TO LEGITIMACY AND BEYOND:

A REFORM AGENDA TO RESTORE PUBLIC CONFIDENCE IN THE FEDERAL COURTS

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I

INTRODUCTION

In 2017, the Federal Judicial Center (FJC) invited me to deliver the keynote address to several hundred district judges at workshops on the east and west coasts, where I talked about the influence of ideology on judicial decision-making. In conversations afterward, several groups of judges took pains to emphasize (corroborative of a point I had made in my remarks) that while judges often had partisan, political backgrounds, they underwent an assimilation that neutralized those allegiances after they ascended the bench. Without disputing that they retained different philosophies and ideological predilections that influenced their decision-making at the margins, they did not self-identify as partisans. They were not Bush judges or Obama judges. They were simply judges.

In 2022, the FJC invited me back to do it again. The world encircling the federal courts had become more divisive, partisan, and nasty in the intervening years. The federal courts were under heightened scrutiny, and I was asked to address how the judiciary might best negotiate this new, perilous terrain. The conversations I had with judges after my talk were noticeably different than those five years earlier. The nonpartisan ethos that the judiciary had cultivated for itself, while still a source of pride, was under stress. The judges with whom I spoke were concerned. They regarded their deeply rooted, nonpartisan culture as essential to their self-identity and to preserving public trust in the courts, and were keen to protect it.

My experience at those workshops was a catalyst for this Article, which

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explores whether recent developments have imperiled public confidence in the federal courts and, finding that they have, proposes reform. Part II discusses the ongoing cycle of anti-court sentiment directed at the federal courts. It situates that cycle in historical context, to the end of explaining why such cycles have come and gone and how, during those periods, independence norms have helped to constrain more draconian efforts to curb the courts. I then explain why the latest cycle is unusually aggressive and why norms that have protected the judiciary's independence for generations may be at risk if public skepticism of the courts reaches the point of undermining the judiciary's perceived authority to govern.

Part III sorts through the definitional clutter that complicates assessments of whether the current cycle of hostility is diminishing the courts' "legitimacy"—a term that social scientists and commentators have deployed as the tipping point when public faith in the judiciary falters. I propose to avoid the confusion that legitimacy talk perpetuates by thinking about the public's confidence in the judiciary's authority to govern as a matter of degree, along a "public confidence continuum."

Part IV summarizes recent data on the impact of developments recounted in Part II. The data show that confidence in the Supreme Court has declined across the public confidence continuum. Extrapolations from that data support the inference that the lower federal courts are likewise at risk.

To restore public confidence in the courts, Part V proposes a preliminary, pragmatic, principled, and intra-judicial reform agenda, informed by the social science synthesized in Part IV. The agenda is preliminary, in that it aims to identify discussion-worthy reforms without bogging down in the details. It is pragmatic, in that it can be implemented by the bench and bar, without the need to overcome practical barriers to constitutional amendments or legislation in a polarized, gridlocked, and hyper-partisan age. It is principled, in that I propose no court-curbing measures that would encroach upon longstanding independence norms—although more aggressive incursions on judicial autonomy may be inevitable if public confidence continues to degrade. And it is largely intra-judicial because the agenda seeks to reinvigorate norms responsible for perpetuating a court culture that pushes back against the partisanship that undermines public confidence in the judiciary's authority to govern—norms that the judiciary itself is best positioned to protect and promote.

II

THE CURRENT CYCLE OF ATTACKS ON THE FEDERAL COURTS IN HISTORICAL CONTEXT

Cycles of anti-court sentiment have arisen throughout U.S. history.[1] They have typically spiked in periods of political transition, when a new regime ascends

1. Charles Gardner Geyh, *The Choreography of Courts-Congress Conflicts*, *in* THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC 19, 19–20 (Bruce Peabody ed., 2011).

to power, and rulings by holdover judges of the old regime provoke public anger.[2] These periods of antipathy have been punctuated by proposals to curb courts in different ways, via judicial impeachment, court-packing, court disestablishment, jurisdiction-stripping, budget-slashing, ending life tenure, or constraining judicial review.[3]

In the modern era, court-curbing proposals have struggled to gain traction in Congress.[4] Cycles of court-directed animus have been constrained by independence norms that have evolved over time and entrenched a measure of respect for the judiciary's autonomy.[5] Consequently, temporary majorities seeking to control the courts have been opposed by court defenders. Backed by long-respected norms against such ploys, court defenders have thwarted the attacks.

The capacity of institutional norms to promote customary respect for the judiciary's independence has been augmented by the courts themselves, which have acted strategically to reduce the risk of backlash by choosing not to decide. Such non-decisions include: declaring matters nonjusticiable, applying rules of construction to avoid resolving unnecessary constitutional questions, and declining petitions for certiorari to circumvent or postpone resolution of heated controversies.[6] Sometimes, the Court has defused looming showdowns by approaching hot-button cases in a spirit of comity, deferring to Congress or the president in ways that avoid constitutional confrontations.[7]

The result has been to preserve a "dynamic equilibrium" between judicial independence and accountability.[8] The extent to which Congress has used and abused the courts to advance its political agendas has thus been contoured and constrained by independence norms augmented by the courts' strategic self-restraint.[9]

The fuse for the latest major cycle of court-focused hostility was lit during the Trump administration and exploded with President Biden's transition to power. President Trump's appointment of three Justices to the Supreme Court gave Republicans the solid conservative majority they had struggled to achieve for the

2. *Id*. (identifying seven such periods of "political realignment").

3. Charles Gardner Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 159 (2003).

4. CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 4–5 (2006) [hereinafter "WHEN COURTS & CONGRESS COLLIDE"].

5. *Id*. at 51–111; Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 544 (2018); Charles Gardner Geyh, *Customary Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 160, 160–84 (Stephen Burbank & Barry Friedman eds., Sage Press 2002).

6. WHEN COURTS & CONGRESS COLLIDE, *supra* note 4, at 224–35.

7. *Id*. at 235–37; BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE 11 (2020).

8. WHEN COURTS & CONGRESS COLLIDE, *supra* note 4, at 253–82.

9. *Id.* This dynamic equilibrium may therefore be viewed in the broader context of American Political Development theory. *See* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken Kersch eds., 2006) (explaining the relationship between Congress and the Supreme Court).

preceding forty years. In the 1980s, the Office of Legal Policy in President Reagan's Department of Justice developed a blueprint for a major rightward pivot in American constitutional law, to be implemented via the appointment of ideological conservatives to the federal bench.[10] During the intervening decades, a pitched partisan battle ensued, starting with Senate Democrats' campaign to reject President Reagan's conservative Supreme Court nominee, Robert Bork.[11]

In this protracted struggle for control of the Supreme Court and lower federal courts, longstanding procedural conventions that regulated the appointments process were abused and abandoned. The nomination and confirmation of federal judges has always been partisan. But procedural conventions—including, among others, blue slip protocols, cloture rules, and timely committee hearing schedules—had long served to promote consultation, deliberation, consensus, and compromise in confirmation proceedings.[12] In the aftermath of the Bork rejection, however, both parties beat these ploughshares into swords to obstruct nominations of the opposing party's president, which elicited counter-campaigns to disarm obstructionists by amending the procedures.[13] This downward spiral culminated in Senate Republicans denying Merrick Garland, President Obama's nominee to succeed Justice Scalia on the Supreme Court, the Committee hearing and vote he would customarily receive.[14] They later exercised the so-called "nuclear option" to deny Senate Democrats the power to filibuster President Trump's three Supreme Court nominees, which enabled the nominees' confirmations by slender margins along nearly straight party lines.[15]

These developments set the stage for a new hyper-aggressive cycle of anger by progressives directed at holdover justices and judges of the Trump administration. First, President Trump's appointment of Justices Gorsuch, Kavanaugh, and Barrett had been enormously consequential—a complete triumph for President Trump and Senate Republicans, who had prevailed in their party's forty-year campaign to tip the ideological balance on the Supreme Court.[16] Second, this ideological pivot occurred in a period of regime flux, when the American public was

10. Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 389–99 (2003); Cass Sunstein, *The Right-Wing Assault*, THE AM. PROSPECT (Feb. 19, 2003), https://prospect.org/article/right-wing-assault [https://perma.cc/ RP9S-RC53].

11. David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900, 915–16 (1990).

12. Charles Gardner Geyh, *Judicial Independence at Twilight*, 71 CASE W. RES. L. REV. 1045, 1071–72 (2021).

13. *Id.* at 1079–80.

14. Erick Trickey, *The History of "Stolen" Supreme Court Seats*, SMITHSONIAN MAG. (Sept. 25, 2020), https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/.

15. Seung Min Kim, Burgess Everett & Elana Schor, *Senate GOP Goes "Nuclear" on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 3:01 PM), https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937#:~:text=Senate%20Republicans%20invoked%20the%20%E2%80%9Cnuclear,clearing%20a%2060%2Dvote%20threshold.

16. Ron Elving, *How the Supreme Court's Conservative Majority Came to Be*, NPR (July 1, 2023, 10:00 AM), https://www.npr.org/2023/07/01/1185496055/supreme-court-conservative-majority-thomas-trump-bush.

deeply divided, polarized, and angry.[17] Third, the victory had been won via procedural maneuvering that angry Democrats decried as hypocritical and unfair.[18] Fourth, Trump-appointed justices and judges were nominated by a president who never won the popular vote and were confirmed by a Republican Senate majority that represented a minority of the voting public.[19] For so momentous a shift in the balance of power on the Supreme Court to be orchestrated via procedural gamesmanship by a president and Senate majority that represented a minority of the electorate was especially galling to supporters of the incoming Biden administration.[20]

Fifth, the newly constituted Court quickly became a lightning rod for controversy. Given pervasive anti-Court agitation, past practice might have led one to anticipate that the Supreme Court would shield itself from backlash by taking a cautious approach to implementing the ideological pivot. But the Court's new conservative majority wasted no time in getting to work. In short order, the Supreme Court ended abortion rights; invalidated gun control measures; weakened the regulatory authority of the administrative state; made aggressive use of its emergency docket, issuing stays, injunctions, and summary orders that imposed the Court's views on the merits of cases in advance or in lieu of formal opinions preceded by briefs and oral argument; and completed its transformation from a common law court guided by precedent and stare decisis to a code court guided by a conservative strain of textualism and originalism.[21] Adding fuel to the fire, all nine justices became the subjects of news reports that questioned their conduct and ethics.[22] Responding to these reports, an unrepentant Supreme Court issued

17. Amber Hye-Yon Lee, *Social Trust in Polarized Times: How Perceptions of Political Polarization Affect Americans' Trust in Each Other*, 44 POL. BEHAV. 1533–34 (2022).

18. Min Kim, *Senators Engage in Bitter Floor Feud Over Barrett Nomination to Supreme Court*, THE WASHINGTON POST (Oct. 23, 2020, 4:37 PM), https://www.washingtonpost.com/politics/senate-barrett-supreme-court-trump/2020/10/23/468fb45e-1547-11eb-82af-864652063d61_story.html.

19. Sarah Begley, *Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count*, TIME MAG. (Dec. 20, 2016, 4:38 PM), https://time.com/4608555/hillary-clinton-popular-vote-final/; Ronald Brownstein, *Small States are Getting a Much Bigger Say in Who Gets on Supreme Court*, CNN (July 10, 2018, 6:01 AM), https://www.cnn.com/2018/07/10/politics/small-states-supreme-court/index.html.

20. Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, NEW YORK TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html; Lawrence Hurley & Andrew Chung, *Democrats Raise Doubts About Trump's High Court Nominee Gorsuch*, REUTERS (Mar. 20, 2017, 3:44 PM), https://www.reuters.com/article/usa-court-gorsuch/democrats-raise-doubts-about-trumps-high-court-nominee-gorsuch-idUSL2N1GX1JG.

21. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 3–5 (2015). file:///Users/hannahfogel/Downloads/SSRN-id2545130.pdf; Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 70–72 (2022); *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

22. Domenico Montanaro, *Justice Thomas Gifts Scandal Highlights "Double Standard" for Ethics in Government*, NPR (Apr. 24, 2023, 5:00 AM), https://www.npr.org/2023/04/24/1171343472/justice-thomas-gifts-scandal-highlights-double-standard-for-ethics-in-government**;** Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, THE NEW YORKER (Jan. 21, 2022), https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court**;** Justin Elliott, Joshua Kaplan & Alex

a statement opposing ethics, discipline, and disqualification reform.[23]

Sixth, the lower federal courts have become increasingly steeped in partisan controversy. Judicial selection has morphed from a sleepy, patronage system governed by "senatorial courtesy" to an ideologically driven free-for-all that has come to resemble the process for Supreme Court appointments.[24] En banc review in the circuit courts has been weaponized in partisan ways.[25] District courts have flexed their power by issuing nationwide injunctions in politically charged cases.[26] And litigants have exploited single-judge divisions to avoid random case assignments and shop for ideologically compatible judges.[27]

Lower federal court judges have also come under fire for their conduct and ethics. Two circuit judges were criticized for announcing that they would not hire

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Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court**;** Josh Gerstein, *Justice Alito Denies Allegation of a Leak in 2014 Case About Access to Birth Control*, POLITICO (Nov. 20, 2022, 12:07 AM), https://www.politico.com/news/2022/11/20/justice-alito-birth-control-leak-allegations-2014-supreme-court-00069603; Julia Conley, *"Shady and Corrupt": Add Barrett Real Estate Deal to List of Supreme Court Ethics Scandals*, COMMON DREAMS (June 22, 2023), https://www.commondreams.org/news/coney-barrett-real-estate-deal; Nicholas Reimann, *Chief Justice John Roberts' Wife Made Over $10 Million as Legal Consultant, Report Says*, FORBES MAG. (Apr. 28, 2023, 5:40 PM), https://www.forbes.com/sites/nicholasreimann/2023/04/28/chief-justice-john-roberts-wife-made-over-10-million-as-legal-consultant-report-says/?sh=12f259f71e9a**;** Greg Stohr, *Ketanji Brown Jackson Book Deal Joins Trendy Supreme Court Side Hustle*, BLOOMBERG (Jan. 7, 2023, at 9:00 AM), https://www.bloomberg.com/news/articles/2023-01-07/ketanji-brown-jackson-memoir-joins-roster-of-image-buffing-supreme-court-books; The Associated Press, *Justice Sotomayor's Staff Urged Schools and Libraries to Buy Her Memoir or Kid's Books*, NPR (July 11, 2023), https://www.npr.org/2023/07/11/1187005372/sonia-sotomayor-supreme-court-staff-book-sales-signings-memoir; Letter from 2,400+ Law Professors to the U.S. Senate (Oct. 4, 2018) (available at https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html) (arguing that the partisan tenor of Justice Kavanaugh's confirmation testimony "did not display the impartiality and judicial temperament requisite to sit on the highest court of our land"); Mattathias Schwartz, Jack Newsham, & Katherine Long, *Buying Face Time: A Secret Invite List Shows How Big Donors Gain Access to Supreme Court Justices,* BUSINESS INSIDER, (July 24, 2023), https://www.businessinsider.com/aspen-institute-donors-supreme-court-justice-elena-kagan-brett-kavanaugh-scotus-ethics-2023-7 (questioning Justice Kagan's role as featured speaker at Aspen Institute fundraiser); Jessica Schneider & Tierney Sneed, *Justice Neil Gorsuch's Property Sale to Prominent Lawyer Raises More Ethical Questions*, CNN (April 25, 2023), https://www.cnn.com/2023/04/25/politics/gorsuch-property-sale-lawyer-ethics/index.html**.**

23. Supreme Court, Statement on Ethical Principles and Practices (Apr. 25, 2023), https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450ea024d/full.pdf. The Court did, however, later relent to the limited extent of adopting a code of conduct. *See infra* note 82 and accompanying text.

24. *See* Geyh, *supra* note 12, at 1093-96 (describing how "[l]ongstanding procedural conventions in judicial confirmation proceedings have collapsed.").

25. *See* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 NYU L. REV. 1373–77, 1428 (2021) (detailing how, beginning in 2018, en banc decisions have started to split along partisan lines).

26. Andrew Hammond, *The D.C. Circuit as a Conseil D'état*, 61 HARV. J. LEGIS. 46 (forthcoming 2024).

27. Perry Stein, *The Justice Department's Fight Against Judge Shopping in Texas*, THE WASHINGTON POST (Mar. 19, 2023), https://www.washingtonpost.com/national-security/2023/03/19/judge-shopping-justice-protests-texas/.

Yale Law School graduates as law clerks because of the school's "woke" culture.[28] A disciplinary complaint was filed against a Trump-appointed district judge in Florida for rulings in a criminal prosecution of former President Trump that had allegedly exhibited favoritism and incompetence.[29] The *Wall Street Journal* reported that over 130 federal judges violated the federal disqualification statute by presiding over cases in which they had financial conflicts of interest.[30] Over 200 conservative judges attacked the Judicial Conference Code of Conduct Committee's draft of an ethics advisory opinion that cautioned judges against membership in the Federalist Society on the grounds that the draft manifested double standards and liberal bias.[31] And after former President Trump was indicted in federal and state courts and found liable for sexual abuse in a state civil action, his political allies assailed the administration of justice in sweeping terms as "weaponized," and infected with liberal bias.[32]

The foregoing developments have led court observers to worry about declining confidence in the courts and what it signifies.[33] Notably, these developments have provoked a debate over whether the Supreme Court and lower federal

28. Nate Raymond, *Trump-Appointed Judge Boycotts Yale for Law Clerks Over "Cancel Culture,"* REUTERS (Sept. 30, 2022, 11:09 AM), https://www.reuters.com/legal/government/trump-appointed-judge-boycotts-yale-law-clerks-over-cancel-culture-2022-09-29/ ; Nate Raymond, *2nd Trump-Appointed Judge Publicly Says She Will Not Hire Yale Clerks*, REUTERS (Oct. 10, 2022, 3:10 AM), https://www.reuters.com/legal/government/2nd-trump-appointed-judge-publicly-says-she-will-not-hire-yale-clerks-2022-10-07/. More recently, several federal judges announced plans to boycott clerkship applicants from Columbia in light of how the university responded to anti-Israel protests. Greg Wehner, *Group of Conservative Judges Vows not to Hire Columbia University Students Due to Anti-Israel Protests,* Fox News, May 7, 2024, https://www.foxnews.com/politics/group-conservative-judges-vow-not-hire-columbia-university-law-students-due-anti-israel-protests.

29. Charlie Savage, *"Deeply Problematic": Experts Question Judge's Intervention in Trump Inquiry*, THE NEW YORK TIMES (Sept. 5, 2022), https://www.nytimes.com/2022/09/05/us/trump-special-master-aileen-cannon.html

30. Michael Siconolfi, Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Dozens of Federal Judges Had Financial Conflicts*, WALL STREET JOURNAL (Apr. 27, 2022, 7:30 PM), https://www.wsj.com/articles/dozens-of-federal-judges-broke-the-law-on-conflicts-what-you-need-to-know-11632922140?page=1.

31. Letter to Robert P. Deyling in response to Advisory Opinion No. 117, accessed at: https://drive.google.com/file/d/1hLKrEVcFIC1sJaPdilqt3M34ZJjlq-t2/view?pli=1 (last visited Jan. 15, 2024).

32. *See* Tim Reid, *Donald Trump Indictment: Senior Republicans Rally Behind Former President*, REUTERS (March 31, 2023, 8:35 AM), https://www.reuters.com/world/us/senior-republicans-rally-behind-trump-after-criminal-indictment-2023-03-30/ (quoting Speaker of the House Kevin McCarthy: "our sacred system of justice has been weaponized"); Nathan Layne, *2024 Republican Hopefuls Rebuke Justice Department, Not Trump After Indictment*, REUTERS (June 9, 2023, 5:20 PM); Nathan Layne, *2024 Republican hopefuls rebuke Justice Department, not Trump after indictment*, REUTERS (June 9, 2024 5:20 PM), https://www.reuters.com/world/us/trumps-republican-rivals-criticize-weaponization-doj-after-indictment-2023-06-09/ (quoting Senator Tim Scott: "Today we see a system of justice in which the scales are weighted"); Kelly Garrity & Nancy Vu, *Hill Reactions: Several Republicans Are Unfazed by Trump's Sex Abuse Verdict*, POLITICO (May 9, 2023, 6:46 PM), https://www.politico.com/news/2023/05/09/lawmakers-react-trump-verdict-00096034 (quoting Representative Markwayne Mullin, that it is "very difficult" for Trump to get a fair trial "in any of these liberal states").

33. For an insightful article developing some of these same themes, see Bruce Green & Rebecca Roiphe, *Public Confidence and Politics On and Off the Bench,* 87 LAW & CONTEMP. PROBS., no. 1, 2024, at 183.

courts are losing "legitimacy"[34]—a term that disputants have framed as the ultimate consequence of declining public confidence, and that social scientists have deployed as a term of art when measuring public support for the courts.

III

TO LEGITIMACY AND BEYOND

Legitimacy is a word that struggles to get out of its own way. Its problems begin with the fact that legitimacy has at least three meanings,[35] each of which is, for want of a better modifier, legitimate.

First, in law, legitimacy derives from the Latin "*legitimare*," meaning to make lawful or something that is "legal because it meets the specific requirements of the law."[36] Richard Fallon thus theorizes that a court is illegitimate in the legal sense if it resorts to interpretative methods that are not generally accepted within the legal culture.[37]

Second, in moral philosophy, legitimacy concerns whether an institution or regime "is worthy of recognition."[38] A court that upholds the laws of a genocidal regime—Nazi Germany for example—lacks moral legitimacy, even if it does so by means of interpretive methods consonant with legitimacy in the legal sense.[39]

Third, in social science, legitimacy concerns "the belief that a[n]…institution…has the right to govern."[40] Tom Tyler elaborates, "Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just."[41] Social scientists frame the inquiry in positive rather than normative terms: a court is legitimate if the public believes that the court has the authority to govern, regardless of whether the court is worthy of that belief in the philosophical sense.

In the context of an article on public confidence in the courts, social science's

34. Zachary B. Wolf, *The Supreme Court is Fighting Over Its Own Legitimacy*, CNN POLITICS (September 29, 2022, 6:17 PM), https://www.cnn.com/2022/09/29/politics/supreme-court-legitimacy-what-matters/index.html; The Associated Press, CHIEF JUSTICE JOHN ROBERTS DEFENDS THE SUPREME COURT – AS PEOPLE'S CONFIDENCE WAVERS, NPR (September 10, 2022, 11:05 AM), https://www.npr.org/2022/09/10/1122205320/chief-justice-john-roberts-defends-the-supreme-court-as-peoples-confidence-waver.

35. RICHARD FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT (2018).

36. *Legitimacy*, Vocabulary.com, https://www.vocabulary.com/dictionary/legitimacy (last visited June 28, 2023).

37. FALLON, *supra* note 35, at 35–36.

38. Joachim Blatter, *Legitimacy*, Britannica, (Dec. 17, 2018), https://www.britannica.com/topic/legitimacy.

39. FALLON, *supra* note 35, at 21–24. *See also*, H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71, HARV. L. REV. 593, 613 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660 (1958).

40. Ian Hurd, *Legitimacy*, Encyclopedia Princetoniensis (last visited June 29, 2023), https://pesd.princeton.edu/node/516.

41. Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. OF PSYCH. 375, 375 (2006).

focus on the public's trust in court authority is front and center,[42] which limits ambiguities created by other definitions. Nevertheless, three complications persist.

First, legitimacy in the legal and philosophical senses remains relevant to the analysis, insofar as it explains increased or decreased public confidence in court authority. For example, a court's lack of legal or philosophical legitimacy could explain a decline of public confidence in that court's authority.[43] Conversely, a court's lack of legal or philosophical legitimacy could explain an increase of public confidence in that court if the court issues rulings that win public support by derogating unpopular laws or enabling an immoral but beloved regime.[44]

Second, to the extent that social scientists aspire for their work to inform discussions outside the academy, they do themselves no favors by perpetuating the use of a term with multiple meanings that confuse everyone but themselves. In public debate, one disputant can brand a court illegitimate because its rulings undermine basic human decency; a second can counter that the court is legitimate because its rulings follow established legal precedent; and a third can take issue with the other two, arguing that the court's legitimacy turns on whether the public will accept and acquiesce to its rulings. Every disputant would be correct, and every member of the audience would be bumfuzzled.

Third, social scientists have encountered difficulties operationalizing their own definition. The prevailing approach among political scientists, beginning with the influential work of David Easton, is to equate legitimacy with "diffuse"—as distinguished from "specific"—support for the judiciary.[45] Specific support concerns public support for a court's specific "outputs." These outputs—particular rulings a court makes or other actions it takes—ordinarily do not alter public support for the judiciary's authority to govern, and thus, do not affect its legitimacy.[46] In contrast, diffuse support is "a reservoir of favorable attitudes or good will" that enables members of the public "to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their

42. *See* Nathan Carrington, *Saving This Honorable Court: Supreme Court Legitimacy and Support for Court Reform* (July 2022) (Ph.D. dissertation, Syracuse University) (SURFACE), https://surface.syr.edu/cgi/viewcontent.cgi?article=2547&context=etd (characterizing Tyler's definition of legitimacy as "widely accepted").

43. *See* James Gibson, *Losing Legitimacy: The Challenges of the Dobbs Ruling to Conventional Legitimacy Theory*, AM. J. OF POL. SCI. (forthcoming), (attributing loss of Supreme Court legitimacy following the supreme Court's opinion in *Dobbs* to moral outrage).

44 *See* Tara Grove, *Book Review: The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2249–50 (2019) (arguing that sociological legitimacy can be in tension with legal legitimacy).

45. DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965); David Easton, *A Re-assessment of the Concept of Political Support*, 5 BRITISH J. OF POLI. SCI. 435, 436-37 (1975). For a fine elaboration on the contours of legitimacy as social scientists use the term, see 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.

46. James Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?* 59 AM. J. OF POLI. SCI. 162, 164 (2015).

wants."[47] Unlike specific support, diffuse support can bear directly on public faith in the courts' authority to govern and therefore their legitimacy. Proceeding on the assumption that diffuse support is coextensive with support for the status quo and opposition to institutional reform, political scientists operationalized diffuse support as an "unwillingness to make or accept fundamental changes in the functions of the institution."[48]

There is a certain logic to saying that diffuse support for an institution is belied by support for reforming that institution in fundamental ways. But equating public support for institutional reform with a decline in the institution's perceived authority to govern, and thus its legitimacy, has been contested. Political scientists Nathan Carrington and Colin French rightly note that people may "want to reform the institution . . . precisely because they realize the legitimacy that the Court has in society and would like to wield it for their own policy goals" or "because they seek to preserve or bolster the Court's legitimacy."[49]

To avoid problems with measuring court legitimacy with reference to the public's views on institutional reform, Carrington argues that legitimacy should be reframed as whether the public has a "felt obligation" to comply with court rulings.[50] For him, "[t]he Court's legitimacy derives . . . from the fact that when the Court yells 'jump!' much of the public says, 'how high?', even if they are still willing to increase the number of justices who yell."[51] The state of felt obligation, he adds, can best be operationalized by asking people whether they think they should "comply with decisions by the Court" or "pressure politicians to comply."[52]

On a theoretical level, Carrington's skepticism of public support for an institution's status quo as a proxy for legitimacy and his proposal to replace institutional support with felt obligation are spot on. From a policy perspective, however, waiting to signal a decline in legitimacy until the public repudiates court rulings and defies court orders may delay notification until the damage is irreversible.[53] By analogy, explosive pyroclastic flow is a more certain indicator of volcanic eruption than the early warning signs of earthquakes, ground depressions, or smoke plumes—which may culminate in nothing. But volcanologists can be forgiven for erring on the side of caution and sounding the alarm after more tentative indicators of impending eruption are detected to ensure that the community will be extra safe, not extra crispy.

The objective, then, is twofold. First, avoid confusion associated with myriad

47. EASTON, *supra* note 45, at 273.

48. James Gibson, Gregory Caldeira, & Vanessa Baird, *On the Legitimacy of National High Courts*, 92 AM. POLI. SCI. REV. 343, 348 (1998).

49. Nathan Carrington & Colin French, *Mechanisms, Measurements, and Manifestations in Evaluating the Effects of Confirmation Hearings on Supreme Court Legitimacy*, 103 SOC. SCI. Q. 1290, 1293 (2022).

50. Carrington, *supra* note 42, at 14-16

51. *Id.* at 19.

52. *Id*. at 20.

53. As the saying goes, trust takes years to build, seconds to break, and forever to repair.

definitions of legitimacy. Second, assess the state of public confidence in the courts' authority with reference to a spectrum of answers that include early warnings when public belief in court authority begins to waiver.

To these ends, I jettison the term legitimacy from the remainder of this Article. Among scholars, public officials, journalists, and pundits of good faith, the multiplicity of definitions promotes confusion, imprecision, and digressive squabbling over terminology. Among those of less than good faith, it encourages disingenuous exploitation of ambiguity by twisting an opponent's intended definition mid-argument to obfuscate and score points.

In the context of an article on public confidence in the American judiciary, the critical inquiry remains whether and to what extent the public believes that the judiciary retains the authority to govern. A court's moral authority to govern and the extent to which its decisions are compatible with the rule of law, or legitimacy in the philosophical and legal senses, remain relevant only insofar as they bear on public attitudes toward the courts.

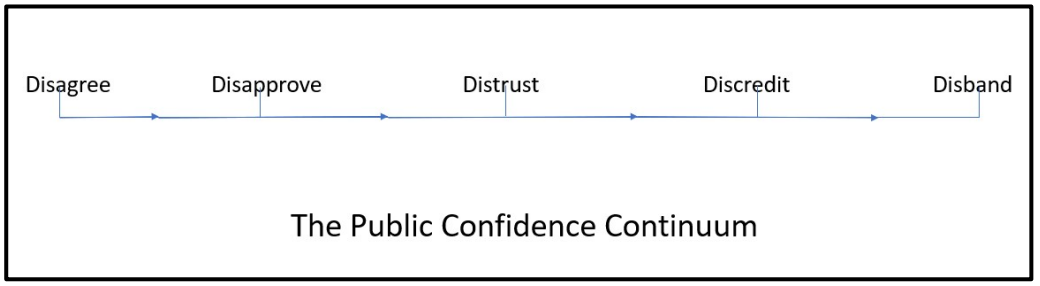
Preserving public confidence in the courts' authority is important for three reasons. First, in Machiavellian terms, the public's continuing faith in the courts preserves the judiciary's hold on power. As Tyler explains, when people believe in the courts' authority, they "feel that they ought to defer to decisions . . . voluntarily out of obligation rather than out of fear of punishment or anticipation of reward," without which, James Gibson notes, courts will find their authority contested.[54] Second, promoting voluntary acquiescence to judicial rulings is more efficient, sparing government the costs of enforcement.[55] Third, as a matter of democratic theory, insofar as the government's authority to rule in a representative democracy derives from the consent of the governed, that consent is threatened when resort to force is routinely required to secure public acquiescence to court orders.[56]

The task for social science is how to measure the public's belief in the courts' authority to govern, given the difficulties with using opposition to institutional reform, or felt obligation, as proxies. An alternative tack is to situate the inquiry on a continuum that takes a more encompassing approach to the ways in which diminished public confidence in the courts' authority can manifest.

54. Tyler, *supra* note 41, at 375; JAMES L. GIBSON & MICHAEL NELSON, BLACK AND BLUE: HOW AFRICAN AMERICANS JUDGE THE U.S. LEGAL SYSTEM 7 (2018).

55. Carrington, *supra* note 42 at 7–8.

56. Andrew Tripodo, *Acquiescence and Consent in Democratic Theory*, J. OF POL. INQUIRY (2014).



A five-point continuum would look something like the illustration above. At one end is disagreement with court rulings or other conduct. Disagreement connotes a lack of specific support for the decisions in question that does not, by itself, signal a decline in the court's perceived authority to govern. But persistent disagreement with rulings over time—or outrage over a single, highly consequential decision—may erode public confidence in the court itself, as political scientist David Easton, who first distinguished between specific and diffuse court support, theorized.[57]

Adjacent to disagreement on the continuum is disapproval of the court for making given rulings or engaging in other controversial conduct. Unlike simple disagreement with decisions that the public regards as mistaken, disapproval denotes that a court's ruling or other conduct was so wrong—morally, legally, or otherwise—that the public respects the court less.

Distrust of the court is one click past disapproval on the continuum. Disapproval conveys disappointment in the court for reaching a given result or behaving in a particular way, which does not necessarily signal diminished faith in the court's continued authority to govern. At some point, however, the cumulative effect of multiple disappointments, or a single, major disappointment, can lead to deepening distrust of the court itself. At this juncture, confidence in the court degrades from generalized to contingent—from diffuse allegiance to the court as an institution, to what Stephen Burbank has called, "what have you done for me lately?" support,[58] where public confidence in the court swings with the popularity of the court's latest ruling. Corroborative of distrust, one might anticipate emerging support, not just for institutional reform of the courts generally, but reform oriented toward curbing judicial discretion and autonomy.[59]

A discredited court is next to last on the continuum. A discredited court is more than distrusted. Its reputation and credibility are so badly damaged that the

57. Easton, *Re-assessment*, *supra* note 45, at 445.

58. Stephen Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 916 (2006).

59. Carrington & French, *supra* note 49, at 1292.

public's felt obligation to respect court rulings is lost. The public may urge defiance of a discredited court's rulings. But defiance is not inevitable if, in the public's view, the court's residual power renders defiance unlikely to succeed or too costly to attempt.

Finally, the logical endpoint on the continuum is disband. When a discredited court is so far gone that the public deems it unsalvageable, abolishing that court is the remedy of final resort.

In the context of surveys that assess the state of public confidence in the courts, the most straightforward application of this continuum would be to ask respondents whether they support a given court, court ruling, or court-related development and if not, why? Because they disagree with what the court has done? Because they disapprove of the court and respect it less, given what it has done? Because, considering what the court has done, they no longer trust its judgment when it makes decisions with which respondents disagree? Because they discredit the court and feel no obligation to comply with its rulings? Because they think the court is irretrievably broken and should be disbanded? Check all that apply. Note that this approach does not assume people are knowledgeable of or think deeply about courts and their decisions. It assumes only that if presented with facts about recent rulings or other court-related developments, people will express a range of feelings about those developments that can elucidate the state of their confidence in the courts' authority.

Brandon Bartels and Christopher Johnston share my frustration with the confusion inherent in legitimacy talk and use public support for court-curbing as a proxy.[60] Court-curbing is a subset of institutional reform that constrains a court's independence in the literal sense. Whether support for such constraints reflects meaningful doubts about the court's authority, however, depends on the nature of the constraint and the reasons that underly the support. If the public wants to do away with the Supreme Court altogether, it is probably indicative of a Court in crisis. If it wants Congress to override the Court's interpretation of a statute, it may be indicative of nothing more than a system in good repair. Moreover, reasons matter. If survey respondents support Supreme Court term limits because they regard the Court as an ossified cabal of jurists who cannot be trusted to wield power, it reveals their diminished diffuse support for the Court's authority to govern. But respondents may support term limits merely because they think that infusing the Court with fresh blood will make a good Court even better, because trusted friends favor term limits, or just because. In short, support for court-curbing is a useful measure, but only if we understand the spectrum of reasons that underly it.

60. Bartels & Johnston, *supra* note 7, at 20–23.

IV

FACTORS BEARING ON THE COURTS' PERCEIVED AUTHORITY TO GOVERN

Part III sought to circumvent discursive quarrels over the meaning of legitimacy and enable measurement of public confidence in the courts' authority to govern on a continuum. The net effect is to permit wider consensus that given developments reflect diminished public confidence along the continuum, despite lingering disagreement over the magic moment when legitimacy is lost. In this part, I bring that continuum to bear, with a summary of what Carrington and French characterize as "the growing chorus of evidence" that the public's belief in the Supreme Court's authority "is not as stable as conventional wisdom suggests."[61] Extrapolating from that data, I explain why this growing instability may also extend to the lower federal courts.

Gibson differentiates between elected state judges, whose authority to govern derives primarily from their accountability to voters, and unelected federal judges, whose authority derives primarily from public trust in their legal expertise.[62] For reasons elaborated upon later, this dichotomy is overdrawn, insofar as federal judges are subject to other forms of accountability that can augment public confidence in their legal expertise. But the essential point remains that public confidence in the federal judiciary turns on the perception that judges are legal animals, not political ones, who are committed to the rule of law, rather than partisan agendas, and whose relative independence from political and popular control enables them to uphold, rather than flout, the law.

Bearing down on recent data relevant to public confidence in the Supreme Court, sixty-two percent of the public support abortion rights, and fifty-seven percent of the public disagreed with the Supreme Court's landmark decision in *Dobbs v. Jackson Women's Health Organization*,[63] which overturned *Roe v. Wade*.[64] Some justices commented publicly that disagreement with an isolated ruling did not signal diminished support for the Court's authority.[65] But additional survey data shows that the ruling moved the needle on the public confidence continuum from simple disagreement with a Court output to disapproval of the Court itself. In the aftermath of *Dobbs*, Gallup reported that public confidence in the Supreme Court sank to an all-time low in the fifty-year history of

61. Carrington & French, *supra* note 49, at 1493.

62. James Gibson, *Judging the Politics of Judging: are Politicians in Robes Inevitably Illegitimate?*, *in* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 281, 284 (Charles Gardner Geyh, ed. 2011).

63. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

64. PEW RESEARCH CENTER, *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/. Roe v. Wade, 410 U.S. 113 (1973).

65. *See* John Biskupic, *Analysis: Supreme Court Justices Respond to Public Criticism with Distance and Denial*, CNN (Sept. 13, 2022, 5:08 AM), https://www.cnn.com/2022/09/13/politics/supreme-court-public-criticism-distance-denial-roberts/index.html (Quoting, among others, Chief Justice Roberts, who said "I don't understand the connection between opinions that people disagree with and the legitimacy of the court.").

the survey, with only twenty-five percent expressing "quite a lot" of confidence and only forty-seven percent indicating that they had at least a "fair amount" of confidence in the Court.[66]

Public disagreement with a Court decision, and disapproval of the Court for making that decision, do not necessarily signal a decline in the Court's perceived authority. Studies by Gibson and others have shown that a reservoir of goodwill for the Court, activated by pervasive symbols of the Court's traditional authority, tends to block dissatisfaction with a given ruling from weakening diffuse support for the Court itself.[67] But times are changing: Gibson's latest research revealed that *Dobbs* was "the straw that broke the camel's back"—that disagreement and disapproval were so deeply felt as to damage the Court's diffuse support.[68]

Gibson and Michael Nelson have drawn an important distinction between an "ideological" Court and a "politicized" one.[69] They found that the public is not especially troubled by the knowledge that the Supreme Court's interpretations of law are subject to ideological influences, but it loses faith in a partisan Court that is perceived as political and self-interested.[70] Logan Strother and Shana Kushner Gadarian, among other scholars, have shown that the public is now discounting as "political" Court decisions with which it disagrees.[71] And it could get worse: Stephen Jessee, Neil Malhotra, and Maya Sen found that the public underestimated how much more conservative the Supreme Court became in the aftermath of President Trump's appointments. The researchers note that if and when the public realizes how conservative the Court has become,[72] it could further diminish institutional support for the Court.[73] If public support for the Court

66. Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx; Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (September 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx#:~:text=WASHINGTON%2C%20D.C.,headed%20by%20the%20Supreme%20Court.

67. James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the US Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions it Makes?*, 80 PUB. OP. Q. 622, 625 (2016).

68. James L. Gibson, *After Dobbs: A Note of Warning to the U.S. Supreme Court* 13 (Wash. Univ. in St. Louis, 2023), https://ssrn.com/abstract=4425652.

69. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 595 (2017).

70. *See id*. (arguing that people view a "politized" court as "the gravest threat to the Court's legitimacy").

71. Logan Strother & Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, 20 THE FORUM 87, 88 (2022); Dino Christenson & David Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 415 (2015); *see* Dino P. Christenson & David M. Glick, *Reassessing the Supreme Court: How Decisions and Negativity Bias Affect Legitimacy*, 72 POL. RSCH. Q. 637, 649 (2019) (suggesting that people's political preferences affect the way that they view the Court's decisions); Michael A. Zilis, *Minority Groups and Judicial Legitimacy: Group Affect and the Incentives for Judicial Responsiveness*, 71 POL. RSCH. Q. 270, 270 (2018) (theorizing that citizens' perception of the Court's protection of certain groups affect their view of the Court's legitimacy).

72. Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows That the Supreme Court is Now Much More Conservative Than the Public*, 119 PNAS 1, 5 (2022).

73. *Id.*

itself is increasingly contingent on agreement with the Court's rulings, it represents an escalation to distrust on the public confidence continuum, insofar as the public is loath to trust the Court when it disagrees with the Court's decisions and dismisses them as political or partisan.

Other factors can heighten—or diminish—the suspicion that the Supreme Court is just another political body that cannot be trusted to wield its legal expertise independently of external control. Carrington and French found that when a Supreme Court nominee, like Brett Kavanaugh, behaves in overtly partisan ways during confirmation proceedings, it heightens public support for court-curbing measures and diminishes public confidence in the Supreme Court as a whole.[74] Miles Armaly found that external elites, such as presidential candidates, who launch partisan attacks on the Court decrease their supporters' confidence in the Supreme Court.[75] Similarly, Jon Rogowski and Andrew Stone found that partisan wrangling by elites over the ideological excesses of judicial nominees in the confirmation process diminish public confidence in the impartiality of the judges appointed.[76] And Mintao Nile and Eric Waltenburg found that the media reduces diffuse public support for the Court with reportage characterizing Court decisions as politically oriented.[77] Conversely, Strother and Colin Glennon found that extrajudicial, rule of law rhetoric by the justices themselves can "powerfully influence" public support for the Court.[78]

Public confidence in judges and courts may be diminished not only when judges are perceived as acting politically, but also unethically.[79] In one recent study, researchers found that ethics scandals, when isolated, reduced public support for the justice involved, but not the Court as a whole.[80] The authors

74. Nathan Carrington & Colin French, *One Bad Apple Spoils the Bunch: Kavanaugh and Change in Institutional Support for the Supreme Court*, 102 SOC. SCI. Q. 1484, 1485–86 (2021). A prior study found a less robust correlation, which Carrington and French attributed to the prior study's focus on increased support for court-curbing measures as a marker for diminished legitimacy. *See* Carrington & French, *supra* note 49.

75. Miles Armaly, *Extra-Judicial Actor Induced Change in Supreme Court Legitimacy*, 71 POL. RSCH. Q. 600, 609–610 (2018).

76. Jon C. Rogowski, *How Political Contestation Over Judicial Nominations Polarizes Americans' Attitudes Toward the Supreme Court*, 51 BRIT. J. POL. SCI. 1251, 1266 (2021).

77. Mintao Nie & Eric N. Waltenburg, *The Impact of the Black Media on Diffuse Support for the U.S. Supreme Court*, 14 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 603, 615 (2017), https://doi.org/10.1017/S1742058X17000194; *see* Vanessa Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCH. 597, 607 (2006) (concluding that "perceptions of fairness are adversely affected when people receive information about a politically charged Court, indicating a likely decline in public support for the institution if citizens came to see judicial deliberations to be…politically driven").

78. Logan Strother & Colin Glennon, *An Experimental Investigation of the Effect of Supreme Court Justices' Public Rhetoric on Perceptions of Judicial Legitimacy*, 46 LAW & SOC. INQUIRY 435, 450 (2021).

79. For a thoughtful article that develops this theme in the context of workplace misconduct, see 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.

80. Joshua Boston, Benjamin Kassow, Ali Masood & David Miller, *Your Honor's Misdeeds: The Consequences of Judicial Scandal on Specific and Diffuse Support*, 56 PS: POL. SCI. & POL. 195, 198–199 (2023).

cautioned, however, that if ethics problems were perceived as more than sporadic, it could diminish support for the Court itself—a relevant concern, given recent news reports raising ethics questions about the conduct of all nine sitting justices.[81]

Moreover, the conduct at issue in many of the Court's recent ethics imbroglios has been of a public confidence-threatening, partisan, and political character. Justice Ginsburg was called out for opposing Donald Trump's presidential candidacy in derogation of the Code of Conduct for U.S. Judges.[82] Justices Scalia and Thomas were criticized for violating the Code by serving as featured speakers at conservative Federalist Society fundraisers.[83] Then-Judge Kavanaugh was the target of numerous disciplinary complaints for a partisan rant during his Supreme Court confirmation testimony.[84] Justice Thomas was criticized for not disqualifying himself from a case in which he dissented from an order directing President Trump to obey a subpoena for records concerning Trump's efforts to overturn the 2020 election that included correspondence from Thomas's spouse, in possible violation of the disqualification statute and Code of Conduct for U.S. Judges.[85] Justice Thomas was later in the spotlight for failing to report lavish gifts he received from a Republican megadonor, in possible violation of the Ethics in Government Act.[86] Justice Alito was the subject of contested allegations that he improperly disclosed the outcome of the Supreme Court's forthcoming opinion in a major freedom of religion case with benefactors of a conservative, religiously motivated Supreme Court lobby organization.[87] And a draft of the Supreme Court's landmark opinion in *Dobbs*, overturning *Roe*, was leaked for seemingly strategic and political reasons. If done by or at the behest of a justice, the leak would have violated the Code of Conduct for U.S. Judges.[88]

Social scientists have documented how accountability promotes public confidence in elected state judiciaries. But because the federal judiciary is unelected, researchers have characterized federal judges as independent and devoted little attention to the role accountability plays in promoting public confidence at the

81. *See supra* note 22 and accompanying text.

82. Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a 'Faker,' He Says She Should Resign*, CNN POLITICS (July 13, 2016), https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trumpfaker/index.html. The Supreme Court subsequently adopted a similar code for itself. *See* Sup. Ct. of the U.S., Code of Conduct for Justices of the Supreme Court of the United States (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

83. RMUSE, *Justices Thomas and Scalia Violate Judicial Ethics by Headlining Right Wing Fundraisers*, POLITICUSUSA (Nov. 16, 2013), https://www.politicususa.com/2013/11/16/justices-thomas-scalia-violate-judicial-ethics-headlining-wing-fundraisers.html.

84. Charles Gardner Geyh, *The Architecture of Judicial Ethics,* 169 U. PA. L. REV. 2351, 2386 (2021).

85. Jane Mayer, *supra* note 22.

86. Domenico Montanaro, *supra* note 22.

87. Josh Gerstein, *supra* note 22.

88. *See* Charles Gardner Geyh, *Judicial Ethics and Identity,* 36 GEO. J. LEG. ETHICS 233, 235 (2023) (stating that the leak of the Dobbs decision, if done by a Justice, would be in disregard of an "ethics directive against judges disclosing nonpublic information they acquire as judges for purposes unrelated to their official duties").

federal level. Yet elections are not the only way to hold judges accountable. In his seminal work on the subject, Stephen Burbank has theorized that in the federal courts, other forms of accountability occupy the flip side of the same coin as judicial independence:[89] public trust in the expertise of an unelected, independent judiciary is logically bolstered by mechanisms that hold judges accountable for deviations from their rule of law mission. Thus, holding federal judges accountable for ethical misconduct that undermines their impartiality, integrity, and independence—including but not limited to hyper-partisan conduct of the sort that has sent public confidence in the Supreme Court into a tailspin—may enhance public confidence in the courts. And in the federal system, disqualification rules, ethics regimes, and disciplinary processes are accountability-promoting mechanisms laser-focused on doing just that. Hence, as discussed in Part V, these mechanisms may have an important role to play in reform.

Research to date has focused on the Supreme Court. Given the ancient aphorism that "the fish rots from the head down,"[90] it is reasonable to suspect that deepening public distrust of the Supreme Court, as the head of the federal judiciary, could filter down to the lower courts under its supervision. Moreover, one can extrapolate from Supreme Court study data to speculate on how public confidence in the lower courts may be affected by recent developments there, subject to caveats that cut both ways. On the one hand, the district and circuit courts are less salient to the public, which means that the public's views of the lower courts may be less informed and less strongly felt.[91] On the other hand, to the extent that the public perceives the Supreme Court as a unique, inherently political, and lawmaking body, relative to the more apolitical courts of error correction at the district and circuit levels, the public may be more troubled by openly partisan, ideologically-driven behavior in the latter.[92]

Accordingly, one can cautiously infer that the public's confidence in the lower courts may be jeopardized by the recent uptick of partisan-seeming behaviors by lower courts and their judges, described in Part II: weaponizing circuit en banc proceedings for partisan ends; issuing nationwide injunctions in politically charged cases; judge-shopping in single-judge divisions for openly partisan purposes; quarreling over the propriety of judicial membership in ideologically aligned organizations; and scoring political points by boycotting clerkship applicants from Yale to punish the school for its progressive policies. Diminished public confidence in the impartiality of Supreme Court justices, precipitated by Senate elites who disparage nominees as activists or extremists in confirmation proceedings, may likewise extend to circuit court nominees, who have been subject to comparable accusations. Highly publicized reports of 131 district judges

89. Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. LAW J. 909, 911–912 (2007).

90. THE IDIOMS, *Fish Rots from the Head Down*, https://www.theidioms.com/fish-rots-from-the-head-down/ (2023).

91. Tom S. Clark, Jeffrey R. Lax & Douglas Rice, *Measuring the Political Salience of Supreme Court Cases*, 3 J. L. & CTS. 37, 37 (2015).

92. Devins & Larsen, *supra* note 25, at 1374–75.

who failed to disqualify themselves from cases in which they had financial conflicts of interest suggest the possibility of systemic ethical misconduct that could trigger diminished public confidence in the lower courts generally.

Even more significant are political leaders' blunderbuss accusations that civil actions and criminal indictments against former President Trump are undeserving of respect because the administration of justice has been corrupted and cannot be trusted.[93] The clear objective of this campaign is to move the public confidence continuum needle to discredit, and social science studies on the corrosive effect of elite-driven, anti-judge, and anti-court campaigns suggest that it just might work.[94]

V

REFORM

Part IV showed that public support for the Supreme Court and possibly the lower courts is diminished across the public confidence continuum. Concerns underlying recent developments recounted in Part II derive from the perception that the federal courts have become too partisan and are too unaccountable for such partisanship when it manifests. Put another way, these threats to public confidence derive from a seeming erosion of the judiciary's culture of nonpartisanship, alluded to at the outset of this Article. Accordingly, a reform agenda should focus on ways to allay the suspicion that judges are driven more by politics than legal expertise, and to augment mechanisms to hold judges accountable for partisan-seeming misconduct.

A. Court-Curbing

Threats to constrain the courts via court-curbing measures, such as court-packing, have served an important role in inter-branch dialogue that has chastened strident courts and helped to preserve a state of dynamic equilibrium between Congress and courts over time.[95] Making good on those threats, however, is a rarity in the modern era and would encroach on the judiciary's customary independence that has been integral to the courts' role in promoting the rule of law since the founding.[96] I appreciate the tactical value of threatening to curb the courts, but am not recommending the implementation of such reforms as sound public policy. If recent developments summarized in Part II presage a fundamental transformation of the federal judiciary to a more partisan political body, aggressive political controls may become necessary to limit court excesses that would otherwise undermine the public's felt obligation to comply with court rulings. But the data does not show that we are there yet. More fundamentally, I

93. *See supra* note 32 and accompanying text.

94. *See* Armaly, *supra* note 75, at 609 (finding that the public is heavily influenced by cues in relation to the judiciary).

95. Geyh, *supra* note 1, at 32–34.

96. *Id.* at 36–39.

interpret the data to corroborate the suspicion that the catalyst for recent developments undermining public confidence in the courts is a deterioration of the judiciary's institutional culture—and cultural reform must begin within the institution. Accordingly, I focus here on reforms that can be implemented by the bench and its primary helpmate, the bar, without intruding upon the judiciary's customary independence and without expecting miracles from a dysfunctional Congress or an all but insurmountable process for amending the Constitution.

B. Promoting Accountability

Of the means at the federal judiciary's disposal to promote accountability, three are ripe for reform: ethics, discipline, and disqualification.

1. Ethics

The data suggests that chronic judicial misconduct may diminish public confidence in the courts generally and that partisan-seeming misconduct is especially deleterious. Codes of judicial conduct are replete with rules that constrain partisanship. They admonish judges to: "act at all times" in a manner that "promotes public confidence" in the "impartiality," as well as the independence and integrity, of the judiciary;[97] keep their "personal philosophy" from interfering with their duty to uphold the law;[98] prevent "political" interests from influencing their judicial conduct;[99] and avoid "political . . . activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."[100] Thus, holding judges accountable to a robust ethics regime can help to reassure a skeptical public that its judges are committed to the nonpartisan administration of justice that codes of conduct demand.

The Supreme Court recently adopted its own code of conduct,[101] and it was right to do so. Whether that code will be worth more than the paper it is printed on depends on what the Supreme Court does with it. In a prefatory statement, the Court explained that its new code sought to "dispel the misunderstanding" that its justices did not already subject themselves to an array of ethical rules and described the code as a compendium of preexisting, "common law ethics rules" that the Court had "long" followed. If the justices were already alert to the ethics restrictions embedded in its new code and committed to abiding by them, they were not alert or committed enough to avoid the litany of ethical imbroglios summarized in Part II. For a code of conduct to serve its purpose, it must be more than a rushed, cut-and-paste job that the Court files to get Congress off its back. Formulating a code of conduct offers an opportunity for judges to meet and buy into a set of ethical principles and practices that they internalize, revisit, and revise as times and circumstances change, regardless of whether such a code is formally enforced in a disciplinary process. It creates a code culture in which judges

97. MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).
98. *Id.* r. 2.2, Comment 2.
99. *Id.* r. 2.4(B)
100. *Id.* Canon 4.
101. Sup. Ct. of the U.S., *supra* note 82.

are ever mindful of their ethical responsibilities—a culture that has been absent from the Supreme Court. Accordingly, it is essential for the Court to treat the promulgation of its new code as a first, not a final, step. If the Court is to avoid the problems of the past, it must embrace the code and its precepts on a deeper level, as judges in other jurisdictions do.

With respect to the lower courts, the Judicial Conference should be more rigorous in updating its Code of Conduct for U.S. Judges, which is modeled after the American Bar Association (ABA)'s 1972 Code of Judicial Conduct.[102] Since 1972, the ABA—actively assisted by federal judges—overhauled its model code twice, in 1990 and 2007, and most state systems have followed suit.[103] The Judicial Conference, however, has clung tenaciously to an incremental approach, declining to adopt numerous ABA-recommended reforms, which has kept the federal courts one step behind most state systems.[104] One recent consequence of an antiquated code is that sexual harassment and gender bias were under-regulated by the Code of Conduct for U.S. Judges, relative to the current ABA Model Code and the codes of most states, until scandal struck, forcing reform.[105] And unlike most state codes of conduct, which follow the 1990 or 2007 ABA models, the Code of Conduct for U.S. Judges phrases its admonitions as toothless "shoulds," instead of enforceable "shalls," which undermine the role of the code in judicial discipline, as discussed next.

2. Discipline

Circuit judicial councils in the federal system should begin with the following default: that the blackletter rules in its code of conduct—including those that admonish judges to avoid partisan conduct and resist political influences—are binding and that judges who violate the code will be held accountable in the disciplinary process.[106] That is the norm in state systems, but the federal judiciary is an outlier.[107] In a 2023 letter to the U.S. Senate Committee on the Judiciary, the Supreme Court described code canons as "broadly worded principles that inform ethical conduct and practices," which "are not themselves rules" because they "are far too general to be used in that manner."[108] This statement is demonstrably wrong. The 1972 ABA Model Code of Judicial Conduct, which the Judicial Conference adopted in large part the next year, declared in its preamble that the text accompanying the canons sets forth "specific rules" that "establish mandatory standards," which the current ABA Model Code describes as "binding and

102. Geyh, *supra* note 84.

103. *Id.* at 2363–64.

104. *See id.* at 2392–96 (providing several examples wherein the Judicial Conference did not adopt reforms recommended by the ABA).

105. *Id.* at 2369–70.

106. *See id.* at 2363 (showing that, in the preamble to the 1972 code, the ABA expressed an intention for the code's rules to be adopted by all jurisdictions as "mandatory . . . unless otherwise indicated").

107. *Id.* at 2391–94.

108. Sup. Ct. of the U.S., *supra* note 23, at 1.

enforceable."[109] Some rules are phrased more broadly than others, but half a century of interpretative precedent across fifty state systems has clarified the rules considerably. The federal judiciary should apply its code not as a series of gaseous platitudes, but as a body of rules with teeth that polices and holds judges accountable for ethical transgressions in ways visible to the public that judges serve. If judges are disciplined for code violations—particularly violations in which partisan, political misconduct undermines judges' impartiality, integrity, or independence, it could help bolster public confidence. And putting judges at meaningful risk of discipline for code violations could dampen the ardor for culture-threatening, partisan-seeming misconduct.

In an effort to restore public confidence in the Supreme Court, members of Congress have introduced legislation that would establish a disciplinary process for the Supreme Court.[110] But at this polarized juncture in our nation's history, opening the door for random individuals to file disciplinary complaints against Supreme Court justices could have the opposite effect: angry partisans would swamp the Court with largely meritless disciplinary complaints against justices they disfavor and trumpet those complaints to the media. The net effect could be to undermine, rather than enhance, public confidence in the Court by creating the misimpression that Supreme Court justices are misbehaving at every turn. As explained in Part V.B.1, the Supreme Court needs to internalize the code of conduct it has adopted, but implementing a disciplinary process is ill-advised and premature.

3. Disqualification

Congress has written the text of disqualification statutes,[111] but the judiciary is responsible for how those statutes are interpreted and the disqualification procedures that courts follow. At a time when perceived partisanship threatens public confidence in judicial impartiality, there are three intra-judicial reforms worth considering.

First, the federal judiciary should end its reliance on self-disqualification. Statutes requiring disqualification for conflicts of interest and real or reasonably perceived bias cannot hope to promote public confidence in the fairness of the litigation process if disqualification decisions are made by the very judges whose impartiality is in question. As the Institute for the Advancement of the American Legal System and the Brennan Center for Justice have recommended, if a judge deems a request to disqualify unwarranted, the matter should be transferred to a different judge for resolution.[112]

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109. MODEL CODE OF JUD. CONDUCT Preamble (AM. BAR ASS'N 1972); MODEL CODE OF JUD. CONDUCT Scope cmt. 6 (AM. BAR ASS'N 2011) (subject to a limited exception, where "otherwise indicated").

110. *E.g.*, S. 359, 118th Cong. § 367 (2023).

111. 28 U.S.C. § 455 (2012). The Judicial Conference has effectively duplicated that text in its Code of Conduct for U.S. Judges; CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C) (JUD. CONF. U.S. 2019).

112. *See* Russell Wheeler & Malia Reddick, *Judicial Recusal Procedures: A Report on the IAALS*

In a related vein, the Supreme Court should follow the lead of jurisdictions such as Texas and establish procedures enabling the high court to review disqualification determinations of individual justices.[113] It would be rare for the Court to second-guess a colleague's disinclination to disqualify. But a procedure ensuring that individual justices do not have the final word on their own fitness to preside would augment the Court's self-accountability. Moreover, it would avoid spectacles such as a recent occurrence in North Carolina, where a state supreme court justice declined to disqualify himself from a case with deeply partisan, political implications in which his father was the named defendant, with no court procedure in place to overrule him.[114] In a letter to the Senate Committee on the Judiciary, the Supreme Court argued that full review of disqualification determinations would produce the "undesirable situation" of enabling the Court to "affect the outcome of a case by selecting who among its members may participate."[115] But that possibility is patently more desirable than entrusting the responsibility to declare what the law is to conflicted justices whose participation in a case would deprive litigants of their statutory, if not due process, rights to an impartial judge.

Second, as Amanda Frost has argued, the federal courts should normalize disqualification practice.[116] Disqualification practice is often truncated, owing to the inherent awkwardness of a proceeding in which the judge is, in effect, on trial. Standard motions practice, which affords both parties an opportunity to submit points and authorities in support of their respective positions, followed by a hearing and a ruling accompanied by a reasoned explanation, is frequently bypassed.[117] The net effect is that a judge's often unexplained rulings are consigned to a black box, unilluminated by the usual rigors of the adversarial process. To no small extent, instituting procedures whereby disqualification requests are heard by a different judge would facilitate normalizing disqualification practice, because judges unfamiliar with the circumstances would be likelier to inform themselves via the adversarial process, by giving both parties an opportunity to be heard on the disqualification issue, before reporting on the result of their inquiry.

Convening, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1, 4 (2017) (recommending that states direct judges who fail to grant requests to disqualify to seek approval of the decision by a designated, second judge); s*ee also* Matthew Menendez & Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, BRENNAN CENTER FOR JUSTICE 1, 6 (2016) (proposing a system where a trial judge who declines to recuse would be reviewed by an independent judge).

113. *See* Tex. R. App. P. 16.3 (providing a three-step procedure for recusal).

114. *See* N.C. State Conf. NAACP v. Moore, 380 N.C. 263, 263–64 (2022).

115. Sup. Ct. of the U.S., *supra* note 23.

116. *See* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 582 (2005) (discussing how, though there are many procedures in place where federal judges are either required or encouraged to implement disqualification practices, these procedures are used too infrequently to normalize the practice among the federal courts).

117. *See id.* at 536 (stating that the recusal process is "usually not adversarial, does not provide for a full airing of the relevant facts, is not bounded by a developed body of law, and often is not concluded by the issuance of a reasoned explanation for the judge's decision . . . [in a] very ad hoc and informal process").

Third, the Supreme Court should revisit an ill-considered effort to dilute its duty to disqualify, which was grounded in spurious claims of its own exceptionalism. The Court recently opined that its "unique institutional setting" warrants a "different" application of disqualification standards relative to other judges, given the "rule of necessity" and its "duty to sit" as a "full Court."[118] The rule of necessity is irrelevant here. That rule would permit otherwise disqualified justices to participate only if there was no procedure in place to resolve cases that ended in a tie vote when fewer than all justices participated—but such a procedure is long-established.[119] The "duty to sit" is an anachronism. It was abrogated by Congress in 1974.[120] The modern ethics rule obligates judges to "hear and decide matters assigned, unless disqualified."[121] That rule is ubiquitous, applies to judges on all tiers of court, and imposes no constraint on the duty to disqualify. Rather, it simply directs judges not to abuse disqualification by exploiting it as a pretext to recuse themselves from controversial cases in which disqualification is uncalled for, because it burdens judges who must step in to replace colleagues who disqualify themselves unnecessarily.[122] The need for full review and the desirability of minimizing tie votes on a Court where disqualified justices cannot be replaced does not justify a *different* application of disqualification standards. It simply provides an *additional* justification for why the justices—like all judges—should only disqualify themselves when called for by the statute. In effect, the Court argues that the decisive vote in a 5-4 decision could and should be cast by a justice whose impartiality is so deeply in doubt that it would force the disqualification of a circuit judge subject to the same statute. The impact of this misguided approach in a consequential case with political implications would have an obvious and deleterious impact on public confidence in the Court.

C. Promoting Legal Expertise

Public confidence in the federal judiciary as a community of legal experts who can be trusted with their independence to uphold the rule of law has been eroded by the suspicion that their decisions are infected with partisanship. Reforms should 1) reinvigorate ethics norms to discourage partisanship; 2) better regulate the processes where partisanship has manifested; and 3) improve

118. Sup. Ct. of the U.S., *supra* note 23.

119. Nancy Gertner & Stephen Gillers, *Supreme Court Justices' Unethical Code of Conduct*, BOSTON GLOBE (June 29, 2023, 3:00 AM), https://www.bostonglobe.com/2023/06/29/opinion/supreme-court-justices-unethical-code-conduct/.

120. CHARLES G. GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 15, 7 (Federal Judicial Center, 3d ed. 2018). The "duty to sit" concerned judges' perceived obligation to preside despite an appearance of partiality, which Congress overrode when it amended the disqualification statute to require that judges and justices to disqualify themselves when their "impartiality might reasonably be questioned."

121. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(2) (JUD. CONF. U.S. 2019).

122. *See* MODEL CODE OF JUD. CONDUCT r. 2.7 cmt. (AM. BAR ASS'N 2020) (stating "the dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues").

communications with and education of the public and their elected representatives to reenforce the role that impartial, independent, and nonpartisan judges play in upholding the rule of law.

1. Reinvigorating Ethics Norms

The federal judiciary has long nurtured an institutional culture that prizes collegiality and marginalizes partisanship. It should take affirmative steps to preserve this culture, as noted at the beginning of this Article. Collegial courts discourage judges from straying too far from the rule of law in pursuit of political agendas for fear of losing the mutual respect that collegial courts cultivate. But in these divisive times, stress fractures have begun to emerge. For example, witness the recent, politicized dispute over judges holding membership in the American Constitution Society, the Federalist Society, and the ABA,[123] and judges who have boycotted clerkship applicants from Yale and Columbia, in protest of the schools' cultural politics.[124] To re-instill buy-in among the judiciary's rank and file, educational programming at the circuit and national levels should reaffirm judges' longstanding commitment to an impartial, independent, and forthright judiciary uncorrupted by partisan politics, along with the sacrifices judges willingly make to preserve those core values by adhering to their code of conduct.

In a more targeted vein, the Judicial Conference's Committee on Codes of Conduct[125] should issue an advisory opinion on the ethics of a judge's hiring practices. It should admonish judges that the duty to appoint clerks "on the basis of merit,"[126] coupled with the proscription on lending the prestige of judicial office to advance their personal interests,[127] forbids blackballing qualified clerkship applicants who graduated from law schools with which the judge has an ideological beef. The Committee should also revisit the prickly issue of judicial membership in the American Constitution Society, the Federalist Society, and the ABA. It is reasonable for the public to assume that judges embrace the values of organizations they join,[128] and psychological science shows that membership in an organization strengthens one's alignment with the organization's values.[129] To the extent that the views espoused by these organizations are generally seen as partisan, political, or ideological, the Committee would be right to advise judges against joining them as members. Such a move, however, need not restrict the freedom

123. *See generally* letter to Robert Deyling, *supra* note 31 and accompanying text.

124. *See supra* note 28.

125. The Committee on Codes of Conduct is a Subcommittee of the Judicial Conference of the United States. https://ballotpedia.org/Committee_on_Codes_of_Conduct_of_the_Judicial_Conference_of_the_United_States#:~:text=The%20Committee%20on%20Codes%20of,Conference%20of%20the%20United%20States.

126. Code of Conduct for U.S. Judges, Canon 3(B)(3).

127. *Id.,*Canon 2(B).

128. For this reason, codes of conduct already bar judges from membership in organizations that practice invidious discrimination. MODEL CODE OF JUD. CONDUCT r. 3.6 (AM. BAR ASS'N 2020).

129. *See* Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 ACAD. MGMT. REV. 20, 26–27 (1989) (finding that social identification with an organization of individuals reinforces the antecedents of that identification).

of judges to attend the organization's functions, speak at its events, advise its committees, or participate on its commissions or task forces. Thus, even if it were deemed ill-advised for judges to join the ABA as members, given the ABA's occasional liberal-leaning position-taking on hot-button issues of substantive law,[130] there should be no ethical impediment to non-member judges participating in apolitical ABA projects aimed at improving the administration of justice. For example, judges would be free to participate on a commission to revise the Model Code of Judicial Conduct, even if it were determined that they should not be card-carrying members of the ABA itself.

2. Regulating Practices and Processes Where Partisanship Manifests

Insofar as judges are on board with revitalizing ethics norms to deescalate partisanship within the ranks of the federal judiciary, it is a short walk from there to the judiciary revising practices and procedures where partisanship can manifest. The Supreme Court's increasing resort to its so-called "shadow docket," in which it has issued orders unaccompanied by explanatory opinions to resolve politically charged issues on an emergency basis, has been rightly criticized for cultivating the perception that the Court is becoming more partisan.[131] As William Baude and Richard Pierce have argued, the Court should allay these suspicions by providing reasoned explanations for the consequential emergency orders that it issues, which would reassure a skeptical public that the Court is acting out of legal principle, rather than political impulse.[132]

Judge-shopping exacerbates the perception that the rule of law is tainted by partisanship. This occurs when judges from small judicial divisions who have been hand-picked by plaintiffs because of their ideological compatibility decide politically charged cases in alignment with their political predilections.[133] As Stephen Vladeck has recommended, district courts should change how cases within their districts are distributed—as the Western District of Texas recently did—or agree to transfer cases out of single-judge divisions when necessary to avoid the appearance of procedural manipulation.[134]

A similar problem arises when partisans file suit against partisans in suits culminating in a single district court issuing a nationwide preliminary injunction

130. Josh Blackman, *The American Bar Association Broke Its Own Rules*, THE ATLANTIC (November 6, 2019), https://www.theatlantic.com/ideas/archive/2019/11/aba-nominations-process-vandyke/601441/.

131. For an insightful discussion about the role played by the Supreme Court's "shadow dockets" in increasing the public perception that the Court is becoming more partisan, see generally STEPHEN VLADECK, THE SHADOW DOCKET (2023).

132. Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 16–19 (2022); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 38–40 (2015).

133. *See* Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 323 (2018) (stating "even when judge-shopping does not actually change case outcomes, it can create the appearance that an adjudication was biased or unfair").

134. Stephen Vladeck, *Don't Let Republican "Judge Shoppers" Thwart the Will of Voters*, N.Y. TIMES, Feb. 5, 2023, https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html.

against a controversial federal policy, which inserts the court into a "quintessentially political fight[]" and fosters "the perception that judges base decisions on political preferences."[135] A logical starting point for reform is for the Judicial Conference and Supreme Court to amend Federal Rule of Civil Procedure 65 to impose procedural constraints on the circumstances in which such injunctions can be issued, as Samuel Bray, Michael Morley, and Zayn Siddique have recommended.[136]

Finally, in a recent article, Neal Devins and Allison Larsen documented a dramatic, statistically significant uptick in "weaponized" en banc review, beginning in 2018, where "judges vote in blocs aligned with the party of the President who appointed them and use en banc review to reverse panels composed of members from the other team."[137] The authors note that the circuits have minimized en banc confrontations through resort to informal "mini en banc" procedures, wherein judges circulate draft panel opinions that enable them to detect and resolve schisms that could otherwise culminate in fractious en banc review.[138] But they rightly conclude that the success of those procedures depends upon judges revitalizing their commitment to rule of law norms, as I recommend in Part V.C.1.[139]

3. Improving Communications and Education

A study summarized in Part IV found that judges can "powerfully" reinforce public confidence in court authority via their external communications.[140] The federal judiciary should develop a constrained social media presence. It should not defend specific judges or court rulings. But it could inform public discussion of judges and rulings with posts and blogs about their nonpartisan institutional culture, the role of the judge in adjudication, how judges are different from public officials in the other branches of government, and the ways in which federal judges, though life-tenured, are nonetheless accountable as discussed in Part V.B.1. Individual judges can reenforce the judiciary's social media messaging via both in-person communications with jurors, witnesses, and parties, and outreach to schools and civic, charitable, and religious organizations where they speak. In these settings, judges can elaborate on how the rule of law works—not just in easy cases, when the facts and law are clear, but in hard cases when they are not, where judges must exercise discretion and judgment informed by their backgrounds, experiences, and common sense, all of which frame their perspectives

135. Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 1, 33–34 (2019).

136. *See generally* JOANNA R. LAMPE, CONG. RSCH. SERV., NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM 42 (2021) (providing a summary of these recommendations). Procedural constraints imposed by a Rule 65 amendment must, of course, be mindful of the Rules Enabling Act, which forbids procedural rules from modifying substantive rights. 38 U.S.C. 2072(b).

137. Devins & Larsen, *supra* note 25, at 137

138. *Id.* at 1422–23.

139. *See supra* Part V.C.1.

140. Strother & Glennon, *supra* note 78, at 438.

on the issues before the court. Such messaging can help the public differentiate between hyper-partisan misconduct that undermines public confidence in the courts and benign, extra-legal influences that inevitably inform judges' decision-making when the facts are mixed or the law is indeterminate.

Just as public confidence in the courts is diminished when judges are rightly accused of behaving in overtly partisan ways, the same may be true when they are falsely accused. As Leslie Levin shows, the bar has played a role in promoting public confidence in the courts by defending them from unjust criticism—a role that it does not play indiscriminately.[141] There are circumstances in which criticism is warranted, where the situation is too nuanced to characterize the criticism as unjust, or where the circumstances are too complex to mount a defense in time to be helpful, given the pace of news cycles. But there are no such impediments to rapid-response efforts countering the emerging phenomenon of public officials discrediting the administration of justice categorically, with sweeping and unsubstantiated claims that it is partisan and illegitimate.[142]

Given data showing that partisan attacks by elected officials against judges and courts can damage public confidence in the judiciary, improving channels of communication between courts and Congress warrants special attention. In the 1970s and 1980s, the Brookings Institution convened a series of conferences attended by representatives of all three branches of government on courts-related issues.[143] As I have elaborated elsewhere, we should explore ways to restart that series for the purposes of: promoting mutual understanding of challenges confronting the courts; reminding Congress of the nonpartisan culture that the judiciary strives to maintain; and repairing the informal norms that have guided the political branches of government, structured the judicial confirmation process, and preserved the judiciary's independence for generations.[144]

VI

CONCLUSION

The continuing vitality of the institutional norms and constitutional conventions that have safeguarded the federal judiciary's autonomy since the founding depend on the public's belief that the judiciary can be trusted with its independence to uphold the rule of law. Recent social science data shows that public faith in the federal judiciary's authority to govern has diminished across the public confidence continuum that I develop here. The largely intra-judicial reforms proposed here aim to restore confidence in the federal courts by targeting the causes of declining public support: the suspicion that judges are both too partisan and too unaccountable.

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

142. *See generally supra* note 32 and accompanying text.

143. Geyh, *supra* note 12, at 1118.

144. For a detailed analysis of these recommendations, see generally *id.* at 1047–119.