

Judicial Impartiality in a Partisan Era

Cassandra Burke Robertson

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Judges Commons](#)

Recommended Citation

Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 Fla. L. Rev. 739 ().

Available at: <https://scholarship.law.ufl.edu/flr/vol70/iss4/4>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

JUDICIAL IMPARTIALITY IN A PARTISAN ERA

*Cassandra Burke Robertson**

Abstract

Judicial legitimacy rests on the perception of judicial impartiality. As a partisan gulf widens among the American public, however, there is a growing skepticism of the judiciary’s neutrality on politically sensitive topics. Hardening partisan identities mean that there is less middle ground on political issues and less cooperation among those with differing political views. As a result, the public increasingly scrutinizes judges and judicial candidates for signs of political agreement, distrusting those perceived to support the opposing political party.

Judges themselves are not immune to these political forces. In spite of a strong judicial identity that demands impartiality and judicial conduct rules that require judges to avoid even the appearance of bias, judges have the same unconscious biases and preconceptions as anyone else. Moreover, judges must generally have strong political affiliations to reach the bench at all, regardless of whether they are elected or appointed. Drawing the line between mere political affiliation and an inappropriate appearance of partisan bias can therefore be difficult.

This Article analyzes the mechanisms available to safeguard judicial impartiality. Although recusal motions are the most common weapon against partisan bias, this Article argues that recusal motions cannot effectively guard against the appearance of bias arising from a judge’s political views. When recusal rules rely on an undefined “appearance” standard, they are susceptible to an interpretive bias that undermines their purpose. Nonetheless, the Article concludes that the appearance of partisan bias in the judicial branch is not so different from other types of unconscious bias. As a result, ordinary procedural tools—including the right to a jury trial and our system of appellate review—may provide a stronger safeguard against judicial bias than recusal motions.

INTRODUCTION	740
I. A GROWING PARTISAN DIVIDE.....	745
A. <i>The Foundations of Partisan Identity</i>	746
B. <i>Partisan Identity, Partisan Politics</i>	751

* John Deaver Drinko–BakerHostetler Professor of Law and Director of the Center for Professional Ethics, Case Western Reserve University School of Law.

II. THE PARTISANSHIP THREAT TO JUDICIAL IMPARTIALITY756

 A. *Political Expectations of the Judiciary*756

 B. *Judicial Identity and Partisanship*759

III. SAFEGUARDING IMPARTIALITY.....764

 A. *Contesting the Appearance of Partiality*764

 B. *Curbing Discretion*.....769

 C. *Protecting the Procedural Safeguards of Impartiality*.....772

CONCLUSION.....774

INTRODUCTION

Public faith in the impartiality of our courts is the bedrock of American democracy and the rule of law.¹ In an increasingly partisan era, however, there is a growing skepticism of the judiciary’s neutrality on politically sensitive issues. This skepticism creates difficulties when it comes to determining when judges should recuse themselves from politically sensitive cases.² Judicial disqualification rules generally require a judge to step aside “whenever a reasonable observer might question the judge’s impartiality.”³ But in an era where the public is becoming ever more politically polarized, how do we recognize the position of a “reasonable observer”?

Two relatively recent cases highlight this dilemma. In the first case, federal Judge Shira Sheindlin ruled that New York’s stop-and-frisk

1. See Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 291 (2010) (“Avoiding not only impropriety, but also the appearance of impropriety, is important for judges because public confidence in the independence, integrity, and impartiality of the judiciary is critical to the public’s willingness to accept judicial decision-making and submit to the rule of law.”).

2. Although originally “recusal” referred to a voluntary process and “disqualification” to a mandatory process, many jurisdictions use the terms interchangeably. Cases quoted in this Article likewise use the two terms as synonyms, and this Article does so as well. See MODEL CODE OF JUDICIAL CONDUCT r. 2.11 cmt. 1 (AM. BAR ASS’N 2011) (“In many jurisdictions, the term ‘recusal’ is used interchangeably with the term ‘disqualification.’”); Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 830 n.3 (1984) (noting that recusal “technically refers to a voluntary decision of the judge to step down”).

3. Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances*, 36 FORDHAM INT’L L.J. 136, 160 (2013); see MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS’N 2011).

policy was unconstitutional.⁴ The ruling was tremendously controversial and became a political touchpoint in the New York political scene. Mayor Bloomberg was quoted as saying that he would feel “responsible for a lot of people dying” if his administration were forced to implement her ruling.⁵ After her decision was publicized in the newspapers, the U.S. Court of Appeals for the Second Circuit stayed her ruling, disqualified her from the case, and criticized her actions.⁶ The Second Circuit’s opinion stated that “the appearance of impartiality surrounding this litigation was compromised by the District Judge’s improper application of the Court’s ‘related case rule,’ and by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court.”⁷ In a follow-up opinion, the court stated that although it was making “no findings of misconduct, actual bias, or actual partiality on the part of Judge Scheindlin,” there were three things the judge had done that gave rise to the appearance of partiality: (1) in an earlier lawsuit, she had advised the plaintiffs that the relief they sought was not available under the settlement agreement they had signed, and that if they wanted the requested relief they would need to file a separate lawsuit;⁸ (2) she participated in media interviews and profiles (although she did not speak about the pending case);⁹ and (3) she described herself to media outlets as a judge who “is skeptical of law enforcement, in contrast to certain of her colleagues, whom she characterizes as inclined to favor the government.”¹⁰ These three things taken together, the court said, “might lead a reasonable observer to question the judge’s impartiality.”¹¹

Observers were sharply split. Certainly, the city’s police commissioner agreed with the Second Circuit that there was an

4. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 627 (S.D.N.Y. 2013); *Floyd v. City of New York*, 959 F. Supp. 2d 668, 671 (S.D.N.Y. 2013); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 486 (S.D.N.Y. 2013).

5. Benjamin Weiser, *Departing Judge Offers Blunt Defense of Ruling in Stop-and-Frisk Case*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/02/nyregion/departing-judge-offers-blunt-defense-of-ruling-that-ended-stop-and-frisk.html>.

6. *Ligon v. City of New York*, 538 F. App’x 101, 102–03 (2d Cir. 2013), *superseded in part*, 736 F.3d 118 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014), and *vacated in part*, 743 F.3d 362 (2d Cir. 2014) (citation omitted).

7. *Id.*

8. *Ligon v. City of New York*, 736 F.3d 118, 124 (2d Cir. 2013) (“And if you got proof of inappropriate racial profiling in a good constitutional case, why don’t you bring a lawsuit? You can certainly mark it as related. . . . So instead of struggling to telling [sic] me about a stipulation of settlement, why don’t you craft a lawsuit?”), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

9. *Id.*

10. *Id.* at 127.

11. *Id.*

appearance of partiality: he stated that “I have always been—and certainly I haven’t been alone—concerned about the partiality of Judge Scheindlin.”¹² But others—including a number of legal ethics professors and retired federal judges—concluded that Scheindlin had done nothing wrong, and no reasonable person could view her actions as giving rise to an appearance of partiality.¹³ In fact, some concluded, it was the judges on the Second Circuit, who were perhaps influenced by an organized political backlash to Judge Scheindlin’s ruling, who displayed the appearance of bias: “[T]he three judges not only permitted the norms of political discourse outside the courthouse to displace the conventional norms of the adversarial process and reasoned judicial decision making, but also, ironically, failed to satisfy the very standards of judicial conduct to which they sought to hold Judge Scheindlin herself.”¹⁴

A second case alleging judicial partisan bias arose in the spring of 2017 in Ohio. A case pending before the Ohio Supreme Court challenged the constitutionality of Ohio regulations that required abortion clinics to have transfer agreements with a local hospital.¹⁵ The case was appealed out of Toledo, where the sole remaining abortion provider in northwest Ohio had trouble finding a local hospital willing to enter into a transfer agreement, but was able to enter an admitting agreement with a hospital in Michigan, approximately fifty miles away.¹⁶

When the case got to the Ohio Supreme Court, pro-choice groups called for Ohio Supreme Court Justice Sharon Kennedy to recuse

12. Joseph Goldstein, *Court Blocks Stop-and-Frisk Changes for New York Police*, N.Y. TIMES (Oct. 31, 2013), <https://www.nytimes.com/2013/11/01/nyregion/court-blocks-stop-and-frisk-changes-for-new-york-police.html> (quoting Police Commissioner Raymond W. Kelly).

13. Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry “Bias!”*, 28 GEO. J. LEGAL ETHICS 177, 179 (2015) (“One might have been prompted to ask, ‘what’s really going on here?’”). Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 GEO. J. LEGAL ETHICS 1043, 1127 (2014) (“However, notwithstanding the Bloomberg administration’s heated public rhetoric, no reasonable observer could have found any basis to question her impartiality or propriety in adjudicating the stop and frisk cases.”). See generally Brief of Six Retired U.S. District Court Judges & Thirteen Professors of Legal Ethics as Amici Curiae Supporting Plaintiff-Appellees’ Motion for Reconsideration by the En Banc Court at 14, *Ligon v. City of New York*, 538 F. App’x 101 (2013) (No. 13-3123) (discussing the court’s hasty decision to remove Judge Scheindlin, including the ruling’s inconsistencies with current legislation and substantial errors reflected in the findings of the court).

14. Kalhan, *supra* note 13, at 1127.

15. *Capital Care Network of Toledo v. State of Ohio Dep’t of Health*, 58 N.E.3d 1207, 1210 (Ohio Ct. App. 2016), *appeal allowed sub nom.*, *Capital Care Network of Toledo v. Ohio Dep’t of Health*, 71 N.E.3d 297 (Ohio Ct. App. 2017).

16. Robert Higgs, *Ohio to Fight Ruling that State Abortion Regulation Is Unconstitutional*, CLEVELAND PLAIN DEALER (Sept. 13, 2016), http://www.cleveland.com/open/index.ssf/2016/09/ohio_to_fight_ruling_that_stat.html.

herself.¹⁷ She had recently spoken to a Toledo right-to-life group, at a time when it was likely that the Ohio Supreme Court would accept the case (though it had not yet done so).¹⁸ Her speech focused on general constitutional and separation-of-powers matters; it “did not discuss or refer to any cases pending before the Supreme Court of Ohio, nor did she mention abortion and the host group’s positions.”¹⁹ However, she was believed to be sympathetic to pro-life causes, as she had “filled out a judicial candidate survey for Right to Life of Greater Cincinnati, in which she affirmed that she agrees with every position espoused by the anti-abortion organization, including its views on legal and constitutional interpretation.”²⁰ No one alleged that she had pre-committed herself to the particular issues in the case. In addition, no party to the case filed a motion seeking her disqualification.²¹

When Justice Kennedy declined the call for recusal, an attorney filed a grievance over her conduct.²² It was dismissed.²³ A second complaint was filed, seeking an investigation by the Ohio Supreme Court’s Office of Disciplinary Counsel.²⁴ Chief Justice Maureen O’Connor attempted to clarify the matter in a public statement, referring to the “unfair criticism of Justice Kennedy,” explaining that all judges have a duty to speak to the public, and stating that neither the speech nor the justice’s prior

17. *Editorial: Ohio Justice Shouldn’t Hear Abortion Case*, COLUMBUS DISPATCH (Mar. 25, 2017), <http://www.dispatch.com/opinion/20170325/editorial-ohio-justice-shouldnt-hear-abortion-case>.

18. *Id.*

19. Maureen O’Connor, *The Judicial Civic Duty to Speak and Explain*, SUP. CT. OHIO & OHIO JUD. SYS. (Mar. 20, 2017), <https://www.supremecourt.ohio.gov/SCO/justices/oconnor/news/2017/judicialCivicDuty.asp>.

20. *Editorial: Ohio Justice Shouldn’t Hear Abortion Case*, *supra* note 17.

21. Jim Provance, *Conflict of Interest Grievance Filed Over Justice’s Talk to Anti-Abortion Group*, TOLEDO BLADE (Apr. 1, 2017), <http://www.toledoblade.com/Courts/2017/04/01/Conflict-of-interest-grievance-filed-over-justice-Sharon-Kennedy-talk-to-anti-abortion-group.html> (“No formal motion has been filed by a party in the case asking for Justice Sharon Kennedy to recuse herself from the state’s appeal of a ruling blocking enforcement of an order for West Toledo’s Capital Care Network to close.”).

22. Jim Provance, *Grievance Against Ohio Justice Kennedy Dismissed*, TOLEDO BLADE (June 19, 2017), <http://www.toledoblade.com/Politics/2017/06/19/Grievance-dismissed-Ohio-Supreme-Court-justice-Sharon-Kennedy.html>.

23. *Id.*

24. *Second Complaint Lodged Against Ohio Justice Kennedy Over Speech*, TOLEDO BLADE (May 16, 2017), <http://www.toledoblade.com/Courts/2017/05/16/Second-complaint-lodged-against-Ohio-Justice-Sharon-Kennedy-over-speech-at-pro-life-group-fund-raiser.html>.

history of “supporting proposed legislation or advocating for certain issues” should disqualify her from hearing the case.²⁵

Even this did little to stem the tide of public criticism, however. One newspaper ran an editorial calling on Justice Kennedy to recuse herself, concluding that her actions could allow a reasonable person to question her impartiality.²⁶ A second newspaper’s editorial board was divided, with one editor agreeing that because Justice Kennedy’s speech did not touch on abortion issues, it should not be disqualifying, others concerned that it at least gave rise to the appearance of partiality, and one who went even further, stating that “Justice Kennedy must face up to how recklessly ill-conceived is her view that such actions have no impact on the credibility of her rulings.”²⁷

The recusal dilemmas facing Judge Scheindlin and Justice Kennedy had certain similarities. In both cases, the judges were perceived to have certain political pre-commitments that could influence their rulings. In Judge Scheindlin’s case, she intended her statement that she was “skeptical” of the police in general as a statement of open-mindedness; she contrasted her view to the views of some of her colleagues, who she believed were “inclined to favor the government.”²⁸ But the statement was taken by some as a statement of partiality, not a statement of open-mindedness. In Justice Kennedy’s case, critics interpreted her willingness to speak to a pro-life group and her endorsement by pro-life political groups as signs that she would be biased against an abortion provider in an upcoming case. Both cases were high-profile and politically charged. And in both cases, partisan views on the merits of the cases diverged sharply. How could it be unreasonable, then, for an observer to believe that the judge’s own partisan identity would threaten her impartiality?

This Article explores the relationship between political partisanship and judicial impartiality. Following this introduction, Part II examines the growing political divide in the United States. It discusses the

25. Maureen O’Connor, *Unfair Criticism of Justice Kennedy Reflects Poorly on All Judges*, ENQUIRER (Mar. 20, 2017), <https://www.cincinnati.com/story/opinion/contributors/2017/03/20/unfair-criticism-justice-kennedy-reflects-poorly-all-judges/99411996/>.

26. *Editorial: Ohio Justice Shouldn’t Hear Abortion Case*, COLUMBUS ALIVE (Mar. 25, 2017), <http://www.columbusalive.com/opinion/20170325/editorial-ohio-justice-shouldnt-hear-abortion-case>.

27. *Did Ohio Supreme Court Justice Sharon Kennedy’s Speech Disqualify Her from Ruling on Toledo Abortion Clinic Case? Editorial Board Roundtable*, CLEVELAND PLAIN DEALER (May 18, 2017), http://www.cleveland.com/opinion/index.ssf/2017/05/justice_sharon_kennedys_speech.html.

28. *Ligon v. City of New York*, 736 F.3d 118, 127 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

foundations of partisan identity, looking to social psychology for an explanation of the processes by which people define their roles in society and in larger social groups. It then applies these processes to the question of political identity, examining how differences in partisan identity create wide gulfs in the political system.

Part III turns more specifically to the judiciary. First, it examines the sometimes-conflicting expectations placed on the judiciary by an increasingly polarized public. Next, it turns to judicial identity, looking at how judges see themselves and how they reconcile their goal of impartiality with the subconscious pressures of partisanship. Part IV then considers mechanisms to safeguard judicial impartiality. It concludes that recusal motions can play only a limited role in this regard. Although they can work well for the most extreme cases of potential bias, they work less well when the appearance of bias depends on one's political views. In these cases, the wide divergence in political views means that different people will also have widely differing interpretations of judicial conduct. Bright-line recusal rules that constrain judicial discretion may work better than an open-ended appearance standard in such cases. Ultimately, however, this Article concludes that the appearance of partisan bias in the judicial branch is not so different from other types of unconscious bias—and our ordinary procedural mechanisms may be able to compensate for unconscious bias better than we realize.

I. A GROWING PARTISAN DIVIDE

In the last twenty years, partisanship has grown stronger in America. The divide between the political parties is deeper and more strongly felt than it has been in many decades. Research suggests that political parties may even be the most polarized they have been in the last 150 years—since the Civil War.²⁹

This polarization means that there is less and less common ground between the two major political parties. The percentage of people identifying with each of the two parties overall has not changed greatly over the years.³⁰ But what has changed is how closely those people

29. Mark Strauss, *It's Been 150 Years Since the U.S. Was This Politically Polarized*, GIZMODO (June 12, 2014), <http://io9.gizmodo.com/its-been-150-years-since-the-u-s-was-this-politically-1590076355>.

30. Philip Bump, *The Growing Myth Of The 'Independent' Voter*, WASH. POST (Jan. 11, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/11/independents-outnumber-democrats-and-republicans-but-theyre-not-very-independent/?utm_term=.cb86fd9bc43c (noting that even though an increasing number of people call themselves “independent,” they still heavily favor one of the two main parties).

identify with their political parties, and across how many dimensions—their “ideological consistency.”³¹ It used to be more common for people to agree with some positions taken by one party and other positions taken by the other. In the last two decades, however, the percent of Americans holding “consistently conservative” or “consistently liberal” opinions has doubled from 10% to 21% on each side.³²

This growing polarization means that there is less and less common ground on issues of public concern. In 1994, for example, there was more agreement on environmental protection, with only a “relatively narrow 10-point partisan gap” on views about environmental regulation.³³ By 2014, that gap had grown to 35 points, with 59% of Republicans—but only 24% of Democrats—believing that environmental regulations “cost too many jobs.”³⁴ The gulf similarly widened as to whether “the government today can’t afford to do much more to help the needy,” with Republican agreement with that statement growing from 58% in 1994 to 73% in 2014, and Democratic agreement declining from 37% in 1994 to 34% in 2014.³⁵ A partisan split has also emerged in people’s views towards immigrants, though both sides have grown more favorable toward immigration overall: In 1994, 64% of Republicans and 62% of Democrats both believed that “immigrants today are a burden on our country because they take our jobs, housing, and health care.”³⁶ By 2014, neither party had majority agreement with that view.³⁷ But there was an emergent split between the parties: 46% of Republicans saw immigration as a burden, while only 27% of Democrats agreed.³⁸

A. *The Foundations of Partisan Identity*

This widening gulf in partisan attitudes is reflected in individuals’ partisan identity. Social psychologists who study identity theory have explained that people’s self-view incorporates multiple role identities and social identities—some of which have an expressly political dimension, but many of which do not.³⁹ Role identities show who an individual is in

31. PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (June 12, 2014), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2014/06/6-12-2014-Political-Polarization-Release.pdf> [hereinafter PEW REPORT].

32. *Id.*

33. *Id.* at 28.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. PETER J. BURKE & JAN E. STETS, IDENTITY THEORY 113, 118–23 (2009).

relation to others in their life—thus, for example, one person may have role identities that include mother, attorney, friend, boss, and political activist. Social identities encompass the groups an individual belongs to—the same person may identify as a Midwesterner, a Catholic, an alumnus of the University of Florida Levin College of Law, and a Democrat.

Both role identities and social identities are imbued with culturally understood meaning, which is called the “identity standard.”⁴⁰ Thus, the identity of “mother” may contain a meaning of nurturing; “boss” may contain meanings both of responsibility and of mentoring; “Midwesterner” may contain meanings of hard work, authenticity, and humility.⁴¹ The cultural meanings attached to various identities can be similar in some ways to stereotypes, but they are also unconsciously assimilated into an individual’s identity structure.⁴² Thus, when a person reflects on her identity as a boss in relation to other employees, she may unconsciously also expect herself to take responsibility for the unit’s success or failure (the responsibility meaning) as well as responsibility for the career development of the workers in her unit (the mentoring meaning).

These identity processes can shed some light on political polarization. People’s social identities, for example, foster a sense of kinship; people are more likely to be favorably disposed to people they recognize as sharing one or more social identities.⁴³ For each person, some social identities will be more salient than others, and there will be significant variation across individuals. Thus, for example, some individuals have a

40. *Id.* at 63 (“With respect to gender identity, for example, people may be characterized as more masculine or more feminine. Clearly, the character of masculinity and femininity—that is, what it means to be male or female—varies from one society to another, and even across individuals within a society.”).

41. *Id.* at 64 (“It is not necessarily one meaning but perhaps several meanings or even a very large number of meanings that are contained in the identity standard. . . . For example, as we indicated with respect to the college student identity, four different meanings have been found to be important: academic ability, intellectualism, sociability, and assertiveness.”); see also Jeffrey D. Epstein, *3 Ways a Midwest Mindset Can Build a Better Business*, ENTREPRENEUR (Aug. 29, 2017), <https://www.entrepreneur.com/article/299266> (listing several “Midwestern” attributes); Linda A. Hill, *Becoming the Boss*, HARV. BUS. REV. (Jan. 2007), <https://hbr.org/2007/01/becoming-the-boss> (explaining the “personal transformation” occurring when an individual is promoted to management for the first time).

42. See BURKE & STETS, *supra* note 39, at 63–64.

43. See Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 269 (2012) (“Members have categorized themselves on factors they value. . . . As a result, group members develop an increasingly favorable perception of the ingroup and a less favorable perception of the outgroup.”).

stronger social identity based on statehood,⁴⁴ racial, ethnic, or religious background,⁴⁵ or political affiliation.⁴⁶ Individuals engage in cognitive framing that reinforces uniformity and enhances group members' self-esteem.⁴⁷

Role identities likewise influence how people see the world. When individuals see their role identities confirmed by those around them—as when, for example, a person with a strong “student” identity receives an A—social psychologists say that the student has achieved “self-verification.”⁴⁸ The self-verification process acts to “confirm what [people] already believe about themselves.”⁴⁹ When people see their self-assessments reflected back at them, they experience positive emotions.⁵⁰ On the other hand, when people receive feedback at odds with their self-identity—as when a person with a strong student identity receives a C or D—emotional distress results.⁵¹ The distress that results from non-self-verifying feedback is greater than the situation would seem to warrant.⁵² Thus, for example, the low grade itself may be relatively unimportant, as with a grade on a low-stakes assignment likely to have little bearing on

44. For example, when I moved from the state of Washington to Texas, I found that the “Texan” social identity was much more visible and prevalent than a “Washington” identity.

45. Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1527–28 (2013) (discussing challenges faced when African-American lawyers share one social identity with clients (race) but not another (class)); Holning Lau, *An Introduction to Intragroup Dissent and Its Legal Implications*, 89 CHI.-KENT L. REV. 537, 539 (2014) (“[R]acial, ethnic, and religious groups are identity groups because these groups frequently play a role in shaping people’s self-concept. To be sure, not all individuals feel a strong sense of membership in racial, ethnic, and religious groups, but these groups have been socially constructed in such a way that they are often salient to people’s identity.”); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 283 (1995) (“As the notions of outing and passing remind us, a person’s interior sense of his or her own race or sexual orientation may or may not be enacted in public. Yet, public or not, each of these identities is social, carrying a conventional name that defines someone as a particular kind of person, a member of one of society’s categories of identity.”).

46. Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT’L L. 389, 394 (2009) (noting how the meanings associated with partisan identity can shift over time).

47. Michael A. Hogg, *Social Identity and Misuse of Power: The Dark Side of Leadership*, 70 BROOK. L. REV. 1239, 1242 (2005) (“Since the groups and categories we belong to furnish us with a social identity that defines and evaluates who we are, we struggle to promote and protect the distinctiveness and evaluative positivity of our own group relative to other groups.”).

48. See BURKE & STETS, *supra* note 39, at 59.

49. *Id.*

50. Cassandra Burke Robertson, *Organizational Management of Conflicting Professional Identities*, 43 CASE W. RES. J. INT’L L. 603, 607 (2011).

51. *Id.* at 607–08.

52. *Id.* at 608.

the student's overall grade in the course—but because the low grade contradicts the student's self-conception, it creates an emotional response similar to a much larger threat, potentially leading to anger, distress, and depression.⁵³

Just as people may engage in unconscious cognitive framing that supports their social identity, they may also engage in cognitive strategies that avoid facing non-self-verifying feedback.⁵⁴ These strategies can be intentional, such as choosing to spend more time with those who share key attributes.⁵⁵ Such affiliation would increase the opportunities for self-verification. Cognitive shifts can also happen at an unconscious level, where people engage in selective attention or selective interpretation, focusing on the information that supports their identity and unconsciously ignoring those that do not.⁵⁶ This process results in a bias blind spot—by unconsciously selectively attending to self-verifying feedback and failing to notice non-self-verifying feedback, the individual maintains his or her self-conception at the cost of failing to perceive important information.⁵⁷

Political identities are not immune to these forces. Certainly, people experience pleasure when their preferred party wins an election and distress when their party loses—even for a House seat outside their own district that does not affect the overall makeup of Congress.⁵⁸ And people may choose to spend time primarily with those who share similar partisan affiliations, creating an identity-reinforcing echo chamber.⁵⁹ Forming such groups does not even require getting together physically, but can instead occur in the virtual space of social media or even by watching

53. *Id.* at 607–08.

54. Robertson, *supra* note 46, at 395.

55. *Id.*

56. *Id.*

57. Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 11 (2009) (“The effects of partisan affiliation, selective perception, and selective interpretation can combine to cause people to experience the same events in vastly different ways.”).

58. Molly Ball, *Why Ossoff Lost*, ATLANTIC (June 21, 2017), <https://www.theatlantic.com/politics/archive/2017/06/a-crushing-loss-in-georgia-ends-a-losing-season-for-democrats/531072/> (describing the intense emotions engendered by a special election in Georgia for a seat in Congress, and noting that “the two candidates had found themselves bit players in a high-stakes contest whose stakes, to the audience outside the Sixth District, were almost entirely symbolic. Win or lose, either of them would be just one vote in a deadlocked Congress. But what would it mean for everyone else?”).

59. Amanda Hess, *How to Escape Your Political Bubble for a Clearer View*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/arts/the-battle-over-your-political-bubble.html> (“On the internet, the ‘echo chambers’ of old media—the ‘90s buzzword for partisan talk radio shows and political paperbacks—have been amplified and automated. We no longer need to channel-surf to Fox News or MSNBC; unseen algorithms on Facebook learn to satisfy our existing preferences, so it doesn’t feel like we’re choosing an ideological filter at all.”).

television channels or listening to radio stations targeted at particular segments of society that share a common political identity.⁶⁰

When political identities are highly salient to an individual, those identities may push individuals toward views on particular policy matters that can be highly resistant to change. A recent article in the *New York Times*, for example, discussed a group of high-school students in Appalachia that strongly identified as conservative.⁶¹ Their identity was founded on “conservative ideals of hard work, small government and what people [in the region] call ‘self-sustainability.’”⁶² Their families and community overwhelmingly supported President Trump in the 2016 election.⁶³ Because the students had internalized a strong conservative identity, they also accepted policy positions associated with that identity, including a belief that climate change was not caused by human activity.⁶⁴ When the students’ science teacher introduced them to information contradicting their prior belief, some students reacted emotionally—it was not just their scientific knowledge that was being challenged, but their very identity, causing students to feel agitated and angry.⁶⁵ Some students, although initially uncomfortable, were able to accept the information they learned without major disruption to their core identity.

For one student, however, the identity threat was too great. When she at first objected that the information conflicted with Christian teachings, the teacher presented a film by a “Christian climate activist.”⁶⁶ The teacher’s instinct made sense: It is not unreasonable to think that the information might be more palatable if conveyed by individuals with values shared by the students and a shared social identity of Christianity. But the student’s conservative identity was more salient to her, and the film felt like an attack on that identity. She became so emotional that she ran out of the classroom.⁶⁷ When explaining her actions later, she framed her response in terms of identity, reporting that she felt the film was saying “that all these people that I pretty much am like are wrong and stupid.”⁶⁸ To the student, accepting that human activity caused climate

60. *Id.*

61. Amy Harmon, *Climate Science Meets a Stubborn Obstacle: Students*, N.Y. TIMES (June 4, 2017), <https://www.nytimes.com/2017/06/04/us/education-climate-change-science-class-students.html>.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

change would threaten both her social identity (“all these people [she is] like”) as well as her view of herself as a smart person.⁶⁹ In the face of such cognitive dissonance, she elected to drop the class.⁷⁰

B. *Partisan Identity, Partisan Politics*

The student’s distress at hearing information that contradicted her political identity exemplifies the personalization of partisanship. On a larger scale, increasing political polarization and hardening partisan attitudes lead to personal and political rifts. Hardening views mean that increasingly people are not just predisposed to think well of others who share their social identity, but are also predisposed to feel antipathy toward those who do not.⁷¹ Researchers have found that “very unfavorable” views of the opposing party have more than doubled in the last twenty years, so that “45 percent of Democrats and 46 percent of Republicans hold ‘very unfavorable’ views of the opposing party.”⁷² Approximately a third of people in both parties believe that the other party’s policies “are so misguided that they threaten the nation’s well-being.”⁷³

Economics professor Matthew Gentzkow has examined how Americans are increasingly polarized, concluding that “what divides them politically is increasingly personal We don’t just disagree politely about what is the best way to reform the health care system. We believe that those on the other side are trying to destroy America, and that we should spare nothing in trying to stop them.”⁷⁴ Studies examining Americans’ attitudes towards members of the opposing political party have found that people hold negative personal characterizations of their political opponents, believing them to be more close-minded, immoral, lazy, dishonest, and less intelligent.⁷⁵ Fifty years ago, less than 5% of

69. *Id.*

70. *Id.*

71. PEW REPORT, *supra* note 31, at 18.

72. Emily Badger & Niraj Chokshi, *How We Became Bitter Political Enemies*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/upshot/how-we-became-bitter-political-enemies.html>.

73. PEW REPORT, *supra* note 31, at 33 (“Overall, 36% of Republicans and Republican leaners say that Democratic policies threaten the nation, while 27% of Democrats and Democratic leaners view GOP policies in equally stark terms.”).

74. Matthew Gentzkow, *Polarization in 2016*, TECH. ACADS. POL’Y (Mar. 18, 2016), <http://www.techpolicy.com/Blog/March-2016/Polarization-in-2016.aspx>.

75. Badger & Chokshi, *supra* note 72 (citing research that “70 percent of Democrats and 52 percent of Republicans considered members of the opposing party to be more close-minded than other Americans. Significant shares also considered opposing partisans exceptionally

Americans of both parties said they would be troubled by a son or daughter marrying a person from the other party.⁷⁶ By 2010, “that share had jumped to half of Republicans and a third of Democrats.”⁷⁷

Ultimately, these partisan rifts also create problems for democratic legitimacy. This very personal partisan divide does not just separate the electorate; it also divides elected officials.⁷⁸ Voting by members of the House of Representatives has gotten significantly more polarized in the last fifty years, leading to a lack of cooperation between the two sides.⁷⁹ Because the number of moderate representatives willing to work across party lines has diminished, it has become harder for Congress to pass legislation, as there is little opportunity for give-and-take.⁸⁰

The rise of partisan gerrymandering makes the situation even more difficult. Districts are drawn with an eye toward maximizing the number of seats held by members of the state’s dominant party.⁸¹ Districts tend not to be closely competitive, and representatives are re-elected more than 90% of the time.⁸² Techniques such as “cracking” (that is, “splitting a party’s supporters between districts so they fall shy of a majority in each one”) and “packing” (“stuffing remaining supporters in a small number of districts that they win handily”) keep the districts from being competitive.⁸³ The goal of partisan gerrymandering is to make the opposing party “waste” as many votes as possible, either in districts

immoral, lazy and dishonest, though Democrats held those views somewhat less. About a third of either party viewed the opposition as less intelligent than other Americans.”).

76. *Id.*

77. *Id.*

78. Nick Gass, *This Graphic Shows How America’s Partisan Divide Grew*, POLITICO (Apr. 24, 2015), <http://www.politico.com/story/2015/04/graphic-data-america-partisan-divide-growth-117312>.

79. *Id.*

80. Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS ONE (Apr. 21, 2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0123507> (“[V]oters cast their ballots on a local basis for increasingly partisan representatives . . . leaving few if any moderate legislators to connect parties for a more cohesive Congress. Elected representatives are increasingly unable to cooperate at a national Congressional level . . .”).

81. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850 (2015) (“[T]he goal of a partisan gerrymander is to win as many *seats* as possible given a certain number of *votes*. To accomplish this aim, a party must ensure that its votes translate into seats more ‘efficiently’ than do those of its opponent.”).

82. See Andris et al., *supra* note 80 (noting that in spite of representatives’ difficulty in passing legislation, they are “re-elected at least 90% of the time, reflecting an evasion of collective responsibility”).

83. Stephanopoulos & McGhee, *supra* note 81, at 851.

crammed full of supporters or in numerous narrowly-lost districts.⁸⁴

Partisan gerrymandering is, unsurprisingly, controversial because of its fundamental inconsistency with democratic governance.⁸⁵ One of the effects of partisan gerrymandering is that politicians need not be accountable to their entire electorate.⁸⁶ In “packed” districts where votes overwhelmingly share party affiliation, the elected representative will not feel vulnerable (unless perhaps facing a serious primary opponent).⁸⁷ In “cracked” districts, the representative is potentially more vulnerable if the prevailing political winds change—but because the district is set up intentionally to disenfranchise votes in the minority political party, the representative is likely not seeking cross-over votes.⁸⁸ Instead, winning re-election relies on turning out the base.⁸⁹

It is possible that the Supreme Court will place limits on states’ abilities to engage in the practice. The Court has agreed to hear a case challenging the constitutionality of partisan gerrymandering in the 2017–2018 term.⁹⁰ But even though partisan gerrymandering contributes to the nation’s growing polarization, it is not solely responsible for that trend. Even in the Senate, where gerrymandering is irrelevant because of

84. *Id.*

85. Richard E. Levy, *The Nonpartisanship Principle*, 25 KAN. J.L. & PUB. POL’Y 377, 377 (2016) (“Rules, requirements, or practices whose purpose and effect is to skew the electoral process to the advantage of one candidate, faction, or party are fundamentally inconsistent with the premise of democratic elections.”).

86. Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 88 (2017) (“The central idea of democracy is that the voters choose their leaders, not the other way around. But when partisans control the redistricting process, incumbent legislators choose the voters who are assigned to their districts.”); Levy, *supra* note 85, at 394 (“[I]t is difficult to see why we tolerate a redistricting process that has the avowed purpose and effect of distorting electoral outcomes.”).

87. John Finnerty, *Momentum May Be Building to End Gerrymandering*, HERALD (June 13, 2017), http://www.sharonherald.com/news/state/momentum-may-be-building-to-end-gerrymandering/article_00c656e8-bb98-576d-92ad-1b21b9bcc356.html (noting that in Pennsylvania in 2016, “86 percent of the state’s races had no primary opponent, and half the incumbents had no opposition in the general election”).

88. Sheila Kennedy, *It’s All About Turnout* (June 22, 2017), <https://www.sheilakennedy.net/2017/06/its-all-about-turnout/> (“Even supposedly ‘safe’ legislative districts can be won by the ‘loser’ party if that party can generate a *sufficient increase in turnout*.”).

89. *Id.* (“Democrats don’t have to ‘peel off’ Republican voters We just have to get the people who already agree with us to the polls.”).

90. *Whitford v. Gill*, 218 F. Supp. 3d 837, 844 (W.D. Wis. 2016), *cert granted*, *Gill v. Whitford*, No. 16-1161, 2017 WL 1106512, at *1 (June 19, 2017); Amy Howe, *Today’s Orders: Court to Tackle Partisan Gerrymandering*, SCOTUSBLOG (June 19, 2017), <http://www.scotusblog.com/2017/06/todays-orders-court-tackle-partisan-gerrymandering/>.

statewide elections, partisan attitudes have increased. One-district states like Vermont and Wyoming “have seen a similar shift to the extremes.”⁹¹

This polarization—aided by gerrymandering, but not caused by it—results in a situation where elected officials sometimes view themselves as representing only those constituents who voted for them, rather than representing the entire population of the official’s state or district.⁹² President Trump reinforced this view when he dismissed the interests of Democratic voters at Republican House members’ town hall meetings, accusing them of “fill[ing] up our rallies” and asserting that “[t]hey’re not the Republican people that the representatives are representing.”⁹³ Efforts to require voter identification were similarly targeted at reducing democratic voter participation.⁹⁴

These hardening partisan attitudes and lack of cooperation can even lead individuals to believe that actions taken by their political opponents lack legitimacy.⁹⁵ In such cases, not only will elected officials avoid working together on policy initiatives, but they may actively try to prevent political opponents from even being aware of their own political

91. Julian E. Zelizer, *The Power That Gerrymandering Has Brought to Republicans*, WASH. POST (June 17, 2016), https://www.washingtonpost.com/opinions/the-power-that-gerrymandering-has-brought-to-republicans/2016/06/17/045264ae-2903-11e6-ae4a-3cdd5fe74204_story.html?utm_term=.09909e8a7866.

92. See Linda Killian, *Ideological Purity Comes Back to Bite the GOP*, USA TODAY (Mar. 31, 2017), <https://www.usatoday.com/story/opinion/2017/03/31/ideological-purity-comes-back-to-bite-republicans-gop-column/99832322/> (stating that “[b]ecause of the lopsided tilt of their districts, they need only appeal to a narrow group of voters to get elected . . .”).

93. Dara Lind, *Donald Trump: Republican Members of Congress Only Represent “Republican People” in Their Districts*, VOX (Feb. 17, 2017), <https://www.vox.com/policy-and-politics/2017/2/17/14640376/trump-protests-obamacare>.

94. Zachary Roth, *Ex-Staffer: Wisconsin GOP Intended ID Law to Disenfranchise Dems*, MSNBC (Apr. 7, 2016), <http://www.msnbc.com/msnbc/ex-staffer-wisconsin-gop-intended-id-law-disenfranchise-dems> (quoting an unnamed lawmaker as expressing support for a voter ID law in Wisconsin because “[w]hat I’m interested in here is winning, and we need to use the opportunity, because if Democrats had the power to do it to us, they’d do it”). In one case, the Fourth Circuit found that a voter ID law was intended to reduce minority votes as well as Democratic ones. *NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016), *cert. denied sub nom.* *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017) (striking down the law under the Voting Rights Act and stating that “in what comes as close to a smoking gun as we are likely to see in modern times, the State’s very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise”).

95. Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 705 (2014) (“The level of animosity across party lines also implies a reduced willingness to treat the actions of partisan opponents as legitimate[.]”).

efforts.⁹⁶ Thus, for example, Republican Senators kept their work on a bill repealing the Affordable Care Act secret until shortly before a vote on the bill was scheduled.⁹⁷ When asked why the details of the proposal had been kept secret even from other members of the Senate, a Republican political operative replied that “of course, you’re not going to go and share [your plans] with the other side.”⁹⁸

Even criminal investigations have fallen prey to the partisan divide. The combination of a strong partisan social identity (which makes people predisposed to view their own party’s actions favorably⁹⁹) combined with a growing and personalized division between the two parties (which can lead people to distrust others’ motives and doubt the legitimacy of actions taken by the opposing party¹⁰⁰), can politicize beliefs about wrongdoing. Senator Rand Paul recently demonstrated this divide. When asked about the possibility of Congressional investigations into Russian interference with the 2016 election, he asserted that it makes “no sense” to spend time “having Republicans investigate Republicans.”¹⁰¹ At the time of that interview, it is unlikely that Paul believed that there was a strong likelihood of actual wrongdoing. But the statement is nonetheless troubling, both because it shows the possibility of a partisan blind spot operating to avoid scrutiny of illegal conduct and, perhaps a greater concern, because it suggests that ethical and criminal investigations of political opponents may be a legitimate partisan objective—that, in a situation raising similar evidentiary red flags, it would be worth investigating the *opposing* party—just not one’s own.¹⁰² The Justice

96. Thomas Kaplan & Robert Pear, *Secrecy Surrounding Senate Health Bill Raises Alarms in Both Parties*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/us/politics/secrecy-surrounding-senate-health-bill-raises-alarms-in-both-parties.html> (noting that “[t]he secrecy surrounding the Senate measure to repeal and replace the Affordable Care Act is remarkable” and that it “has created an air of distrust and concern” but that “Senate Republican leaders evidently think their back-room approach gives them the best chance to devise a health care bill that can squeak through the Senate, given their narrow majority and the policy differences in their conference”).

97. MJ Lee et al., *Senate GOP Finally Unveils Secret Health Care Bill; Currently Lacks Votes to Pass*, CNN (June 22, 2017), <http://www.cnn.com/2017/06/22/politics/senate-health-care-bill/index.html>.

98. *CNN Tonight: The Invisible Tapes Surface; Trump Throws a Piece of Clue* (CNN television broadcast June 22, 2017), <http://www.cnn.com/TRANSCRIPTS/1706/22/cnnt.01.html>.

99. *See supra* Section II.A.

100. *See id.*

101. Jordain Carney, *Rand Paul: Flynn Probe Would Be ‘Excessive,’* HILL (Feb. 14, 2017), <http://thehill.com/blogs/floor-action/senate/319534-rand-paul-flynn-probe-would-be-excessive>.

102. It is worth noting that voters’ support for such an investigation also split along party lines: While 62% of Americans expressed support for the investigation, only 28% of “grassroots Republicans” did. Dick Polman, *Now Republicans Won’t Investigate*, FARMINGTON DAILY TIMES

Department ultimately appointed a special counsel to investigate, but the partisan divide in views about that investigation remains strong.¹⁰³

II. THE PARTISANSHIP THREAT TO JUDICIAL IMPARTIALITY

The growing partisan polarization creates dangers for the judicial branch. The appearance of impartiality is critically important to the effective functioning of the judiciary. But judges are not immune from the political pressures and partisan interests that pervade the political branches of government. This Part examines the political expectations that people have for the judiciary, as well as judges' expectations for themselves.

A. *Political Expectations of the Judiciary*

The judiciary faces conflicting expectations from the public. On the one hand, the public relies on the judicial branch to safeguard the constitutional rights and liberties that are not always protected by the political branches of government.¹⁰⁴ In order for the court system to play this role effectively, judges must maintain their impartiality. And indeed, the public generally believes in judicial impartiality—or at least that the judiciary is more impartial than other government representatives.¹⁰⁵ And in large part, this belief is well warranted: Scholars have noted that “credible examples” of “judges deciding cases based on responsive or

(Feb. 16, 2017), <http://www.daily-times.com/story/opinion/columnists/2017/02/16/polman-now-republicans-wont-investigate/98002808/>.

103. See Lisa Mascaro, *Pro-Trump Group Launches New Attack Ad Against Special Counsel Robert Mueller*, L.A. TIMES (June 25, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-1498343348-htmlstory.html> (quoting Republican operative Tomi Lahren, saying “[o]nly in Washington could a rigged game like this be called independent”); Mallory Shelbourne, *GOP Rep Dismisses Mueller Probe: ‘What the Hell Are We Investigating?’*, HILL (June 12, 2017, 8:24 PM), <http://thehill.com/homenews/house/337521-gop-rep-on-mueller-what-the-hell-are-we-investigation> (noting that Republican House member Sean Duffy has questioned the appointment of Robert Mueller and called the investigation a “charade” that “is the Democrats’ effort to undermine the election results of last Nov. 8 and get their net end result, which is Donald Trump out of the White House”).

104. Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 803 (2014) (“Our constitutional scheme is, of course, willing to tolerate departures from democratic norms of political accountability to ensure that minority rights are protected against majoritarian over-reaching.”); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . .”).

105. See Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 336 (2003) (“[A]t a time when the political branches are continually maligned as platforms for long-winded, small-minded demagogues, respect for the courts continues to persist.”).

tribal partisanship are notable for their extreme rarity.”¹⁰⁶

Particularly in recent years, however, the public often has an additional hope for the judiciary: that it will help move forward their desired policies.¹⁰⁷ Perhaps because the gridlock facing Congress in recent years has made it seem like a less likely vehicle for political efforts, the future composition of the U.S. Supreme Court was described by people on both sides of the political aisle as the “most important” issue in the 2016 presidential election.¹⁰⁸ As Professor Richard Hasen has stated, “with gridlock in the political branches, the Supreme Court’s word is often the final word on U.S. policy on questions from health care to voting rights.”¹⁰⁹

As the country has gotten more polarized, there has been more overt discussion of seeking to stack the bench with politically compatible judges. Republican senators refused even to grant a hearing to Merrick Garland after he was nominated to the Supreme Court by President Obama—in spite of the fact that Judge Garland had previously been uniformly praised on both sides of the political aisle.¹¹⁰ In an inverse of President Roosevelt’s court-packing plan, some even suggested that the seat should remain empty indefinitely if a Democratic president was elected in 2016.¹¹¹ After President Trump nominated Justice Gorsuch to

106. Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1832 (2014).

107. See, e.g., Ari Berman, *The Supreme Court Is the Most Important Issue in the 2016 Election*, NATION (Feb. 16, 2016), <https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/> (looking to the Supreme Court for “[h]ealthcare, gay marriage, voting rights, affirmative action, reproductive rights, labor rights, immigration, climate change”).

108. *Id.* (“A cliché we hear every presidential cycle is that the Court should be one of the most important issues in the election, but this year, following the death of Antonin Scalia, it’s never been truer.”).

109. Richard L. Hasen, *Why the Most Urgent Civil Rights Cause of Our Time Is the Supreme Court Itself*, TALKING POINTS MEMO (Sept. 28, 2015), <https://talkingpointsmemo.com/cafe/supreme-court-greatest-civil-rights-cause> (“The ideological divide on the Court has now become a partisan divide as well. . . . Today all the liberals on the Court have been appointed by Democratic presidents and all the conservatives on the Court by Republican presidents.”).

110. Ariane de Vogue, *How McConnell Won, and Obama Lost, the Merrick Garland Fight*, CNN (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html>.

111. Burgess Everett, *Cruz: GOP May Block Supreme Court Nominees Indefinitely*, POLITICO (Oct. 26, 2016), <https://www.politico.com/story/2016/10/cruz-supreme-court-blockade-230363> (quoting Senator Ted Cruz, when asked how the Senate would handle a potential Clinton nominee, as stating that “[t]here is certainly long historical precedent for a Supreme Court with fewer justices”); Jonathan Swan, *Heritage Calling for Supreme Court Blockade If Clinton Wins*, HILL (Nov. 3., 2016), <http://thehill.com/homenews/senate/304231-heritage-calling-for-supreme-court-blockade-if-clinton-wins> (“The conservative group Heritage Action is pushing Republican

the Court, the Senate dropped its supermajority requirement for his confirmation vote, allowing the confirmation to proceed on a party-line vote.¹¹² Democrats in turn amped up the partisan rhetoric, decrying the “stolen” seat.¹¹³

The public view of the judiciary is therefore somewhat conflicted. Although people generally see judges as impartial, they also want judges on the bench who share their political views. Somewhat counterintuitively, they have greater faith in elected judges rather than in appointed ones—the partisan nature of most judicial elections is apparently not seen as a threat to impartiality.¹¹⁴ Americans do believe “that raising money compromises the integrity of the judiciary,” but also believe that “a judge who voices his opinions can be fair and impartial in a later case.”¹¹⁵

When judges do demonstrate their impartiality by voting in a way that contradicts their partisan affiliation, it can be seen as a betrayal.¹¹⁶ Those who believe they share a salient political and social identity with the judge and thus expect to also see their beliefs about the case reflected in the judge’s ruling feel cognitive dissonance.¹¹⁷ When Chief Justice Roberts voted to uphold the Affordable Care Act and Justice Kennedy ruled in favor of same-sex marriage, for example, they angered many

senators to keep the Supreme Court at eight justices if Democrat Hillary Clinton is elected president.”).

112. Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

113. Ari Melber & Noel Hartman, *Neil Gorsuch Seeking ‘Illegitimate Seat’ on Court, Feingold Says*, NBC NEWS (Mar. 20, 2017), <http://www.nbcnews.com/politics/supreme-court/feingold-gorsuch-seeks-illegitimate-seat-court-n735541> (“Democrats should filibuster this choice, and fight with every fiber of their being, or they will be guilty of letting the Republicans get away with stealing a Supreme Court seat.”); Erick Trickey, *The History of ‘Stolen’ Supreme Court Seats*, SMITHSONIAN (Mar. 20, 2017), <https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/> (“Last year, when Senate Republicans refused to vote on anyone President Barack Obama nominated to replace the late Justice Antonin Scalia, Democrats protested that the GOP was stealing the seat, flouting more than a century of Senate precedent about how to treat Supreme Court nominees.”).

114. Dimino, *supra* note 105, at 336 n.232.

115. *Id.*

116. Josh Gerstein, *Conservatives Steamed at Chief Justice Roberts’ Betrayal*, POLITICO (June 25, 2015), <https://www.politico.com/story/2015/06/gop-conservatives-angry-supreme-court-chief-john-roberts-obamacare-119431> (quoting Curt Levey of the Committee for Justice, “a group that presses for conservative judges,” as saying “[t]his affirms that Roberts is something very different than what conservatives and probably even liberals thought they were getting. . . . I would expect people to be bitterly disappointed with Roberts”).

117. *See supra* Section II.A for a discussion of the tendency to employ cognitive strategies in line with identity.

grassroots conservatives, who saw those votes not just as a political disagreement, but as a breach of the rule of law itself.¹¹⁸

B. *Judicial Identity and Partisanship*

Judges' own expectations for the judiciary in some ways mirrors the public's. The ideal of impartiality is a salient—perhaps the most salient—aspect of the judicial identity.¹¹⁹ Even in the days of Blackstone, the role of “judge” was infused with a demand for impartial adjudication that owed allegiance to no party but the law.¹²⁰ Blackstone himself “viewed disqualification for personal bias as an unimaginable sign of weakness in a judge, whose authority depended on the ability to fairly mete out justice.”¹²¹

At the same time, however, judges are human—and therefore susceptible to the same unconscious biases that afflict us all.¹²² When a judge with a strong role identity is accused of impartiality, we would therefore expect the judge to react the same way as any other individual

118. Gerstein, *supra* note 116 (“I think he just doesn’t have the courage to follow the law when it leads to an uncomfortable place[.]”); Tom Howell Jr., *Justices Roberts, Kennedy Fall from GOP Favor After Recent Supreme Court Decisions*, WASH. TIMES (July 19, 2015), <https://www.washingtontimes.com/news/2015/jul/19/john-roberts-anthony-kennedy-lose-republican-favor/>.

119. Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 679 (2011) (“Blackstone’s observation that the judge’s authority “greatly depends” on a presumption of impartiality, underscores the centrality of impartiality to the common law judge’s self-identity.”).

120. *Id.*; WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768) (“[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”).

121. John Gibeaut, *Show Me the Money: States, ABA Try to Figure Out When Campaign Cash Leads to a Judge’s Recusal*, A.B.A. J. (Mar. 1, 2012), http://www.abajournal.com/magazine/article/show_me_the_money_states_aba_try_to_figure_out_when_campaign_cash_ads_up.

122. Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 41 (2014) (stating that “[n]o one is immune from the influence of implicit bias”); see Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 1 (2007) (discussing the effect of the human tendency to make snap judgments); see also Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 759 (2016) (explaining how law teachers can improve the professional responsibility curriculum by including behavioral lessons); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1640 (2015) (suggesting that competing prescriptions in legal ethics fail to help lawyers avoid unethical conduct because of social psychology); Jennifer K. Robbenolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1113 (2013) (providing suggestions for improving legal ethics).

who received non-self-verifying feedback.¹²³ That is, we would expect some level of emotional distress and a tendency to employ cognitive strategies that discount or discredit such feedback.¹²⁴ Importantly, a judge who independently determines that he or she should recuse would not likely have such a negative response, because such a decision ratifies his or her identity as someone who values impartiality. Receiving a motion seeking involuntary disqualification, on the other hand, can feel like a threat to the judge's core judicial identity.

And indeed, observers have noted that judges seem to respond to disqualification motions in just this way.¹²⁵ Professor Charles Geyh has explained how a motion to recuse can give rise to an emotional reaction from the judge, writing that judges are well aware that ethical rules require them to avoid even the appearance of partiality.¹²⁶ As a result, "[b]eing accused of looking bad, when they don't think they looked bad, creates the kind of stress point that makes this issue very, very complicated."¹²⁷ He finds that judges are therefore "reluctant to concede" that they may appear partial when faced with a motion to recuse.¹²⁸

The late Justice Scalia demonstrated this "stress point," when asked to recuse from a case in which former Vice President Richard Cheney was a party.¹²⁹ Justice Scalia had attended a hunting trip with Cheney while the case was ongoing, and a motion had been filed seeking his recusal.¹³⁰ Justice Scalia denied the motion in what was described as "a searing, 21-page memo."¹³¹ He expressed anger at the accusation of perceived partiality, writing that "[i]f it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."¹³²

The reality, however, is that even the best judges can never be perfectly impartial. In eighteenth century England, Blackstone pointed

123. *See supra* Section II.B.

124. *See supra* Section II.B.

125. Charles Geyh et al., *The State of Recusal Reform*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 515, 519 (2015).

126. *Id.*

127. *Id.*

128. *Id.*

129. Joseph P. Williams, *The Ethical Honor System*, U.S. NEWS (June 9, 2017), <https://www.usnews.com/news/the-report/articles/2017-06-09/supreme-court-justices-play-by-their-own-ethics-rules>.

130. *Id.*

131. *Id.*

132. *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 929 (2004) (denying motion to recuse).

out that judges are “generally selected by the prince or such as enjoy the highest offices in the state,” and “in [spite] of their own natural integrity,” the judges “will have frequently an involuntary bias towards those of their own rank and dignity.”¹³³ This problem was similarly recognized at the United States’ founding, when the Antifederalists worried “that judges would naturally favor private citizens or organizations that were part of the ruling elite.”¹³⁴

Today, that worry still exists, as judges continue to be disproportionately drawn from a privileged socioeconomic background.¹³⁵ But the hardening of political attitudes and partisanship raises a new concern: that judges will also be biased because of their political affiliations and partisan membership.¹³⁶

Partisan connections are replete in the judiciary. In a majority of states, judges run for election—often on expressly partisan platforms.¹³⁷ In some states it is not uncommon for litigation to proceed, “from start to finish, by state-court judges of a single partisan persuasion who were elected in expressly partisan contests.”¹³⁸ In federal court, where judges are appointed for life, the influence of partisan politics is unavoidable; “[p]olitics play a role in the composition of the federal courts, in oversight of the courts, and in shaping the courts’ jurisdiction.”¹³⁹

Even the Supreme Court is not immune from the negative effects of political polarization. In a recent interview, Justice Elena Kagan explained that the Court’s approach to decision-making varies according to how controversial the case is.¹⁴⁰ The cases less likely to capture public attention are easier for the Court to deliberate and discuss, and so are

133. BLACKSTONE, *supra* note 120, at 379.

134. Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 152 (1991).

135. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 140 (2013) (acknowledging that “[j]udges overwhelmingly come from wealthy backgrounds, and many have never walked in the shoes of economically disadvantaged people”).

136. Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1418 (2016) (suggesting that partisan loyalties may impact the way that judges decide cases).

137. *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O’Connor, J., concurring) (“39 states currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both.”) (citing AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (Apr. 2002)).

138. Levitt, *supra* note 106, at 1831.

139. Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947, 956 (2006).

140. Hasen, *supra* note 109.

subject to longer discussions at the Court's conference.¹⁴¹ The more high profile and politically significant cases—the “high profile cases that appear on the front page of the newspaper”¹⁴²—actually get less time in group deliberation, as “further discussion would just ‘irritate’ colleagues and change no one’s minds.”¹⁴³

Given the psychological forces that act on all of us, it would not be surprising for judges’ political identities to result in unconscious biases that conflict with their self-conception as impartial decision-makers.¹⁴⁴ Identifying the particular occasions when such biases manifest themselves, however, is not an easy task.

Unconscious bias, by its very nature, is not overt. Even when it is operating, people can point to other reasons for their conclusions. A study of college students studied a “liking bias,” examining whether students would be more likely to favor an individual in a hypothetical dispute who shared various social and personal characteristics with the subject.¹⁴⁵ Unsurprisingly, such a bias was found.¹⁴⁶ What was more surprising, however, was that when researchers attempted to de-bias the subjects by educating them about the possibility of the liking bias and having them reflect deeper on their evaluation of the dispute, the students became even more set in their first conclusions, believing that they had neutral, unbiased reasons for their beliefs.¹⁴⁷

Thus, while it is true that “credible examples of these judges deciding cases based on responsive or tribal partisanship are notable for their extreme rarity,”¹⁴⁸ this effect may simply mean that we are unable to recognize individual examples.¹⁴⁹ While ordinarily “[r]ole norms constrain responsive and tribal partisanship” in judging, bias can become an issue when those role norms come into conflict with a strongly partisan

141. *Id.*

142. John O. McGinnis, *Our Two Supreme Courts*, LIBR. L. & LIBERTY (May 6, 2015), <http://www.libertylawsite.org/2015/05/06/our-two-supreme-courts/>.

143. Hasen, *supra* note 109.

144. Brannon P. Denning, *The Case Against Appointing Politicians to the Supreme Court*, 64 FLA. L. REV. F. 31, 32 (2012) (“[I]t might be difficult for a politician *cum* Justice to shed party attachments even after donning her robes.”).

145. Cynthia McPherson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 166 (2006).

146. *Id.*

147. *Id.*

148. Levitt, *supra* note 106, at 1832.

149. Melinda A. Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence*, 49 VAL. U. L. REV. 807, 865 (2015) (hypothesizing that the social science research would likely carry over into the judicial context as well).

social identity.¹⁵⁰

Biases operate at an unconscious level and there are always other plausible explanations for any particular ruling.¹⁵¹ And political bias is especially hard to pin down; at some level, “[p]olitics, ideologies, and theories of governance and interpretation shade into one another.”¹⁵²

What we can say, however, is that there are patterns of biased judicial decision-making in a number of contexts. Scholars have found that when judges were able to override jury decisions on the death penalty, elected judges were more likely to do so than appointed ones.¹⁵³ Even for appointed judges, scholars have found that “the probability that a capital verdict will be reversed on final federal review seems to be related to whether review is by judges mainly appointed by Republican presidents or by judges mainly appointed by Democratic presidents.”¹⁵⁴

Likewise, research has found that judicial decisions tend to align with judges’ “retention incentives.”¹⁵⁵ Regardless of whether the judges were elected or appointed, their rulings “appear to behave roughly the same in terms of partisan favoritism that would cater to their party audience.”¹⁵⁶ Recent empirical work took the research a step further, investigating whether a partisan bias could be found when examining judicial rulings

150. Levitt, *supra* note 106, at 1867; *see also* Robertson, *supra* note 46, at 394 (discussing that “a person’s political identity will affect not just his or her opinions about relevant policy choices: it will also affect his or her perception of the facts underlying those policy choices”).

151. Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237, 282 (“Frequently (and inevitably), we are ignorant of the mental processes that led to a particular result. There is, however, ample evidence that factors we either cannot or will not recognize affect the decisions we reach.”).

152. Bandes, *supra* note 139, at 950.

153. *Id.* at 951; Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995).

154. Bandes, *supra* note 139, at 958 (quoting JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 398 (2002)).

155. Kang & Shepherd, *supra* note 136, at 1444; *see also* Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 342 (2002) [hereinafter Helland & Tabarrok, *Electoral Institutions*] (testing the “partisan election hypothesis” to see if elected judges “have an incentive to grant larger awards than other judges”); Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 171 (2009) (stating “that the voting of state supreme court judges is strongly associated with the stereotypical preferences of the retention agents”); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 158 (1999) [hereinafter Tabarrok & Helland, *Court Politics*] (arguing that “elected judges face different incentives and can be predicted to behave differently than nonelected judges”).

156. Kang & Shepherd, *supra* note 136, at 1444.

in local election litigation.¹⁵⁷ Not only did the researchers find such a connection, but they also found that it did not hold true “for lame duck incumbents who are vacating their seats,” thus suggesting that judicial selection alone could “not fully explain the relationship between campaign contributions and partisan loyalty in these cases.”¹⁵⁸

III. SAFEGUARDING IMPARTIALITY

All of these contradicting principles come into play in responding to calls for recusal in particular cases. The public largely believes that judges can remain impartial, and expects them to do so—but in politically sensitive cases people also believe that impartiality means aligning with their own policy choices.¹⁵⁹ The concept of impartiality is a very strong part of the judicial identity, but that identity does not always shield judges from ruling in ways that favor their social, political, and economic interests.¹⁶⁰ Counterintuitively, the fact that impartiality is integrated so tightly into the judicial identity can actually make it harder for judges to recognize their own unconscious biases.¹⁶¹

Under these circumstances, how can the legal profession best protect judicial impartiality in an era of entrenched partisanship? This Part examines the strengths and weaknesses of several options, including (1) contesting the appearance of partiality through recusal motions; (2) placing additional restrictions on judicial discretion by adding more bright-line rules for disqualification, and (3) relying on procedural safeguards to promote impartiality.

A. Contesting the Appearance of Partiality

Both state and federal judges are typically governed by standards requiring them not just to rule impartially, but also to maintain the appearance of impartiality. Federal judges are governed by 28 U.S.C. § 455, which provides that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”¹⁶² Most state court judges are governed by state codes that mirror the ABA’s Model Code of Judicial Conduct, which likewise provides that “[a] judge

157. *Id.* at 1446.

158. *Id.* at 1447.

159. *See supra* Section II.A.

160. *See supra* Section II.B.

161. *See supra* Section II.B.

162. 28 U.S.C. § 455; *see also* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1230 (2002) (noting that the Code of Conduct for U.S. Judges has similar language).

shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."¹⁶³ The Model Code also gives a number of specific instances in which appearances require the judge's disqualification: including, for example, situations where the judge has a financial interest in the case, where the judge has made statements that appear to commit the judge to reach a particular result in future cases, or where the judge's spouse or child is acting as a lawyer for a party in the case.¹⁶⁴

The Model Code defines *impartiality* as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."¹⁶⁵ In spite of the breadth of this definition, not all preconceptions are disqualifying. The Supreme Court has interpreted the words "bias" and "prejudice" under § 455 to "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree."¹⁶⁶

Judges are responsible for voluntarily stepping aside when they are disqualified under these provisions.¹⁶⁷ Litigants can also file motions seeking to recuse a judge. In most jurisdictions, the challenged judge will hear and rule on the motions themselves—a practice that has been subject to much criticism.¹⁶⁸ There is typically no formal opinion issued when a motion is denied, as approximately 90% are.¹⁶⁹

A judge who determines that the grounds for recusal have not been

163. MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS'N 2011).

164. *Id.* (providing a list of fourteen specific instances that will require judicial disqualification).

165. MODEL CODE OF JUDICIAL CONDUCT, Terminology (AM. BAR ASS'N 2011).

166. *Liteky v. United States*, 510 U.S. 540, 550 (1994).

167. Numerous observers recommend having someone other than the challenged judge decide the recusal motion, noting that due to the nature of unconscious bias, bias blind spot, and the "public position" effect, "the challenged judge typically will not be aware of their effect on his or her decision-making process." Debra Lyn Bassett, *Three Reasons Why the Challenged Judge Should Not Rule on a Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 659, 660 (2015); see also Geyh, *supra* note 119, at 695, 708 (concluding that allowing a judge to rule on his or her own recusal motion relies on "two implicit assumptions: that judges are able to assess the extent of their own bias; and that judges are able to assess how others reasonably perceive their conduct" and pointing out that "[n]either assumption is safe").

168. *Id.* at 729 ("Assigning disqualification motions to a different judge will avoid self-interested judges 'grading their own papers' but may not overcome the ambivalence judges feel about questioning the impartiality of colleagues.").

169. Gibeaut, *supra* note 121.

met should deny the motion and hear the case, however. As a well-regarded treatise has summarized, “a federal judge still has a duty to sit unless there are grounds for recusal. . . . A federal judge has never been permitted to recuse because a case would impose personal burdens or because he would rather handle some other kind of case, and § 455(a) certainly does not provide such license.”¹⁷⁰

Appellate courts can review a judge’s failure to step aside. In the last ten years, the Supreme Court has twice held that a judge’s failure to do so resulted in a violation of the litigant’s due process rights. First, in *Caperton v. A.T. Massey Coal Co.*,¹⁷¹ the Court held that an elected judge whose campaign was funded in large part by a single donor (the CEO of a mining company) could not constitutionally adjudicate a case in which that company was a party.¹⁷² The Court noted that a subjective belief in impartiality was not enough; instead, it applied an objective test to determine whether recusal was necessary, finding “a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”¹⁷³ Given the importance of the very large contribution to the justice’s campaign, the Court found that due process required recusal.¹⁷⁴

More recently, the Supreme Court issued an opinion in *Williams v. Pennsylvania*,¹⁷⁵ a case in which an elected district attorney sought the death penalty against a defendant, was then elected to the Pennsylvania Supreme Court many years later, and in that capacity voted with the court to deny habeas relief in a later proceeding by that same defendant.¹⁷⁶ The Court reversed the judgment of the Pennsylvania Supreme Court, holding that “under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.”¹⁷⁷ In determining that the risk of actual bias was unacceptably high, the Court

170. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3549 (3d ed. 2008).

171. 556 U.S. 868 (2009).

172. *Id.* at 884.

173. *Id.*

174. *Id.* at 886.

175. 136 S. Ct. 1899 (2016).

176. *Id.* at 1905.

177. *Id.*

referenced the concept of unconscious bias, noting that “a risk that the judge ‘would be so psychologically wedded’ to his or her previous position as a prosecutor that the judge ‘would consciously or unconsciously avoid the appearance of having erred or changed position.’”¹⁷⁸ The Court also emphasized the importance of the appearance, as well as the actuality, of impartial adjudication: “An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”¹⁷⁹

Given the broad standard of the judicial conduct rules (requiring disqualification when a judge’s impartiality “might reasonably be questioned”) along with the Supreme Court’s emphasis on the appearance of impartiality, it might seem that motions to recuse based on political pre-commitments and partisan affiliation would be on strong ground. Indeed, commentators have called on parties to more often seek recusal on these bases.¹⁸⁰ But scholars have found that such recusal motions are effective only when “[t]he sources of bias are objectively identifiable, and other judges who do not suffer from the same bias may be found.”¹⁸¹

When the bias at issue is a political worldview or ideology, such objective identification may be difficult or impossible. As noted above, politics cannot be effectively separated from other underlying ideology, theories of governance, or even legal interpretation.¹⁸² Knowing that a judge views herself as an originalist, for example, can allow an observer to make reasonable (though not perfect) predictions about how that judge will rule in constitutional cases—and on balance, such rulings are associated with one political party more than the other. Likewise, knowing that a judge was appointed by a Republican or a Democratic president makes it somewhat easier to predict the judge’s rulings, though also with highly imperfect accuracy. Hindsight bias, of course, can make such predictive accuracy appear stronger (“Of course the judge ruled that

178. *Id.* at 1906.

179. *Id.* at 1909.

180. See Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 319 (2010) (“[T]his Article advances the following, slightly scandalous claim: particularly in our post-*Caperton*, political-realist world, tough-on-crime elective judges should recuse themselves from all criminal cases.”).

181. Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 631, 656 (2015).

182. See Bandes, *supra* note 139, at 950; see also Page, *supra* note 151, at 281 (discussing that “people do not necessarily know why they have reached a particular decision”).

way!”), but there are enough examples of judges ruling contrary to expectations that no prediction can be guaranteed.

Even when judges do rule in accordance with their perceived political leanings, it does not mean that the judge is beholden to party interests. Instead, such a ruling may simply reflect either the thoroughness of the vetting process prior to the judge’s appointment, or a high level of concordance between the judge’s views and the views of a majority of the electorate. In either case, the judge’s personal views (such as being “skeptical of the police,” or holding religious objections to abortion) may have figured in to the judge’s ascendance to the bench.¹⁸³ In both cases, a reasonable observer may believe that the judge’s view and political identity would cause her to unconsciously sympathize with certain parties. In neither case, however, are there specific facts that would lead a reasonable observer to conclude that the judge could not set aside that sympathy. The Supreme Court has, after all, specified that disqualifying bias would likely either rest upon appearance of “knowledge that the [judge] ought not to possess” or a sympathy that is “excessive in degree.”¹⁸⁴ Courts have furthermore held that the “recusal statute should not be construed so broadly as to become presumptive or to require recusal based on unsubstantiated suggestions of personal bias or prejudice.”¹⁸⁵

The question, of course, is how do you define the appearance of bias that is “excessive in degree”—and what kind of evidence is necessary to substantiate it? The majority view appears to be that one’s worldview and social identities do not indicate disqualifying bias. Courts have therefore held that an Episcopalian judge could hear a case in which an Episcopal diocese is a litigant,¹⁸⁶ a judge whose wife was a litigation director for the ACLU could hear a same-sex marriage challenge even though the ACLU had filed amicus briefs in other same-sex marriage cases,¹⁸⁷ and a judge who had sponsored death-penalty legislation in his earlier career as a legislator could oversee prosecutions brought under that law.¹⁸⁸

Thus, as one legal scholar has noted, the recusal process is not particularly effective in cases of alleged partisan bias.¹⁸⁹ The appearance

183. *See supra* Part I.

184. *Liteky v. United States*, 510 U.S. 540, 550 (1994).

185. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659–60 (10th Cir. 2002).

186. *Id.* at 659.

187. *Perry v. Schwarzenegger*, 630 F.3d 909, 916 (9th Cir. 2011).

188. *Buell v. Mitchell*, 274 F.3d 337, 347 (6th Cir. 2001).

189. *Green, supra* note 13, at 201.

of impartiality, after all, is in the eye of the “reasonable” beholder—and as the public grows more partisan, views of judicial conduct will likewise split along party lines.¹⁹⁰ We see this in response to the two situations set out in the introduction.¹⁹¹ To law-and-order conservatives, it seemed obvious that Judge Scheindlin’s actions gave rise to an appearance of partiality. To liberals, it appeared obvious that Ohio’s Justice Kennedy did. But neither view was widely shared by those with the opposite political identity. When the public is so polarized, it becomes extremely difficult to identify the view of a “reasonable” person.

At its worst, the process may actually be counterproductive: “Given the judicial norm of impartiality, an accusation of bias, if taken seriously, will weaken public respect for, and undermine the legitimacy of, the opinion.”¹⁹² In a few situations, such as the *Williams* and *Caperton* cases described above, the facts may be so dramatic that it is not difficult to say that the appearance of bias is either suggestive of improper connections to the case (as in *Williams*) or of partiality based on extraordinary circumstances (as in *Caperton*). In those cases, recusal is critically important not just to protect the appearance of justice, but also to protect fundamental due process. But in the general case of unconscious partisan bias, recusal motions are unlikely to solve the problem. If we rely on them as the primary vehicle to address the possibility of partisan bias, then we run the risk that nearly half the country will not just be disappointed in the recusal ruling (whether granted or not), but will actually lose respect for the legitimacy of the court.

B. *Curbing Discretion*

If recusal alone cannot solve the problem of perceived partisan bias in the judiciary, then what else could be done? Some have suggested curbing judicial speech in order to reduce the appearance of bias. However, such curbs hamper the public’s ability to meaningfully contribute to judicial selection efforts, whether by direct election or otherwise.¹⁹³ As a result, the Supreme Court has held that such restrictions must be judged by strict

190. See *supra* Section II.B.

191. See *supra* Part I.

192. Green, *supra* note 13, at 201.

193. Stephen Gillers, “If Elected, I Promise [_____]”—What Should Judicial Candidates Be Allowed to Say?, 35 IND. L. REV. 725, 725 (2002) (“[A] popular election means that voters will pick judges. In making those choices, they need information. . . . We cannot give voters the job of picking judges and then deny them the kind of detail that a responsible person would want to have to fulfill the assignment conscientiously.”).

scrutiny, a standard that few restrictions on speech can survive.¹⁹⁴

A more fruitful possibility is to expand the use of bright-line recusal rules that do not require the exercise of discretion. The ABA Model Code of Judicial Conduct, for example, contains fourteen situations in which the appearance of bias is presumed—cases where, for example, the judge has a financial interest in the case or where the judge’s spouse is a lawyer or a party.¹⁹⁵

Additional grounds for non-discretionary disqualification—especially grounds tied to strong partisan activity—could be adopted. This type of rule “may prevent the biased judge from taking personal offense to a recusal motion, or can make recusal motions unnecessary since the grounds for recusal are objectively identifiable to any reasonable jurist.”¹⁹⁶ For example, the ABA has recommended adding a hard-cap dollar amount at which a litigant’s campaign contributions will disqualify a judge.¹⁹⁷ Few states have accepted such a rule at this point.¹⁹⁸ Two of the larger states that have are New York, which set an automatic recusal amount of \$3,500, and California, which requires recusal for contributions over \$1,500.¹⁹⁹

One of the concerns raised by the contributor automatic-disqualification rule is that it could allow for strategic disqualification—that is, a law firm or lawyer could make a donation solely with the intent of disqualifying a judge.²⁰⁰ Setting a high enough dollar amount and forbidding donations from parties or firms with pending cases could help ameliorate that problem.

194. *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (“[T]he State has voluntarily taken on the risks to judicial bias described above. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”).

195. MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS’N 2011).

196. *Bam*, *supra* note 181, at 656–57.

197. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(4) (AM. BAR ASS’N 2011) (proposing that states require disqualification when “[t]he judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge’s campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]”).

198. Gibeaut, *supra* note 121.

199. *Id.*

200. *Id.* (“Artificially low limits may encourage lawyers to forum-shop merely by making contributions over the threshold amount to judges they’d rather not face. The existing ABA model also only limits contributions to a judge’s campaign, and not independent expenditures of the sort that arose in *Caperton* and again in *Citizens United*.”).

In addition, a second reform—allowing one “peremptory” challenge of a judge—could also help forestall such gamesmanship.²⁰¹ Eighteen states now have some form of peremptory disqualification, including large states such as Texas and California.²⁰² As Professor Geyh has stated, peremptory recusal statutes allow a party to “have one crack at the judge and can remove him automatically without having to get in the judge’s grill and say, ‘you’re as partial as the day is long.’”²⁰³ The remaining states and the federal system should consider adopting such a process.

This procedure may be especially important in protecting against the appearance of partisan bias, because it neither requires substantiation of bias nor threatens the judge’s self-conception of impartiality.²⁰⁴ And if both sides are given a single strike, parties would have to choose carefully: Every judge comes to the bench with his or her own worldview. Is this particular judge worth using the party’s single strike on? Because both parties get a single strike, chances are strong that the judge who hears the case will be perceived as, if not entirely unbiased, at least legitimate by both parties.

Law professor Milan Markovic has suggested a similar prophylactic recusal rule for nationality-based challenges to judges in international criminal tribunals who are asked to rule on crimes committed by or against persons in the judge’s home nation.²⁰⁵ Markovic notes that it is likewise difficult to discern the presence of nationality-based bias in specific judges or particular cases, as “[t]here are no reliable indicia of a judge’s identification with his or her national polity or whether he or she is under conscious or subconscious pressure to rule in a particular

201. RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* 753–54 (2d ed. 2007).

202. *Id.* at 753 (“Whereas in a majority of jurisdictions judges may only be removed for cause, a substantial minority of states have adopted statutes or court rules that permit a party to seek judicial disqualification on a peremptory basis.”); Bassett, *supra* note 167, at 679 (“[E]ighteen state judiciaries, including California, Texas, and Indiana, employ a peremptory-disqualification procedure, some federal case law has recognized a discretionary transfer of a judicial disqualification motion to another judge, and some state courts require the transfer of such motions.”).

203. Geyh, *supra* note 126, at 539; ABA Judicial Disqualification Project, *Taking Disqualification Seriously*, 92 *JUDICATURE* 12, 15 n.39 (2008) (“States that permit peremptory challenges of at least some judges are: Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming.”).

204. FLAMM, *supra* note 201, at 753–54.

205. Milan Markovic, *International Criminal Trials and the Disqualification of Judges on the Basis of Nationality*, 13 *WASH. U. GLOBAL STUD. L. REV.* 1, 47 (2014).

manner.”²⁰⁶ Nevertheless, he concludes that because “national bias is likely to be more prevalent and significant” when the judge shares a national identity with either the alleged perpetrator or the victims, the international tribunals “should not place judges in the position of having to represent the international community in cases involving crimes allegedly committed by or against their fellow nationals.”²⁰⁷

These same concerns operate nationally when partisan bias is at issue. Stronger mandatory disqualification rules, combined with a single peremptory strike, could ameliorate the perception of political bias in the judiciary. These rules would probably not be invoked in a large number of cases, but they would not need to be. The important thing is that they could provide a remedy in the few cases that cause the highest risk of distrust in the judicial system.

C. *Protecting the Procedural Safeguards of Impartiality*

Perhaps the most important protection of an impartial judiciary is our procedural system itself. The founders of our tripartite democratic system realized that perfect impartiality was an impossible goal. As long as judges are human, they will be subject to the same unconscious biases and blind spots that affect us all. As Professor Geyh has noted, what matters is that “judges are ‘impartial enough’ to fulfill the role assigned them under state and federal constitutions: to uphold the rule of law.”²⁰⁸ Given this reality, the founders created procedural safeguards within the American judicial system to counter ordinary levels of partisan bias.

For the founders, the most important mechanism to curb judicial bias was the jury.²⁰⁹ The Antifederalists, concerned that “judges would naturally favor private citizens or organizations that were part of the ruling elite,” believed that the civil jury “would serve as a bulwark against private as well as public oppression.”²¹⁰ Alexander Hamilton likewise wrote that juries could offer a “security against corruption.”²¹¹ Although jurors, as well as judges, could suffer from bias, Hamilton believed that both judge and jury could be a check on each other. He concluded that there would be “double security,” because the judge could grant a new

206. *Id.* at 46–47.

207. *Id.* at 47–48.

208. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 497 (2013) (“Judges have long been characterized as human beings subject to human prejudices . . .”).

209. FEDERALIST NO. 83 (Alexander Hamilton).

210. Scheiner, *supra* note 134, at 152.

211. FEDERALIST NO. 83 (Alexander Hamilton).

trial “where the jury has gone evidently wrong,”²¹² and the jury could protect against the “temptations to prostitution which the judges might have to surmount.”²¹³

Today, that jury process is used much more rarely than it was at the time of the founding.²¹⁴ But if the jury process is endangered, it is still not yet dead. In addition to its adjudication role, the mere presence of a jury can also serve “a watch-dog function,” encouraging judges to consider a diversity of viewpoints.²¹⁵ Lawyers, judges, and others who care about the functioning of the judicial system should work hard to ensure that juries continue to offer a check on judicial decision-making.

An even though the jury may have declined in use, another procedural safeguard—a robust appellate system—has become a fundamental cornerstone of the judicial system over the last century.²¹⁶ Appellate review helps to minimize the effects of a single judge’s bias. Appellate review does not guarantee bias correction,²¹⁷ but evidence suggests that the old adage “more heads are better than one,” holds some truth. Group decision-making tends, at least on average, to lead to less biased outcomes.²¹⁸ Between the process of deliberation, the law of averages smoothing out the risk of individual bias, and the multiple points of view on a panel of judges, a multi-member court is less likely to give rise to a biased judgment.²¹⁹

Focusing on appellate law as a bias-correction mechanism also has a separate advantage: it ensures the standardization of legal doctrine, allowing that doctrine to be applied without regard to an individual judge’s predilections. In this way, appellate review resembles the discretion-curbing mechanisms described above.²²⁰ Thus, while judicial discussions of personal bias can tend to polarize opinion and risk undermining judicial legitimacy, discussions of doctrine generally do not

212. *Id.*

213. *Id.*

214. SUJA THOMAS, *THE MISSING AMERICAN JURY* 49 (2016) (noting that civil and criminal grand juries have declined in authority since the late eighteenth-century).

215. Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 903 (2016).

216. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1264–65 (2013).

217. For example, many people believe that the Second Circuit actually injected bias into the stop-and-frisk case rather than curing it. *See supra* Section III.A.

218. Robertson, *supra* note 216, at 1264.

219. *Id.*

220. *See supra* Section III.B.

run this risk.²²¹ The removal of Judge Scheindlin from the stop-and-frisk case, for example, was highly controversial, with accusations of judicial bias on both sides.²²² The constitutional doctrine itself, while still politically charged, did not lead to the same vitriol against members of the judiciary. Ultimately, the issue was settled (at least for the time being) by a combination of judicial involvement and political decision-making: After the policy was ruled unconstitutional, a new political administration was elected and chose to drop the appeal.²²³

CONCLUSION

The perception of judicial impartiality is essential to a belief in judicial legitimacy. In the current era, however, the public's deepening political divide threatens the perception of judicial neutrality. Hardening partisan identities mean that there is less middle ground on political issues and less cooperation among those with differing political views. As a result, the public increasingly scrutinizes judges and judicial candidates for signs of political agreement—and for signs of political opposition.

That scrutiny often raises questions about judges' political commitments. Judges must generally have strong political affiliations to reach the bench at all, regardless of whether they are elected or appointed. Furthermore, in spite of a strong judicial identity that demands impartiality, judges have the same unconscious biases and preconceptions as anyone else.

But trying to use disqualification motions to address such bias is problematic. First, it is often impossible to separate partisan bias from ordinary political worldview, ideology, or theories of governance. Second, the appearance of impartiality depends very much on the political views of the observer—and with a growing partisan schism

221. Green, *supra* note 13, at 201–02 (“If a critic makes a persuasive case that an opinion is poorly reasoned, then the opinion already will be discredited, and there is little need to put another nail in the coffin by speculating about whether unconscious stereotypes or other unconscious processes led the judges astray. If one’s legal analysis of the court’s ruling is unpersuasive, however, the charge of implicit bias may undeservedly bolster the critique and discredit the judge’s decision for reasons unrelated to its quality.”).

222. *See supra* notes 12–13 and accompanying text.

223. Philip Bump, *The Facts About Stop-and-Frisk in New York City*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/21/it-looks-like-rudy-giuliani-convicted-donald-trump-that-stop-and-frisk-actually-works/?noredirect=on&utm_term=.f13df60aeebe; *see also* Kalhan, *supra* note 13, at 1045 (“In the wake of de Blasio’s victory, the remedial process ordered by the District Court appeared all but certain to proceed in orderly fashion—and with broad approval by the City’s own electorate—once the new administration assumed office and withdrew its predecessor’s appeal.”).

throughout the country, there is no single perspective that can be attributed to a so-called “reasonable observer.”²²⁴ Finally, the deepening political divide means that a large fraction of the population will always be dissatisfied with the ruling on a disqualification motion alleging political bias. That dissatisfaction risks growing into a more generalized distrust of the court’s ruling, undermining the very purpose of the recusal rules.

Luckily, disqualification need not be the first line of defense against political polarization. The procedural safeguards of our justice system are robust enough to adapt to an increasingly polarized nation. Certainly, there is a role for recusal motions, as they can effectively counter the most extreme cases of potential bias. When political views diverge, however, our ordinary procedural tools—including the right to a jury trial and our system of appellate review—may better protect the integrity of the judicial system than mandatory disqualification.

224. *In re* Third Party Subpoena to Fusion GPS, 292 F. Supp. 3d 307, 309 (D.D.C. 2018) (denying a disqualification motion that sought recusal based on the judge’s connection to President Trump’s transition team and noting that the standard for disqualification “calls for an objective inquiry into whether there is an appearance of impartiality, ‘from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.’”) (citing *Cheney v. United States Dist. Ct. for the Dist. of Columbia*, 541 U.S. 913, 924 (2004) (Scalia, J.)).

