager to maximize opportunities to exercise creativity or power (or both) tend to neglect the risks and costs of prematurity at every level of the court system.⁸²

When issues replace cases as the object of judicial attention, and when judges assume the burden to consider “not only . . . the facts of the immediate case, but also envision the countless permutations of facts that might arise in the universe of future cases,”⁸³ we have moved from the inductive to the deductive realm, from techniques traditionally associated with common law to those traditionally associated with civil law,⁸⁴ from the domain of courts to that of legislatures.⁸⁵

81. See Allen, *supra* note 55, at 601 (“fully formed at birth”). This, of course, is quite the opposite of the concern that it may take a court of appeals too long to produce a precedential opinion settling a question, with all of the costs that attend conflicting opinions in the lower tiers. See *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062–63 (9th Cir. 2000) (“twenty separate unpublished dispositions instructing district courts to take a total of three different approaches to correct the problem”).

For a valuable contribution to the literature on tiered appellate decisionmaking that takes account of both the difficulties caused by appellate court structure (i.e., panel decisions that must be followed) and of the need for judicial dialogue, see Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025 (1999). See also Barnett, *supra* note 15, at 21–25 (discussing different degrees of precedential force, some of which would obviate problems caused by rule that a panel decision can only be overruled by the court en banc); *Panel Discussion*, *supra* note 67, at ___ (Judge Michael Boudin) (“it is a real problem to go around to all the other judges to get it undone . . .”).

82. See *Burbank I*, *supra* note 8, at 1998 (“just as premature aggregation in a class action may seriously prejudice the ability of those who have been injured to establish a right to recover under the governing substantive law, so may other forms of aggregation, such as consolidation”) (footnote omitted); *id.* at 1996–97 (“The calculus is different for trial judges, particularly in the age of managerial judging, aggregation, and settlement.”) (footnote omitted).

83. *Hart*, 266 F.3d at 1176, *quoted supra* text accompanying note 67.

84.

[W]hether a disposition should be published depends in part on what one views as precedent or as contributing to precedent and stating the law. *If this is limited to abstract and theoretical statements of legal rules, less will be published.* However, if precedent is seen as developing incrementally through stating the application of a rule to facts which mark out a line, then more is to be published.

Process, *supra* note 37, at 101 (emphasis added). See Pether, *supra* note 19, at 1512; Allen, *supra* note 55, at 600. Of course, the traditional view has been that “[p]recedent is one of the primary ways in which common-law systems are distinct from civil-law systems.” Price, *supra* note 15, at 120 (footnote omitted). For a revised view of civilian practices, using publication and precedent in France for comparison, see Cappalli, *supra* note 22, at 770.

85. See Cappalli, *supra* note 22, at 774–75; Allen, *supra* note 55, at 599. “While courts are called upon in particular disputes to ‘settle authoritatively what is to be done,’ it is for other institutions to do so when what is at issue are laws of general prospective application.”

The other side of this coin is that, preoccupied by issues and by the agony of foresight when determining today what facts are *and will be* important to the wise framing of those issues for the future, our courts—victims of a “perniciously tyrannical future”⁸⁶—may give inadequate attention to the wise and just resolution of the cases before them.⁸⁷ Another worry is that the emphasis of tiered appellate decisionmaking on writing opinions declaring the law slights the interests of all litigants in knowing why their case was decided as it was,⁸⁸ as well as the interests of all who seek to monitor the performance of courts to ensure that their decisions are rational (not arbitrary), treat those who are similarly situated alike, and are consistent with authority to which they are subordinate.

An irony emerging from this perspective on tiered appellate decisionmaking is that, if Congress were interested in using its control over the budget to rein in “activist judges,” the best means to do so might be precisely the opposite of those which seem obvious. Once most of the promises made to Congress on its behalf in 1925 were forgotten,⁸⁹ the Supreme Court

Hartnett, *supra* note 15, at 149.

86. *Supra* text accompanying note 2.

87. *Cf. Wasby, supra* note 15, at 333 (noting “instances when the panel may resolve a case in two dispositions—a published opinion covering matters of greater importance or of first impression in the circuit, and a *memodispo* treating the remainder of the issues”). On the risks of elevating opinions over judgments in the Supreme Court, see Hartnett, *supra* note 15, at 136–46. *Cf. id.* at 134 n. 58 (“Issue-by-issue voting then, is consonant with . . . emphasis on courts as the managers of the law; it is in considerable tension with the traditional emphasis, rooted in Article III, on courts as case deciders.”). Having noted that “all writs of certiorari are limited writs” in the sense that “[n]one brings forth all properly preserved claims of error within the Supreme Court’s jurisdiction,” Hartnett, *supra* note 34, at 1707, Professor Hartnett continues:

Put somewhat differently, the Supreme Court does not so much grant certiorari to particular cases, but rather to particular questions. Especially in light of its expressed lack of interest in simple error correction, the result can well be the affirmation of judgments that, while correct as to the controversial issue on which certiorari is granted, are nevertheless erroneous because based on a simpler error that the Supreme Court declines to consider.

Id. (footnotes omitted).

88.

The third duty of the court is to write an opinion which is intelligible, which explains the result, and which we hope, is acceptable to the losing side. I think about losing litigants a lot. Those are the people who need to understand that they have been heard—that a reasoning creature of some kind has evaluated their argument and come to some sort of defensible conclusions about it. They won’t like it; they won’t enjoy losing, but I hope that they will have a sense that they have been heard. And so it’s important how opinions are written.

Future, supra note 3, at 536.

89. See Hartnett, *supra* note 34, at 1647, 1684–92, 1704–12. See also *id.* at 1724 n.460 (“With the exception of the rule of four, the Supreme Court no longer follows the approaches to certiorari described in the hearings on the Judges’ Bill.”). Note, however, that more lim-

became essentially impervious to caseload pressures. And so, we now know, are the courts of appeals, at least so long as they have an adequate supply of judicial surrogates with whose help they can create functionally discretionary dockets through tiered decisionmaking, leaving Article III judges freer to search for lawmaking opportunities.⁹⁰ In both cases, the ability of the courts to set their own agenda permits them “to ‘shed the long-standing image of a neutral arbiter and an interpreter of policy’ and emerge ‘as an active participant in making policy.’”⁹¹ Thus, rather than seeking to beat the federal courts of appeals into submission by drowning them in work,⁹² our hypothetical Congress should give them the resources required to treat—and require that they treat⁹³—if not all, then most, cases with the dignity of a signed precedential opinion.⁹⁴

This would solve the problem of incentives that might follow if tiered appellate decisionmaking were not addressed in gross, and adequate resources were not provided, leaving courts free to switch from nonprecedential opinions to judgment orders.⁹⁵ I accept that there is more than one way to skin a cat. I also believe, however, that if judges accepted the importance

ited forms of certiorari existed prior to 1925. *See id.* at 1651.

90. On the courts of appeals as “the new certiorari courts,” see Richman & Reynolds, *supra* note 16, at 93–94. *See also* Stephen L. Wasby & Martha Humphries Ginn, *Triage in Appellate Courts: Cross-Level Comparison*, 88 JUDICATURE 216 (2005). *Cf.* Hartnett, *supra* note 34, at 1647 n.16 (“Under current certiorari practice, most petitions are never read by the Justices, who instead rely largely on one or two page summaries prepared by a law clerk”). Of course, even though additional staff may free up more of a judge’s time in one sense, responsible supervision takes time. Consider Judge Arnold’s vivid simile:

Judges are like funnels: There’s a big opening at the top and all the law clerks and the staff attorneys pour stuff in there. There’s just a little funnel at the bottom. It all has to go through one person. And unless the judge widens out that bottom so that it all just drops through rubber-stamped, you’re not really getting any more done.

Future, *supra* note 3, at 543.

91. Hartnett, *supra* note 34, at 1718 (quoting RICHARD L. PACELLE, JR., *THE TRANSFORMATION OF THE SUPREME COURT’S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* 15 (1991)). *See also* Wasby & Ginn, *supra* note 90, at 224.

92. *See Conference Adopts Cost-Containment Plan in Wake of Limited Congressional Funding: Continues Push for Court Funds*, THE THIRD BRANCH, Oct. 2004, at 1.

93. The provision of adequate resources should solve any separation of powers problem that might otherwise be created by such a requirement. *See* *Miller v. French*, 530 U.S. 327, 350 (2000); *Burbank V*, *supra* note 11, at 1688. *But cf. Panel Discussion*, *supra* note 67, at ___ (Judge Michael Boudin) (suggesting that it “would raise a constitutional problem that would be of great interest if the Congress or the Rules Committee ever sought to prescribe weight . . .”)

94. For the possibility that the behavior of Supreme Court justices in the certiorari process is affected by their views about the judicial role and precedent (so that, for example, those favoring the creation of broad rules will vote to take fewer cases), see Cordray & Cordray, *supra* note 59, at 423–34.

95. *See supra* note 22.

of judicial accountability in this area and the negative implications of (some of) their current practices for the ability to hold them accountable, they would not ask the watchmen to turn the other cheek.⁹⁶

Judge Arnold himself observed that the remedy for caseload pressures was not "to create an underground body of law good for one place and time only," but rather "to create enough judgeships to handle the volume, or, if that is not practical, to take enough time to do a competent job with each case."⁹⁷ He acknowledged and would have been willing to pay the cost of growing backlogs.⁹⁸ He did not mention (although it may have occurred to him) that, although making appellate courts more accountable in this way would not in one sense reduce their ability to make law, it could reorient them to the incremental, case-oriented lawmaking role that he championed, a role that is difficult to discern in *Hart v. Massinari*.⁹⁹ On this hypothesis, the answer is to feed, not to starve, the beast!¹⁰⁰

III. "A LITTLE TOUCH OF POLITICS"

In connection with the first dimension of judicial accountability that this account reveals—accountability to the past—it is not clear whether Judge Arnold's view of the role of courts in making law was intended—in

96.

When I became Chief Justice of the Third Circuit in 1998, I persuaded my colleagues that we owe a greater duty to our colleagues of the bar and to their clients—you represent the appellants, you do not get oral argument, you get a one-line disposition, boom! "affirmed," you are out. I viewed it as a matter of respect for the bar, respect for the profession. I mean judges are nothing but lawyers with robes on, a robe and a commission, and lawyers are part of our profession. I think we owe respect to our profession. I also viewed it not just as a matter of respect for our profession, but as a matter of responsibility and accountability. My colleagues agreed, and we ceased writing judgment orders and started writings NPOs in every case.

Panel Discussion, *supra* note 67, at ___ (Judge Edward Becker).

97. *Anastasoff*, 223 F.2d at 904. *See Future*, *supra* note 3, at 543 ("My feeling is that we need more judges").

98. *See Anastasoff*, 223 F.2d at 904. *See also Future*, *supra* note 3, at 538.

99. Consider Judge Kozinski's assertion that under *Anastasoff* "federal judges are not merely required to follow the law, they are also required to *make* law in every case." *Hart*, 266 F.3d at 1160 (emphasis in original). There is irony in this emphasis on making law from someone who understands the dubiety of historical arguments predicated on the centrality of opinions. *See id.* at 1168–69. For, as John Harrison has pointed out, the absence of official reporters in the early years of the Supreme Court is hard to square with the argument that our federal judiciary was "set up with a focus on judicial exposition of law." John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 230 (1997). *See Hartnett*, *supra* note 15, at 129.

100. From that perspective, the benefits thus achieved should be considered in answering the question whether "spending more money, more judge time, on cases is . . . worth it." *Panel Discussion*, *supra* note 67, at ___ (Judge Michael Boudin).

either positive or normative dimensions—to include the Supreme Court. The Court enjoys a discretionary docket because Congress agreed in 1925, and has agreed since then, with the need to relieve it of the burdens of mandatory appellate review.¹⁰¹ Freedom from those burdens, in turn, facilitated a different view of the Court's role in interpreting the Constitution—in making constitutional law.

The power to refuse to hear cases enables the Court to bide its time and “to escape, at least temporarily, from the logical implications of an initial unpopular on-the-merits decision.” It also enables the Court to intervene selectively, without committing itself to policing a new area it brings under its supervision. As a result, then, the procedural license given by certiorari has had a profound role in shaping our substantive constitutional law.¹⁰²

Having for eighty years exercised the power to pick and choose among cases vying for review, having from the beginning identified conflicting rulings below as a criterion important to the exercise of its discretion,¹⁰³ and for that and other reasons having come to focus on issues (questions) rather than cases,¹⁰⁴ the Court does not, and perhaps could not, project Judge Arnold's image of a reluctant lawmaker.

Tiered appellate decisionmaking in some circuits has effects quite similar to those we associate with the Supreme Court's approach to its discretionary docket. I have previously observed that “technical proficiency requires hard work, patience, and thoroughness—in a common law system the handmaidens of the inductive method,”¹⁰⁵ and that one of the less-noticed costs of tiered appellate decisionmaking “may be further erosion in the capacity for technical proficiency of our judges.”¹⁰⁶ Another cost I noted on that occasion is the “further erosion of attributes that distinguish the judicial process from other processes of authority, including the political processes.”¹⁰⁷ Whether or not intentional, the creation of a functionally dis-

101. See Hartnett, *supra* note 34, at 1660–1704 (Taft's successful campaign for broad discretionary power to determine which cases to hear); *id.* at 1708–10 (subsequent history of mandatory jurisdiction culminating in 1988 legislation virtually eliminating it).

102. *Id.* at 1730–31 (footnotes omitted). See *id.* at 1732 (“would the Supreme Court have incorporated the Fourth, Fifth, Sixth, and Eighth Amendments if it were obliged to review every state judgment that upheld a criminal conviction or sentence over a defendant's objection based on one of those Amendments?”).

103. See *id.* at 1721; *supra* note 89.

104. See *id.* at 1705–07; *supra* note 87.

105. Stephen B. Burbank, *Making Progress the Old-Fashioned Way*, 149 U. PA. L. REV. 1231, 1233 (2001) [hereinafter *Burbank X*].

106. *Id.* at 1234.

107. *Id.*

cretionary docket may suit the utility function of some court of appeals judges. By thus encouraging posterity-worship, tiered appellate decision-making can blur the notional line that separates courts from legislatures.

As to the second dimension—accountability to the present and the future—tiered appellate decisionmaking in some circuits may leave parties unconvinced that their arguments have been heard and may make it difficult for others who are interested in what courts do to monitor decisions in the interest of exposing and hence deterring arbitrariness and the inequitable administration of the laws. Judge Arnold's expressed conviction that his colleagues would not purposely manipulate the practice so as to enable and conceal lawlessness was doubtless sincerely held. It is not obviously, however, *in these times* a conviction that those who are not judges should be asked to share on faith.¹⁰⁸

Although Judge Arnold's extrajudicial writings were instinct with concern about judicial accountability, he did not often write about judicial independence. That is not, I suggest, because he thought that everyone understands what judicial independence is and accepts that, defined as a judge might like to define it, it is an unalloyed good. He did state on one occasion that federal judges "are not accountable in any way for the results of the cases that [they] decide."¹⁰⁹ Yet, he knew that, if the federal judiciary is in fact, or is perceived to be, insufficiently accountable, it will lose the independence necessary for it to accomplish, if not what the architects of our system intended, then what developing American constitutionalism requires. In linking the institution of precedent to Article III in *Anastasoff*, after all, the judge stressed that it was both a barrier to "a dangerous union with legislative power"¹¹⁰ and "a bulwark of judicial independence in past struggles for liberty."¹¹¹

The judge believed that the federal judiciary must have the "continuing consent of the governed"¹¹² in order to do its job. He also believed that,

Those branches of government do things simply because they believe they are best in the public interest. That is their nature. Courts, on the other hand, are not, or should not be, simple expressions of human will. We're supposed to make our decisions by reference to something other than our own personal opinions, by reference to the law, reason, the facts, concepts like that.

Future, *supra* note 3, at 544–45.

108. See *supra* text accompanying notes 40–43. See also *Panel Discussion*, *supra* note 67, at ____ (Judge Michael Boudin) (discussing the problem of "perception becoming reality").

109. Answers for Interview for "The Third Branch" 3 (January 29, 1990) [hereinafter *Answers*] (available from author). Neither this answer, nor the question to which it responded, was included in the published interview. See *Judge Richard Arnold: Presenting the Courts' Budget to Congress*, THE THIRD BRANCH 9–10 (Feb. 1990).

110. *Anastasoff*, 223 F.3d at 903.

111. *Id.* at 900.

112. *Public*, *supra* note 6, at 5.

once a court has observed all jurisdictional limitations on its power, it must render and accept responsibility for a decision, however unpopular, that the law requires. From this perspective, his repeated expressions of concern about judicial accountability represented underlying anxiety about the prospects of judicial independence, the continuing willingness or ability of the federal courts not to “pull [their] punches”¹¹³ when the law requires an unpopular decision.

To the extent that Judge Arnold would have exempted the Supreme Court from the modest and restrained lawmaking role that he advocated, perhaps he would have acknowledged the need also to accord it some relief from this position that, all jurisdictional restraints having been observed, a court must not shirk from deciding a case in accordance with the law as that court understands it. Surely, at least, he would have recognized that, the more indeterminate law is, and the more room there is therefore for the play of policy and preference, the more legitimate—and the more important—it is for a court of last resort also to take account of considerations that bear on the perceived legitimacy and continued effectiveness of the judiciary as a whole.¹¹⁴ Indeed, since it is easier for the Supreme Court to duck cases by denying certiorari than it is for appellate courts by using the lower tiers, and having regard to limited appellate capacity and appetites, perhaps he would have deemed it appropriate for all courts to take account of such considerations in making choices when their decisions are likely to be the last judicial word on the subject, in fact if not in theory.¹¹⁵

113. *Id.* at 59. In seeking explanations for President Washington’s nomination of William Drayton, who had served as a British judge, to the newly created United States District Court for the District of South Carolina, Judge Arnold noted that he had “faithfully applied the law even when it favored enemies of the crown. He was the sort of man, one supposes, who could be depended upon to make unpopular rulings, even rulings placing his own position in jeopardy, when the law required.” *Judicial Politics*, *supra* note 12, at 485.

114.

Only when the concepts of sociological and legal legitimacy are distinguished does *Casey*’s provocative aspect come into focus: the majority opinion suggests that the Supreme Court is permitted and perhaps required by law to base its decisions partly on public perceptions and, in particular, on an asserted interest in preserving its own sociological legitimacy.

Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1841. *See id.* at 1850 (“in my view it is morally as well as legally legitimate for courts to take public reaction into account in determining whether to extend judicial precedent to recognize new rights”) (footnote omitted); *infra* text accompanying notes 122–24.

115. For the potential of opinions that can be cited but that lack “full precedential weight” to foster dialogue about, and prevent premature ossification with respect to, novel or underdeveloped issues, see Berman & Cooper, *supra* note 81, at 2037–41. This is quite different from strategic behavior on the part of a court of appeals (or judge) in seeking to affect the course of decision in the Supreme Court, of which I doubt that Judge Arnold would have approved. *But see* Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. L. REV. 861, 869 (1998).

Judge Arnold was candid about, and humorous in describing, the politics of his appointment to the federal bench.¹¹⁶ He was also, and characteristically, modest in attributing his appointment and lengthy tenure as Chair of the Budget Committee of the Judicial Conference of the United States to his pre-judicial service as legislative assistant to Senator Dale Bumpers, a member of the Appropriations Subcommittee for the judiciary.¹¹⁷ I do not doubt that this played a part in the Chief Justice's initial decision to appoint Judge Arnold, just as I do not doubt that Arnold's extraordinary personal charm, his integrity and his political acumen would have kept him in that position in any event.

Judge Arnold enjoyed his service as Chair of the Budget Committee, he said, because, "[i]t has a little touch of politics about it . . . and I have always enjoyed politics."¹¹⁸ He also observed that "[p]olitics is people, and . . . it should be and can be an honorable profession."¹¹⁹ On another occasion, however, noting that "many members of the public seem to feel that judges are just politicians in another guise," Judge Arnold concluded that "[s]ometimes some of us are, but we should not be."¹²⁰

These views are not inconsistent, insofar as, while acting as Chair of the Budget Committee, Judge Arnold, although a judge, was not acting as part of a court exercising judicial power. Moreover, he could and likely would have distinguished between a federal judge and an elected politician with words similar to those he used to describe why the federal judiciary is not usually uppermost in the minds of members of Congress—"we lack a particular constituency."¹²¹ In any event, that Judge Arnold disapproved of deeming federal judges "just politicians" hardly suggests that he intended the bright line between law and politics that the distinction might suggest.

I believe that Judge Arnold would have distinguished between (1) a situation in which, responding to popular sentiment at the time, a court evaded a result that either clear (and clearly controlling) precedent or the unmistakable tenor of positive law required,¹²² and (2) a situation in which, precedent or positive law not unmistakably dictating the result, the court considered the implications of alternative decisions for the continuing ability of the judiciary to decide cases as required by the law as generally un-

116. See *Discontent*, *supra* note 3, at 767-68.

117. His humor again shone through. "I was appointed on merit, the same way I became a Federal judge." *Money*, *supra* note 6, at 22, *quoted supra* note 6.

118. Obituary, *supra* note 1.

119. *Id.*

120. *Future*, *supra* note 3, at 545.

121. *Money*, *supra* note 6, at 25.

122. See *Public*, *supra* note 6, at 59. Cf. *Madison*, *supra* note 7, at 289 (distinguishing between transient public opinion and "opinion manifested and solidified over decades of time" in discussing Madison's view of constitutional interpretation).

derstood when it is not popular to do so. In the former, the court would be engaged in a political act difficult to distinguish from the behavior of an elected politician responding to a constituency (and not the constituency whose rights Madison was most concerned about).¹²³ In the latter, the behavior would be "political" only in the sense that statesmanship, deference, and compromise in a world of disputable premises and conclusions are part of the art of governance.¹²⁴

Judge Arnold's illuminating discussion of the writings of James Madison suggests that for both men constitutional text was the beginning rather than the end of interpretation and that regard should be paid to customs, norms, and practice in deciding constitutional meaning.¹²⁵ This is not surprising because both Madison and Arnold, while brilliant thinkers comfortable with theory, were practical people who understood that constitutional arrangements must accommodate the developing needs of our society, as they must the conflicting pressures on actors entrusted with the important business of governance in a democracy.¹²⁶ Since they were practical people,

123. See JACK N. RAKOVE, *ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 290 (1996).

124.

But deference is not a one way street. Not only does the judiciary properly defer to the other branches in the vast majority of cases, but a central question (perhaps the central question) in constitutional adjudication is the scope of this deference, and whether it should vary depending on the constitutional provision at issue or the political power of the persons harmed.

Hartnett, *supra* note 15, at 156–57 (footnotes omitted). See *id.* at 157–58 ("Indeed, the very practice of writing opinions is an act of judicial deference and an invitation to dialogue."). See also Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 *LAW & CONTEMP. PROBS.* 21 (1998).

125. See *Madison*, *supra* note 7, at 285–93. Elsewhere, Judge Arnold expressed his own view that

[t]o understand the relationship among the branches of the federal government, one must realize that much of constitutional law is not made or interpreted by judges, but simply grows up. It is a matter of practice and is found not only in documents, but in what people do from day to day in their governmental functions. Constitutional law is made by the President, Congress *and* the courts.

Money, *supra* note 6, at 19.

126.

I can't claim that Madison changed often enough to be perfect, but it does seem to me that he exhibited a healthy sense of practicality in approaching the great constitutional questions that confronted him. Practicality, after all, is not a bad thing in government. If the government doesn't work, if the Constitution is interpreted in such a way as to make it so rigid as to be completely unable to adapt, government will fail of its essential purpose.

Madison, *supra* note 7, at 293. See *id.* at 273, 288. See also Richard S. Arnold, *Mr. Justice Brennan—An Appreciation*, 26 *HARV. C.R.-C.L. L. REV.* 7, 14 (1991) ("For judges to make up new principles is illegitimate. For them to adapt old principles to changing conditions is necessary.").

"it is . . . impossible to believe that they were concerned with the structure [of government] to the exclusion of the processes of dialogue and interaction it enabled."¹²⁷ Those processes are part of our politics.

In considering a robust notion of judicial independence, requiring freedom from virtually all influence by other actors, that some political scientists deploy to support the proposition that judicial independence is a myth, I have maintained that the notion is both too robust and inconsistent with our constitutional architecture.

It is too late to deny that, in addition to being an integral part of a political system, the federal courts are involved in politics, at least if politics are "defined as the honorable profession of ensuring that government performs for the benefit of the people." The admission does not, however, negate either the reality or ideal of core judicial independence. Influence is not control. It is consistent with our constitutional design and may be required by evolving notions of law and lawmaking.¹²⁸

Judge Arnold understood that courts are involved in politics in this sense, and, far from regretting that fact, he rejoiced in it. As he said, "politics is people."¹²⁹ His concern for the people who came before his court, including the lowliest and most desperate characters,¹³⁰ stands as both an enduring monument to his memory and an enduring caution to those who are inclined to make categorical judgments in apportioning judicial effort.¹³¹ For as the judge observed, "[a]lthough you pick up a file and say, 'Well, there is a ninety-eight percent chance that this is frivolous,' that does not mean you read only two percent of the file."¹³²

Thus, it is not surprising that Judge Arnold believed that "running for office [was] one of the biggest parts of [his] education,"¹³³ and that he found it "very helpful as [he sat] on the bench to have had some experience in politics."¹³⁴ He once observed that

127. *Burbank II*, *supra* note 9, at 327.

128. *Id.* at 327-28 (footnote omitted).

129. *Supra* text accompanying note 119.

130. See *Future*, *supra* note 3, at 536 (quoted *supra* note 88); *id.* at 541 (expressing doubts about specialized administrative court for social security cases "because I think that ordinary folks, when the most important decision in their lives is whether they can get these benefits, a question that turns on federal law, should have a federal court to go to"); *id.* at 545 ("The second point is that we must be open. People, even if they are demented, even if they are inmates, need to have a place to go to complain and be heard.").

131. "I do not have data on this, but, from my experience, prime candidates for unpublished opinions are Social Security, Black Lung, and criminal cases as well as prisoner petitions. Some cases in those areas do merit publication, but many do not." Martin, *supra* note 17, at 183.

132. *Money*, *supra* note 6, at 34.

133. SYMPOSIUM ON THE JUDICIARY 12 (Patricia A. Eables & John P. Gill eds., 1989).

134. *Id.*

the courts, like the rest of the government, depend on the consent of the governed. And we judges are, in a sense, political. I have sometimes described myself as a professional politician, because I think that the courts are, in the finest and broadest sense of the word, a political institution. We function not on paper or in the abstract, but as part of a real, living system of government, each part of which has its own role to play.¹³⁵

The parallels between Judge Arnold and Judge Edward Becker, another great federal judge whose work and career it has been my privilege to study, are arresting. Both came to the bench with extensive experience in politics. Both were (and Judge Becker still is) adept at common law judging, bringing "high intelligence, extraordinary energy, and unbounded intellectual curiosity"¹³⁶ to their work. In both we see as well the added qualities of "fascination and patience with the complexities of legal doctrine and willingness, at the end of the day, to abide the mistakes and limitations of authorities [they are] pledged to respect."¹³⁷ In sum, for Richard Arnold, as for Edward Becker, the notion that "law is nothing more than politics" was "not a counsel of despair because, for him, law [was] equally nothing less than politics: the art of seeking to improve the human condition through intelligence, patience, persuasion, and compromise."¹³⁸

Four years ago, I noted how much more difficult the road was for federal judges dedicated to technical proficiency and the common law method than it was thirty or even twenty years before,¹³⁹ and I suggested that, in any event, "technical proficiency is a fortuity among judges selected, by whatever appointive or elective system, for their ideology or their willingness to trim their judicial sails to the prevailing winds of interest group politics."¹⁴⁰ Moreover, having argued that "politics need not be the enemy either of judicial independence or of judicial distinction,"¹⁴¹ I asked, "What room is there in tomorrow's politics for patience, for persuasion, or for compromise?"¹⁴²

The intervening years have done nothing to quell my anxiety about the state of the federal judiciary or about the state of the politics of which federal courts are inescapably a part. They thus have served to reinforce the sense of urgency I feel when contemplating Richard Arnold's distinguished career and the passing from the scene of his luminous example.

135. *Id.*

136. *Burbank X*, *supra* note 105, at 1232.

137. *Id.*

138. *Id.* at 1234–35.

139. *See id.* at 1233.

140. *Id.* at 1234.

141. *Id.*

142. *Burbank X*, *supra* note 105, at 1235.

Consider first the politics of federal judicial selection. Even one who understands that hypocrisy is the coin of the realm within the beltway may have difficulty swallowing current levels on both sides of the aisle. Yet, all of this hypocrisy, partisan battling, and threats of political nuclear war¹⁴³ may keep us from focusing on what may be at stake. We are at risk of the appointment to the federal bench of individuals who lack both Richard Arnold's capacity for judicial independence and his capacity for constructive political engagement.

I draw a distinction between ideology in the weak sense of the preferences as to political, social, and economic arrangements that all sentient adults, and hence all judges, have and that inevitably affect decisions in which there is an element of discretion, on the one hand, and ideology in the strong sense of preferences that "hold sway with such power as to be impervious to adjudicative facts, competing policies, or the governing law as it is generally understood,"¹⁴⁴ on the other. Ideology in this second sense, I have argued, "is revealed as the enemy of judicial independence."¹⁴⁵ It is in that regard no different from non-ideological pre-commitment to certain legal positions for the purpose of securing or retaining a judicial position.

To understand why that is true, it is essential to recall that (1) judicial independence is not an end in itself but a means to governmental ends, (2) within the federal government, those ends relate to the institution of the federal judiciary rather than to individual judges, (3) the primary ends sought by the architects of federal judicial independence were the enablement of judicial review and the resolution of ordinary cases according to law,¹⁴⁶ and (4) "judicial independence and judicial accountability [being] joined at the hip . . . judicial independence is no better served by the perception of unaccountability than it is by unfounded cynicism bred of irresponsible criticism."¹⁴⁷ Accordingly, "[t]rue judicial independence . . . requires insulation from those forces, external and internal, that so constrain *human* judgment as to subvert the judicial process."¹⁴⁸

Judges whose belief systems are hard-wired are likely to be eager lawmakers; those who are pre-committed for reasons of personal advancement may or may not be. In any event, the same qualities that render them unfit to serve as judges from a traditional perspective, which views law as

143. See Charles Hurt, *Support Falters for the "Nuclear Option,"* WASH. TIMES, Mar. 2, 2005, at A1.

144. *Burbank I*, *supra* note 8, at 1999.

145. *Id.*

146. See *Burbank II*, *supra* note 9, at 336.

147. Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 121 (1996) [hereinafter *Burbank XI*].

148. Stephen B. Burbank, *Is it Time for a National Commission on Judicial Independence and Accountability?*, 73 JUDICATURE 176, 177-78 (1990) [hereinafter *Burbank XII*].

determinate knowledge to be discovered, render them equally unfit in a world that acknowledges the indeterminacy of much (not all) law and the importance of dialogue in arriving at solutions that serve the common weal. True believers, no matter what their beliefs or political persuasion, know what is right, and the brighter, the more self-confident and the more energetic they are, the more likely they are to regard processes and institutions of dialogue and accountability as obstructions and to endeavor to render them irrelevant. Non-ideological pre-commitment forecloses dialogue, and although motivated by a vision of accountability, contributes to its degradation.

The federal judiciary needs more judges who are politicians in the sense that Richard Arnold was a politician. These are judges for whom people are more important than abstractions, for whom dialogue and deference are both a two-way street—dialogue and deference involving litigants, other courts, and the other institutions of government—and for whom processes and institutions of accountability are viewed not as obstructions but, like the law itself, as “those wise restraints that make us free.”¹⁴⁹ Such people need not have a background in politics. Indeed, although the example of Judge Arnold, as of Judge Becker, suggests that political experience can be helpful, one can easily imagine a different kind of politics, whether one infected with ideology of the strong sort or with relentless partisanship, that would be a handicap.

Today’s complex legal landscape cries out not just for judges who renounce the partisan and who are not slaves either to a belief system or to an identifiable constituency. It also cries out for humility, by which I mean recognition, in Judge Arnold’s words, that “holding . . . a commission signed by the president does not in and of itself confer moral superiority.”¹⁵⁰ To me, humility also entails that, at the end of the day, judges be willing to abide “irrationality and irresponsibility in the [legislative and executive], unless it is manifested in behavior that the Constitution, fairly interpreted, reprehends.”¹⁵¹

The need for more federal judges who are adept at the political arts is by no means confined to the realm of courts. Indeed, the need is equally acute, much more obvious, and presumably less controversial, in the host of non-judicial activities in which the modern federal judiciary engages, many of which bring the judiciary’s representatives in contact with elected politicians and their representatives. That was the realm in which Judge Arnold served for so long and with such distinction as Chair of the Budget Commit-

149. This language is part of the citation read by the president of Harvard University in conferring the J.D. diploma at commencement. See *Burbank II*, *supra* note 9, at 316 n.10.

150. *Public*, *supra* note 6, at 5.

151. *Burbank I*, *supra* note 8, at 2009; see *supra* text accompanying note 143.

tee. Judge Arnold's assertion that federal judges "are not accountable in any way for the results of the cases that [they] decide,"¹⁵² even if formally correct, by no means captured the judge's deep respect for processes and institutions of accountability, fidelity to which, he recognized, is critical to "the continuing consent of the governed."¹⁵³ No such gloss is required for his next assertion in the written responses to questions from which the first was taken, to wit, that "[the federal judiciary is], however, accountable for the way in which we spend public money, and the political branches of the federal government are, quite properly, in control of the amount of money we receive to spend."¹⁵⁴

The overarching question is how federal courts and the federal judiciary can participate in politics without becoming a victim of politics. Robert Katzmann,¹⁵⁵ Charles Geyh,¹⁵⁶ and Judith Resnik¹⁵⁷ have illuminated some of the external dilemmas implicating that question, particularly as to communications between the judiciary and Congress.¹⁵⁸ Aspects of the continuing debate about tiered appellate decisionmaking highlight some internal dilemmas, and they caution us not to neglect the role that strategic behavior may play, and the limits of its power, in processes that might otherwise be viewed as internal.

It will come as no surprise that, just as Judge Arnold deplored the growth of tiered appellate decisionmaking, so did he deplore—indeed, he found incredible—rules forbidding citation of opinions in the lower tiers.¹⁵⁹ Doubtless he understood that, apart from the impact of such rules on the ability of lawyers zealously to represent their clients and on the freedom of expression,¹⁶⁰ they are inimical to judicial accountability. For, although

152. Answers, *supra* note 109, at 3.

153. Public, *supra* note 6, at 5. See *supra* text accompanying notes 12, 112.

154. Answers *supra* note 109, at 3.

155. See ROBERT A. KATZMANN, COURTS AND CONGRESS (1997); JUDGES AND LEGISLATORS: TOWARDS INSTITUTIONAL COMITY (Robert A. Katzmann ed., Brookings Institution 1988).

156. See Charles G. Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996).

157. See Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003).

158. See *Discontent*, *supra* note 3, at 774 ("When it was proposed to create a new federal civil-rights action for gender-based violence, the Judicial Conference initially opposed that. By the way, there is an important political lesson there, because we got our noses bloodied when we did it.") (footnote omitted); *Future*, *supra* note 3, at 540 (using Judicial Conference's opposition to Violence against Women Act to illustrate "perils that judges get into when they get into some sort of quasi-political discourse"); *Money*, *supra* note 6, at 28 (judiciary's opposition to having its appropriation subject to the line item veto "is a case study in what goes wrong when judges get into substantive issues with political overtones").

159. See *Discontent*, *supra* note 3, at 778.

160. See *id.* ("How this can be squared with the First Amendment, I don't know."). See

modern technology and the requirements of federal law now make it possible for anyone so motivated (and with adequate resources) to monitor tiered appellate decisionmaking in most federal courts,¹⁶¹ no-citation rules reduce the signals that might prompt such monitoring by the profession, the press, and the public. They also reduce the psychological pressure on judges—confronted with their courts' prior decisions and asked to follow, distinguish, explain, or disavow them—to monitor themselves.¹⁶²

Concerned that four (of thirteen) courts of appeals forbid the citation of their own opinions in the lower tiers for most purposes, including for persuasive value—and that they may sanction lawyers who transgress—in 2003 the Committee on Appellate Rules published for comment a proposal designed to require limited uniformity.¹⁶³ Proposed Federal Rule of Appellate Procedure 32.1 would prevent courts of appeals from forbidding citation of opinions, but not, its authors were at pains to stress, from implementing other tiering distinctions, including distinctions as to precedential status.¹⁶⁴ The Appellate Rules Committee approved the proposed rule, as amended, in April 2004 after considering more than 500 written comments and hearing oral presentations.¹⁶⁵ At its June 2004 meeting, however, the Standing Committee recommitted the proposal to the Appellate Rules Committee for additional consideration, to be informed by empirical study.¹⁶⁶

As one who has long advocated greater reliance on empirical research in federal court rulemaking, far be it for me to object if a proposal is delayed because of genuine concern about costs or benefits that are amenable

also Barnett, *supra* note 15, at 13 n.56 (citing *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001) as supporting a First Amendment challenge to no-citation rules); William T. Hangle, *Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 690 (2002) ("It is all speculation, and speech should not be strangled on speculation."). For the argument that such rules also conflict with an attorney's duty of candor, see Goering, *supra* note 19, at 75–80.

161. See *supra* text accompanying notes 19–22.

162. See Barnett, *supra* note 15, at 16 ("[The case against no-citation rules] asks only that they be acknowledged and considered. This obligation serves the ends of fairness and consistency, assuring that the prior decision not be rejected without on-the-record consideration and explanation.") (footnote omitted).

163. For a summary of current practices and a history of the Committee's consideration of the issues, see *Panel Discussion*, *supra* note 67, at ____ (Professor Patrick Schiltz).

164. See Proposed Federal Rule of Appellate Procedure 32.1 Advisory Committee Note, available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=51>.

165. See Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules 2–11 (Apr. 13–14, 2004), available at <http://www.uscourts.gov/rules/Reports/AP5-2004.pdf> [hereinafter Appellate Committee April 2004 Minutes].

166. See Committee on Rules of Practice and Procedure, Meeting of June 17–18, 2004, Minutes, at 8–11, available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> [hereinafter Standing Committee Minutes].

to empirical assessment.¹⁶⁷ I also understand, however, that calls for more study can mask unalterable substantive disagreement and/or the desire to conduct a private burial.¹⁶⁸ Although either or both may have motivated some of the actors in this case, the reasoned support of the Chair of the Standing Committee, Judge David Levi, and others¹⁶⁹ for the action taken ensured that it would not serve merely to delay, let alone to bury, the proposal. Indeed, the Administrative Office completed statistical analyses of unpublished opinions in courts of appeals that permit citation in January 2005,¹⁷⁰ and a preliminary report on the Federal Judicial Center's surveys of judges, attorneys, and case files (the last to determine how often attorneys and courts cite unpublished opinions in unrelated cases) became available in April 2005.¹⁷¹

167. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993) [hereinafter *Burbank XIII*]. Would that it had always been true that "in dealing with controversial matters . . . the rules committees have consistently sought strong empirical support for proposed amendments." Standing Committee Minutes, *supra* note 166, at 10 (Judge Levi); See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989) [hereinafter *Burbank XIV*]; *id.* at 1928 ("whatever ties some of the original rule-makers had to the realist movement, most (but not all) of their successors have severed the empirical cord") (footnotes omitted); Laurens Walker, *A Comprehensive Reform of Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 487 (1993) (finding in "at least eighteen different" sets of amendments between 1939 and 1991 "only one or two instances when the Committee abandoned the rationalistic approach and sought an empirical predicate for decision").

168.

[S]ocial science may serve as a substitute for decision-making in that instead of resolving a difficult problem, a policy-maker may decide simply to study it further—perhaps hoping that pressures to resolve the problem or to resolve it in a particular direction will go away—which sometimes happens.

Richard Lempert, "Between Cup and Lip": *Social Science Influences on Law and Policy*, 10 LAW & POL'Y 167, 184 (1988). See *Panel Discussion*, *supra* note 67, at ____ (Judge Edward Becker) ("It has become terribly politicized . . . But the political forces were so strong that it was decided, 'Well, let's hold it up and let's do a study.'"); Goering, *supra* note 19, at 87 ("the Committee's reaction speaks louder than its words").

169. See Standing Committee Minutes, *supra* note 166, at 10-11. See also *infra* note 177 (recommendation of Reporter of Appellate Rules Committee).

170. Memorandum from John K. Rabiej to Judge Samuel A. Alito and Professor Patrick J. Schiltz (Jan. 10, 2005) (on file with author). According to the author of this memorandum, the "data shows little or no evidence that the adoption of a permissive citation policy impacts the median disposition time in either direction." *Id.* at 1. He also reports that the "data shows little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." *Id.* at 2.

171. See Tim Reagan et al., Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report (Federal Judicial Center Apr. 14, 2005). As to the survey of judges, the authors reported:

Judges in circuits that permit citation to unpublished opinions in unrelated cases do not think the number of unpublished opinions that they author, the length of

At its meeting on April 18, the Appellate Rules Committee approved an amended Proposed Appellate Rule 32.1 by a vote of 7-2.¹⁷² As reflected in the minutes of that meeting, both supporters and opponents “agreed that the [AO and FJC] studies were well done and, at the very least, demonstrated that the arguments against Rule 32.1 were ‘not proven.’”¹⁷³ In addition, some “members—including one opponent of Rule 32.1—went further and said that the studies in some respects actually refuted those arguments.”¹⁷⁴ In June, the Standing Committee approved the following proposed rule:

Rule 32.1 Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgment, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” or the like.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.¹⁷⁵

their unpublished opinions, or the time it takes them to draft unpublished opinions would change if the rules on citing unpublished opinions were to change [i.e., became more restrictive]. Judges in circuits that recently relaxed their rules on citation to unpublished opinions reported some increase in such citations, but no impact on their work.

Judges in circuits that permit citation to unpublished opinions in unrelated cases report that these citations create only a small amount of additional work and are seldom inconsistent with published authority, but they are no more than occasionally helpful.

Judges in circuits that forbid citation to unpublished opinions in unrelated cases, on the other hand, predicted that relaxing the rules on citation to unpublished opinions will result in shorter opinions or opinions that take longer to prepare.

Id. at 3.

As to the survey of attorneys, the authors reported that “[m]ost attorneys said that a rule permitting citation to unpublished opinions would not impose a burden on their work, and most expressed support for such a rule.” *Id.* at 15.

172. Draft Minutes of Spring 2005 Meeting of Advisory Committee on Appellate Rules 18 (Apr. 18, 2005) [hereinafter Appellate Committee April 2005 Minutes] (on file with author). These minutes, which will be available at <http://www.uscourts.gov> once approved by the committee in October 2005, contain excellent summaries of the FJC’s and AO’s research. See *id.* at 8–13.

173. *Id.* at 13.

174. *Id.*

175. Proposed Federal Rule of Appellate Rules 32.1, available at <http://www.uscourts.gov/Reports/ST09-2005.pdf#page=51>.

Although empirical data did in fact “better inform the committee,” it is not clear, given the politics of this particular rulemaking proposal, that they will “take much of the passion out of the debate.”¹⁷⁶ For the effort to derail Proposed Appellate Rule 32.1 has all the markings of the kind of organized interest group lobbying campaign¹⁷⁷ in which the weight of numbers and the vigor of advocacy are, or so it is hoped, more important than the strength of the arguments, let alone any evidence, offered in support of the position advanced.¹⁷⁸

In work that considers federal court rulemaking from an interest group perspective, I suggested that it would be odd to describe federal judges and/or the federal judiciary as an interest group when they are engaged in

176. Standing Committee Minutes, *supra* note 166, at 10 (Judge Levi). The Judicial Conference approved Proposed Appellate Rule 32.1 at its meeting in Sept. 2005, and the proposal will now be submitted to the Supreme Court. Continuing opposition could derail it at that stage as it could in Congress if the proposal were promulgated by the Court.

177. As described by the Reporter of the Appellate Rules Committee:

The comments were highly unusual in several respects. First, we received an extraordinarily large number of comments. As noted, we have already received over 500 comments . . . Second, the overwhelming majority of the comments—close to 95%—pertained *only* to proposed Rule 32.1. *Third, most of the comments on Rule 32.1 came from just one circuit.* About 75% of all comments (pro and con) regarding Rule 32.1—and about 80% of the comments opposing Rule 32.1—came from judges, clerks, lawyers, and others who work or formerly worked in the Ninth Circuit. Fourth, the vast majority of the comments on Rule 32.1—about 90%—took the same position. They opposed adopting the rule. *Finally, the comments regarding Rule 32.1 were extremely repetitive. Many repeated—word-for-word—the same basic “talking points” distributed by opponents of the rule, and many letters were identical or nearly identical copies of each other.*

Memorandum from Patrick J. Schiltz, Reporter, to Advisory Committee on Appellate Rules 1–2 (Mar. 18, 2004) (footnotes omitted) (emphasis added) (on file with author). *See id.* at 1–2 n.1 (stating that “almost all of the twenty-one law professors who wrote to oppose Rule 32.1 had clerked for Ninth Circuit judges” and that “many of the commentators from outside of the Ninth Circuit were also former Ninth Circuit law clerks or were inspired to write because of Ninth Circuit connections”); *id.* at 91 (“I recognize, of course, that most of the opposition to Rule 32.1 came from one circuit, where a campaign against the rule was led by some of that circuit’s judges.”).

178. *See id.* at 92 (“Some of the arguments against Rule 32.1 strike me as clearly incorrect.”); *id.* (“Other arguments against Rule 32.1 are internally inconsistent.”); *id.* (“Still other arguments against Rule 32.1 suffer from gaps in their reasoning.”); *id.* at 93 (“This paragraph basically repeats the same assertion three times. The assertion may very well be true, but repetition does not make it so.”); *id.* at 93 (“many of the arguments against Rule 32.1 were exaggerated”); *id.* at 93 (“What most struck me about the arguments against Rule 32.1 is that they sometimes made a better normative case *for* Rule 32.1 than the arguments of the rule’s supporters.”). It should be noted that, his views about the merits of the opposition to Rule 32.1 notwithstanding, Professor Schiltz’s personal recommendation was “that the Committee remove Rule 32.1 from its study agenda or, if the committee thinks it would be worthwhile, postpone further action on Rule 32.1 to give the F[ederal] J[udicial] C[enter] time to study the empirical claims made by the supporters and opponents alike.” *Id.* at 95.

lawmaking (rulemaking) under the Enabling Act.¹⁷⁹ I also suggested, however, that the judiciary's undoubted role as an interest group in its relations with Congress and the Executive may influence "the effectuation of individual or institutional judicial interests in rulemaking."¹⁸⁰ The political history of Proposed Appellate Rule 32.1 may call for a revision of my views on the first proposition, and it reinforces the suggestion, in the second, that participation in an interactive lawmaking process can induce strategic behavior.

It is clear that opponents of the proposed rule, led by Judge Kozinski,¹⁸¹ organized a massive letter writing campaign in an effort to defeat it. That campaign yielded "more than 500 public comments,"¹⁸² prompting the Chair of the Standing Committee to observe that "the proposed rule was very controversial"¹⁸³ and that "the sheer size of the body of comments was daunting."¹⁸⁴ However, he added that "many of the comments seemed to copy each other."¹⁸⁵ A member of the committee "noted that he had been struck by how strongly a number of judges feel about the issue,"¹⁸⁶ while several cited "the great sensitivity of the issue among circuit judges."¹⁸⁷ One of them "added that there were powerful arguments in favor of the proposed amendment, but that it would be a mistake institutionally to go forward with a rule that has generated so much opposition."¹⁸⁸

It is also clear that, in waging their lobbying campaign against Proposed Appellate Rule 32.1, opponents have not confined themselves to written communications or oral testimony that are part of the official record. Judge Kozinski and others made off-record attempts to influence the Appellate Rules Committee,¹⁸⁹ and similar efforts, including telephone call to lawyer members, were made to influence the Standing Committee.¹⁹⁰

179. See *Burbank V*, *supra* note 11, at 1715.

180. *Id.* See *id.* at 1717.

181. Judge Kozinski's letter to the Appellate Rules Committee has been published. Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36 (2004). For a reply, see Stephen R. Barnett, *In Support of Proposed Federal Rule of Appellate Procedure 32.1: A Reply to Judge Alex Kozinski*, 51 FED. LAW. 32 (2004).

182. *Id.* at 8 (Judge Alito).

183. *Id.* at 10 (Judge Levi).

184. *Id.* at 9.

185. *Id.*

186. *Id.* at 10.

187. Standing Committee Minutes, *supra* note 169, at 10.

188. *Id.*

189.

Mr. Letter said that the Justice Department had originally asked the committee to approve a citation rule and continues to favor such a rule. However, the Solicitor General received a phone call Judge Alex Kozinski of the Ninth Circuit and other opponents of the rule, and he is troubled by some of the concerns that they

The extent to which off-record communications, written or oral, occur (and their influence) in federal court rulemaking is a subject of my on-going research. I expect that such communications are common between judges, and I doubt that, from the perspective of influence (or the appearance of influence) divorced from reason, they are often likely to prove a source of serious concern.¹⁹¹ I am less sanguine, from that perspective, about such communications between judges who are not members of the rulemaking committees and non-judge members of those committees, particularly if the members practice before the judges who are lobbying them. Moreover, that is probably not the only relevant perspective from which to view off-record communications in a process that is dominated by judges, which raises the question of how, if at all, the norms of court rule-making are, or should be, different from those of judicial decisionmaking.

The elaborate and relatively transparent processes of modern federal court rulemaking, like the processes of modern administrative law, can be viewed as conferring legitimacy on the enterprise or as preventing arbitrary action.¹⁹² Those processes do in any event afford ample opportunities for interest groups and others potentially affected by proposed action to monitor the rulemakers. A different choice of perspective is likely to affect one's assessment of the strategic implications of such monitoring. Thus, the opportunities for monitoring can be seen as an advantage to interest groups with the resources and political clout to overturn the results of action by the rulemakers that has been reported to Congress under the Rules Enabling Act.¹⁹³ Alternatively, when the processes themselves are considered, active

raised. The Solicitor General believes it essential that this Committee fully consult with the Ninth Circuit regarding its concerns.

Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules 35 (Nov. 18, 2002), available at <http://www.uscourts.gov/rules>. At the same meeting, an unidentified lawyer member "argued strongly against approving any rule regarding the citation of precedential opinions. He said that, although he had previously favored such a rule, he had been persuaded by discussions with Judge Kozinski and others from the Ninth Circuit that no such rule should be approved." *Id.* at 36.

190. Telephone interview with David Bernick, Esq. (May 9, 2005) (on file with author).

191. Possible exceptions concern communications from (1) the Chief Justice (who makes all appointments) to members of rules committees, and (2) members of a court that reviews decisions by judicial members of such committees.

192. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461 (2003). For an interesting and useful unpacking of the concept of "legitimacy" in constitutional debates, see Fallon, *supra* note 114. In a brief section on legislative, presidential, and administrative legitimacy, Professor Fallon notes that "debates about the legal legitimacy of administrative adjudication and rulemaking never wholly disappear," *id.* at 1842 (footnote omitted), while "administrative agencies are widely believed to face a serious, even alarming sociological legitimacy deficit." *Id.* at 1844 (footnote omitted).

193. See 28 U.S.C. § 2074 (2000). Cf. Elizabeth Garrett, *Interest Groups and Public Interested Regulation*, 28 FLA. ST. U. L. REV. 137 (2000) (exploring how institutional struc-

monitoring can be seen to insulate the rulemakers, both by disciplining the form and content of interest group participation and by creating a record of reasoned response.¹⁹⁴

There is nothing surprising about disagreement on some issues of mutual concern among members of an interest group, and the existence of organizations advocating the interests of discrete sub-groups within the federal judiciary has long called into question the appropriateness of lumping federal judges together for all purposes.¹⁹⁵ The judiciary endeavors to speak with one voice in its relations with other institutions of government,¹⁹⁶ but Article III protections (if not the First Amendment) effectively prevent its leadership from requiring adherence, as it were, to the party line.

The rulemakers are understandably leery of controversy, particularly since the early 1990's, when the Supreme Court, embroiled in a rulemaking controversy involving foreign governments, asked that future reports including proposed rules or amendments include a statement of contentious issues.¹⁹⁷ At one time the existence of controversy functioned as a proxy for possible invalidity under the Enabling Act, remitting decisions about prospective federal regulation to Congress,¹⁹⁸ and, although the rulemakers have been more careful about the limits of their mandate in recent years, the

ture affects behavior in politics and noting the potential ability of well-financed interest groups "to manipulate the more open system to their advantage"); Joseph Smith, *Congress Opens the Courthouse Doors: Statutory Changes to Judicial Review Under the Clean Air Act*, 58 POL. SCI. RES. Q. 139, 144 (2005) (1977 statutory change requiring EPA to permit oral presentations "allowed interested groups to place information in the rulemaking record that could help them in later challenges to EPA regulations.").

194. Cf. Stephen P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000) (in response to interest group, capture and public choice accounts of regulation, arguing for attention to "administrator ideology and administrative procedure as determinants of regulatory outcomes"); Stephen P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (assessing four main theories of the regulatory state in light of administrative process expectations for each and contesting the inevitability of regulatory failure once the administrative process is taken into account). Professor Croley suggests that Congress may use administrative procedure to insulate itself from interest groups. See Croley, *Public Interested Regulation*, *supra*, at 7. That is an apt way to describe one of Congress' purposes in the 1988 legislation requiring greater transparency in the rule-making process. See *Burbank V*, *supra* note 11, at 1724.

195. See, e.g., *Conference Represents Federal Trial Judges*, THE THIRD BRANCH, June 2003, at 10–13 (interview with Chief Judge Irene M. Keeler, N.D. W. Va., Chair of the National Conference of Federal Trial Judges, Judicial Division, American Bar Association).

196. See *id.* ("our public position never conflicts with any official policy adopted by the Judicial Conference"); *Burbank V*, *supra* note 11, at 1733–34 n.254.

197. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 843 (1993).

198. See Jonathan Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 857 (1974); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1191 n.751, 1192 n.759 (1982).

proxy function remains a possibility so long as statutory limitations on the rulemaking enterprise are indeterminate. Yet, the increasing involvement of interest groups in court rulemaking, coupled with Congress' awareness of the power of procedure and its political potential,¹⁹⁹ augurs quite a different view of, and role for, controversy, one that attends to its strategic utility *ex ante* instead of its meaning *ex post*.

The history of Proposed Appellate Rule 32.1 suggests that the rule makers need to confront both the potential and the limitations of strategic behavior intended to defeat a proposal. Wrapped up in that question for rulemakers who are judges is the additional question of the extent to which the enterprise should be conducted according to norms different from those to which they have been socialized as judges. In confronting these questions, however, the rulemakers may find that the Rule 32.1 history is valuable more for the light cast by its exceptionalism than it is as representative of rulemaking normal. In particular, they should consider the messages that caving to internal group politics may send to other groups, to Congress, and to the public.

If a campaign noted more for its passion and repetitiveness than for the strength of its arguments or its support in documented experience sufficed to block or indefinitely delay a proposal for which reasoned arguments were very powerful, would others notice that heat triumphed over light because it was generated by judges? Would they also notice that the triumph could have had nothing to do with the fear of congressional override, there being no reasonable possibility that the body that enacted the E-Government Act of 2002 would disapprove a change intended to enhance transparency and likely to improve the accountability of the judiciary?²⁰⁰ If they did notice, what impact would that have on perceptions of the processes of modern court rulemaking as either conferring legitimacy or guarding against arbitrary action? More important, if they did *not* notice, what impact would the history of Proposed Appellate Rule 32.1 have on the future conduct of those who neither receive the same level of deference from, nor accord it to, the judges who dominate court rulemaking?

Finally, what impact would the triumph of the interests of a vocal judicial minority have on Congress's views of court rulemaking? If those frustrated by the (hypothetical) defeat of Proposed Appellate Rule 32.1 (which, after all, was put on the agenda at the behest of the Solicitor General)²⁰¹ sought direct legislative action from Congress, why should that body defer

199. See *Burbank V*, *supra* note 11, at 1706–14, 1737.

200. See *supra* text accompanying note 20. "Crucial to the efficacy of an information system for controlling abuses of power is that control over it not be limited to power-wielders and the entities that originally authorized their actions." Grant & Keohane, *supra* note 27, at 41.

201. See *Panel Discussion*, *supra* note 67, at ____ (Professor Patrick Schiltz).

to "The Enabling Act Process?"²⁰² More generally, why should Congress trust the rulemakers to advance the "public interest," rather, for instance, than the narrow interests of the federal judiciary, or worse, the interest groups from which the members of the rules committees emerged?²⁰³

At the least, the history of Proposed Appellate Rule 32.1 suggests that, prior to the development of an institutional position, the rulemakers need to attend to the use of the techniques of interest group politics by different groups of judges, whether or not they are regarded as constituting different interest groups. In doing so, I expect, it will be helpful to distinguish between the political arts of Richard Arnold and those of Tom Delay: "*Suaviter in modo, fortiter in re*," which, as roughly translated by Judge Arnold, means "[g]ently in manner, strongly in matter or substance."²⁰⁴

IV. CONCLUSION

Both facets of Richard Arnold's career that I have chosen as my focus prompt inquiry about the proper roles of federal judges and of the federal judiciary. My inquiry has sought to avoid platitudes and rose color glasses, to take seriously, as Judge Arnold took seriously, the importance of judicial accountability to the quality of judicial independence, and to pay close attention to politics and power. Perhaps it was Judge Arnold's experience as a legislative assistant that made him a realist about power. I believe that, as a realist, he would have agreed with one of the conclusions of my recent study of procedural regulation in the federal courts:

In the current political climate—perhaps the most poisonous in forty years for the relationship between Congress and the federal judiciary—there is reason for concern about adherence to long-standing customs or norms and hence about resort to blunt instruments of influence or control by members of Congress determined to work their will on the federal courts and to "take no prisoners" in the process. The proper response is not—it cannot be—assertions of power that does not exist. The

202. See *Burbank V*, *supra* note 11, at 1731–34, 1737–39.

203. But see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999). This article fails to turn the light of public choice and other theories of human behavior on the process it recommends. The author does not consider the judicial utility function or the potential ideological cast of rulemakers all of whom have been appointed by a highly visible political figure, the Chief Justice of the United States.

204.

I like to recall a line from Lord Chesterfield's letters to his son. Lord Chesterfield gave his son some general advice about how to conduct himself toward others. The advice was, "*Suaviter in modo, fortiter in re*." Now that means, in rough translation, "Gently in manner, strongly in matter or substance."

Public, *supra* note 6, at 5.

federal judiciary not only lacks a purse and a sword; its shield is very narrow. Wiser heads must prevail, and, if necessary, informed public opinion must be brought to bear on those who are ignorant of, or choose not to heed, the lessons of our constitutional history.²⁰⁵

I know that his exemplary career was on my mind as I wrote those words, just as it is on my mind as I contemplate the state of the federal judiciary and "the breakdown in the norms of institutional respect and accommodation" that is "a defining characteristic of contemporary politics."²⁰⁶

I have called on the federal judiciary to lead, if only by example, an effort to recivilize politics:

The notion that the judiciary might take the lead in reestablishing such a politics—of "custom, dialogue, compromise, and statesmanship"—will come as a shock only to those who believe that politics and law, like judicial independence and accountability, are irreconcilable, or those whose exposure to politically feckless judges has caused them to forget those who are adepts.²⁰⁷

Richard Arnold was an adept at the politics of judging and the politics of the judiciary, and it would help if other federal judges followed his example. It would thus help if the Supreme Court were less inclined to posterity-worship²⁰⁸ and institutional self-aggrandizement.²⁰⁹ One can only wonder whether the Court might not be different, and all of us better off, in these

205. *Burbank V*, *supra* note 11, at 1734–35 (footnotes omitted).

Rather than waging a losing battle about power, far better to seek to forestall irrationality and irresponsibility through genuine dialogue, informed and nourished by the respect that is due to all branches of government and that is required if we are to honor the genius of those who fought and died for our liberty.

Id. at 1735–36.

206. *Id.* at 1736.

If our political life in general, and the interaction of governmental institutions in particular, is marked by mutual respect and a willingness to defer to others, we stand a substantial chance of never again facing a case like [*Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487)]—or a civil war. If we lose those characteristics . . . these risks increase.

Hartnett, *supra* note 15, at 159.

207. *Burbank V*, *supra* note 11, at 1742–43 (footnotes omitted).

208. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

209. See, e.g., Peter W. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 CORNELL J.L. & PUB. POL'Y 503, 510 (2003) (noting that of "151 federal statutes declared unconstitutional in whole or part by the Court between 1789 and June 2000, forty—over twenty-six percent—were declared unconstitutional since 1981"); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 163 (1997) (noting that *Boerne* represents a "startlingly strong view of judicial supremacy"); Hartnett, *supra* note 15, at 123–26.

respects had Richard Arnold spent a portion of his judicial career where he belonged.

