FOREWORD

JUDGES IN THE 21ST CENTURY: CONFIDENCE LOST?

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Judges and courts are embedded in the functioning of our society and our everyday lives. They decide not only critically important societal issues such as the limits of commercial power and protection of the environment, but deeply personal issues such as who can marry and whether a pregnancy can be terminated. We learn in the popular press or on social media about significant decisions of the U.S. Supreme Court and lower courts, about how judges conduct high-profile trials and pretrial proceedings, and about battles over judicial confirmations and elections. We see fictional judges in literature, on television, and in film. Some of us have personal encounters with courts as parties, witnesses, or jurors or hear others' accounts of their experiences. Any or all of this, and more, shapes our perceptions of justice in America.

The public perception of judges and courts matters because we want to believe that when people are accused of a crime or have a civil dispute, judges will preside fairly, steering the proceedings toward just resolutions. In an ideal world, athletes would blame their losses on their own performances and not the officiating, and likewise, the public would attribute losing verdicts and adverse rulings to the law and facts, not the judging. The public's belief that the courts operate competently, fairly, and neutrally promotes public support for the courts, helping to maintain judicial independence from the other branches of government. Conversely, public dissatisfaction with judges and courts contributes to the weakening of the judiciary, increasing the risk that courts' decisions will be disobeyed, that people will not voluntarily turn to the courts to resolve their disputes, and that people will distrust not only courts, but the entire political system.

Even after decades of research, not enough is known about how the public views most courts. The answers may differ depending on which members of the public and which courts. Recent surveys show declining confidence in the U.S. Supreme Court, perhaps attributable to dissatisfaction with its recent decisions or with some of its members' out-of-court conduct. But that may not affect how one views judges whom one encounters personally in federal district court or state proceedings.[1] Likewise, perceptions of trial court judges may not influence

views of appellate judges or Supreme Court justices. The public's attitudes about courts and judges may be nuanced.

Most of the social science research on the public's views of courts has focused on the U.S. Supreme Court, and some of the lessons that can be drawn from that research are contested. Recent scholarship challenges earlier findings that the public knows very little about the Court.[2] It was once accepted that public support for the Court is relatively stable, but research now suggests that public support may be more malleable than previously believed.[3] Politicians' statements, hyper-politicized media reports, and controversial Court decisions are among the factors that can negatively affect the public's views of the Court.[4]

Personal experiences, among other factors, shape the public perception of lower courts.[5] The works of Tom Tyler and others concerning litigants' attitudes toward judicial proceedings show that if litigants perceive themselves to have been treated respectfully and fairly and to have had an opportunity to be heard, they are more likely to accept the results of court decisions.[6] Especially for unrepresented civil litigants such as low-income individuals in divorce, housing and consumer debt cases, judges likely play a central role in shaping the perception of whether proceedings were fair. Black litigants have more negative attitudes towards the courts (in both civil and criminal matters) than their White counterparts and perceive significantly more procedural injustice.[7]

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1. Confidence in these courts may be somewhat higher. One recent survey indicates that 60% of respondents have a great deal or some confidence in their state courts and 57% have confidence in federal courts, although these numbers are also declining. *State of the Courts: 2022 Poll*, NAT'L CTR. FOR STATE COURTS, (2022), https://www.ncsc.org/__data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf [https://perma.cc/7F66-G6EU].

2. James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 439 (2009); Francisco I. Pedraza & Joseph Daniel Ura, *Latinos' Knowledge of the Supreme Court*, 9 J. L. & COURTS 27, 43 (2021).

3. *Compare, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 J. POL. SCI. 635, 659 (1992), *with* James L. Gibson, *Losing Legitimacy: The Challenges of the* Dobbs *Ruling to Conventional Legitimacy Theory*, AM. J. POL. SCI., https://doi.org/10.1111/ajps.12834 (forthcoming 2024); Michael Nelson & Patrick D. Tucker, *The Stability and Durability of the Supreme Court's Legitimacy*, 83 J. POL. 767, 770–71 (2021).

4. Miles T. Armaly, *Who Can Impact the US Supreme Court's Legitimacy?*, 41 JUST. SYSTEM J. 28–29, 31–32 (2020); Michael J. Nelson & James L. Gibson, *How Does Hyperpoliticized Rhetoric Affect the US Supreme Court's Legitimacy?*, 81 J. POL. 1512, 1512–13 (2019); Matthew P. Hitt & Kathleen Searles, *Media Coverage and Public Approval of the U.S. Supreme Court,* POL. COMMUNIC'N 566, 579–80 (2018).

5. *See, e.g.*, Jamie G. Longazel et al., *Experiencing Court, Experiencing Race: Perceived Procedural Justice Among Court Users,* 1 RACE & JUST. 202, 205 (2011).

6. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 49–57, 123–29 (2002); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 217, 227–29 (2007); Tom Tyler*, Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284–86 (2003).

7. *See* Longazel et al., *supra* note 5, at 214–15; *see also* Cassandra A. Atkin-Plunk, Jennifer H. Peck

The methods of selecting judges, whether by election or appointment, are intended to promote confidence in judges' qualifications, as are central features of how courts operate, such as the openness of court proceedings and the tradition of writing opinions on significant questions. Yet these can be double-edged swords. High-pitched political battles over judicial selection, unrestrained contributions to judicial elections, critical media accounts of judges' courtroom conduct, and acerbic dissenting opinions can undermine public confidence in judges' competence, fairness, and impartiality. So, too, can judges' off-the-bench conduct that suggests that they will not be neutral arbiters.

For obvious reasons, there is a value to identifying, and encouraging, practices that promote public confidence and to identifying, and discouraging, practices that undermine public confidence. To some extent, this may mean promoting a better public understanding of what judges do, and defending judges from unfair attacks, so that the public will not mistrust courts undeservedly. To some extent, this means reviewing courts' current efforts to promote public confidence and considering whether more can be done so that judges better deserve the public trust.

To be clear, courts are already taking steps to improve public trust. They have worked to increase access to justice for individuals who cannot afford a lawyer by encouraging lawyer *pro bono*, providing courthouse self-help resources, and in some jurisdictions, allowing non-lawyers to provide *pro se* litigants with limited legal advice. They have approved mediation programs, special community courts, and drug courts that are designed to address the root problems that bring people to court in the first place and that are more likely to make individuals feel that they have been treated fairly and that their needs are addressed.[8] Courts have developed their own programs to educate the public about what they do, and in some states, created mechanisms for responding to misinformation and attacks.[9] There is no question, however, that to bolster public confidence in the courts, much more remains to be done.

This Foreword introduces articles published in this issue of *Law and Contemporary Problems* that seek to advance the discussion of why public confidence in courts and judges is eroding and how it can instead be enhanced. Although the articles collected here largely address these concerns in the context of federal courts, which are a small minority of our country's courts, many of their

& Gaylene S. Armstrong, *Do Race and Ethnicity Matter? An Examination of Racial/Ethnic Differences in Perceptions of Procedural Justice and Recidivism Among Problem-Solving Court Clients,* 9 RACE & JUST. 151, 167–68 (2018) (reporting that Black criminal defendants had significantly lower perceptions of procedural justice in problem-solving courts than White defendants).

8. *See, e.g.*, *National Community Court Initiative*, CTR. FOR JUST. INNOVATION (2023), https://www.innovatingjustice.org/national-community-court-initiative [https://perma.cc/NUJ7-YR9C].

9. *See, e.g.*, *Distance Learning: Civics for Civic Engagement in the Federal Courts*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/distance-learning-civics-civic-engagement-federal-courts [https://perma.cc/DZ94-ZY99]; Task Force on Countering Disinformation, *Concluding Report*, ARIZ. SUP. COURT 7 (Mar. 1 2022), available at https://www.azcourts.gov/Portals/74/DisinformationTaskForceConcludingReport2022_1.pdf [https://perma.cc/25H4-X7MP].

insights are generalizable to state courts.

In his article, Charles Gardner Geyh explains the recent history and political maneuvering, starting in the 1980s, that have brought us to this moment of deep concern about the public's loss of confidence in the U.S. Supreme Court and the lower federal courts.[10] As he notes, we often refer to a loss of "legitimacy" to describe this declining public confidence, and social scientists regularly use this term to measure public support for the courts. But as Geyh explains, the term has multiple meanings that produce such complications in its measurement and application that we would do better to jettison the term. Instead, he argues that the critical inquiry should be whether and to what extent the public believes that the judiciary retains the authority to govern. He proposes a measurement scale that moves on a continuum from mere "disagreement" with a decision, on one end, to "disband" on the other, that is, where the public deems the court to be unsalvageable and believes that it should be abolished. Drawing on the social science literature, Geyh explains that that the public loses faith in a partisan court that is perceived as political and self-interested. He also notes that public confidence in judges and courts may be diminished when judges are perceived as acting unethically. He argues that public trust in the unelected federal judiciary is bolstered by mechanisms that hold judges accountable for deviations from their rule of law mission. Like some of the other authors, Geyh suggests various reforms to increase public confidence in courts.

Controversial decisions have sometimes undermined public confidence, at least among members of the public who sympathize with the losing side. Luke Norris argues that court decisions resistant to the regulatory state are among those contributing to declining public confidence in the judiciary.[11] This piece is particularly timely as the Supreme Court has just overturned the 40-year-old *Chevron* doctrine.[12] Like Geyh, Norris begins with a historical perspective, explaining how judicial resistance to the regulatory state helped to turn the tide away from New Deal liberalism and towards neoliberalism, which is characterized by faith in market arrangements and skepticism about governmental intervention. Norris details numerous ways in which, starting in the 1970s, (mostly) Republican judges have undermined the regulatory state by undercutting the possibility of robust implementation and enforcement of regulatory law. He argues that this shift occurred due to deliberate strategies of the conservative legal movement to shape law students, lawyers, and judges with strong pro-market and anti-regulatory views. They did this, for example, by funding law-and-economics scholars who helped make these views a part of mainstream legal education. He contends that the perception that judges are biased towards powerful economic actors and against parties like workers and

10. Charles Gardner Geyh, *To Legitimacy and Beyond: A Reform Agenda to Restore Public Confidence in the Federal Courts*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 1.

11. Luke P. Norris, *Judges and the Regulatory State: Trends of Resistance and Restraint,* 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 31.

12. Loper Bright Enterprises v. Raimondo, No. 22-451, slip. op. (U.S. Sup. Ct. June 28, 2024).

consumers can undermine faith in the judiciary and the rule of law. Norris looks to law schools to help address this anti-regulatory shift. Taking a page from the conservative movement, he suggests how deliberate changes in legal education, including the rise of modern law and political economy approaches (which seek to develop a deeper understanding of inequality and how power works in markets) can help produce lawyers and judges who think differently—and more positively—about the regulatory state.

Drawing on lessons from social psychology, Jeffrey Rachlinski and Andrew Wistrich take a different approach and look at how state and federal courts treat non-binding precedent.[13] As they note, reliance on precedent is a bedrock principle of our legal system, and public support for the courts depends, in part, on the public's perception that courts are following their own rules. "Courts that ignore other courts send a strong signal to the public that they are not playing by their own rules." At the same time, it is not necessarily reasonable or desirable for judges to rely on non-binding precedent, because doing so may simply perpetuate the previous courts' mistakes. There may be a benefit to giving legal issues a fresh look and not assuming that earlier courts got it right. Social psychologists have demonstrated, however, that people rely heavily on what other people do to decide how to behave ("the imitation heuristic"), and that individual decision making can be excessively—and wrongly—influenced by groups. Do judges fall into this trap? Using experiments with state judges and federal magistrate judges that test for this psychological phenomenon, the authors find that a single precedent had little influence over judges; that judges tended to follow three consistent precedents; and that precedent following occurred somewhat less when judges learned that three courts had decided one way and a fourth court had decided another. The authors conclude that the imitation heuristic had much less influence on judges than one might have supposed. They explain why this treatment of non-binding precedent appears sensible but note that the judiciary's legitimacy would be enhanced if judges followed non-binding precedents more frequently than their experiments suggest that judges do.

Turning to the question of who becomes a judge and how, four co-authors—Matthew Baker, Christina Boyd, Jennifer Hickey, and Adam Rutkowski—examine the evolution of the process for selecting, reviewing and confirming federal judicial nominees, including the central importance of politics and how it intersects with race and gender.[14] They observe that although always political by design, the judicial selection process has become even more politicized in response to the increased emphasis on lower courts' policymaking function. Drawing on data from the Federal Judicial Database from 1987 to 2022, the co-

13. Jeffrey J. Rachlinski & Andrew J. Wistrich, *The Psychology of Persuasive Precedent*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 53.

14. Matthew E. Baker, Christina L. Boyd, Jennifer Hickey & Adam G. Rutkowski, *How the Politics of Federal Judicial Selection Affect Judicial Diversity and What This Means for Public Confidence in Courts*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 85.

authors found that although President "Obama prioritized gender and racial diversity over ideological preferences," most presidents have selected nominees who were deeply engaged in political activities on behalf of the president's party. A preference for judges who previously demonstrated a strong partisan or ideological commitment, they suggest, advantages white men, who are more likely to be politically engaged and part of a political network. In addition, despite the "professed objectivity" of the American Bar Association, its evaluations of judicial candidates have been both ideologically biased and "bias[ed] against female nominees, nominees of color, and nominees with 'nontraditional' legal backgrounds." Further, the Senate confirmation process treats female nominees and nominees of color less welcomingly than white men, at least at the Supreme Court level, and possibly at the lower court level. The article concludes that establishing a diverse, representative judiciary would promote public confidence in the courts, but that racial and gender biases, along with the centrality of nominees' political views in the selection process, undermine this objective.

Susan Fortney addresses the judicial workplace—in particular, the federal judiciary's response to allegations of sexual harassment, gender-based discrimination, and other workplace misconduct by judges in federal courthouses.[15] What the Supreme Court once said of the police might equally be said of federal judges—namely, that there is a "deep-rooted feeling that [they] must obey the law while enforcing the law."[16] For the public to have confidence that federal judges fairly apply employment and civil rights laws to parties in civil lawsuits, the public must believe that judges take these laws seriously as applied to their own and their colleagues' conduct. Fortney describes how the federal judiciary, responding to misconduct allegations, has strengthened some aspects of self-policing in recent years. The federal judiciary's reforms largely focus on formal aspects of its "ethical infrastructure" regarding how standards of conduct are communicated and monitored. At the same time, however, Fortney identifies the "absence of consequences for wrongdoers, limitations on remedies, the difficulties in navigating the internal complaints processes, and the lack of public accountability" as serious deficiencies in the federal judiciary's exclusive reliance on self-regulation to protect federal judicial employees from harassment and discrimination. The federal judiciary has invoked judicial independence to justify resisting proposed legislation that extends the protections of antidiscrimination laws to federal judicial employees. Were it to support the proposed legislation, rather than invoke judicial exceptionalism to avoid judges' accountability for workplace misconduct, the federal judiciary would inspire greater confidence in its commitment to both obeying the law and fairly enforcing it.

Veronica Root Martinez examines the insistence on self-policing and judicial

15. Susan Fortney, *The Role of Accountability in Preserving Judicial Independence: Examining the Ethical Infrastructure of the Federal Judicial Workplace*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 119.

16. Spano v. New York, 360 U.S. 315, 320 (1959).

exceptionalism on the part of the Justices on our highest court.[17] As her article describes, after much resistance, the Justices adopted a code of conduct in 2023 in response to questions raised publicly about the propriety of virtually every sitting Justice's conduct. The new code immediately drew criticism both because compliance was not mandated—even its disqualification provisions say only that the Justices "should" comply—and because, consequently, there is no enforcement mechanism. While welcoming the new code as a good start, Martinez argues that the Justices must do more to build public confidence that they are conducting themselves ethically. Justices' mere technical compliance with rules is not enough, she says, because rules cannot always capture normative expectations. She urges Congress to enhance the Justices' disclosure obligations—for example, regarding the largesse they receive from wealthy friends with political interests—so that public officials and the public can more effectively review and evaluate the Justices' conduct. Further, she proposes that Congress establish a public body, such as an independent ethics commission, to conduct investigations and evaluations of Justices' most highly questionable conduct to determine whether serious departures from established rules and standards warrant a Justice's impeachment.

Focusing on the increasing public perception that judges are merely "politicians in robes," Bruce Green and Rebecca Roiphe argue that judges' self-regulation is the best way to assure the public that judges are working in a nonpartisan manner, employing traditional modes of interpretation, and otherwise comporting with professional expectations of political neutrality.[18] Their article emphasizes that judges are expected to possess and project a "professional identity": a nonpartisan approach to judging that offsets judges' unavoidable political preferences and inclinations. To promote public confidence, the article posits, judges must reinforce, not undercut, the appearance that they are nonpartisan. Judges are limited in their ability to do so. They cannot avoid presiding over, and deciding, politically significant cases, or avoid the inevitable effects of ideological commitments on their work. However, judges can avoid politicizing administrative aspects of their job, such as the selection of law clerks, and even more importantly, they can avoid extrajudicial conduct that is, or would fairly be perceived as, partisan. Although some commentators advocate stricter regulation, Green and Roiphe argue that judges should principally engage in self-restraint to promote a "professional identity devoted to neutral values." They note that self-restraint is important, in part, because rules cannot adequately capture the complex analysis that should determine whether particular social interactions, professional engagements, or other extrajudicial activities with a partisan valence are overly partisan.

Shifting from a focus on ways that judges can increase confidence in courts,

17. Veronica Root Martinez, *Supreme Impropriety? Questions of Goodness and Power,* 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 147.

18. Bruce A. Green & Rebecca Roiphe, *Public Confidence, Judges, and Politics On and Off the Bench*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 183.

Leslie Levin considers the role that bar associations can play in helping to maintain public confidence in the judiciary.[19] In her article, she describes how modern U.S. bar associations have worked to bolster public confidence in courts over the last 150 years. While some of these efforts have focused directly on improving judges and judicial procedures, they have also occasionally included public statements that defend judges or courts from criticism. More recently, some bar organizations have adopted written protocols to define when it is appropriate to defend courts from unjust criticism. Levin discusses evidence from social scientists indicating that unjust attacks by high-ranking public officials can reduce public support for courts and suggests when it might be appropriate for a bar organization to respond to a public official's criticism of a judge or court. She notes, however, that these efforts may have limited impact on the public—especially those with deeply partisan views—and may be most important for communicating disapproval to the speaker. She also contends that although it is not comfortable or easy to do so, bar organizations should publicly criticize courts when courts fail to correct mistakes that seriously undermine public support for the judiciary.

Together, the articles in this collection demonstrate that public confidence in the judiciary is crucially important but not easily secured, and that the question of how best to secure it is multi-faceted, complex, and not easily answered. The public perception is shaped not only by how judges appear to conduct their work in court but by who judges are and how they are selected, how they conduct themselves as employers and administrators, and how they comport themselves in professional and personal activities outside of judging. It is also shaped by factors largely beyond courts' control, including politicians' statements and media narratives. Although there is already a substantial literature on the courts, our hope and expectation are that these articles will contribute meaningfully to the ongoing scholarly conversation and perhaps even have a positive influence on judges' and others' thinking and conduct.

19. Leslie C. Levin, *Mere Words: The Role of Bar Organizations in Maintaining Public Support for the Judiciary*, 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 213.