

THE DIMENSIONS OF JUDICIAL IMPARTIALITY

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Abstract

Scholars have traditionally analyzed judicial impartiality piecemeal, in disconnected debates on discrete topics. As a consequence, current understandings of judicial impartiality are balkanized and muddled. This Article seeks to reconceptualize judicial impartiality comprehensively, across contexts. In an era when “we are all legal realists now,” perfect impartiality—the complete absence of bias or prejudice—is at most an ideal; “impartial enough” has, of necessity, become the realistic goal. Understanding when imperfectly impartial is nonetheless impartial enough is aided by conceptualizing judicial impartiality in three distinct dimensions: a procedural dimension, in which impartiality affords parties a fair hearing; a political dimension, in which impartiality promotes public confidence in the courts; and an ethical dimension, in which impartiality is a standard of good conduct core to a judge’s self-definition. The seeming contradictions that cut across contexts in which judicial impartiality problems arise can, for the most part, be explained with reference to the dimensions those problems inhabit and the constraints to which regulation in those dimensions are subject. Thus, what is impartial enough to assure parties a fair hearing in the procedural dimension may or may not be impartial enough to satisfy the public in the political dimension, which may or may not be impartial enough to ensure that judges are behaving honorably in the ethical dimension. Analyzing impartiality problems through the lens of the dimensions they occupy not only resolves many of the imponderables that have long plagued the subject, but also reveals a distinct trend—impartiality is being transformed, from a value traditionally regulated largely by judges and the legal establishment in the procedural and ethical dimensions, to one that is increasingly the province of the political dimension, where it is regulated by the public and its elected representatives. By situating impartiality at the crossroads of judicial procedure, ethics, and politics, this Article offers a new perspective, not just on judicial impartiality, but also on the role of the American judiciary in the administration of justice and the political process.

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INTRODUCTION

“Judicial impartiality” is a feel-good term, like “puppies” and “pie,” that no decent soul would denigrate. Like “judicial independence,” judicial impartiality is ubiquitous. It is used and abused in myriad ways: to make legal arguments, score political points, exhort judges, and reassure the public. Unlike judicial independence, however—which has been exhaustively analyzed, theorized, canonized, and eulogized in books, edited volumes, reports, academic conferences, and articles—judicial impartiality has received no systematic attention. There have been targeted efforts to evaluate when a judge’s impartiality might reasonably be questioned for purposes of judicial disqualification;¹

1. See, e.g., Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s*

when the need for judicial impartiality justifies various ethics restrictions on judicial speech, association, and conduct;² and when adjudicators run afoul of the Due Process Clause for being actually, probably, or apparently partial.³ Missing from the literature is any sustained effort to conceptualize impartiality broadly in relation to its multiplicity of applications.

As a consequence of being undertheorized and haphazardly analyzed, judicial impartiality has stumbled its way into a series of holes, imponderables, and seeming contradictions:

- In 1974, author Lillian Hellman wrote that “[n]obody outside of a baby carriage or a Judge’s chamber can believe in an unprejudiced point of view.”⁴ As jaded as she may have meant to sound nearly four decades ago, in a skeptical age when social science research has debunked the notion that judges entertain an “unprejudiced point of view,” the distinction she drew between judges and the general population seems almost naïve. Is the realm of the impartial now peopled only with infants—is judicial impartiality a fiction, or worse, a scam?

- Vaughn Walker, a gay district court judge, invalidated California’s Proposition 8, which outlawed same-sex marriage.⁵ Under the federal disqualification statute, Judge Walker’s sexual orientation did not furnish a reasonable basis to question his impartiality.⁶ On the other hand, if Judge Walker owned a single share of stock in a corporation that intervened to defend Proposition 8, he would have had to disqualify himself immediately.⁷ Is it more likely that Judge Walker’s nominal shareholding would incline him to uphold Proposition 8, than that a lifetime of discrimination as a gay man would incline him to invalidate it?

Impartiality “Might Reasonably Be Questioned,” 14 GEO. J. LEGAL ETHICS 55 (2000); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733 (2011).

2. See, e.g., Kathleen M. Sullivan, *Republican Party of Minnesota v. White: What are the Alternatives?*, 21 GEO. J. LEGAL ETHICS 1327 (2008); *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127 (2006).

3. See, e.g., Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009).

4. Lillian Hellman, *Love Letters, Some Not So Loving*, N.Y. TIMES, Oct. 13, 1974, <http://www.nytimes.com/books/00/09/10/specials/west-ray.html>.

5. Lisa Leff, *U.S. Court Rules Recusal of Gay Judge Not Necessary: Legal Battle on California’s Prop 8 Continues*, HOUS. CHRON., June 15, 2011, at A5.

6. See *id.*

7. 28 U.S.C. §§ 455(b)(4), (d)(4) (2006) (requiring disqualification when a judge “has a financial interest in . . . a party to the proceeding,” and defining “financial interest” as “ownership of a legal or equitable interest, however small”).

- In 2002, the U.S. Senate blocked President George W. Bush's nomination of District Judge Charles Pickering to the Fifth Circuit Court of Appeals on the grounds that his ideologically conservative views fueled doubts among interest groups and Senate Democrats that he would impartially uphold the law;⁸ and yet, upon returning to his duties as a district court judge, it would have been frivolous for parties to seek Judge Pickering's disqualification on the grounds that his impartiality might reasonably be questioned.⁹ Why the double standard?

- Minnesota's Code of Judicial Conduct included an ethics rule that forbade judicial candidates from announcing their views on issues that they would likely decide as judges—a rule the state defended as necessary to preserve judicial impartiality.¹⁰ Justice Antonin Scalia, writing for the Supreme Court in 2002, emphatically rejected the view that impartiality meant a “lack of preconception in favor of or against a particular *legal view*,” on his way to invalidating the rule on First Amendment grounds.¹¹ Yet sixteen years earlier, then-nominee Judge Scalia refused to announce his legal views to the Senate Judiciary Committee, explaining:

[T]he only way to be sure that I am not impairing my ability to be impartial, and to be regarded as impartial in future cases before the Court, is simply to respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right, or wrong.¹²

Was Justice Scalia being duplicitous, or was something else going on?

- In the seventeenth century, Sir Matthew Hale devised a code of judicial conduct for his own use, which included a rule stating: “That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.”¹³ More recently, however, the

8. See Darryl Fears, *Nominee's Past Opens Old Wounds; Appeals Court Pick Raises Tempers, Divides Blacks*, WASH. POST, Mar. 3, 2002, at A5 (discussing opposition to Judge Pickering in terms of his ideology compromising his impartiality); Charles Hurt, *Senators Send a Signal, Reject Judicial Pick in Voting down a Conservative Judge for an Appeals Court Seat*, PHILA. INQUIRER, Mar. 15, 2002, at A2 (reporting on Senate Judiciary Committee rejection of Judge Pickering).

9. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 10.7 (2d ed. 2007) (noting that there is a “strong presumption against disqualifying a judge” solely on the basis of the judge's judicial philosophy or views on matters of public policy).

10. See *Republican Party of Minn. v. White*, 536 U.S. 765, 768–75 (2002).

11. *Id.* at 777–78.

12. *Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary*, 99th Cong. 58 (1986) (statement of Antonin Scalia, Judge, U.S. Court of Appeals for the District of Columbia Circuit).

13. 2 LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 208 (1881).

U.S. Supreme Court has directed judges not to postpone judgment, given the expense of discovery, but to dismiss complaints at the beginning of any cause that judges deem “implausible” in light of their “common sense” and “experience.”¹⁴ Is impartiality becoming expendable?

In Part I, I seek to isolate persistent problems with judicial partiality as they have been described and discussed in popular culture, to the end of illustrating the various ways in which judicial impartiality has been conceptualized. The goal is to define impartiality and its converse in functional rather than legal terms: partiality is as partiality does. Over time, authors of novels, poems, disquisitions, and polemics have identified a sprawling array of behaviors as antithetical to judicial impartiality. A synthesis of these illustrations yields a typology that helps to delineate the scope of judicial partiality as it has traditionally been understood.

A critical insight in Part I is that traditional understandings of judicial impartiality do not include the naïve assumption that judges are devoid of bias. Judges have long been characterized as human beings subject to human prejudices—a characterization that has gained currency in the aftermath of the legal realism movement. If perfect impartiality is unattainable, the more pragmatic objective is to ensure that judges are “impartial enough” to fulfill the role assigned them under state and federal constitutions: to uphold the rule of law. How impartial is impartial enough to preserve the rule of law, however, depends on who one asks and why they care.

In Part II, I argue that there are three beneficiaries of an impartial judiciary, each with different interests, who occupy three distinct dimensions of judicial impartiality: (1) parties to litigation, who seek a fair hearing from an impartial judge, in a “procedural dimension” of impartiality; (2) the public, for whom the institutional legitimacy of the judiciary depends on the impartiality of its judges, in a “political dimension” of impartiality; and (3) judges themselves, who take an oath to be impartial and for whom impartiality is a standard of conduct that is core to their self-definition, in an “ethical dimension” of impartiality.

In Part III, I describe the different mechanisms for managing impartiality in the procedural, ethical, and political dimensions, to the end of reconceptualizing how impartiality is regulated. The differing objectives of each dimension, and the varying constraints under which each dimension operates, yield perspectives unique to each dimension on how judicial partiality problems should be managed.

14. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 593–95 (2007) (Stevens, J., dissenting); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Part IV then returns to the imponderables enumerated in the opening paragraphs of this Article, which ultimately become ponderable, when evaluated with reference to the dynamic, tripartite schema developed here. Reanalyzing these developments reveals a distinct trend, in which the scope of procedural and ethical impartiality is shrinking, while the reach of political impartiality is correspondingly expanding. The net effect is not, as some commentators have argued, that impartiality is under siege or diminishing; rather, impartiality is being transformed, from a value traditionally regulated in large part by judges and the legal establishment in the procedural and ethical dimensions, to one that is increasingly the province of the political dimension, where it is subject to regulation by the public and their elected representatives. The three-dimensional construct developed here thus offers a new perspective on longstanding claims that the judiciary has become overly politicized, and, in so doing, illuminates approaches to reform.

I. PERSISTENT PARTIALITY PROBLEMS

The *Oxford English Dictionary* defines “impartial” as “[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased, fair, just, equitable.”¹⁵ Conversely, “partial” is defined as “unduly favouring one party or side in a suit or controversy, or one set or class of persons rather than another; prejudiced; biased; interested; unfair.”¹⁶ “Bias,” in turn, is defined as “[a]n inclination, leaning, tendency, bent; a preponderating disposition or propensity; predisposition *towards*; predilection; prejudice.”¹⁷ Finally, the *Oxford English Dictionary* defines “prejudice” as a “[p]reconceived opinion; bias or leaning favourable or unfavourable; prepossession . . . an instance of this; a feeling, favourable or unfavourable, towards any person or thing, prior to or not based on actual experience; bias, partiality,”¹⁸ and *Webster’s Third New International Dictionary* elaborates that it is “an opinion or leaning adverse to anything [formed] without just grounds or before sufficient knowledge.”¹⁹

Impartiality, described in these ways, has been a defining feature of the judicial role dating back to antiquity. Plato recounts that in 399 BC, Socrates described a judge’s responsibilities in the following way: “Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.”²⁰ To better understand how

15. OXFORD ENGLISH DICTIONARY 700 (2d ed. 1989).

16. *Id.* at 265.

17. *Id.* at 166.

18. *Id.* at 356–57.

19. 2 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1788 (16th ed. 1971).

20. FRANKLIN PIERCE ADAMS, BOOK OF QUOTATIONS 466 (1952).

and why law regulates judicial impartiality, it helps to appreciate the range of perceived partiality problems to which lawyers, lawmakers, and judges have responded over time. Such an exercise requires an exploration beyond legal texts to sources that reflect broader public concerns. In the absence of polling data from the distant past, partiality problems as portrayed in literature (fictional and not) may be the next best proxy, for they illuminate how judicial partiality was understood by authors of the time—understandings intended to resonate with contemporary readers. Studying partiality problems of the past with reference to literature of the day comes with two caveats: first, literature offers insights into how judicial conduct was perceived, but not necessarily how judges actually behaved; and second, fiction writers can be expected to exaggerate perceived problems to make their points and sell books. Here, however, my objective is limited to categorizing the range of judicial biases and prejudices that have been on the public’s mind over time, where it is irrelevant that the nature and extent of such biases and prejudices have sometimes been exaggerated. Armed with this deeply rooted typology, it is comparatively easy work to sort and situate analogous events that implicate judicial partiality in current debate.

Conceptions of judicial partiality, drawn from depictions in nonlegal texts, can be organized into four categories: judges who have personal interests in case outcomes; judges who have relational interests in case outcomes; judges who have political interests in case outcomes; and judges who have personal biases for or against case participants that are unattributable to the judges’ personal, relational, or political interests.

A. *The Judge Who Has a Personal Interest in Case Outcomes*

The archetype of the partial judge is the corrupt jurist who solicits or accepts bribes. As early as the second century BC, Shudraka wrote of the need for judges to be “untouched by avarice.”²¹ William of Nassington and John Gower each complained of fourteenth century English judges siding with whichever party gave the judge the larger gift,²² and a folktale of that period—widely told across the Eurasian continent—recounted this phenomenon in humorous terms: A carpenter and a butcher took each other to court over a will. The carpenter gave the judge’s wife a wagon and the judge sided with the carpenter until the butcher presented the judge’s wife with four oxen to pull the wagon, whereupon the judge entered judgment for the butcher.²³ “Turn the

21. Shudraka, *The Little Clay Cart*, in 9 HARVARD ORIENTAL SERIES 133–34 (Arthur William Ryder trans., 1905) (2007), available at <http://www.sacred-texts.com/hin/lcc>.

22. KATHLEEN E. KENNEDY, MAINTENANCE, MEED, AND MARRIAGE IN MEDIEVAL ENGLISH LITERATURE 92, 96 (2009) (recounting the views of Nassington and Gower).

23. Theo Meder, *Tales of Tricks and Greed and Big Surprises: Laymen’s Views of the*

wagon,” called the carpenter to the judge, but the judge replied: “The wagon cannot be turned, for the oxen want to go the other way.”²⁴ Three centuries later, concerns persisted. In England, *A Poem on the Times* wryly observed:

The ambidextrous judges, bribed, rebrib’d
And lesser gifts to greater still subscribed.²⁵

In an eighteenth century Chinese novel, *Celebrated Cases of Judge Dee*, the anonymous author wrote that “the amelioration of the common people depends on the honesty of the magistrate,” adding that “magistrates who let their conduct of a case be influenced by bribes . . . should never be appointed a ruler over others,” because “how could such men make their subordinates honest, and bring peace to the common people?”²⁶ While the personal interest at stake for the partial judge is typically economic, that is not always so. In Shakespeare’s *Measure for Measure*, for example, the corrupt quid pro quo featured a judge who sought to trade a decision for sexual favors.²⁷

Partial judges have also been portrayed as abusing judicial power for personal gain by means other than the traditional quid pro quo. Geoffrey Chaucer’s *Physician’s Tale* concerned a “wicked judge” who paid a “churl” to falsely claim that a “noble knight’s” daughter was the churl’s slave so that the judge would have a pretext to take custody of the knight’s daughter and have his way with her.²⁸ Judges who accepted gifts from interested parties after the case was over, or without express or implied assurances of reciprocation, raised the specter of partiality for personal gain without demonstrable corruption.²⁹ In the absence of stable and adequate judicial salaries, such gifts were in lieu of income, and debate persists to this day on the extent to which the rampant bribery complained of in England throughout the middle part of the second millennium was real or merely perceived—particularly given the harsh penalties in place for bribery.³⁰ There is no disputing, however, that gifts from parties invited favoritism, fueled widespread suspicions

Law in Dutch Oral Narrative, 21 HUMOR 435, 438–39 (2008).

24. *Id.* at 439.

25. Wilfrid Prest, *Judicial Corruption in Early Modern England*, 133 PAST & PRESENT 67, 69 (1991) (quoting *A Poem on the Times*).

26. CELEBRATED CASES OF JUDGE DEE 5–6 (Robert Van Gulik trans., 1976).

27. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 4, lines 52–54.

28. See GEOFFREY CHAUCER, CANTERBURY TALES 283–90 (J.U. Nicolson trans., Garden City Publ’g Co. ed. 1934).

29. KENNEDY, *supra* note 22, at 111 (“Receiving payment after an impartial decision was still considered wrong.”).

30. Prest, *supra* note 25, at 72–73 (“If for no better reason than fear of the consequences . . . medieval judges cannot usually have behaved in ways which directly contravened the letter of their oath . . .”).

of corruption, and were—with the exception of modest gifts of food and drink—regarded as troublesome.³¹ In 1620, Sir Francis Bacon was impeached for accepting gifts from litigants, despite his proof that he often ruled against his benefactors.³² Later that century, Sir Matthew Hale penned a personal code of judicial conduct that included the self-admonition “[t]o abhor all private solicitations . . . in matters depending.”³³ The practice of judges subsidizing their incomes by keeping the fines they assessed—a practice requiring disqualification of judges in English courts as early as 1609³⁴—likewise concerned a judge’s problematic personal interest in case outcomes outside the context of corrupt *quid pro quos*.

Contemporary analogs: The judge who abuses his office for personal gain by taking bribes or accepting favors continues to exemplify the bad judge depicted in television series and films. In a new twist on this ancient problem, John Grisham’s *The Appeal* portrays an interested party who bought influence with a justice on the Mississippi Supreme Court by contributing to his election campaign.³⁵ These stories mirror contemporaneous events: twice in the past generation, judicial corruption has held the spotlight on the nation’s biggest stage for official misconduct—congressional impeachment proceedings. In 1989, Congress impeached and removed District Judge Alcee Hastings for conspiring to solicit a bribe.³⁶ And in 2010, Congress impeached and removed District Judge G. Thomas Porteous for, among other things, soliciting money from an attorney in a pending case.³⁷ Sting operations aimed at rooting out judicial corruption at the local level have also made occasional headlines.³⁸ Issues raised by Grisham’s *The Appeal* have played out in West Virginia and elsewhere as reformers have decried the influence, real or perceived, of campaign contributions on judicial decision making, and its adverse impact on judicial impartiality.³⁹ In a

31. *Id.* at 71–73.

32. MARY L. VOLCANSEK, JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON 70–71 (1996).

33. LORD CAMPBELL, *supra* note 13, at 208.

34. *See Bonham v. Coll. of Physicians (Dr. Bonham’s Case)*, 77 Eng. Rep. 646, 652 (1610).

35. *See generally* JOHN GRISHAM, *THE APPEAL* (2008).

36. EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 172–74 (1999).

37. *Details of the Articles of Impeachment for Porteous*, CQ WEEKLY (Dec. 13, 2010), available at <http://library.cqpress.com/cqweekly/document.php?id=weeklyreport111-000003777898&type=toc&num=77&>.

38. *See, e.g.*, JAMES TUOHY & ROB WARDEN, *GREY LORD: JUSTICE*, CHICAGO STYLE 36–57 (1989) (describing the “Grey Lord” sting operation); Drew Broach, *Judges Probe Began with 1 Tip: Bondsman Pointed Finger at Rival*, TIMES-PICAYUNE (New Orleans, La.), Oct. 31, 2011, at A1 (describing the “Wrinkled Robe” sting operation).

39. *See* JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009*:

like vein, lawmakers and the media have criticized judges for taking expense paid “junkets” to educational seminars at vacation resorts, courtesy of corporations with an interest in cases coming before those judges, arguing that such trips create an appearance—if not the reality—of partiality.⁴⁰

B. *The Judge Who Has a Relational Interest in Case Outcomes*

The concern that impartiality could be corrupted by a judge’s preexisting relationship with parties to a proceeding is longstanding. As early as the second century BC, Shudraka urged judges to show “equal grace” to “friend, foe, [and] kinsman.”⁴¹ The peril of judges being influenced by their friendships was a topic of concern in fourteenth century Europe. John Gower, writing in the 1370s, noted how difficult it was to bring suit against anyone who had ties to the judge, and criticized the practice of litigants finding nobles who were friendly with the judge to write letters vouching for litigants in court.⁴²

Authors have likewise chronicled the danger of partial judges presiding over trials of their enemies. In the fifteenth century, Thomas Hocclave recounted the story of a Persian judge who the king ordered to be flayed alive for sentencing a personal enemy to death.⁴³ And in his quasi-historical work *Personal Recollections of Joan of Arc*, Mark Twain wrote of Bishop Cauchon—who presided at Joan’s trial for heresy notwithstanding his vested interest in her demise—that “this proposed judge was the prisoner’s outspoken enemy, and therefore he was incompetent to try her.”⁴⁴

Then, there are relatives. In Lewis Carroll’s *Alice’s Adventures in Wonderland*, the King was doubly encumbered: he was a judge presiding over a trial in which his tyrannical wife was the victim of an alleged tart theft, and he was a nincompoop.⁴⁵ The resulting partiality problem manifested itself as a race to judgment. No sooner was the indictment read against the Knave of Hearts than the King-Judge, with the Queen scowling at his side, directed the jury to “[c]onsider your verdict,” prompting the herald (the white rabbit) to admonish the King:

DECADE OF CHANGE 1–4 (2010). Campaign contributors can likewise create an external political interest in case outcomes for the judge. See *infra* Section I.C.; Meryl J. Chertoff, *Trends in Judicial Selection in the States*, 42 MCGEORGE L. REV. 47, 48 (2010).

40. See, e.g., Glen Elsasser, *Activists Shine Light On Junkets For Judges*, CHI. TRIB., July 25, 2000, at N4; Editorial, *Time to Ban Judicial Junkets*, N.Y. TIMES, Oct. 15, 2005, at A18.

41. Shudraka, *supra* note 21.

42. KENNEDY, *supra* note 22, at 96.

43. *Id.* at 111.

44. 2 MARK TWAIN, *PERSONAL RECOLLECTIONS OF JOAN OF ARC* 64–65 (1896).

45. See LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 91–103 (Orion Publ’g Grp. 1993) (1865).

“Not yet, not yet! . . . There’s a great deal to come before that!”⁴⁶ As the proceedings continued, the King passively abided the Queen’s mid-trial exhortations to declare the knave guilty and have him beheaded, before calling upon the jury to render a verdict “for about the twentieth time that day,” only to have the enraged Queen rejoin: “No, no! . . . Sentence first—verdict afterwards.”⁴⁷

Contemporary analogs: The risk of favoritism that relational conflicts of interest create is embodied in the contemporary adage: “A good lawyer knows the law; a great lawyer knows the judge.” In 2004, Justice Antonin Scalia provoked a media firestorm when he refused to withdraw from a case in which Vice President Dick Cheney was a party, after flying to Louisiana at the Vice President’s invitation for a weekend of duck hunting while the case was pending.⁴⁸ In 2008, Wisconsin Supreme Court Justice Annette Ziegler was reprimanded for presiding over cases, as a court of appeals judge, in which her husband’s business was a party.⁴⁹ More recently still, Justice Clarence Thomas’s qualifications to sit in a case concerning the constitutionality of health care reform legislation has been challenged on the grounds that organizations with which his wife was affiliated stood to gain if the legislation was invalidated.⁵⁰

C. *The Judge Who Has a Political Interest in Case Outcomes*

Impartiality has often been portrayed as compromised when judges have a political interest in the outcome of a proceeding. Political interests can be subdivided into the external and internal. External political interests are situated at the intersection between judicial impartiality and judicial independence: a judge’s impartiality is undermined when her political future is subject to manipulation or control by others who have an interest in the outcomes of cases the judge decides. Internal political interests, in contrast, relate to ideological zeal, which can bias the judge for or against litigants and lead her to prejudge cases.

46. *Id.* at 93.

47. *Id.* at 101.

48. See Editorial, *The Court’s Honor at Stake*, STAR-LEDGER (Newark, N.J.), Mar. 19, 2004, at 20; Op-Ed., *Duck Blinded: Scalia’s Trip Doesn’t Pass Smell Test*, OKLAHOMAN, Feb. 19, 2004, at 12A; Editorial, *Justice in a Bind*, N.Y. TIMES, Mar. 20, 2004, at A12; Editorial, *Position Looks Compromising*, SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 3, 2004, at 16A; Editorial, *Scalia’s Conflict of Interest*, DENVER POST, Jan. 26, 2004, at B-07; Op-Ed., *Scalia Tries to Duck Conflict with Waterfowl Reasoning*, TAMPA TRIB. (Fla.), Jan. 26, 2004, at 18.

49. Steven Elbow, *State Supreme Court Reprimands Ziegler in Unprecedented Ruling*, CAPITAL TIMES (Madison, Wis.), May 28, 2008.

50. Robert Barnes, *As Health Case Looms, 2 Justices Targeted: Conservatives Attack Kagan While Liberals Slash at Thomas*, HOUS. CHRON., Dec. 4, 2011, at A23.

Illustrations abound of judges whose impartiality has been depicted as compromised by external political interests. The most infamous example comes from the crucifixion scene in the New Testament: Pontius Pilate judged Jesus blameless, but acquiesced to calls for his crucifixion after the Jews cried out, saying “[i]f you let this man go, you are no friend of Caesar.”⁵¹ In Leo Tolstoy’s *Resurrection*, a panel of judges imposed a harsh sentence on the accused—withstanding its recognition that the jury had convicted her inadvertently by bungling the verdict forms—because the judges feared adverse publicity if they were perceived as lenient.⁵² Conversely, in *A Child’s History of England*, Charles Dickens idealized an impartial judge through the lens of a “doubtful” story in which a “brave and generous,” though “wild and dissipated,” prince drew a sword on the chief justice “because [the judge] was firm in dealing impartially with one of [the prince’s] dissolute companions.”⁵³ The justice had the prince arrested, and the prince acquiesced, which offered King Henry, and Dickens, a teaching moment: “Happy is the monarch who has so just a judge, and a son so willing to obey the laws.”⁵⁴

Emblematic of the jurist whose internal political interests compromise his impartiality is the iconic “hanging judge.” Robert Louis Stevenson’s description of Lord Hermiston, in *The Weir of Hermiston*, is illustrative: “[H]e did not affect the virtue of impartiality; this was no case for refinement; there was a man to be hanged, he would have said, and he was hanging him. Nor was it possible to see his lordship, and acquit him of gusto in the task.”⁵⁵ The hanging judge’s impartiality is thus undermined by his ideological predisposition to convict and execute, reflected in his indifference to the rule of law. A vivid, if disturbing, illustration comes from the story files of Judge Roy Bean:

“Carlos Robles, this court finds you charged with a grave offense against the peace and dignity of the sovereign State of Texas, to wit: cattle rustlin’. How do you plead?”

Unable to understand a word of English the defendant uttered a few sentences in Spanish.

“Court accepts yore [sic] plea of guilty. The jury will now deliberate, and if’n it brings in a verdict short of hangin’ it’ll be declared in contempt. Gentlemen, what’s yore [sic] verdict?”

51. *John* 19:12 (New International Version).

52. LEO TOLSTOY, *RESURRECTION* 95–97 (Anthony Briggs ed. & trans., Penguin Classics 2009) (1899).

53. 1 CHARLES DICKENS, *A CHILD’S HISTORY OF ENGLAND* 268 (1853).

54. *Id.*

55. ROBERT LOUIS STEVENSON, *WEIR OF HERMISTON* 46 (Charles Scribner’s Sons 1907) (1896).

“Guilty as hell, your honor.”⁵⁶

Contemporary analogs: If the hanging judge was emblematic of the nineteenth century jurist whose internal ideological predilections compromised his impartiality, the twenty-first century analog is the “activist judge.” The activist judge, whose constitutional and statutory analyses are polluted by her ideological biases, is not typically the stuff of riveting legal thrillers, but has achieved a prominent place in American political theater. At the turn of the twenty-first century, conservative court critics decried liberal activists—primarily in the federal district and circuit courts—who allegedly disregarded the law and substituted their political preferences. More recently, critics on the political left have responded in kind, by accusing the Supreme Court of conservative judicial activism.⁵⁷ To address the problem of “activist” judges who compromise their impartiality by acting upon their internal political interests, court critics have, with mixed success, undertaken to impeach wayward judges, cut their budgets, curtail their jurisdiction, solicit their views (if not their commitments) on issues they are likely to decide as judges, and subject them to other means of political accountability.⁵⁸ Court defenders, in turn, have characterized such efforts as aimed at manipulating judges into making decisions that the critics favor; put another way, court critics stand accused of seeking to control judges by exerting external political influence on the judges targeted, to the detriment of judicial independence and impartiality.⁵⁹ In an age when “[w]e are all legal realists now,”⁶⁰ it is perhaps unsurprising that the public would thus perceive political influences as posing two distinct threats to judges’ impartiality: internally, from judges who skew their rulings to implement their own political agendas, and externally, from outsiders who seek to implement their political agendas by conforming judges to their will.

D. *The Judge Who Has a Personal Bias*

Bias is useful in this typology primarily as a residual category—a bin for forms of partiality that cannot otherwise be categorized as a judge’s personal, relational, or political interest in the outcome of a proceeding.⁶¹ A prominent subset of cases left for the “bias” category is

56. RICHARD ERDOES, *SALOONS OF THE OLD WEST* 138 (1979).

57. See Charles Gardner Geyh, *The Criticism and Speech of Judges in the United States*, in *JUDICIARIES IN COMPARATIVE PERSPECTIVE* 257, 263–66 (H.P. Lee ed., 2011) (documenting attacks on judges).

58. See *id.*

59. See generally Charles G. Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 *CORNELL L. REV.* 191 (2012) [hereinafter Geyh, *Can the Rule of Law Survive?*].

60. Joseph William Singer, *Legal Realism Now*, 76 *CALIF. L. REV.* 465, 467 (1988).

61. Bias attributable to the judge’s prior relationship with an individual (rather than with

status- or group-based prejudice: unjustifiable fondness for or antipathy toward parties or other participants in the process because of their status as members of a particular race, ethnicity, class, gender, or other identifiable group.

The forms of status- or group-based judicial bias with the most distinguished pedigree are wealth and class. At its basest level, judicial bias in favor of the wealthy and against the poor has one foot in corrupt judicial self-interest, discussed earlier: when judges award decisions to the highest bidder, rich parties win and poor parties lose. But the problem, as depicted over time, has transcended corruption. One scholar has described the work of medieval poets who decried “class justice,” in which “a poor man can hardly ever win against a rich man or a nobleman, no matter how just his case may be.”⁶² To counter the perceived problem, English judges took an oath as early as the fourteenth century “to do equal law and execution of right to all . . . rich or poor,”⁶³ and in the seventeenth century, Sir Matthew Hale’s code of judicial conduct addressed this ongoing concern with the rule “[t]hat I be not biassed with compassion to the poor, or favor to the rich.”⁶⁴

In *Amelia*, published in 1751, Henry Fielding described a day in the court of Justice Thrasher, who: convicted a “poor woman,” falsely accused of streetwalking, after rejecting her truthful defense; dismissed charges against a “genteel young man and woman,” after “declar[ing] with much warmth that the fact [recounted in the charge against them] was incredible and impossible”; and convicted a “shabbily dressed” man, rejecting his truthful claim that the crime had been perpetrated by two others “who appeared to be men of fortune.”⁶⁵ While Fielding noted that some of these proceedings were tainted by bribery, his final, sarcastic indictment of Thrasher went not to his corruption but to his bias against the poor: “In short, the magistrate had too great an honour for truth to suspect that she ever appeared in sordid apparel; nor did he ever sully his sublime notions of that virtue by uniting them with the mean ideas of poverty and distress.”⁶⁶

In William Godwin’s *Things as They Are; or, The Adventures of Caleb Williams*, published in 1794, the protagonist was a secretary, whose employer was a wealthy man who committed murder and framed the secretary for robbery.⁶⁷ When the secretary defended himself by

the group to which the individual belongs), for example, is a form of relational interest; bias attributable to the issues a party raises is a form of political interest.

62. Meder, *supra* note 23, at 438.

63. Prest, *supra* note 25, at 71.

64. Quoted in LORD CAMPBELL, *supra* note 13, at 208.

65. 1 HENRY FIELDING, *AMELIA* 8–9 (J.M. Dent & Sons Ltd. 1962) (1751).

66. *Id.* at 10.

67. See WILLIAM GODWIN, *THINGS AS THEY ARE; OR, THE ADVENTURES OF CALEB WILLIAMS* (David McCracken, ed., Oxford Univ. Press 1982) (1794).

reporting the truth, the judge summarily rebuffed him:

A fine time of it indeed it would be, if, when gentlemen of six thousand a year take up their servants for robbing them, those servants could trump up such accusations as these, and could get any magistrate or court of justice to listen to them! . . . There would be a speedy end to all order and good government, if fellows that trample upon ranks and distinctions in this atrocious sort, were upon any consideration suffered to get off.⁶⁸

Ethnic, racial, and gender bias have likewise been featured in depictions of judicial conduct. In *Amelia*, Justice Thrasher found a defendant guilty, explaining: “Sirrah, your tongue betrays your guilt. You are an Irishman, and that is always sufficient evidence with me.”⁶⁹ In the 1898 nonfictional polemic *J’Accuse!*, Emile Zola attacked the French administration of justice for its court martial of Captain Alfred Dreyfus, which Zola attributed to a “‘dirty Jew’ obsession that is the scourge of our time.”⁷⁰ In perhaps his most infamous tale, Judge Roy Bean purportedly acquitted a defendant of murder, reasoning that “I find the law very explicit on murdering your fellow man, but there’s nothing here about killing a Chinaman. Case dismissed”—an episode famous for its grotesque racial bias, but complicated by an overlay of political partiality: Bean was surrounded by an angry group of the perpetrator’s friends, who were intent on violence if their comrade was convicted.⁷¹ And in the climactic trial scene of Mary Wollstonecraft’s eighteenth century novel *The Wrongs of Woman*, a misogynist judge trivialized the protagonist’s suffering at the hands of an abusive husband in a marriage she could not escape.⁷² “What virtuous woman thought of her feelings?” he asked rhetorically, answering that “[i]t was her duty to love and obey the man chosen by her parents and relations, who were qualified by their experience to judge better for her, than she could for herself.”⁷³

What message do these depictions of judicial bias convey? Sometimes, as with Judge Roy Bean, they may be nothing more than stories about a judge with a bias—the isolated bad (if colorful) apple,

68. *Id.* at 276.

69. FIELDING, *supra* note 65, at 8.

70. Emile Zola, *J’Accuse!*, L’AUREOLE (Paris, Fr.), Jan. 13, 1898, available at <http://www.oxygenee.com/Zola-and-Dreyfus.pdf>.

71. Shawn E. Tuma, *Law in Texas Literature: Texas Justice—Judge Roy Bean Style*, 21 REV. LITIG. 551, 561 (2002).

72. See MARY WOLLSTONECRAFT, *THE WRONGS OF WOMAN* 129–34 (W.W. Norton & Co. ed., 1994) (1798).

73. *Id.* at 133.

whose misconduct is meant to say nothing about judges generally. At other times, however, the biased judge is portrayed as a representative sample from a bad barrel. Of Justice Thrasher, Fielding remarked that “[t]he higher we proceed among our public officers and magistrates, the less defects of this kind will, perhaps, be observable”⁷⁴—which by negative implication meant that Thrasher’s defects were widely observable among “lower” magistrates. Godwin’s magistrate was the foil for an even more sweeping indictment: “And this at last was the justice of mankind!” Caleb Williams railed, despairing that “six thousand a year shall protect a man from accusation; and the validity of an impeachment shall be superseded, because the author of it is a servant!”⁷⁵ Similarly, Wollstonecraft’s judge was written into the climax of *The Wrongs of Woman* as emblematic of his gender and of the bias of men toward women.

These categorical claims of judicial partiality imply a more intractable problem: impartiality is illusory. Judges are elites captured by their own biases, who will protect the interests of fellow elites at the expense of the general public. The sentiment is succinctly expressed in the African proverb: “Corn can’t expect justice from a court composed of chickens.”⁷⁶ In *Spoon River Anthology*, published in 1916, Edgar Lee Masters made a similar, if narrower, point in an anecdote about a diminutive judge for whom “it was natural” to “ma[k]e it hard” on “the giants” who appeared before him, given the teasing the judge had endured earlier in life.⁷⁷ Lighthearted though this story may be, it is but a short walk from there to the darker conclusion that judges are ensnared by the same prejudices that afflict us all—prejudices attributable to the influences of their class, gender, race, ethnicity, and life experiences. Some nineteenth century thinkers made that very point. Robert Green Ingersoll declared that “[w]e must remember that we have to make judges out of men, and that by being made judges their prejudices are not diminished and their intelligence is not increased.”⁷⁸ David Dudley Field echoed, “Judges are but men, and are swayed like other men by vehement prejudices. This is corruption in reality, give it whatever other name you please.”⁷⁹

Contemporary analogs: The civil rights movement of the 1950s and 1960s has been retold in books and films that feature racist state judges

74. FIELDING, *supra* note 65, at 6.

75. GODWIN, *supra* note 67, at 277.

76. MADISON MCGRAW, JUSTIFY THE MEANS 128 (2003).

77. Edgar Lee Masters, *Judge Selah Lively*, in SPOON RIVER ANTHOLOGY 94 (Bartleby 1999) (1916), available at <http://www.bartleby.com/84/94.html>.

78. Robert G. Ingersoll, Speech in Washington, D.C. (Oct. 22, 1883).

79. David Dudley Field, *A Few Words on Judicial Integrity*, 6 ALBANY L.J. 265, 265 (1872).

of the Jim Crow era and their heroic federal counterparts who weathered local animus and implemented new civil rights laws.⁸⁰ In the 1980s and 1990s, court systems undertook racial and gender bias studies that documented problems including, but not limited to, judges.⁸¹ The critical legal studies movement of the 1980s revisited the ancient problem of class bias in systemic terms, arguing that rules of law were written, enforced, and upheld by elites, including judges, who protect entrenched interests of the powerful at the expense of the powerless.⁸² Critical race and feminist theories arose out of the critical legal studies movement and explored similar themes in the context of race, gender, ethnicity, and sexual orientation.⁸³ Even more recently, minority judges have found themselves in the crosshairs of high-profile claims that their impartiality is compromised by bias: can a gay judge in a stable relationship fairly adjudicate the constitutionality of a law banning same-sex marriage?⁸⁴ Is it problematic for a Latina judge to say that she will analyze cases differently than her white, male counterparts?⁸⁵

II. THE DIMENSIONS OF IMPARTIALITY

Writers of the nineteenth and twentieth centuries had already come to the unremarkable conclusion that judges were human beings, and as such were subject to human prejudices.⁸⁶ Social science research has since documented that judges, particularly Justices on the U.S. Supreme Court, are influenced by their ideological predilections.⁸⁷ Some political

80. As to books, see, for example, JACK BASS, *UNLIKELY HEROES: A VIVID ACCOUNT OF THE IMPLEMENTATION OF THE BROWN DECISION IN THE SOUTH BY SOUTHERN FEDERAL JUDGES COMMITTED TO THE RULE OF LAW* (1981). As to films, see, for example, *MISSISSIPPI BURNING* (Orion Pictures 1988) (depicting FBI agents investigating the murder of civil rights workers).

81. See generally Blake D. Morant, *Introductory Essay: The Relevance of Gender Bias Studies*, 58 WASH. & LEE L. REV. 1073 (2001) (discussing racial and gender bias studies); Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167 (1999).

82. Allan C. Hutchinson, *Introduction to CRITICAL LEGAL STUDIES* 1, 4 (Allan C. Hutchinson ed., 1989).

83. See, e.g., Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL LEGAL STUDIES*, *supra* note 82, at 120–36; Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *CRITICAL LEGAL STUDIES*, *supra* note 82, at 56–76.

84. See Leff, *supra* note 5.

85. Julie Hirschfield Davis, *Sotomayor Is Confirmed in Historic Vote by Senate*, CHARLESTON GAZETTE (W. Va.), Aug. 7, 2009, at A1 (noting that opponents of Justice Sotomayor during her nomination process repeatedly cited a speech in which “she hoped a ‘wise Latina’ judge would usually make better decisions than a white man”).

86. See *supra* notes 77–79 and accompanying text.

87. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* xvi (1993) (“[W]e demonstrate that . . . the facts of the case and the ideology of the justices . . . successfully explain and predict the votes of Supreme Court justices.”).

scientists have discussed the ways in which judges strategically implement their policy preferences,⁸⁸ while others have argued that the choices judges make are influenced by the audiences whose approval they seek.⁸⁹ Studies of heuristics have shown that judges, like the general population, are apt to take mental shortcuts in their decision making by acting upon a range of subconscious biases.⁹⁰ More recent research has documented the impact of judges' race and gender on their decision making in discrimination cases.⁹¹ In short, perfect judicial impartiality does not exist.

If perfect judicial impartiality is the elusive ideal, the more pragmatic quest is for "impartial enough." That begs the question, "impartial enough for what?" The answer turns logically on the goal judicial impartiality seeks to achieve, a goal that judges and lawyers everywhere would identify, almost reflexively, as "the rule of law." Insofar as we remove partiality from the decision making equation, what is left are the merits of the dispute before the judge—merits to be decided on the basis of applicable facts and law. And so, efforts to define the role of the judge in government typically emphasize the need for impartial judges to promote the rule of law.⁹²

In a world where imperfect impartiality is a constant, however, saying that impartial judges are needed to uphold the law merely skirts the question of how much partiality can be tolerated before rule of law objectives are thwarted to an unacceptable degree. Such an inquiry is further complicated by the realization that the law itself often is what it is because judges previously said that it was—judges who were influenced to an uncertain degree by their ideological and other

88. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUDGES MAKE* xiii (1998).

89. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 4 (2006) ("I argue that judges care about the regard of salient audiences because they like that regard in itself, not just as a means to other ends. Further . . . judges' interest in what their audiences think of them has fundamental effects on their behavior as decision makers.").

90. See, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1, 3–6, 15, 17–18, 27 (2007); Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 779–84 (2001); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571, 571–75 (1998); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 *OR. L. REV.* 61, 61, 64–65 (2000).

91. See, e.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 *WASH. U. L. REV.* 1117 (2009); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 *YALE L.J.* 1759 (2005).

92. MODEL CODE OF JUDICIAL CONDUCT Pmb1. (2007) [hereinafter MODEL CODE] ("The United States legal system is based upon the principle that an independent, impartial, and competent judiciary . . . will interpret and apply the law that governs our society."); A.B.A., *JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY* 9 (2003) ("[Judges] must, in short, be impartial if we are to be governed by the rule of law rather than judicial whim.").

prejudices. A better understanding of how impartial a judge must be to uphold the rule of law requires an appreciation for who the beneficiaries of an impartial judiciary are. Put another way, whether a judge is “impartial enough” to uphold the law may depend on who we are trying to convince, why they care, and what is needed to convince them. As elaborated upon below, judicial impartiality serves three distinct audiences, giving rise to three distinct dimensions of impartiality: (1) parties and the procedural dimension, (2) the public and the political dimension, and (3) judges and the ethical dimension.

Parties: At an elemental level, judges resolve disputes for the benefit of parties to those disputes. The stories of corrupt, conflicted, or biased judges, recounted in Part I, often cast losing parties as the ultimate victims—the martyrdom of Jesus Christ and Joan of Arc at the hands of partial judges being extreme examples. In the heat of battle, disputants may regard an impartial judge as their second choice; it would be best to have a partial judge who will rule in their favor. An impartial judge, however, remains preferable to a partial one who will rule against them, and if neither disputant controls the judge, an impartial judge is the safest alternative. Psychologist Tom Tyler has found that parties are more apt to accept adverse outcomes in litigation if they feel that they were subject to a fair process featuring a judge they regarded as impartial.⁹³ For parties, then, the interest in judicial impartiality is personal to them, acutely felt, case-specific, and shaped by firsthand experience. The focus of their attention is on the process employed to litigate their cases, and whether that process protected them adequately from the perils of partiality summarized in Part I. This, then, is the procedural dimension of impartiality.

Public: Judges may adjudicate disputes between private parties, but they are more than private dispute resolution specialists. They are public officials who together comprise a separate and independent branch of government, whose constitutional role is to serve as impartial guardians of the law. As such, their institutional legitimacy logically depends on the continuing support of the public that judges serve, which in turn depends on whether the public regards its judges as fulfilling their constitutional roles. If the decisions judges make lead the public to worry that judges are partial in ways that undermine their commitment to the rule of law, as the public defines it, the judiciary’s institutional legitimacy may suffer. Thus, in the *Celebrated Cases of Judge Dee*, discussed in Part I, the public is portrayed as the ultimate beneficiary of an impartial judiciary, because partial judges cannot “bring peace to the

93. See TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 83 (1997); Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 *LAW & SOC’Y REV.* 51, 69–70 (1984).

common people.”⁹⁴ Relative to the parties, then, the public’s interest in an impartial judiciary is less personal than philosophical or ideological, more diffuse than acute, systemic rather than case-specific (although highly publicized cases can breed systemic concerns), and shaped less by firsthand experience than by impressions gleaned from public discussions on the acceptability of judges to the body politic. In other words, the focus of the public’s attention is on the impartiality of judges in relation to the role they play in the administration of government, which is “political” in the original sense of the term. This is the political dimension of impartiality.

The Judge: For over two thousand years, being a good judge has meant being an impartial judge.⁹⁵ Impartiality is a defining feature of the judicial role in ways it is not for other public officials: whereas legislators, city council members, mayors, governors, and presidents should be partial to their constituents’ preferences, judges should not. In the context of its procedural and political dimensions, impartiality is an instrumental value that serves other ends; being a “good judge” who impartially upholds the law is important to ensure a fair process to parties and to promote public confidence in the courts. There remains, however, an extent to which being “good” is an irreducible end in itself⁹⁶: the corrupt or biased judge is simply “wicked,” to borrow Chaucer’s adjective from *The Physician’s Tale*.⁹⁷ To the extent that being good is its own reward, judges themselves are the beneficiaries of their own impartiality. As adjudicators at the center of the litigation process, judges have an interest in the procedural dimension of impartiality; as representatives of the third branch of government, judges desire institutional legitimacy and consequently have an interest in the political dimension of impartiality, too. But as women and men whose self-identity as good judges is tethered to the oath they have sworn to be impartial—an oath judges have taken for centuries—there is a third dimension of impartiality: an ethical dimension.

Thinking about impartiality in terms of its three dimensions yields a critically important insight: different dimensions may yield different answers to the question, how impartial is impartial enough? Depending on the context, the impartiality needed to provide parties with a fair hearing in the procedural dimension may be different than that needed

94. See *supra* note 26 and accompanying text.

95. See *supra* note 20 and accompanying text.

96. Judicial independence is often characterized as an instrumental value that furthers other ends, such as the rule of law, and not as an end in itself. Impartiality, however, is different. Judicial independence qua freedom from external control is a privilege subject to abuse, while impartiality, as an unbiased, unprejudiced state of mind, is not. Therefore, in relation to the judicial role, independence cannot be characterized as an unqualified good in the way that impartiality can.

97. See CHAUCER, *supra* note 28.

to reassure the public in the political dimension, which may, in turn, differ from the impartiality required to ensure that judges are behaving honorably in the ethical dimension. To better understand the different ways in which the partiality problems identified in Part I are evaluated depending upon the dimension of impartiality at issue, it is helpful to look at the ways in which judicial impartiality is regulated.

III. REGULATING THE DIMENSIONS OF IMPARTIALITY

The procedural, ethical, and political dimensions of judicial impartiality have been regulated in different but overlapping ways. The distinct means by which regulatory schemes manage judicial impartiality can, for the most part, be explained with reference to the varying goals of promoting judicial impartiality in the three dimensions: to ensure procedural fairness for parties in the litigation process; to encourage judges to conduct themselves honorably and ethically; and to preserve public confidence in the courts. A full appreciation of these regulatory mechanisms, however, also requires that they be understood against the backdrop of historical, pragmatic, and other constraints that have affected their development.

I elaborate here on the primary mechanisms that regulate impartiality in each dimension: due process, disqualification, and rules of litigation procedure in the procedural dimension; codes of judicial conduct and disciplinary processes in the ethical dimension; and removal, selection, and oversight in the political dimension. In so doing, I do not mean to imply that the compartmentalization of judicial impartiality is tidy.⁹⁸ Mechanisms that I have assigned to one dimension can serve the interests of another. For example, disqualification rules that parties exploit to protect their rights to an impartial judge in the procedural dimension also serve as standards of good judicial conduct in the ethical dimension.⁹⁹ Codes of judicial conduct, while centered in the ethical dimension, include rules oriented toward ensuring a fair process for parties¹⁰⁰ and promoting public confidence in the courts,¹⁰¹ which

98. Professor Stephen Burbank has expressed a preference for “the messiness of lived experience to the tidiness of unrealistically parsimonious models.” Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE* 41, 53 (Charles Gardner Geyh ed., 2011). While Professor Burbank was writing about quantitative models, his point applies equally to theory. There is a line between simplification and oversimplification that scholars must not cross.

99. Compare 28 U.S.C. § 455 (2006), with U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

100. See, e.g., MODEL CODE, *supra* note 92, R. 2.2 & cmt. 1 (requiring judges to “perform all duties of judicial office . . . impartially,” to “ensure impartiality and fairness to all parties”); *id.* R. 2.6 & cmt. 1 (requiring that judges guarantee all parties “the right to be heard according to

overlap with the procedural and political dimensions, respectively. Impeachment, while a remedy for judges whose partiality violates the public trust in the political dimension, also delineates standards of judicial conduct that inform the ethical dimension.¹⁰² Notwithstanding such messiness at the margins, thinking about judicial impartiality in relation to the dimensions it occupies is worth the trouble because it elucidates the complexities and seeming contradictions that pervade the subject and gave rise to the imponderables that introduced this Article.

A. *Regulating Impartiality in the Procedural Dimension*

There are three basic procedural mechanisms that are brought to bear to preserve impartiality for the benefit of parties to litigation: (1) the Due Process Clauses of the federal and state constitutions, (2) disqualification processes, and (3) rules of litigation procedure. Understanding the scope and limits of these mechanisms requires an appreciation for the relationship between their ends and means, and the constraints under which they operate.

All three mechanisms in the procedural dimension are implemented by judges, as part of a larger mission to administer justice on a case-by-case basis. As a consequence, the pursuit of impartiality is necessarily tempered by the constraints of broader systemic goals. Achieving near-perfect impartiality among judges assigned to hear cases through the application of overly rigorous processes that compound costs, exacerbate delays, and compromise the supply of available judges would purge partiality at the expense of thwarting access to justice, and thus rob Peter to pay Paul. Hence, the three procedural mechanisms that promote judicial impartiality must be construed, applied, and ultimately limited in light of the systemic objective of ensuring the effective and expeditious administration of justice. Thus, the process that is “due” parties under the Fifth and Fourteenth Amendments is constrained by an assessment of the burdens that additional process would impose.¹⁰³ Ethics rules forbid recusal except when disqualification is required because “[j]udges must be available to decide the matters that come before the court,”¹⁰⁴ while the “rule of necessity” directs otherwise

law,” which is “an essential component of a[n] . . . impartial system of justice”).

101. *See, e.g., id.* R. 1.2 (“A judge shall act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

102. *See infra* notes 204–209 and accompanying text (discussing impeachment as a remedy for less than “good” behavior).

103. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[T]he specific dictates of due process generally requires consideration of . . . the Government’s interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

104. MODEL CODE, *supra* note 92, R. 2.7, cmt. 1.

disqualified judges to hear cases when no other judge would be qualified to sit.¹⁰⁵ The first rule in the Federal Rules of Civil Procedure emphasizes that the rules seek not only “just” determinations, but “speedy[] and inexpensive” ones as well.¹⁰⁶

At a minimum, these systemic constraints render the procedural dimension ill-suited to address the sweeping claims of partiality described in Part I—that judges are activists whose ideological predilections create political conflicts of interest that undermine their impartiality, or that judges are unacceptably biased because of their class, race, gender, or other status. And so, attempts to remove judges from cases in litigation on the basis of such categorical claims have fallen on deaf ears.¹⁰⁷ As elaborated upon next, the three mechanisms in the procedural dimension are best suited to ameliorate judicial partiality in more limited, narrowly targeted, case-specific ways.

1. The Due Process Clauses

The Fifth and Fourteenth Amendments of the U.S. Constitution prohibit the national and state governments from depriving persons of their life, liberty, or property without due process of law.¹⁰⁸ In addition, many state constitutions have a due process clause of their own.¹⁰⁹ In popular culture, an impartial adjudicator has been a defining feature of a fair judicial process for more than two thousand years.¹¹⁰ It is thus unsurprising that the U.S. Supreme Court has interpreted the Due Process Clause in a manner consistent with that ancient understanding by declaring that “[a] fair trial in a fair tribunal is a basic requirement of due process,”¹¹¹ and that the Due Process Clause guarantees parties the “right to have an impartial judge.”¹¹²

The Due Process Clauses articulate broad principles, but are of only modest importance in the daily regulation of judicial impartiality in the procedural dimension. The circumstances in which the Court has actually held that the “right to have an impartial judge” was violated are few and limited. The Court has reversed judgments where a state judge has: kept the fines he assessed against parties that appeared before

105. See CHARLES GARDNER GEYH, FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 13–15 (2d ed. 2010) [hereinafter GEYH, DISQUALIFICATION], available at [http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/\\$file/judicialdq.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf).

106. FED. R. CIV. P. 1.

107. See FLAMM, *supra* note 9, § 10.3.

108. See U.S. CONST. amend V; *id.* amend XIV.

109. See Anthony B. Sanders, *The “New Judicial Federalism” Before its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline*, 55 AM. U. L. REV. 457, 467 (2005).

110. See *supra* Part I.

111. *In re Murchison*, 349 U.S. 133, 136 (1955).

112. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

him;¹¹³ ruled on the merits of issues that he himself was litigating as a private party in an unrelated proceeding;¹¹⁴ presided over criminal contempt proceedings in which the defendants' allegedly contemptuous conduct had been directed toward the judge;¹¹⁵ and heard a case in which a party's recent support for the judge's election campaign was so substantial as to create a probability of bias.¹¹⁶ Such limited application is attributable to historical, pragmatic, and prudential constraints.

Historically, civil and common law systems each afforded parties ample opportunity to challenge the impartiality of their respective fact-finders—judges under civil law and jurors under common law.¹¹⁷ English common law judges, however, were entitled to an almost ironclad presumption of impartiality, subject to a lone exception for cases in which they had an economic interest in the outcome.¹¹⁸ Two and a half centuries later, the four dissenting Justices in *Caperton v. A.T. Massey Coal Co.* pointed to this ancient presumption in support of their argument that a probability of judicial bias does not violate due process,¹¹⁹ a point the majority deflected by emphasizing how exceptional and extreme the facts of *Caperton* were.¹²⁰ In other words, the ancient presumption of impartiality limits the application of the Due Process Clause to deeply rooted exceptions and truly outrageous circumstances.

Pragmatically, some forms of partiality are more manageable to regulate than others. For example, personal conflicts of interest—the first form of partiality that the Supreme Court recognized as implicating due process concerns¹²¹—can be delineated by clear(ish) rules triggered whenever a conflict arises. Divining judicial bias, in contrast, requires an assessment of the judge's subjective state of mind—a difficult task that courts have long been reluctant to undertake.¹²² In *Caperton*, the

113. See, e.g., *id.* at 523.

114. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823–24 (1986).

115. See, e.g., *Taylor v. Hayes*, 418 U.S. 488, 503 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971); *Murchison*, 349 U.S. at 139.

116. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264–65, 2267 (2009).

117. See Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 677–78 (2011).

118. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947).

119. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting) (“There is a ‘presumption of honesty and integrity in those serving as adjudicators’ . . . All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”).

120. *Id.* at 2263, 2265 (majority opinion) (noting that “this is an exceptional case” and “[t]he facts now before us are extreme by any measure”).

121. See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

122. See *Inhabitants of Northampton v. Smith*, 52 Mass. (11 Met.) 390, 396 (1846) (“[A]n interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test . . .”); Frank, *supra* note 118, at 611–12

majority sought to make such assessments more manageable by crafting an objective “probability” of bias standard for assessing due process claims.¹²³ Chief Justice John Roberts, writing on behalf of the four dissenters, was unconvinced and itemized forty questions that the new standard left unanswered, leading him to the conclusion that regulating probable bias was unworkable.¹²⁴ The majority’s rejoinder was to emphasize, repeatedly, how rarely its probable bias standard would be triggered.¹²⁵

Prudentially, the Due Process Clause is a backstop, or last resort, constrained by respect for separation of powers and federalism concerns, that “demarcates only the outer boundaries of judicial disqualifications.”¹²⁶ While the Fifth Amendment’s Due Process Clause presumably guarantees litigants the right to an impartial judge in federal court, federal courts have long avoided constitutional questions when cases can be resolved on nonconstitutional grounds.¹²⁷ Given the availability of disqualification under federal statute,¹²⁸ then, recourse to the Fifth Amendment is unnecessary. The need for state courts to ameliorate judicial partiality through resort to the Fourteenth Amendment or the due process clauses of their own constitutions is similarly obviated by the availability of state disqualification rules.¹²⁹ Although the Fourteenth Amendment affords federal courts the opportunity to address the qualifications of state judges, principles of comity and federalism have restricted the reach of Fourteenth Amendment claims. In *Tumey v. Ohio*,¹³⁰ for example, the Court ruled that the Due Process Clause forbade a judge from presiding over a case in which he had a financial conflict of interest, but not before opining that “[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters

(“English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias . . . was rejected entirely.”).

123. *Caperton*, 129 S. Ct. at 2265.

124. *Id.* at 2267, 2269–72 (Roberts, C.J., dissenting).

125. *See id.* at 2265–67 (majority opinion).

126. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

127. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

128. 28 U.S.C. § 455 (2006).

129. State courts, like their federal counterparts, adhere to *Ashwander* avoidance principles. *See, e.g.*, Jack Tuholske, *Going With the Flow: The Montana Court’s Conservative Approach to Constitutional Interpretation*, 72 MONT. L. REV. 237, 242–43 (2011) (noting that the state supreme court implemented *Ashwander* principles).

130. 273 U.S. 510 (1927).

merely of legislative discretion.”¹³¹ Given the stories recounted in Part I—which predate when *Tumey* was decided in 1927, and show a deeply rooted antipathy toward judges who preside in the teeth of relational conflicts and personal biases—the suggestion that kinship and bias did not implicate core due process concerns can only be explained in terms of the historical, pragmatic, and prudential constraints summarized here.

2. Disqualification

In the procedural dimension, disqualification rules seek to ensure parties a fair hearing by affording them an opportunity to challenge the impartiality of their assigned judge. As previously noted, disqualification rules likewise serve as standards of conduct in the ethical dimension of impartiality.¹³² Those standards are more or less uniform across state and federal systems,¹³³ and between procedural and ethical dimensions,¹³⁴ with the Model Code of Judicial Conduct serving as a template.¹³⁵ The Model Code makes provision to disqualify judges for many of the chronic partiality problems recounted in Part I. Personal and relational conflicts of interest are addressed by rules requiring disqualification when the judge or the judge’s close relatives are parties,¹³⁶ lawyers,¹³⁷ or material witnesses¹³⁸ in a case; when they have an economic¹³⁹ or other interest¹⁴⁰ in the outcome of the proceeding; under limited circumstances, when the firm¹⁴¹ or governmental entity¹⁴² where the judge previously worked appears before her; and when a judge as a judicial candidate receives campaign contributions from

131. *Id.* at 523.

132. *See supra* note 99 and accompanying text.

133. *See* ABA Judicial Disqualification Project, *Taking Disqualification Seriously*, 92 JUDICATURE 12, 14–15 (2008).

134. For example, the standards for disqualification in 28 U.S.C. § 455, which grants parties a procedural right to challenge a judge’s partiality, are basically the same as the standards in Canon 3C of the Code of Conduct for United States Judges, which regulates disqualification as a matter of judicial ethics. *See also* GEYH, DISQUALIFICATION, *supra* note 105, at 2.

135. ABA Judicial Disqualification Project, *supra* note 133, at 14 (noting that state codes of judicial conduct are based on the Model Code of Judicial Conduct “in the vast majority of states”).

136. MODEL CODE, *supra* note 92, R. 2.11(A)(2)(a).

137. *Id.* R. 2.11(A)(2)(b).

138. *Id.* R. 2.11(A)(2)(d).

139. *Id.* R. 2.11(A)(3).

140. *Id.* R. 2.11(A)(2)(c).

141. *Id.* R. 2.11(A)(6)(a) (requiring disqualification when the judge “was associated with a lawyer who participated substantially as a lawyer in the matter during such association”).

142. *Id.* R. 2.11(A)(6)(b) (requiring disqualification when the judge “served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding”).

parties or lawyers in excess of a specified amount.¹⁴³ Political conflicts of interest are likewise addressed in part by this last rule, insofar as campaign contributions are perceived as an external source of political influence on judicial decision making, and by a rule requiring disqualification when a judge publicly pre-commits herself to reach a particular result in a future case.¹⁴⁴ Finally, bias is addressed by rules requiring disqualification when the judge “has a personal bias or prejudice concerning a party or a party’s lawyer.”¹⁴⁵

Disqualification is subject to some of the same constraints that shape the scope of due process. Historically, judges have enjoyed the same presumption of impartiality that limits the application of due process analysis.¹⁴⁶ Pragmatically, the subjective nature of judicial bias has limited its reach as a traditional ground for disqualification.¹⁴⁷

More fundamentally, perhaps, the same judges who administer disqualification rules self-identify collectively as impartial and have done so for millennia; to concede bias under such circumstances is, in effect, to concede failure.¹⁴⁸ To offset these constraints, the Model Code calls for disqualification when the judge’s “impartiality might reasonably be questioned,”¹⁴⁹ which seeks to avoid problematic inquiries into the judge’s subjective state of mind with an objective standard, and to lessen the stigma of disqualification by focusing on perceived partiality, rather than partiality in fact.¹⁵⁰ Because judges are under a separate ethical directive to avoid perceived partiality (as a subset of the duty to avoid the appearance of impropriety), however, judicial ambivalence over disqualification lingers.¹⁵¹ One multistate study showed that judges are least troubled by disqualification for

143. *Id.* R. 2.11(A)(4).

144. *Id.* R. 2.11(A)(5).

145. *Id.* R. 2.11(A)(1).

146. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (“[J]udges or justices cannot be challenged,” because “the 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.”).

147. FLAMM, *supra* note 9, § 3.2 (discussing proof problems limiting disqualification for actual bias).

148. See Geyh, *Why Judicial Disqualification Matters*, *supra* note 117, at 678–79.

149. MODEL CODE, *supra* note 92, R. 2.11(A).

150. Geyh, *Why Judicial Disqualification Matters*, *supra* note 117, at 690–92.

151. MODEL CODE, *supra* note 92, R. 1.2 cmt. 5 (directing judges to avoid the appearance of impropriety, and explaining that “[t]he test” for an appearance of impropriety is, among other things, “whether the [judge’s] conduct would create in reasonable minds a perception” that “reflects adversely on the judge’s . . . impartiality”); see also Geyh, *Why Judicial Disqualification Matters*, *supra* note 117, at 703–04 (discussing tension between the appearance of partiality in disqualification proceedings, and the ethical directive to avoid the appearance of impropriety).

traditional conflicts of interest,¹⁵² where the rules are relatively clear, and disqualification is automatic when facts giving rise to a conflict are present—for example, when the judge holds stock in the defendant corporation, or the judge’s brother is the plaintiff. Conversely, ambivalence rises with more discretionary inquiries into the judge’s biases or personal relationships with case participants.¹⁵³ Simply put, because disqualification rules require judges to rule on the partiality of their brethren, and often themselves, judicial construction of those rules can be expected to err on the side of the presumption of impartiality.

3. Rules of Litigation Procedure

The law that regulates the way judges decide cases is embodied in procedural rules and statutes that, with exceptions, regulate judicial partiality only indirectly. One obvious exception is state and federal disqualification rules and statutes, which I have already touched upon. A second exception is the judicial oath of office, which, in the federal system at least, is situated among procedural statutes regulating the courts, and pursuant to which judges swear to discharge their duties impartially.¹⁵⁴

More generally, however, the law governing litigation procedure implements an adversarial system by means of rules that manage judicial partiality more subtly. The Federal Rules of Civil Procedure (FRCP) abandoned the complex formalities of common law pleading that had thwarted litigants from getting their cases heard on the merits by, among other things, reducing the multiplicity of common law causes of action to a single civil action,¹⁵⁵ and reducing the plaintiff’s burden of initial pleading to supplying “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁵⁶

The paradigmatic merits determination in suits at common law is the jury verdict, which follows a trial where the judge officiates between adversaries. As previously noted, rigorous procedures seek to ensure the impartiality of jurors as fact finders, as contrasted with judges, who enjoy a more robust presumption of impartiality in their traditional role as umpires on questions of law.¹⁵⁷ While the FRCP afford judges opportunities to decide cases on the merits prior to trial, those

152. JEFFREY SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 69 (1995) (“[T]he survey showed a sensitivity to conflicts of interest and a concern for judicial impartiality”).

153. *Id.* at 1.

154. 28 U.S.C. § 453 (2006) (“I, ____, do solemnly swear . . . that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . .”).

155. FED. R. CIV. P. 2.

156. *Id.* at 8(a).

157. *See supra* note 117–119 and accompanying text.

opportunities are carefully circumscribed to reduce the risk of uninformed, premature judgments that could fairly be characterized as prejudice. Thus, for example, in a defendant's motion to dismiss for failure to state a claim, the judge must accept as true all facts alleged in the complaint, and must err on the side of non-dismissal by construing the complaint liberally and "draw[ing] all reasonable inferences in plaintiff's favor."¹⁵⁸ And at the summary judgment stage, the judge must let the case proceed to trial unless there is "no genuine dispute as to any material fact."¹⁵⁹

At an elemental level, then, the Federal Rules of Civil Procedure and the adversarial process it regulates restrict the authority of judges to act upon their predispositions, prejudices, and personal biases by sharply limiting their opportunities to end cases before the necessary facts can be adduced and the merits explored. Professor Judith Resnik described the underlying problem as one of prejudgment:

Deciding at one point in time versus another is not intrinsically faulty unless the assumption is that prejudgment is based upon incomplete or inaccurate information. Prejudgment is suspect in the context of a system that assumes an increase in information over time and designates specific points in time when the act of judging becomes legitimate.¹⁶⁰

By necessary implication, prejudgment is illegitimate because judges who lack the information needed to make reasoned determinations on the merits must ground their decisions in under-informed speculation that is prejudiced (and hence, partial) by definition.¹⁶¹ Professor Lon Fuller credited the adversarial process with imposing a structure that controls the judge's propensity toward premature decisions grounded in personal predilections:

An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities

158. 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.34(1)(b) (3d ed. 2012).

159. FED. R. CIV. P. 56(a).

160. Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1885 (1988).

161. See *supra* notes 15–19 and accompanying text.

and nuances.¹⁶²

Appellate review operates as another indirect procedural check on partiality. Appellate review is commonly justified in terms of the need to correct lower court errors.¹⁶³ To the extent that such errors were caused by judicial partiality, obviously enough, the appellate process corrects those errors, too.¹⁶⁴ In mandamus proceedings, when partiality leads to errors so egregious as to constitute usurpations of judicial power, circuit courts have sometimes admonished district judges for their lack of impartiality.¹⁶⁵ In addition to reversing erroneous rulings that may have been the product of a partial judge, federal circuit courts of appeal and the U.S. Supreme Court are authorized by statute to remand actions and “require such further proceedings to be had as may be just under the circumstances.”¹⁶⁶ The circuit courts of appeal have construed this as permitting remand to a different district judge when the circuit court is concerned about the impartiality of the judge to whom the case was originally assigned.¹⁶⁷

As noted at the outset of this Section on the procedural dimension of impartiality, judges have a system to run, which operates as a constraint on the application of procedures aimed at curbing partiality to the extent that such procedures are in tension with the “speedy[] and inexpensive determination” of civil actions.¹⁶⁸ Procedures that defer resolution of cases on the merits pending discovery or trial reduce the risk of premature judgment at the expense of protracting proceedings for what may be a very busy court and cost-conscious parties. As elaborated upon in Part IV, the Supreme Court’s recent reinterpretation of pleading standards has made this constraint increasingly salient in the past generation.

162. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).

163. GENE SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 479 (4th ed. 2009) (“One purpose of appeal is to *ensure the correctness* of lower court dispositions.”).

164. At common law, where disqualification for bias was not permitted, appeal was recognized as the primary remedy for parties victimized by judicial partiality. *McCauley v. Weller*, 12 Cal. 500, 523–24 (Cal. 1859) (explaining that jurors are disqualified more readily than judges and that the premature “expression of an unqualified opinion on the merits” will disqualify a juror, but not a judge, because a judge’s decisions are subject to appeal).

165. See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 297–302 (1993).

166. 28 U.S.C. § 2106 (2006).

167. See GEYH, JUDICIAL DISQUALIFICATION, *supra* note 105, at 109–13 (2010) (discussing the circumstances in which circuit courts have reassigned cases to a different judge under § 2106).

168. FED. R. CIV. P. 1.

B. *Regulating Impartiality in the Ethical Dimension*

In the ethical dimension, impartiality is an end in itself for the good judge. The ethics of impartiality are managed primarily by codes of judicial conduct and the disciplinary processes that implement them.

Elaborating on the ways such codes operate in the ethical dimension is simplified by the fact that the Code of Conduct for United States Judges and the codes of judicial conduct for virtually every state judiciary are derived, to varying degrees, from the American Bar Association's Model Code of Judicial Conduct.¹⁶⁹ Conversely, describing the role of the codes is complicated by the different niches the codes occupy in state and federal systems. The Model Code envisions being used in the manner state systems use it: as a guide to judges on their ethical obligations and as a basis for enforcement in disciplinary proceedings if the Code is violated.¹⁷⁰ The federal system, in contrast, uses the Code primarily as a tool for guidance.¹⁷¹ While the Judicial Conference has acknowledged that sometimes Code violations can serve as a basis for discipline,¹⁷² the disciplinary process in the federal system operates independently of the Code and subjects judges to limited forms of discipline for "conduct prejudicial to the effective and expeditious administration of the business of the courts."¹⁷³

Either way, however, codes of conduct intersect with impartiality in the ethical dimension. The preamble to the Model Code declares its goal to "assist judges in maintaining the highest standards of judicial and personal conduct,"¹⁷⁴ and, to that end, the first Canon in the Code directs judges to "uphold and promote the . . . impartiality of the judiciary."¹⁷⁵

The Model Code of Judicial Conduct is replete with rules directing judges to avoid conduct that jeopardizes judicial impartiality in each of the four persistent problem areas described in Part I. In addition to the Code's disqualification rule—which, as previously described, does double duty in the procedural dimension and includes provisions applicable to each problem area¹⁷⁶—additional rules elaborate in more targeted ways on a judge's ethical obligation to avoid specific partiality

169. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 55 (2000) (noting that forty-nine states have adopted some form of the ABA Model Code).

170. MODEL CODE, *supra* note 92, pmb. para. 3.

171. *Id.*

172. See JUDICIAL CONFERENCE OF THE U.S., RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 28 (2008), available at http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf.

173. 28 U.S.C. § 351.

174. MODEL CODE, *supra* note 92, pmb. para. 3.

175. *Id.* Canon 1.

176. See *supra* notes 133–153 and accompanying text.

problems.¹⁷⁷

By virtue of addressing the same partiality problems enumerated in Part I, regulatory mechanisms in the procedural and ethical dimensions undeniably overlap. Some rules in the Model Code explicitly admonish judges to act impartially and to avoid conduct that calls their impartiality into question.¹⁷⁸ If a judge is sanctioned for violating one of these rules in the context of a pending case, the ethical lapse would seem to furnish irrefutable proof that the judge's "impartiality might reasonably be questioned" for parties seeking disqualification, thereby creating a bridge between the ethical and procedural dimensions.

Areas of overlap notwithstanding, impartiality is regarded and regulated differently in the two dimensions. Some conduct that is deemed problematic in the ethical dimension of impartiality is not necessarily problematic in the procedural dimension. There are rules in the Model Code that regulate impartiality less than explicitly, through prophylactic restrictions on judicial speech or conduct that poses an unacceptable risk of real or perceived partiality. For example, the Code directs judges not to "initiate, permit, or consider ex parte communications," and does so because ex parte communications jeopardize impartiality by affording a party one-sided access to the judge, thereby aligning the judge with that party.¹⁷⁹ Another rule

177. Personal conflicts: MODEL CODE, *supra* note 92, R. 2.4(B) (prohibiting financial interests from influencing the judge's conduct); *id.* R. 3.11(B), (C) (prohibiting continuing business relationships with people likely to come before the judge); *id.* R. 3.13 (restricting gifts judges may receive). Relational conflicts: *id.* R. 2.4(B) (prohibiting family and social relationships from affecting a judge's judgment). Political conflicts: *id.* R. 2.4(A), (C) (prohibiting judges from being "swayed by public clamor or fear of criticism," and from allowing political interests or relationships to influence their conduct); *id.* R. 2.2 cmt. 2 (directing judges to "interpret and apply the law without regard to whether the judge approves or disapproves of the law in question"); *id.* Canon 4 (prohibiting judges from engaging in political activities that are "inconsistent with the . . . impartiality of the judiciary"). Bias: *id.* R. 2.3(B) (directing judges to avoid bias and prejudice on the basis of race, ethnicity, sex, sexual orientation, socioeconomic status, etc.); *id.* R. 3.6(A) (prohibiting judicial membership in private organizations that practice invidious discrimination).

178. *See, e.g., id.* R. 1.2 (directing the judge to "act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary"); *id.* R. 2.2 (directing the judge to "perform all duties of judicial office . . . impartially"); *id.* R. 2.11 (requiring disqualification "in any proceeding in which the judge's impartiality might reasonably be questioned"); *id.* R. 2.13 (directing the judge to "exercise the power of appointment impartially"); *id.* R. 3.1 (directing the judge not to "participate in activities that would appear to a reasonable person to undermine the judge's . . . impartiality"); *id.* R. 3.13 (directing the judge not to "accept any gifts, loans, bequests, benefits, or other things of value, if acceptance . . . would appear to a reasonable person to undermine the judge's . . . impartiality"); *id.* Canon 4 (directing the judge not to "engage in political or campaign activity that is inconsistent with the . . . impartiality of the judiciary").

179. *Id.* R. 2.9; JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS 5-1 (4th ed. 2007) (explaining that ex parte communications are prohibited because "the judge may be exposed to

admonishes judges to avoid making “any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending,” which an accompanying comment explains is “essential to the maintenance of the . . . impartiality of the judiciary.”¹⁸⁰ Sometimes, judges who make improper *ex parte* communications or public statements on pending cases are ordered to disqualify themselves,¹⁸¹ but not always. As one treatise has summarized the state of the law: “Out-of-court comments about a pending case, like *ex parte* conversations, are prohibited for other reasons, but they will not be considered disqualifying on the basis of impermissible bias unless they go too far.”¹⁸²

In the ethical dimension, *ex parte* communications (with enumerated exceptions) are categorically improper because of the threat they pose to the judge’s real or perceived impartiality. But in the procedural dimension, such communications do not justify the comparably categorical conclusion that the judge’s impartiality might reasonably be questioned for purposes of disqualification. Rather, the communications must be evaluated case by case to see if they go “too far.” Similarly, public comments on pending cases that are improper in the ethical dimension do not trigger automatic disqualification in the procedural dimension; disqualification is largely limited to bias emanating from an extrajudicial source, because it is to be expected that judges will form views about claims and parties during judicial proceedings. Unless a judge’s public comments reveal extrajudicial bias or an utter incapacity to be fair, disqualification is unwarranted.¹⁸³ Viewed another way, judges who adopt and enforce codes of conduct in the ethical dimension

only one side of an argument or an isolated source of information, to the detriment of the judge’s impartiality”); FLAMM, *supra* note 9, at 374 (“[W]henver a judge initiates or entertains *ex parte* communications, a question may reasonably be raised about his ability to be impartial in disposing of questions germane to the subject of such communications. It is, therefore, ordinarily considered improper for a judge to either initiate or consider such communications during the course of a proceeding, except to the limited extent authorized by law.”).

180. MODEL CODE, *supra* note 92, R. 2.10 & cmt. 1.

181. *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 116–18 (D.C. Cir. 2001) (requiring disqualification for statements to reporters); FLAMM, *supra* note 9, at 374–75 (“[W]here a judge violates this rule [against *ex parte* communications], he is ordinarily obliged to recuse himself from presiding over that proceeding . . .”).

182. ALFINI ET AL., *supra* note 179, at 4-24; *see also* FLAMM, *supra* note 9, at 406 & n.2 (“[T]he fact that a judge has engaged in *ex parte* communications, standing alone, is not necessarily sufficient to warrant disqualification . . .”); LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 27, 29–30 (2d ed. 1986).

183. *United States v. Barry*, 961 F.2d 260, 263–65 (D.C. Cir. 1992); ALFINI ET AL., *supra* note 179, at 4-24 (“Even strong statements made out-of-court about a pending case are not disqualifying if they do not stem from an extrajudicial source and so long as they do not go so far as to show that the judge’s mind is closed.”).

apply prophylactic standards to guide good judges away from conduct that could impugn their impartiality, whereas judges in the procedural dimension are subject to the added constraints of having dockets to manage and a system to administer, which counsels against the application of disqualification rules that are any broader than necessary to assure parties a fair hearing in the case in question.

Conversely, some conduct that is deemed problematic in the procedural dimension of impartiality is not problematic in the ethical dimension. As previously noted, across state and federal systems, disqualification is a matter of ethics and procedure.¹⁸⁴ Even though procedural and ethical disqualification directives are essentially the same,¹⁸⁵ the application of those directives is not. Whereas a judge is subject to disqualification in the procedural dimension when her impartiality might reasonably be questioned, irrespective of the judge's state of mind, she is subject to discipline in the ethical dimension only when non-disqualification is willful—that is, when she knew or should have known that disqualification was necessary.¹⁸⁶ In the procedural dimension, parties are entitled to a fair process featuring an impartial judge, which is a goal that is compromised when the disqualification standard is met. A good judge likewise disqualifies herself when the disqualification standard is met, but good judges make honest mistakes—mistakes made all the more understandable by a separate ethical directive that admonishes judges to decide the cases they are assigned unless disqualification is required—out of respect for the administrative burdens that unnecessary disqualifications pose.¹⁸⁷

The conclusion that erroneous non-disqualification sometimes spells trouble in the procedural dimension before it does so in the ethical dimension is consonant with the more general principle that when judges make honest mistakes, the appropriate remedy is appeal, not discipline.¹⁸⁸ To reverse judges for honest mistakes is salutary; to punish judges for honest mistakes threatens their decisional independence.¹⁸⁹ Although state judges have an ethical duty to “uphold and apply the law,”¹⁹⁰ errors are subject to reversal, not discipline,

184. See *supra* notes 133–135 and accompanying text.

185. Compare 28 U.S.C. § 455, with CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 3C (2011) (showing that rules are almost identical in many respects).

186. ALFINI ET AL., *supra* note 179, at 4-3 (“[A] judge will be subject to discipline (as distinct from reversal on appeal) for incorrectly failing to disqualify himself only where the failure was willful.”).

187. MODEL CODE, *supra* note 92, R. 2.7 & cmt. 1 (directing that judges must “decide [all] matters assigned to the judge, except when disqualification is required,” because of “the burdens that may be imposed on a judge’s colleagues” by “unwarranted disqualification”).

188. ALFINI ET AL., *supra* note 179, at 1-11.

189. *Id.* at 2-4.

190. MODEL CODE, *supra* note 92, R. 2.2.

unless the errors are so egregious or chronic as to manifest bad faith or incompetence.¹⁹¹

Drilling the matter down to the bedrock, impartiality promotes good process in one dimension and good judges in the other. Incursions on perfect impartiality will be tolerable or not, depending on which objective is at issue and the constraints to which the applicable system of regulation is subject. In both dimensions, a judge is often exposed as partial through her speech or associations. In the procedural dimension, the speech and associations of a partial judge have consequences for the process: parties are entitled to disqualification or reversal. In the ethical dimension, such speech and associations have consequences for the judge, who is subject to discipline or (in state systems) removal. A core constraint on the regulation of judicial impartiality through codes of judicial conduct and disciplinary processes, then, is constitutional; codes of conduct seek to preserve impartiality by restricting judicial speech and expressive conduct, which judges and judicial candidates have sometimes challenged as a violation of their First Amendment rights.¹⁹²

When codes of conduct restrict judicial speech on the basis of its content, the restrictions are subject to strict scrutiny.¹⁹³ While promoting judicial impartiality is recognized as a compelling state interest, in the aftermath of the Supreme Court's decision in *Republican Party of Minnesota v. White*, state and federal courts have looked more closely at whether code restrictions on judicial speech promote impartiality with sufficient precision. In *White*, the U.S. Supreme Court invalidated a rule in the Minnesota Code of Judicial Conduct, derived from the 1972 Model Code, which forbade judges and judicial candidates from announcing their views on issues that could come before them as judges, on the grounds that the rule did not further the purported goal of promoting judicial impartiality.¹⁹⁴ In the aftermath of *White*, First Amendment challenges to code provisions that restrict speech for the sake of preserving judicial impartiality have continued apace. Uncertainty abounds. Some courts have invalidated rules that prohibited judges from pledging, promising, or committing to decide future cases in particular ways, while others have upheld them. Some courts have invalidated rules that prohibited judges from soliciting campaign contributions directly from donors, while others have upheld them. And

191. See ALFINI ET AL., *supra* note 179, at 2-4-2-15. In the federal system, the issue is resolved by the disciplinary statute itself, which directs chief judges to dismiss judicial conduct complaints that are "directly related to the merits of a decision or procedural ruling." 28 U.S.C. § 352(b)(1)(A)(ii).

192. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002).

193. *Id.* at 774.

194. *Id.* at 787-88.

some courts have invalidated rules that prohibited judges from engaging in partisan political activities of various kinds, while, yet again, others have upheld them.¹⁹⁵

In the ethical dimension, then, codes of judicial conduct sometimes regulate judicial partiality by prohibiting judicial speech, while in the procedural dimension, a judge's speech is not prohibited, but the baleful effects of that speech on the parties' rights to a fair hearing can be ameliorated by the judicial process. As a consequence, it may be problematic under the First Amendment to reprimand a judge for making statements to the detriment of her perceived impartiality, but not to disqualify her from a case for doing so. Litigants insensitive to this distinction between dimensions have argued that the First Amendment prohibits the disqualification of judges for announcing views they have a First Amendment right to express, and have convinced at least one court that they are right.¹⁹⁶ More recently, however, the Supreme Court has ruled that the right of public officials to speak their minds does not subsume a right to act upon those views in their official capacity,¹⁹⁷ which should put this small piece of the larger dispute to rest.

Regulatory structures in the procedural and ethical dimensions are routinely brought to bear against many of the chronic partiality problems described in Part I, but are ill-equipped to tackle more pervasive problems the public regards as systemic. Part of the difficulty lies in the piecemeal orientation of these mechanisms. Granting this litigant's request for disqualification or disciplining that judge for an appearance of bias does little to allay entrenched suspicions that judges categorically are under the thrall of their political ideology, socioeconomic status, gender, or race. Rules of ethics categorically prohibit judges from becoming so enthralled,¹⁹⁸ and rules of procedure subject individual judges to disqualification when it occurs.¹⁹⁹ But the default position in the ethical and procedural dimensions is to presume that judges are impartial until that presumption is rebutted with demonstrable proof to the contrary. Moreover, rules of ethics and procedure are enforced against judges by other judges, which skeptical observers may regard as so many foxes guarding the henhouse. To address these more diffuse and systemic concerns for the benefit of a

195. Charles Gardner Geyh, *The Criticism and Speech of Judges in the United States*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 257, 271 & nn.52–58 (H.P. Lee ed., 2011) (citing and discussing cases).

196. See James Bopp, Jr. & Anita Y. Woudenberg, *An Announce Clause by Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves for Exercising Their Freedom to Speak*, 55 DRAKE L. REV. 723, 724 (2007); *Duwe v. Alexander*, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007).

197. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 1, 9 (2011).

198. See MODEL CODE, *supra* note 92, R. 2.2 cmt. 2.

199. FLAMM, *supra* note 9, at 274.

public whose confidence in the courts may swing in the balance, regulatory mechanisms in the procedural and ethical dimensions of impartiality are supplemented by an array of devices in the political dimension.

C. Regulating Judicial Impartiality in the Political Dimension

The unifying feature of structures that regulate impartiality in the political dimension is that those structures are implemented by the public or the public's elected representatives for the purpose of promoting the judiciary's institutional legitimacy within the body politic. Such structures are logically subdivided into three categories: (1) mechanisms for judicial removal, (2) mechanisms for judicial selection, and (3) mechanisms for judicial oversight. These structures can be used to enhance the judiciary's legitimacy in a variety of ways that include but are not limited to promoting public confidence in the judiciary's impartiality. For example, judicial removal, selection, and oversight can also enhance the public's faith in the courts by policing judicial honesty, integrity, competence, diligence, and temperament. The focus in this Section, however, is on the ways in which the political dimension regulates the four persistent partiality problem areas outlined in Part I.

The political dimension is uniquely equipped to address partiality problems that citizens and their representatives regard as troublesome, but which judges—who oversee regulation in the procedural and ethical dimensions—do not, or which are otherwise ill-suited for remediation outside of the political dimension because of constraints under which regulation in other dimensions operate. Of particular relevance here are suspicions that broad segments of the judiciary are captured by their biases or political interests, which, despite being concerns of long standing, go largely unaddressed in litigation and disciplinary settings. With respect to the most publicized and pervasive of these public suspicions—that judges allow their ideological interests to subvert the rule of law—regulation in the political dimension manifests an inherent tension, in which one form of partiality is discouraged by encouraging another: public or political branch controls on judicial decision making seek to discourage judges from acting on their internal political interests in ways that could compromise their impartiality, and do so by encouraging judges to respond to political pressure and thereby act on their external political interests in ways that could compromise their impartiality. Insofar as regulation in this arena curtails one form of partiality by exacerbating another to the end of optimizing public confidence in the courts, delegating the task of striking the preferred balance to the public and its elected representatives (subject to the broad constitutional limits outlined below) has intuitive appeal.

This is, in effect, another way of framing the perpetual struggle between the decisional form of judicial independence and judicial accountability, which scholars (myself included) have explored elsewhere.²⁰⁰ There are, however, three reasons to recast this piece of the independence–accountability debate in terms of judicial impartiality. First, the harms that independence and accountability seek to prevent can fairly be characterized as forms of judicial partiality: independence aims to insulate judges from external threats or blandishments that could impair judges’ impartial judgment, while accountability aims to ensure that judges do not allow their internal biases to compromise their impartial judgment. Second, disputants in the independence–accountability debate justify their positions in terms of the need for judicial impartiality: court defenders have objected that threats to remove judges on account of their decisions will undermine judicial impartiality;²⁰¹ court critics have argued that thwarting Senate confirmation of “activist” judges is necessary to ensure that judges impartially uphold the law,²⁰² and defenders and critics alike have rationalized their efforts to subject judges to or liberate judges from political branch controls in terms of the need to promote judicial impartiality.²⁰³ Third, situating the struggle between decisional independence and judicial accountability in a political dimension of impartiality makes it possible to analyze that struggle in a broader context that integrates procedure, ethics, and politics.

1. Mechanisms for Judicial Removal

Removal mechanisms serve as a bridge between the ethical and political dimensions of impartiality. In the federal system, the sole

200. See Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 915–17 (2006) (likening the relationship between judicial independence and accountability to that of yin and yang); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339–40 (1999) (describing independence and accountability as different sides of the same coin).

201. See, e.g., Joan Biskupic, *In Rare Appearance, 2 Justices Concur in Threats to Neutrality*, WASH. POST, Dec. 6, 1998, at A2 (“Several speakers in the weekend conference here said the overall trend [of proposing to impeach judges for their decisions] threatens the impartiality that is the hallmark of the courts and can lead judges to look over their shoulders.”).

202. Sean Lenggell, *Republican Filibuster Blocks Liu for Appeals Court*, WASHINGTON TIMES, May 20, 2011, at A2 (explaining that Senate Republicans filibustered circuit court nominee Goodwin Liu because “Mr. Liu’s legal writings ‘reveal a left-wing ideologue who views the role of a judge not as that of an impartial arbiter, but as someone who views the bench as a position of power’”).

203. See, e.g., Editorial, *Gingrich’s Threats Against Judges Go Way Beyond the Pale*, U.S.A. TODAY, Dec. 20, 2011, at 10A (characterizing proposal to disestablish courts staffed by “activist” judges as antithetical to an impartial judiciary); Tom McClusky, *Rein in Activist Judges*, U.S.A. TODAY, Aug. 2, 2006, at 8A (advocating various political branch controls on the judiciary to preserve impartiality and independence).

mechanism for judicial removal is the impeachment process.²⁰⁴ Impeachment is situated in the political dimension, as I have defined it, by virtue of being a power within the sole authority of Congress to exercise for the redress of “Treason, Bribery, or other high Crimes and Misdemeanors”²⁰⁵—offenses *The Federalist* characterized as “political” in nature and constituting an “abuse or violation of some public trust.”²⁰⁶ Impeachment, however, is logically connected to the ethical dimension too, insofar as conduct that the judiciary deems bad enough to warrant discipline can be bad enough to undermine public trust and warrant impeachment. Accordingly, the ultimate disciplinary sanction that federal statute authorizes the judiciary to impose in the ethical dimension is to refer a matter to the House of Representatives for a possible impeachment inquiry in the political dimension.²⁰⁷

Impeachable offenses do not always implicate judicial partiality—Judge Harry Claiborne, for example, was impeached and removed for tax evasion,²⁰⁸ which impugned his integrity, but not necessarily his commitment to deciding cases without bias or prejudice (except, perhaps, tax evasion cases). Nevertheless, of the few judicial impeachments that have been prosecuted to conclusion, several have concerned judges who, returning to the typology detailed in Part I, allegedly had their impartiality compromised by personal or relational interests in matters that they decided.²⁰⁹

In state systems, the primary mechanism for judicial removal is the disciplinary process.²¹⁰ I have previously situated judicial discipline in the ethical dimension because it is the means by which judicial systems

204. See Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213, 215–18, 220–22 (1993).

205. U.S. CONST. art. II, § 4.

206. THE FEDERALIST NO. 65, at 358 (Alexander Hamilton) (E.H. Scott, ed.).

207. 28 U.S.C. § 351 *et seq.* (2006).

208. VAN TASSEL & FINKELMAN, *supra* note 36, at 168–69 (1999).

209. Judges impeached for personal interests include Judges Robert Archbald, who was impeached and removed for cultivating business relationships with prospective litigants. CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 150 (2006) [hereinafter GEYH, *WHEN COURTS & CONGRESS COLLIDE*]. Alcee Hastings was impeached and removed for soliciting a bribe. EMILY FIELD VAN TASSEL, *WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE 1789 TO 1992* 81 (1993) [hereinafter VAN TASSEL, *WHY JUDGES RESIGN*]. G. Thomas Porteous was impeached and removed for soliciting payment from a lawyer in a pending case. CQ WEEKLY, *supra* note 37. Judges impeached for relational interests include Walter Nixon, who was impeached and removed for perjury after falsely denying that he intervened on a friend’s behalf to secure the dismissal of a case. VAN TASSEL, *WHY JUDGES RESIGN*, *supra*, at 101. Halsted Ritter was impeached, but removed on an omnibus count, for awarding excessive sums to a law partner. GEYH, *WHEN COURTS & CONGRESS COLLIDE*, *supra*, at 151. And George English was impeached and then resigned for, among other things, securing a position for his son with a bank holding bankruptcy funds under the judge’s control. *Id.* at 150–51.

210. ALFINI ET AL., *supra* note 179, at 15-1.

enforce codes of judicial conduct to the end of calling judges to task for bad behavior that subsumes various forms of partiality. Self-policing in this way can simultaneously promote public confidence in the courts, but other mechanisms for judicial removal are more clearly denominated political because they are controlled by non-judicial actors. In addition to impeachment processes, various states employ such removal mechanisms as: the legislative address, which authorizes the legislature to seek the removal of a judge by petitioning the governor; automatic removal of a judge upon conviction of specified crimes, which gives the executive branch a role to play in judicial removal through criminal prosecution; and judicial recall, in which the electorate is enabled to seek the removal of a judge in special elections.²¹¹

Mechanisms for judicial removal in the political dimension operate under the constraint of being cumbersome by constitutional design; these mechanisms authorize political branch encroachments on the tenure, and hence the autonomy, of the judiciary, and their unwieldiness operates as a check against overuse.²¹² For example, removal by impeachment in the federal system and in most states requires an impeachment upon a majority vote by one chamber of the legislature followed by a trial and conviction upon a supermajority vote in the other chamber.²¹³ As a consequence, to the extent that impeachment has been brought to bear as a remedy for judicial partiality, it has been reserved for egregious personal or relational conflicts on the order of corruption or indictable crimes.²¹⁴ In contrast, efforts to characterize highhanded decision making as an impeachable usurpation of power in which the judge's duty to impartially uphold the law is compromised by personal or political zeal have chronically failed.²¹⁵

The role that these removal mechanisms play in policing judicial conduct and promoting public confidence in the impartiality of the judiciary, however, is not necessarily limited to those few cases in which judges are removed by such mechanisms. When a judge is threatened with impeachment, recall, or removal by legislative address, it underscores the seriousness of the speaker's concern and calls public

211. *Id.* at 15-1, 15-5, 15-9–15-12, 15-14–15-15.

212. *Id.* at 15-1–15-2.

213. Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 WIDENER L. SYMP. J. 117, 121 (2000).

214. VAN TASSEL & FINKELMAN, *supra* note 36, at 5–6, 13.

215. Since 1787, the House of Representatives has investigated at least thirty-two judges for high-handed decision making. GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 209, at 119. Of those, four were impeached but only one, John Pickering, was removed. *Id.* at 125. Pickering's conviction is attributed largely to the judge's insanity, not his decision making. VAN TASSEL & FINKELMAN, *supra* note 36, at 92 (“[H]is manifest disability undercut the precedential value his removal had for establishing the validity of the Jeffersonian theory of impeachment.”).

attention to the underlying partiality problem.²¹⁶ Moreover, the threat itself can chasten the judge in subtle and sometimes not so subtle ways. For example, in 1996, United States District Judge Harold Baer reversed his decision to suppress evidence in a drug case after being threatened with impeachment for what House and Senate leaders characterized as an “activist” ruling.²¹⁷ In 2003, a Massachusetts superior court judge resigned after a bill of legislative address was filed because of a sentence she imposed in a kidnapping case.²¹⁸ That same year the Nevada chief justice survived a recall election over her decision in a tax case, but resigned at the end of her term.²¹⁹ Finally, recourse to these mechanisms, even if only as a rhetorical device, offers court critics an opportunity to target more categorical partiality problems. At the start of the nineteenth century, for example, newly elected Jeffersonian Republicans in Congress actively pursued impeachment as a means to purge the judiciary of what they regarded as excessively partisan judges appointed by the predecessor Federalist regime.²²⁰ Nearly two centuries later, newly elected congressional Republicans proposed a campaign to impeach “liberal judicial activist[.]” judges appointed by prior administrations.²²¹ In this way, the threat of removal has been used to address more systemic concerns that judicial impartiality has been compromised by partisan, political interests.

2. Mechanisms for Judicial Selection

In state systems, judges are selected by at least five different means, involving various combinations of governors, commissions, legislatures, and voters.²²² Each of these participants can have a role to play in evaluating a judicial candidate’s past or prospective impartiality as one issue among many in judicial selection. As a practical matter, however,

216. See Charles Gardner Geyh, *The Choreography of Courts–Congress Conflicts*, in *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 19, 32–33 (Bruce Peobody ed., 2011).

217. Don Van Natta, Jr., *A Publicized Drug Courier Pleads Guilty to 3 Felonies*, N.Y. TIMES, June 22, 1996, at 23.

218. See ALFINI ET AL., *supra* note 179, at 15–10.

219. See *id.* at 15–14.

220. VAN TASSEL & FINKELMAN, *supra* note 36, at 91 (discussing Jeffersonian Republicans’ campaign to remove “all of [the judges] . . . indiscriminately”) (internal quotation marks omitted).

221. GEYH, *WHEN COURTS & CONGRESS COLLIDE*, *supra* note 209, at 3.

222. The five systems include: gubernatorial appointment; gubernatorial appointment from a candidate pool selected by a judicial nominating commission (“merit selection”), typically followed by periodic retention elections; partisan election; nonpartisan election; and legislative appointment. See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1263 (2008) [hereinafter Geyh, *Endless Judicial Selection Debate*]. For a summary of which states use what selection methods, see <http://www.judicialselection.us>.

the choices that governors and commissions make to exclude particular judicial candidates are largely inscrutable, and legislatures have primary responsibility for judicial selection in only two states.²²³ That leaves voters, and because 80% of state judges stand for judicial elections of some sort,²²⁴ the role that elections play in policing judicial impartiality is the focus here.

Elections have one foot in judicial selection and the other in judicial removal: in states with contested elections, the net effect of selecting a challenger over an incumbent is to remove the incumbent from office; in states with retention elections, the public's role in judicial selection is limited to deciding whether an incumbent should be removed to make way for a new appointment. Either way, elections serve as a means to police judicial impartiality. For example, candidates have been called to task for their personal interest in making decisions that accommodate the preferences of their campaign contributors,²²⁵ or for their relational interest in presiding over cases in which the judge's relatives had an interest.²²⁶ Perhaps the most common partiality problem to surface in recent judicial campaigns concerns claims that candidates have internal political interests in the issues they will decide as judges that may trump their commitment to follow the law. Examples abound in which judicial candidates have been portrayed by their opponents as activists whose commitment to impartially uphold the rule of law is compromised by their ideological biases on such matters as same-sex marriage, the death penalty, abortion, water rights, and tort reform.²²⁷

It is, of course, possible for judicial candidates to have principled disagreements over the interpretation of constitutions and statutes or the direction of the common law without implicating the impartiality of either candidate. Moreover, serious scholars of judicial behavior have refuted the premise that the rulings judges make are the product of binary choices between law and politics.²²⁸ In the political dimension of

223. Geyh, *Endless Judicial Selection Debate*, *supra* note 222, at 1263.

224. ABA, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS I (2002).

225. See Toby Coleman, *Massey CEO Gives \$1.7 Million to Anti-Warren McGraw Group*, W. VA. CITIZEN ACTION GRP. (Oct. 15, 2004), http://www.wvcag.org/news/fair_use/2004/10_15_a.htm.

226. In a 2007 Wisconsin Supreme Court race, candidate Annette Ziegler was accused (as a court of appeals judge) of presiding over cases in which her husband was affiliated with a corporate party. See Viveca Novak & Emi Kolawole, *Warring Ads in Wisconsin Supreme Court Race: Ziegler and Clifford Sling Mud in the Dairy State*, FACTCHECK.ORG (Mar. 30, 2007), http://www.factcheck.org/judicial-campaigns/warring_ads_in_wisconsin_supreme_court_race.html.

227. Charles Gardner Geyh, *The Criticism and Speech of Judges in the United States*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE *supra* note 57, at 265–66.

228. Lawrence Baum, *Law and Policy: More and Less than a Dichotomy*, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE, *supra* note

impartiality, however, dichotomous debates over the “activist” motivations of judicial candidates are a prominent feature of the landscape in judicial campaigns.²²⁹ If a campaign becomes a referendum on which candidate (or whether a given candidate) is committed to impartially upholding the law in light of her views on issue *X*, then it follows logically that the choices voters make in that election can promote public confidence in the impartiality of the judiciary.

The primary constraint on the capacity of elections to police impartiality concerns the tension alluded to earlier: to the extent that elections promote public confidence in an impartial judiciary by reassuring voters that judges selected will impartially uphold the law as voters understand it, elections do so by means that arguably undermine judicial impartiality in other respects. First, the prospect of electoral defeat is an external interest that can—and in the minds of ardent judicial election proponents, should—influence the judge’s assessment of the law and facts, to the detriment of the judge’s independence and impartiality. Second, competitive elections are fueled by campaign expenditures that create the perception that judges have a personal financial interest in aligning their decisions with contributor preferences. While worries about unaccountable judges run amok have stalled a mid-twentieth century movement among the states to end contested judicial elections,²³⁰ worries about elections run amok have thwarted any movement in the opposite direction.²³¹ Moreover, in heated election campaigns where each side accuses the other of sponsoring an ideological zealot, the conclusion that the electoral process promotes public confidence in the impartiality of the judges selected may be optimistic.²³²

98, at 71 (arguing that the law–policy dichotomy “oversimplifies the reality of judging”); Frank Cross, *Law is Politics*, in *id.* at 92, 110 (arguing that the “complementary effect” of law and politics on judicial decision making is “the strength of our judicial system”).

229. Geyh, *Can the Rule of Law Survive?*, *supra* note 59, at 216–17.

230. Geyh, *Endless Judicial Selection Debate*, *supra* note 222, at 1262 (noting that “the merit selection movement has stalled”).

231. Campaigns have been launched in several states to replace merit selection systems with contested elections. *See id.* To date, however, those efforts have failed. *See History of Reform Efforts: Unsuccessful Reform Efforts*, AM. JUDICATURE SOC’Y, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state= (last visited Dec. 18, 2012); Charles Gardner Geyh, *Judicial Selection Reconsidered: A Plea for Radical Moderation*, 35 HARV. J.L. & PUB. POL’Y 623, 630–31 (arguing for incremental reform of judicial selection “[w]hen, as now, the latest movement has run its course and the political will for fundamental change is absent”).

232. Survey research suggests that contested elections foster general public support for the courts. *See* JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY* 146–48 (2012). That, however, is an issue distinct from whether elections engender confidence in the *impartiality* of the judges so selected.

In the federal system, presidents often identify impartiality as a quality they seek when choosing judicial nominees, while senators rationalize their roles in confirmation proceedings in terms of assuring that judges confirmed will impartially uphold the law.²³³ The Senate has rejected nominees who exhibited financial interests in the cases they decided, the most notable example being President Richard Nixon's failed Supreme Court nomination of Judge Clement Haynsworth, who was voted down in part for presiding over cases in which he held stock in corporate parties.²³⁴ Relational interests have been at issue with nominees portrayed as cronies of the president—President George W. Bush's aborted Supreme Court nomination of his counsel, Harriet Miers, being a recent example.²³⁵

Bias too has arisen as an issue: President Nixon's nomination of Judge G. Harrold Carswell to the Supreme Court was rejected, in part, for evidence of racism.²³⁶ Conversely, President Jimmy Carter launched a campaign to improve the judiciary's institutional legitimacy by diversifying the ranks of the district courts with more women and racial minorities.²³⁷ There are two data points that suggest the possibility of a relationship between such diversification efforts and the judiciary's impartiality in the political dimension. First, the perceived impartiality of a largely white judiciary is much lower among African-Americans than white Americans.²³⁸ Second, a judge's race and gender inform perspectives that influence outcomes in cases of special relevance to members of the affected gender or race.²³⁹ Paradoxically, to acknowledge this relationship openly is to risk overstating it, if the ideal of an impartial judge is one impervious to extralegal influences; witness Justice Sonia Sotomayor's confirmation struggle in the wake of statements she made that a "wise Latina judge" might decide cases differently, and better, than a white male counterpart.²⁴⁰ And so, as Professor Martha Minow has explained, claims that judges and the

233. See Davis, *supra* note 85.

234. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 736 & n.2 (1973).

235. GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 209, at 206.

236. See *id.* at 203.

237. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 243–44 (1997).

238. See DAVID B. ROTTMAN ET AL., NAT'L CTR. FOR STATE COURTS, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY, FINAL REPORT 10 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf>.

239. See Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect On Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 60–61 (2011); Edward A. Adams, *Race & Gender of Judges Make Enormous Difference in Rulings*, *Studies Find*, A.B.A.J., Feb. 6, 2010.

240. Davis, *supra* note 85.

judiciary are “enriched” by the diversity of experience that comes from racial, ethnic, and gender differences are countered by claims that a judge should be “stripped down like a runner” who sheds the biases of his race and gender like so much clothing.²⁴¹

As with elections in state systems, however, the federal appointment process recently fixated on partiality manifested by the ideological orientation of judicial nominees, to the end of purging the judiciary of “activists” or “extremists,” whose internal political interests in case outcomes compromise their allegiance to the rule of law.²⁴² And as with state judicial election campaigns, the campaign against activism waged in confirmation proceedings has transcended attacks on individual nominees and acquired a systemic focus, by seeking to ameliorate a more pervasive suspicion that judges generally capitulate to their ideological biases.²⁴³ Moreover, the countervailing concern is likewise the same: the confirmation process, like the electoral process, is ostensibly aimed at preserving public confidence in the judges so selected, but may—through highly partisan attacks impugning the impartiality of nominees from presidents of both parties—damage the judiciary’s perceived legitimacy.²⁴⁴

From the perspective of social science, the “judicial activist” bogeyman is a cartoonish distortion of reality. The adversarial process presupposes that there is always more than one way to look at difficult legal and factual questions. When the answers to such questions are unclear, honorable judges must, of necessity, exercise discretion—discretion that is informed by their life experience. And the data show that such discretion can be influenced by a variety of factors, including ideology, race, gender, and others.²⁴⁵ Campaigns to purge judicial decision making of ideological influences are thus misinformed or disingenuous. More reasonably conceived, such campaigns seek to ensure that ideological influences on the exercise of judicial discretion will fall within a politically acceptable range. To that extent, selection processes are aimed at producing judges who will be impartial enough to retain public support—and consistent with that objective, survey data in state and federal systems show that public support for the courts remains relatively strong.²⁴⁶

241. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1201 (1992).

242. See GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 209, at 214–21.

243. See *id.*

244. See Geyh, *Can the Rule of Law Survive?*, *supra* note 59, at 232.

245. See *supra* note 239 and accompanying text.

246. See Keith J. Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, in WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE, *supra* note 98, at 306, 310–11.

3. Mechanisms for Judicial Oversight

In the state and federal systems, legislatures have varying degrees of regulatory authority over judicial pay raises, court structure, jurisdiction, budgets, administration, and procedure.²⁴⁷ These tools can afford the political branches a role to play in the procedural and ethical dimensions of impartiality. For example, in the federal system, Congress has enacted legislation governing disqualification²⁴⁸ and procedural rulemaking,²⁴⁹ which structures the manner in which courts regulate impartiality in the procedural dimension. And Congress has also enacted the Judicial Conduct and Disability Act,²⁵⁰ which is a means by which the federal judiciary manages impartiality in the ethical dimension.²⁵¹

At their core, however, mechanisms for legislative oversight of the courts are centered in the political dimension—mechanisms that can be employed, or at least purportedly employed, for the purpose of promoting public confidence in the impartiality of the judiciary. Congress, by virtue of its power to establish inferior courts, has broad regulatory authority over the lower courts.²⁵² To guard against perceived partiality by state judges against out-of-state litigants, Congress has, since 1789, authorized lower federal courts to exercise jurisdiction over cases arising between citizens of different states,²⁵³ and more recently has expanded diversity jurisdiction to provide defendants greater access to federal forums in class actions.²⁵⁴ In 1891, Congress established the circuit courts of appeals to control what congressional committee reports characterized as district court “despotism,” that is, unchecked judicial partiality toward personal or internal political interests that impeded the rule of law.²⁵⁵ Legislation that limits sentencing discretion—statutory minimums, maximums, and sentencing guidelines, for example—curtails the authority of judges to act on their

247. See Charles Gardner Geyh, *The Elastic Nature of Judicial Independence and Judicial Accountability*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 167, 168–71 (Gordon M. Griller & E. Keith Stott, Jr. eds., ABA Press 7th ed. 2002) [hereinafter Geyh, *The Elastic Nature of Judicial Independence*].

248. 28 U.S.C. § 455 (2006).

249. *Id.* §§ 2071–77.

250. *Id.* §§ 351–64.

251. See *id.*

252. Geyh, *The Elastic Nature of Judicial Independence*, *supra* note 247, at 168–69.

253. 28 U.S.C. § 1332(a) (2006).

254. *Id.* § 1332(d).

255. JURISDICTION OF THE COURTS OF THE UNITED STATES, H.R. REP. NO. 50-942, at 3–4 (1888), reprinted in 3 *CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY 1787–1977*, 4543, 4545–46 (Bernard D. Reams, Jr. & Charles R. Haworth eds., 1978); Act of March 3, 1891, ch. 517, 26 Stat. 826.

ideological prejudices.²⁵⁶ And the campaign against judicial activism, which Republican presidential candidates sought to revitalize in the 2012 presidential campaign, has included proposals to discourage partiality toward judges' internal political interests by disestablishing or cutting the budgets of uncooperative courts, freezing judicial salaries, and depriving judges of jurisdiction to hear controversial cases.²⁵⁷ Many state legislatures have undertaken to regulate their respective judiciaries in similar ways toward similar ends by manipulating judicial salaries and budgets and proposing to curtail subject matter jurisdiction and judicial review.²⁵⁸

The authority of legislatures to regulate judicial impartiality through oversight is subject to constitutional and normative constraints. As to constitutional constraints, Article III limits legislative control over judicial tenure and salaries, and the judiciary's exclusive constitutional authority to exercise judicial power bars Congress from overturning judgments by legislation.²⁵⁹ Congress's authority to establish (and by negative implication disestablish) the lower courts does not extend to the U.S. Supreme Court, where congressional authority is limited to making regulations and exceptions incident to the Court's appellate jurisdiction²⁶⁰ and exercising whatever additional powers are implied by the Necessary and Proper Clause.²⁶¹ Many state constitutions grant their judicial systems greater institutional separation and independence than their federal counterpart, which can further limit legislatures' regulatory authority over state court operations.²⁶² As to normative constraints, I have argued elsewhere that over the course of the nineteenth century, Congress gradually internalized judicial independence norms that constrained its political will to control judges and their decision making to the full extent authorized by the U.S. Constitution.²⁶³ The net effect was to render less viable tools seemingly at Congress's disposal to chasten judges whose internal political interests in the outcomes of cases they decided compromised their impartiality.²⁶⁴

256. See GEYH, *WHEN COURTS & CONGRESS COLLIDE*, *supra* note 209, at 268–69.

257. *Id.* at 3–4.

258. Emily Field Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciaries*, in ALFRED P. CARLTON, JR., *JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY* app. E, at 6–10 (2003).

259. See U.S. CONST. art. III, § 1.

260. See *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

261. See *id.* at 233–34; U.S. CONST. art. III, § 2; *id.* art. I, § 8, cl. 18 (defining the Necessary and Proper Clause).

262. Charles Gardner Geyh, *The Elastic Nature of Judicial Independence*, *supra* note 247, at 170.

263. See GEYH, *WHEN COURTS & CONGRESS COLLIDE*, *supra* note 209, at 10–14.

264. *Id.* at 254–55.

IV. PONDERING IMPONDERABLES AND TRACKING TRENDS

Professors Stephen Burbank and Barry Friedman reconceptualized judicial independence with the insight that the judiciary's independence is not monolithic; it has different forms, different meanings, and different applications in different contexts.²⁶⁵ The same may be said of judicial impartiality. Describing judicial impartiality in terms of its procedural, ethical, and political dimensions—each with distinct schemas for regulation that vary across and within jurisdictions—illuminates the relationship between judicial process, ethics, and politics and reveals an architecture for conceptualizing impartiality that solves some of the puzzles introduced in this Article.

A. *The Imponderables Revisited*

This Article began with Lillian Hellman's observation that "[n]obody outside of a baby carriage or a Judge's chamber can believe in an unprejudiced point of view."²⁶⁶ Putting the infants to one side (or at least down for a nap), judges may well "believe" themselves unprejudiced. After all, judges "persistently and adamantly deny that their fact-finding or legal interpretations are motivated by their personal . . . preferences."²⁶⁷ Moreover, even if judges *are* influenced by their prejudices, cognitive psychology offers an explanation, traveling under the name "motivated reasoning," for why judges may be sincere in their belief that they are not so influenced.²⁶⁸ After two millennia of evidence to the contrary, however, it is too late in the day to make categorical claims that judges are literally impartial in the sense of being devoid of prejudice or bias. Hellman made her observation in a book review: unlike fiction writers, she explained, "the historian or biographer . . . must make sure . . . that the people he is writing about

265. See Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence, in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 16–22 (Stephen B. Burbank & Barry Friedman eds., 2002).

266. Hellman, *supra* note 4.

267. C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 147 (1996).

268. Motivated reasoning posits that a decision maker's ideological and other motivations affect her reasoning process in ways that persuade her to favor legal arguments for preferred outcomes. See EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 13–40 (2009) (outlining the theory of motivated reasoning and exploring potential weaknesses); Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry, in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 3, 5 (David Klein & Gregory Mitchell eds., 2010) (summarizing the development of the attitudinal model of judicial behavior); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 541–42 (2004) (exploring motivated reasoning in several contexts where facts were distorted to ensure a desired outcome).

are not the victims of his loving or unloving heart.”²⁶⁹ Thus, even if it is impossible to have an unprejudiced point of view, she concluded, “simply in self-interest, the biographer must try for one.”²⁷⁰ Perhaps the same may be said of judges: even if a completely impartial perspective is unattainable, we must still insist that judges—aided by those who oversee judicial systems—“try for one.” In short, perfect impartiality remains the ideal, while “impartial enough” is the pragmatic objective. That objective is dimension-dependent, in that the impartiality needed to give parties an acceptably fair hearing can differ from that needed to ensure an acceptably ethical judge, which, in turn, can differ from the impartiality necessary to preserve an acceptable degree of public confidence in the judiciary.

Once the inevitability of imperfect impartiality is acknowledged, it becomes possible to unpack the quandary presented by Judge Walker deciding the same-sex marriage case. Insofar as Judge Walker’s perspective is informed by his experience as a homosexual, the same can be said of the heterosexual judge. To the extent that these differences in perspective are characterized as forms of bias that can influence a judge’s interpretation of the Equal Protection Clause in the context of a gay marriage case, they are ubiquitous. And in the procedural dimension of impartiality, which is constrained by the need for an ample supply of judges to decide cases, universal disqualification would be impracticable. Whether a judge is gay or straight, Christian or Jewish, male or female, black or white, may well exert a more significant extralegal influence on judicial decision making in certain kinds of cases than, say, whether the judge owns a few shares of stock in a corporate party. But from a practical perspective, disqualification procedure depends on more or less bright lines and limited applications. Hence, disqualification for stock ownership presents a manageable disqualification rule, while disqualification for affiliation with a given race, gender, ethnicity, or sexual orientation—absent specific statements or conduct indicative of bias in a particular case—does not. Moreover, absent such particularized evidence of bias, the right of parties to an impartial hearing in the procedural dimension is not compromised but arguably furthered by the diversity of perspective that comes from judges with varying backgrounds. If one accepts the premise that there is often no one “correct” answer to many of the difficult questions judges decide, and that the exercise of discretion is therefore inevitable, then as long as a judge’s race, gender, ethnicity, or sexual orientation informs her discretion without overriding her commitment to follow the law, diversity of perspective can level the ideological playing field for

269. Hellman, *supra* note 4.

270. *Id.*

litigants.

Judge Pickering's scenario addresses the flip side of the same coin. A judge's political ideology may influence her decision making to an even greater extent than her race or gender, but like the influence of gender or race, ideology furnishes neither a necessary nor manageable basis for disqualification in the procedural dimension.²⁷¹ The political dimension, in contrast, is unencumbered by the same constraints and is less concerned with ensuring litigants a fair hearing than it is with preserving the public's confidence in the impartiality of its judiciary. Hence, the Senate may challenge the impartiality of nominees in light of racial, gender, or ideological biases that would not call the judge's impartiality into question in disqualification proceedings.²⁷² For example, it is difficult to imagine that Justice Sotomayor could be disqualified from race and gender discrimination cases on the grounds that her impartiality might reasonably be questioned because she once said that her status as a Latina woman influences her decision making.²⁷³ And yet, in confirmation proceedings, the Senate devoted considerable attention to whether that very statement would undermine public confidence in her impartiality to an unacceptable degree.²⁷⁴ The same point can be made of Judge Pickering: ideological predilections that would have little bearing on Judge Pickering's impartiality in a disqualification setting nonetheless called his impartiality into question during his Senate confirmation proceedings.²⁷⁵

The Senate's rejection of Judge Pickering's nomination to the Fifth Circuit underscores how much ideological orientation has to do with a judge's impartiality in the political dimension, where a nominee's commitment to impartially uphold the law is measured with reference to whether the judge's views on legal issues are politically acceptable. In that setting, the judge who shares her views risks undermining her perceived impartiality with the public and being rejected by the Senate for that reason. It is thus understandable that as a nominee Judge Scalia declined to take public positions on issues he was likely to decide as a Justice, on the grounds that doing so could compromise his impartiality.²⁷⁶ Conversely, in *Republican Party of Minnesota v. White*,²⁷⁷ when Justice Scalia opined on behalf of the Court that a judge's predilections on questions of law had nothing to do with his impartiality, he did so in a case that fell squarely within the ethical

271. FLAMM, *supra* note 9, at § 10.7.

272. *See, e.g.*, Davis, *supra* note 85.

273. *Id.*; FLAMM, *supra* note 9, at § 10.3.

274. Davis, *supra* note 85.

275. *See supra* note 8 and accompanying text.

276. *Nomination of Judge Antonin Scalia*, *supra* note 12, at 58.

277. 536 U.S. 765 (2002).

dimension of impartiality.²⁷⁸ At issue was whether the Minnesota Supreme Court's interest in preserving impartiality by disciplining judicial candidates who announced their preexisting legal views trumped the candidates' First Amendment freedom of speech.²⁷⁹ In that setting, Justice Scalia approved one definition of impartiality (lack of bias for or against a party) and possibly a second (open-mindedness), but explicitly rejected a third: "lack of preconception in favor of or against a particular *legal view*."²⁸⁰ With respect to the latter, the Court explained that preexisting views on legal questions were indicative of a good and learned judge, not a partial one.²⁸¹ The Minnesota Supreme Court's ultimate argument was, in effect, that a good judge is an impartial judge is an open-minded judge, and that candidates who announce their views compromise their open-mindedness—an argument the Court rejected on the grounds that the announce clause did not further the state's purported interest in an impartial, open-minded judiciary.²⁸²

Put another way, in the ethical dimension, declining to share one's thoughts on legal questions during judicial campaigns is not a defining feature of an impartial qua ethical judge. It may, however, remain an issue for an impartial qua fair judge in the procedural dimension, insofar as judges who share their views in ways that appear to pre-commit them to decide future issues in specified ways may be subject to disqualification.²⁸³ And in the political dimension, declining to share one's views can be a near-prerequisite for an impartial qua politically acceptable judge. The problem in the political dimension is not that judges who announce their views appear closed-minded to Senators in confirmation proceedings or to voters in judicial elections—although judges who decline to express their views often worry aloud that they do not want to compromise their impartiality in the procedural dimension by appearing to pre-commit themselves before parties have an opportunity to be heard.²⁸⁴ The core problem in the political dimension is that the substance of a judicial candidate's views is fodder for campaigns that attack the candidates as activist or excessive in ways that belie the candidate's commitment to impartially upholding the law. And so, Judge Scalia kept his counsel during confirmation proceedings, and incumbent state judges likewise decline overtures to announce their views in judicial campaigns, notwithstanding their First Amendment

278. *Id.* at 776–77.

279. *Id.* at 768.

280. *Id.* at 775–78.

281. *Id.* at 777–78.

282. *Id.* at 778–81.

283. MODEL CODE, *supra* note 92, R. 2.11(A)(5).

284. *See Nomination of Judge Antonin Scalia, supra* note 12, at 58.

right to do otherwise.²⁸⁵

Which brings us to the problem presented by *Twombly*²⁸⁶ and *Iqbal*,²⁸⁷ in which the Supreme Court has reinvigorated the pleading process by subjecting complaints to dismissal if they do not allege a plausible claim—an assessment that the Court has instructed judges to make with reference to their “common sense” and “experience.”²⁸⁸ By encouraging judges to make plausibility assessments prior to discovery, the Court has weakened a procedural impediment to premature judgment. Insofar as plausibility “may lie in the eye of the beholder,”²⁸⁹ the new standard invites judges to act on their predispositions to the detriment of their impartiality. For example, one recent study confirmed that there has been a statistically significant change in dismissal rates in black plaintiffs’ claims of race discrimination post-*Iqbal*.²⁹⁰

The debate over pleading standards turns on the question of whether the costs and delays of discovery—constraints under which impartiality is regulated in the procedural dimension—trump the benefits of protracting the litigation process to better guard against prejudgment and the perils of judges bringing their prejudices into play at the outset of the litigation. In *Twombly* and *Iqbal*, the Court answered that question in the affirmative. The implication underlying these decisions is not that impartiality is expendable, but that it is expensive, and that a pleading standard that tolerates a bit more prejudgment in exchange for a bit less cost and delay yields a process that is “impartial enough” for the procedural dimension.

B. Trends in the Regulation of Impartiality

The relevance of *Twombly* and *Iqbal* is not limited to their use as a foil for understanding how impartiality is regulated in the procedural dimension. Anger over those decisions piqued congressional interest, a development that is representative of a larger trend. When recent events in the regulation of impartiality are compartmentalized into their applicable dimensions, a pattern emerges that reveals a gradual movement away from regulation in the procedural and ethical dimensions toward regulation in the political dimension.

285. See CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 41 (2009) (finding no statistically significant post-*White* impact on contestation rates in judicial elections).

286. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

287. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

288. *Twombly*, 550 U.S. at 555–56; *Iqbal*, 556 U.S. at 678–79.

289. Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 36 (2010).

290. Quintanilla, *supra* note 239, at 30–42.

Returning briefly to *Twombly* and *Iqbal*, two consequences followed naturally from the Supreme Court's decisions. First, by changing the pleading standards on its own, the Court effectively foreclosed resolution of the question in the procedural dimension by means of the largely intra-judicial Rules Enabling Act.²⁹¹ That is so because, as a practical matter, it is unlikely that the Judicial Conference would challenge the conclusion of its presiding officer, the Chief Justice (who voted with the majority in both cases),²⁹² and nullify *Twombly* and *Iqbal* by promulgating a new rule that could only become effective with the approval of the Supreme Court—the Supreme Court that authored the cases the new rule would overturn.²⁹³ As a consequence, the question of pleading standards reform in the aftermath of *Twombly* and *Iqbal* has moved to Congress in the political dimension, where it has become a hotly contested issue.²⁹⁴ Second, by giving district judges greater latitude to dismiss complaints they deem “implausible” on the basis of their “common sense,” the Court has increased the discretion of judges to act upon their predilections in ways that invite more sustained inquiry into such questions during confirmation proceedings. To date, district judges have largely avoided the highly politicized confirmation showdowns that have plagued Supreme Court and circuit court nominees.²⁹⁵ To the extent that “plausibility” is in the eye of the beholder, however, it may only be a matter of time before the “common sense” of district court nominees is tested in the appointments crucible.

A comparable movement from the procedural to the political dimensions has occurred in the disqualification arena. An ironic impediment to regulating impartiality through rigorous enforcement of disqualification rules in the procedural dimension is that the procedures courts typically follow to implement those rules can compromise the perceived impartiality that disqualification rules seek to promote. In the federal system, and in many states, judges whose disqualification is sought decide the matter for themselves.²⁹⁶ Appellate review is available, but, with rare exception, appellate courts employ a highly deferential standard of review,²⁹⁷ which proceeds from the dubious premise that when deciding whether a judge is or appears to be too biased to hear a matter, we should defer to the assessment of the judge

291. 28 U.S.C. §§ 2071–77 (2006).

292. *Id.* § 331.

293. *Id.* § 2074(a).

294. Videofile: *Has the Supreme Court Limited Americans' Access to Courts?*, U.S. SENATE COMM. ON THE JUDICIARY (Dec. 2, 2009), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da1540e6d>.

295. GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 209, at 214.

296. See ABA Judicial Disqualification Project, *supra* note 133, at 16.

297. *Id.*

who allegedly is or appears to be too biased to hear the matter.²⁹⁸ Moreover, on courts of last resort, judges typically have the first and final word on their own qualifications to sit, and may err on the side of non-disqualification if there is no means to replace them when they withdraw.²⁹⁹ Insofar as being impartial is a defining feature of the “good” judge in the ethical dimension, judges who implement disqualification rules in the procedural dimension would seem to have a personal interest in the outcomes of challenges to their own impartiality. As a consequence, many lawyers have long been reluctant to seek disqualification of judges, who are unlikely to second-guess their own impartiality and who may take umbrage at the suggestion that their impartiality is in doubt.³⁰⁰

For their part, judges have pushed back against efforts to reform disqualification procedure, arguing that such reforms are unnecessary and burdensome—core efficiency concerns that constrain the regulation of impartiality in the procedural dimension.³⁰¹ In 2007, the American Bar Association (ABA) launched the Judicial Disqualification Project, which was aimed at “taking [judicial] disqualification seriously.”³⁰² The Project’s 2008 preliminary report proposed six specific reforms to “diminish or eliminate the need for targeted judges to rule on motions for their own disqualification.”³⁰³ Two draft resolutions followed that sought to implement the recommendations of the draft report,³⁰⁴ but were withdrawn following objections from the ABA’s Judicial Division, among other ABA entities.³⁰⁵ A third resolution proposed simply that “each state should have in place clearly articulated procedures . . . for the handling of disqualification determinations” that “should be designed to produce resolution of disqualification issues that are both prompt and meaningful.”³⁰⁶ Even that, however, drew Judicial Division fire,³⁰⁷ and the call for prompt and meaningful determinations was

298. *Id.* at 16–17.

299. *See, e.g.,* *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 915–16 (2004) (Justice Scalia explained his disinclination to err on the side of disqualification, given the risk of a 4–4 tie on the Court.).

300. Geyh, *Why Judicial Disqualification Matters*, *supra* note 117, at 700–01.

301. ABA Judicial Disqualification Project, *supra* note 133, at 17.

302. *Id.* at 12. I served as Director of and consultant to the ABA Judicial Disqualification Project from 2007 to 2009. The views I express in this Article are mine alone, and not necessarily those of the ABA Judicial Disqualification Project, the ABA Standing Committee on Judicial Independence to which I reported, or the ABA itself.

303. Charles Gardner Geyh, Judicial Disqualification Project, *Report of the Judicial Disqualification Project* 59 (2008) (on file with the author), available at http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report.authcheckdam.pdf.

304. ABA, DISCUSSION DRAFTS (RES.?) (on file with the author).

305. Geyh, *Why Judicial Disqualification Matters*, *supra* note 117, at 727–28.

306. ABA, DISCUSSION DRAFT (July 16, 2010) (on file with the author).

307. Geyh, *Why Judicial Disqualification Matters*, *supra* note 117, at 727–28.

replaced by a fourth resolution, which the ABA ultimately adopted, for “prompt review by another judge or tribunal, or as otherwise provided by law or rule of court, of denials of requests to disqualify a judge”³⁰⁸— which, given the universal availability of appellate review could fairly be characterized as endorsing the status quo.

With efforts to reinvigorate the administration of disqualification rules in the procedural dimension languishing, activity in the political dimension has filled the void. The House Judiciary Committee held hearings on judicial disqualification in 2009 that focused on disqualification procedure.³⁰⁹ A 2009 survey found that over 80% of the public thought that disqualification requests should be decided by a different judge than the one whose disqualification is sought.³¹⁰ Interest groups and the media have tapped into the public’s skepticism of judicial self-disqualification with several highly publicized campaigns to pressure Supreme Court Justices into recusing themselves in high-profile cases. Calls for Justice Scalia’s disqualification in the duck hunting imbroglio of 2004 were followed by campaigns to disqualify Justices Thomas and Elena Kagan from participating in a case challenging the constitutionality of health care legislation, because of alleged conflicts attributable to the activities of Justice Thomas’s spouse on behalf of organizations opposed to the legislation, and Justice Kagan’s role in the development of the legislation while Solicitor General for the Obama Administration. Meanwhile, Justice Stephen Breyer announced his view that disqualification concerns were overblown and that the disqualification of Justice Thomas presented a “false issue.”³¹¹ As previously noted, there are longstanding ethical directives against judges making public statements on pending or impending cases.³¹² That Justice Breyer saw fit to make such statements here simultaneously underscores the diminished status of disqualification relative to other issues in the legal process, and the

308. ABA, JUDICIAL DISQUALIFICATION AND DISCLOSURE RESOLUTION 107 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/judicial_independencereport107_judicial_disqualification.authcheckdam.pdf.

309. *Examining the State of Judicial Recusals after Caperton v. A.T. Massey: Hearing Before the Subcomm. on Courts & Competition Pol’y of the H. Comm. on the Judiciary*, 111th Cong., 1st Sess. (2009), available at http://judiciary.house.gov/hearings/hear_091210_2.html.

310. Lissette Villarruel, *Poll: Public Wants Firewall Between Judges, Election Backers*, GRAVEL GARB (Feb. 23, 2009), <http://www.gavelgrab.org/?p=877> (finding that 81% of U.S. adults thought that a different judge should decide disqualification motions).

311. Robert Barnes, *A Health Law Warm-up Fight for High Court*, WASH. POST, Nov. 28, 2011, at A1 (internal quotation marks omitted).

312. U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(6) (2011) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”), available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx>.

elevated status of disqualification in the political process.

Arguably, the Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*³¹³ revitalized impartiality in the procedural dimension by characterizing non-disqualification in the teeth of probable bias as a Due Process Clause violation.³¹⁴ The impact of *Caperton*, however, is sharply limited by the constraints under which the Due Process Clause regulates judicial impartiality.³¹⁵ As previously explained, such constraints relegate due process challenges to the status of a last resort reserved for nippy days in hell.³¹⁶ The *Caperton* majority emphasized that non-disqualification will violate due process only in outlier cases, when judges exhibit a flagrant probability of bias that inexplicably manages to evade capture by standard disqualification rules—rules that require recusal whenever a judge's impartiality might reasonably be questioned.³¹⁷ In short, the impact of *Caperton* is likely to be largely symbolic.

There is likewise evidence of a gradual movement away from regulation of impartiality in the ethical dimension and toward heightened interest in the political dimension. A primary constraint on the robust operation of disciplinary mechanisms in the ethical dimension is that those mechanisms are implemented by and for judges who are predisposed to presume themselves impartial.³¹⁸ In the federal system, that constraint has rendered the lower federal courts susceptible to criticism that the disciplinary process is underenforced and that the Code is underutilized.³¹⁹ Such criticism has piqued congressional interest, thereby shifting the locus of attention to the political dimension. Thus, in response to the latest wave of concern, the House held oversight hearings on the disciplinary process;³²⁰ members of Congress investigated the conduct of judges whose disciplinary proceedings have stalled,³²¹ with an eye toward possible impeachment; the Chair of the House Judiciary Committee introduced legislation to

313. 556 U.S. 868 (2009).

314. *Id.* at 883–90.

315. *Id.* at 889–90.

316. *See supra* notes 126–130 and accompanying text.

317. *Caperton*, 556 U.S. at 886–90.

318. *See supra* notes 198–199 and accompanying text.

319. *See, e.g.*, Lise Olson, *Judging the Judges: Veil of Secrecy Stirring Calls for Change*, HOUS. CHRON., Dec. 31, 2009, at A1.

320. *The Operations and Federal Judicial Misconduct and Recusal Statutes: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. (2001) (culminating in the proposal of The Judicial Improvements Act of 2002, H.R. 3892, 107th Cong. (2002)).

321. *Impeaching Manuel L. Real, Judge of the U.S. Dist. Court for the Cent. Dist. of Cal., for High Crimes and Misdemeanors: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 90 (2006).

establish an inspector general to investigate disciplinary complaints against judges;³²² and Senators, frustrated by the Judicial Conference's failure to regulate the ethics of judges attending educational seminars at vacation resorts, underwritten by corporations interested in the outcomes of cases those judges decided, introduced bills to ban "junkets for judges."³²³

The Supreme Court, in contrast to the "inferior courts," is not subject to any disciplinary process, other than impeachment, and has no code of conduct to which it has bound itself.³²⁴ Chief Justice Roberts has explained that Justices on the Court do in fact consult the Code just as district and circuit court judges do,³²⁵ which is not the same as saying that they have bound themselves to follow the Code as lower courts have. Thus, for example, Justices Scalia and Thomas were featured speakers at the 2012 annual meeting of the Federalist Society, which would seem to have violated the Code of Conduct as construed by the Judicial Conference.³²⁶ The vacuum created by the absence of a Code to regulate the Court in the ethical dimension has been filled in the political dimension with a campaign launched by the media and interest groups, questioning the ethics and perceived impartiality of individual Justices, decrying the absence of a Code that applies to the Supreme Court, and calling for reform. At the same time, a group of preeminent scholars have called attention to the under-regulation of the Supreme

322. H.R. 5219, 109th Cong. (2006); Bruce Moyer, *Proposals Resurface to Create a Judicial Branch Watchdog*, FED. BAR ASS'N (Mar./Apr. 2011), <http://fedbar.org/Advocacy/Washington-Watch/WW-Archives/2011/MarchApril-2011.aspx>.

323. Fair and Independent Federal Judiciary Act of 2003, S. 787, 108th Cong., 1st Sess. (2003).

324. See Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 111 (2004).

325. Chief Justice John G. Roberts, Jr., *2011 Year-End Report on the Federal Judiciary 2-4* (2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

326. U.S. COURTS, COMMITTEE ON CODES OF CONDUCT, ADVISORY OPINION NO. 46 (2012) ("The Commentary to Canon 4C states that '[a] judge may attend fund-raising activities of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event.' When a judge is chosen to receive an award, it would appear likely that the judge would be either a 'guest of honor' or a 'speaker' at such an event. Additionally, the judge should consider whether the judge's presence is being employed as a device to promote publicity and the sale of tickets."), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>. The annual dinner would seem to be a "fundraising activity" in the obvious sense that the Federalist Society wants revenues from ticket sales to exceed costs, and so will sell as many tickets as possible by promoting the Justices as featured speakers. There are good reasons to relax this restriction (the Model Code has, in Rule 3.7(A)(4)), particularly for Justices on the U.S. Supreme Court whose appearance as featured speakers at such events can enrich public understanding of the Court and its Justices. The point, for purposes here, however, is that Justices Thomas and Scalia felt unencumbered by the Code of Conduct for U.S. Judges, which retains the restriction.

Court in the procedural and ethical dimensions and called for reform.³²⁷

Among the states, *Republican Party of Minnesota v. White* diminished the constitutional authority of state supreme courts and judicial conduct organizations to regulate the political speech of judges in the name of preserving judicial impartiality. Insofar as the ethical propriety of judges appearing to prejudge cases from the campaign stump remains an issue, it is an issue relegated by default to the political dimension.³²⁸ And so, in the post-*White* era, judicial campaigns have featured an awkward ballet, in which interest groups have asked judges to state their views on issues they may decide; and when judges demur, citing impartiality concerns, the groups have sought to make a campaign issue of the judges' intransigence.³²⁹

This trend in the regulation of impartiality that I have sought to isolate—away from its procedural and ethical dimensions and toward the political—yields a new perspective on longstanding, if diffuse, complaints within the legal establishment that the judiciary is being overly “politicized.” It is too late in the day to take calls to “depoliticize” the judiciary seriously, when social science learning and public opinion have converged on the conclusion that judges exercise discretion that is subject to ideological and other political influences.³³⁰ In short, we must recognize that regulation of judges and their impartiality in the political dimension is an inevitability. One may nonetheless worry about excessive politicization, when pieces of impartiality that are arguably better reserved for regulation in the procedural and ethical dimensions are commandeered by the political dimension. For those who share such concerns, the three-dimensional schema proposed here offers a possible path to reform: regulatory recapture by the ethical or procedural dimensions from the political.

One example should suffice. In the past decade, when Congress intruded upon the ethical dimension with threats to legislate against “junkets for judges,” insinuate an inspector general into the judiciary’s disciplinary process, and launch retaliatory impeachment inquiries, the

327. Hon. Joseph R. Biden, Jr. et al., *Four Proposals for a Judiciary Act*, PAULCARRINGTON.COM (Feb. 9, 2009), <http://paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm>.

328. About half the states have adopted a rule in the ABA Model Code that calls for the disqualification of a judge whose public statements “appear to commit” the judge to reaching a particular result in a future case, but that rule does not address the ethical propriety of making such statements in the first place.

329. Terry Carter, *The Big Bopper: This Terre Haute Lawyer is Exploding the Canons of Judicial Campaign Ethics*, 92 A.B.A. J. 31, 32–34 (2006) (characterizing the message sent by questionnaires as: judge, you can no longer hide behind the code of judicial conduct, in light of the U.S. Supreme Court’s decision in *White*, and if you decline to answer what my client constituency wants to know, it will most likely cost you their votes).

330. Geyh, *Can the Rule of Law Survive?*, *supra* note 59, at 244–45.

Judicial Conference responded by retaking the regulatory initiative. Chief Justice William Rehnquist established a Commission to evaluate the disciplinary process, which published a candid and sometimes critical self-assessment that culminated in proposed reforms that the Judicial Conference promptly adopted.³³¹ At the same time, the Judicial Conference Committee on Codes of Conduct revised its advisory opinion on participation in and reimbursement for judicial participation in educational activities to address some of the core concerns underlying legislation aimed at so-called “junkets.”³³² The gambit quieted congressional critics: no legislation was enacted, no formal impeachment investigations progressed, and the regulatory center of gravity remained within the ethical dimension and the Judicial Branch. It is beyond the scope of this Article to develop a normative theory to evaluate which dimension is best suited to take the lead in regulating what impartiality problems. For purposes here, it is enough to note that the interdimensional balance is fluid and subject to negotiation and compromise.

CONCLUSION

Over the course of the past fifteen years, judicial independence has been richly theorized in symposia, books, and articles. This Article represents an initial effort to do the same for judicial impartiality. By reconceptualizing judicial impartiality in three dimensions, and applying this three-dimensional schema across a range of applications, I have sought to situate impartiality at a critical crossroads, where judicial procedure, ethics, and politics meet.

331. THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE, 239 F.R.D. 116, 126 (2006), available at <http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>.

332. U.S. COURTS, COMMITTEE ON CODES OF CONDUCT, ADVISORY OPINION No. 67 (2012), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>.