

PUBLIC CONFIDENCE, JUDGES, AND POLITICS ON AND OFF THE BENCH

BRUCE A. GREEN AND REBECCA ROIPHE*

I

INTRODUCTION

Public confidence in the judiciary is important for a host of reasons, including to encourage parties to resolve disputes through the courts and to abide by court rulings.¹ But public confidence in the U.S. Supreme Court appears to have reached a low-water mark,² and public confidence in state-court judges and lower-court federal judges has also ebbed.³ There are undoubtedly many reasons for the public's declining opinion of the judiciary, traditionally the government's most respected branch.⁴ These include the unpopularity of some judicial decisions⁵ and politicians' public attacks on judges, such as President Trump's repeated attacks on the courts that issued decisions he disfavored⁶ and Democratic politicians' scathing attacks on the Supreme Court following the decision in *Dobbs v. Jackson Women's Health Organization*.⁷ Our article focuses

Copyright © 2024 by Bruce A. Green and Rebecca Roiphe.
This Article is also available online at <http://lcp.law.duke.edu/>.

* Bruce A. Green is the Louis Stein Chair of Law at Fordham Law School; Rebecca Roiphe is the Joseph Solomon Distinguished Professor of Law at New York Law School. Thanks to Leslie Levin and the participants in the symposium for their thoughtful comments.

1. See Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POLITICS 697, 687 (2006) (asserting that people may not abide by court rulings or use courts to settle disputes without public confidence in the judiciary).

2. 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> [<https://perma.cc/R28W-897F>] (“With the U.S. Supreme Court expected to overturn the 1973 *Roe v. Wade* decision before the end of its 2021-2022 term, Americans’ confidence in the court has dropped sharply over the past year and reached a new low in Gallup’s nearly 50-year trend.”).

3. *State of the State Courts*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-leadership/state-of-the-state-courts> [<https://perma.cc/J2UV-4XRR>] (“NCSC’s 2022 survey of public opinion finds that public trust and confidence in the courts continues to slide.”).

4. Lloyd N. Cutler, *The Limits of Advice and Consent*, 84 NW. U. L. REV. 876, 877 (1990).

5. Mark Sherman & Emily Swanson, *Trust in the Supreme Court Fell to Lowest Point in Fifty Years After Abortion Decision, Poll Shows*, AP NEWS (May 17, 2023, 3:05 PM), <https://apnews.com/article/supreme-court-poll-abortion-confidence-declining-0ff738589bd7815bf0eab804baa5f3d1> [<https://perma.cc/5FC3-TMVJ>] (noting that the sharp decline in confidence was driven by Democrats and individuals who are pro-choice).

6. See *In His Own Words: The President’s Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts> [<https://perma.cc/EU32-98Q5>] (collecting examples of Trump’s attacks on the judiciary). See also note 22, *infra*.

7. Kyle Morris, *Democrats Attack the ‘Extreme Right-Wing’ Supreme Court on Dobbs Anniversary, Vow to ‘Fight Back’*, FOX NEWS (June 24, 2023, 1:01 PM), <https://www.foxnews.com/politics/democrats->

on one factor: the public's increasing perception—or realization—that judging is, or has become, politicized. This perception is captured, and fueled, by the description of judges as politicians in robes.

This perception is potentially significant because judges have attempted to cultivate the appearance that they are nonpartisan and nonpolitical, and this appearance is considered important to the courts' legitimacy. Regardless of who they were before putting on the robes, and regardless of how they achieved their judgeships, once they join the bench, judges try to convey explicitly and symbolically that, unlike public high officials in the executive and legislative branches, they are not favoring a political side: they do not see politics. For example, Supreme Court Justices traditionally convey their detachment by sitting somewhat impassively during State of the Union addresses—at least until Justice Alito notably breached decorum by shaking his head and appearing to mouth “not true” when President Obama accused the high court of favoring special interests in its decision overturning campaign finance restrictions.⁸ The public's realization that judges hold, and give effect to, political preferences may not only undermine the judiciary's legitimacy but may potentially expose judges as liars and hypocrites.

The federal judiciary has also acknowledged the importance of nonpartisanship in judicial conduct rules that it has adopted for lower court judges, based on American Bar Association (ABA) models.⁹ U.S. Supreme Court Justices recently adopted their own rules.¹⁰ Among the judicial conduct rules' expectations of judges, judging, and the judiciary are “independence, integrity and impartiality,”¹¹ competence and diligence,¹² fairness,¹³ and absence of bias and prejudice.¹⁴ To promote public confidence that judges possess these

attack-extreme-right-wing-supreme-court-dobbs-anniversary-vow-fight-back. [<https://perma.cc/KEY6-PSEZ>] See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

8. Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. Times (Jan. 28, 2010), <https://www.nytimes.com/2010/01/29/us/politics/29scotus.html>.

9. See ABA MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2020). See also LISA L. MILLORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* (1992) (for discussions of the judicial codes' development and adoption); Robert C. Berness, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1035–37 (2001) (discussing how the ABA addressed concerns of partisanship in the judiciary); John B. Oakley, *Prospectus for the American Law Institute Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 870–71 (1998).

10. *Code of Conduct of Justices of the Supreme Court of the United States*, SUP. CT. (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [<https://perma.cc/9KXT-G7MK>]. Canon 5 of the Supreme Court's code of conduct provides that “A Justice Should Refrain from Political Activity,” and elaborates in part as follows: “A Justice should not: (1) act as a leader or hold any office in a political organization; (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.” *Id.*

11. ABA MODEL CODE OF JUD. CONDUCT, Canon 1, r. 1.2, r. 3.1(c) (AM. BAR ASS'N 2020).

12. *Id.* at Canon 2.

13. *Id.* at r. 2.2.

14. *Id.* at r. 2.3(a).

traits and will employ judicial authority consistently with them, judges are instructed, even if they are seeking election to the bench, to “be free *and appear to be free* from political influence and political pressure.”¹⁵ Toward this end, judicial conduct rules restrict judges’ participation in political organizations, their endorsement of other candidates for public office, and their ability to make campaign commitments about how they will decide cases or resolve issues.¹⁶

Judges might be regarded as unduly or inappropriately political in any of several senses. Most obviously, the public may perceive that politics intrudes into how judges perform their core function—interpreting and applying the law. That is the traditional implication of the term “politicians in robes” and the traditional critique or criticism of the judiciary. We are uncertain of the origins of this epithet, which has been attributed to Charles Sheldon, a Washington State University political scientist.¹⁷ But the premise dates at least as far back as the legal realists’ insight that multiple considerations, including politics, influence judges’ decisions. Judicial regulation also focuses on three other aspects of judges’ behavior that are only indirectly relevant to their core work but that are easier to oversee and perhaps important for appearances’ sake: judges might justifiably, and unavoidably, be regarded as politicians in how they attain their jobs and advance within the judiciary; they might be regarded as too political in their administrative activities as judges, such as in their selection of law clerks; and they might be considered too political in their extrajudicial activities.

Empirical studies show that judges are not immune to political and other biases, but at least when the law is relatively clear, they mostly decide issues in accordance with rule of law values.¹⁸ Even when the law is unclear, judges tend to preserve procedures designed to promote uniformity and fairness on some level.¹⁹ This article suggests that judges’ professional identity is what leads them to put politics aside. That is to say that the public perception of judges as politicians in robes is largely a misperception, or at least an exaggeration, predicated on public skepticism of whether judges’ shared professional values counterbalance their personal and political interests. Sometimes judges blame others for the public misperception, attributing it to the failings of civic education²⁰ or the media.²¹ But this article shows that judges themselves share the

15. *Id.* at r. 4.1, cmt. 1 (emphasis added).

16. *Id.* at r. 4.1.

17. James C. Foster, *The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon’s Appellate Courts*, 39 WILLAMETTE L. REV. 1313, 1316 n.23 (2003).

18. Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 206–14 (2012) (summarizing empirical studies of judicial behavior).

19. Charles Gardner Geyh, *Judicial Ethics: A New Paradigm for a New Era*, 9 ST. MARY’S J. MALPRACTICE & ETHICS 238, 252 (2019).

20. See Raymond J. Lohier et al., *Losing Faith: Why Public Trust in the Judiciary Matters*, 106 JUDICATURE 70, 73 (2022) (asserting the public’s disillusionment with the U.S. Supreme Court unfairly influences its view of federal courts of appeals because “[t]he level of civic education about what we do is such that most people don’t distinguish between different court systems”) (quoting Judge Lohier).

21. *Strategic Plan for Federal Judiciary, Issue 2: Preserving Public Trust, Confidence and Understanding*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/issue-2-preserving-public-trust->

blame because judges can, at times, allow, or appear to allow, other allegiances to eclipse their professional role.

We use the term professional identity to refer to a certain cast of mind. Judges have been socialized through law school, legal practice, and their experience on the bench to think in a particular way, justify their opinions in recognizable terms, and conduct their work according to common customs and habits, some of which are codified or embedded in the codes of judicial conduct. Their self-image, as well as their reputation among lawyers and other judges, serves to reinforce these values and norms.

Our objective is therefore to survey judicial activity that threatens to undermine judges' ability to form, preserve, and project a professional identity committed to judicial values such as those expressed in the judicial codes. We explore what conduct potentially interferes with the socialization of judges or gives the impression that a partisan commitment or other affiliation has significantly eroded or superseded the influence of the judge's professional identity.²² As we seek to clarify how judges ought to conduct themselves in different aspects of their work to promote public confidence in courts, one question that recurs is whether judges should be even more vigilant or change their conduct in a more extreme way because external forces beyond their control have compounded the problem, leading the public to doubt whether judges are engaged in anything other than raw politics. While we do not have a clear answer to this question, it is an important one to raise, given increased ideological polarization as well as the vast sums of money fueling both politics and litigation.

Given the complex and evolving nature of the problem, we conclude that regulatory solutions would be both difficult to implement and ineffective. The need for delicate line-drawing and balancing of multiple values makes politicization of the judiciary particularly unsuited to regulation. If the goal is to buttress professional identity and convey the vitality of this common culture, rules may be not only unhelpful but also counterproductive. Thus, instead, we suggest that judges themselves seek to cultivate and promote a professional culture and project the vitality of this common identity to the public.

confidence-and-understanding [<https://perma.cc/A3SZ-5WWU>] (“Public perceptions of the judiciary are often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction.”).

22. Criticism can take the form of suggesting that a judge has allowed a different identity or affiliation to overshadow the judicial one. In questioning the impartiality of the judge who was assigned to preside in a case concerning Trump University, former President Trump accused Judge Gonzalo Curiel of being a “hater” because he was Mexican and opposed Trump’s policy of building a wall along the border. Nina Totenberg, *Who is Judge Gonzalo Curiel, The Man Trump Attacked for His Mexican Ancestry?*, NPR (June 7, 2016, 7:20 PM) <https://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry> [<https://perma.cc/3T9Q-TLMZ>]. Trump later clarified that he did not think Mexican judges were incapable of being impartial but believed Curiel was in fact biased. *Id.*

II

JUDGES AS POLITICALLY PARTISAN DECISIONMAKERS

Increasingly, judges have come to worry that the public thinks that politics dictates judges' decisions in the cases before them. Judges, in turn, try to convince the public that this is a misperception. By way of illustration, two years before the Supreme Court overturned *Roe v. Wade*,²³ a federal judge rounded out her opinion enjoining the application of South Carolina's anti-abortion law by disputing the popular perception that judges decide politically-charged cases based on their political preferences.²⁴ She wrote:

[T]he Court is well aware some may think the politics of the President who appointed it, and not the law, not the Court's sleepless nights, and not its herculean efforts to get it right, is a consideration and serves as a barometer as to how this Court would rule upon the abortion question presented here. And, unwittingly or not, the media tends to feed this narrative by often noting the name of the President who appointed the federal judge assigned to a particular politically divisive matter such as this.

But, such a suggestion is misinformed at best, and highly offensive at worst. We judges are not politicians in robes. Or, as Supreme Court "Chief Justice Roberts said: 'We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.'" . . . At a panel at William & Mary Law School, then potential nominee, now a Supreme Court Justice, Amy Coney Barrett agreed with that sentiment: "The chief justice, I think, articulated what members of the judiciary feel[.]" . . .

They are both correct. That is why no one who reads either this Court's opinions, or the opinions of its highly esteemed colleagues on the District of South Carolina Court, can divine from our decisions the political party of the President who appointed us. To echo Chief Justice Roberts's and Justice Barrett's comments, we are neither Democrat nor Republican courts. We are Article III constitutional courts. Period.²⁵

Although judges rarely publish opinions like this one defending the courts from charges of political partisanship,²⁶ judges increasingly feel moved to make speeches and to publish extrajudicial writings reassuring the public that they and their colleagues do not allow political partisanship to determine their judicial decisions.²⁷

23. *Roe v. Wade*, 410 U.S. 113 (1973).

24. *Planned Parenthood S. Atl. v. Wilson*, 527 F.Supp.3d 801, 815–16 (D.S.C. 2021).

25. *Id.*

26. As of February 2023, a LEXIS search identified only two other judicial opinions employing the phrase "politicians in robes." The first was an opinion in the West Virginia Supreme Court of Appeals dissenting from the Court's decision holding that a Justice of that Court who was appointed to fill an unexpired term was ineligible to run for election to that position. *State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 607 (W. Va. 2000) (Starcher, J., dissenting). The second was a 2011 opinion upholding Iowa's judicial selection process. *Carlson v. Wiggins*, 760 F.Supp.2d 811, 831 (S.D. Iowa 2011) (quoting Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 483, 489 (2009)) ("[T]he state of Iowa has a legitimate interest in increasing judicial legitimacy by decreasing the role of partisan politics in the judicial selection process. If the public believes that 'judges are just politicians in robes—then there is no reason to prefer their interpretation of the law or Constitution over the opinions of the real politicians representing the electorate.'").

27. See, e.g., *Barrett Concerned About Public Perception of Supreme Court*, NBC NEWS (Sept. 18, 2021, 7:19 AM), <https://www.nbcnews.com/politics/supreme-court/barrett-concerned-about-public->

Judges' reassurances have not allayed public concern and criticism, however. Although judges strive to project neutrality and detachment, they are increasingly accused of being politicians in robes.²⁸ The phrase itself was employed during Robert Bork's confirmation hearings to describe what the sitting liberal justices supposedly were and what Judge Bork would not become—namely, an activist justice deciding Supreme Court cases based on his political preferences, rather than based on impartial applications of interpretive techniques or neutral principles.²⁹ Critics on the right, who continue to describe Democratic appointees on the federal bench as political activists,³⁰ are now joined by commentators from the other side of the political spectrum. Critics on the left describe Republican appointees as politicians in robes,³¹ and others assume that

perception-supreme-court-n1279042 [https://perma.cc/GM9S-ESGW] (reporting on Barrett's speech at the University of Louisville's McConnell Center); Robert Barnes & Ann E. Marimow, *Justice Breyer Warns Proponents of Packing Supreme Court to Think Long and Hard About the Risks*, WASH. POST (Apr. 7, 2021, 4:00 PM), https://www.washingtonpost.com/politics/courts_law/justice-breyer-says-expanding-the-supreme-court-will-erode-trust/2021/04/06/cabc95c4-9730-11eb-a6d0-13d207aadb78_story.html?_pml=1 [https://perma.cc/Y3WT-2DF2] (reporting on Justice Breyer's public defense of the court).

28. See, e.g., Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 DEPAUL L. REV. 333, 338 (2018) (quoting a 2009 talk in which former Justice O'Connor observed that "the public is growing increasingly skeptical of elected judges in particular, whom it has come to regard as 'just politicians in robes'").

29. See 133 CONG. REC. S14767 (1987) (statement of Sen. Roth) ("When judges act like politicians in robes, we all lose . . . Judge Bork has devoted his considerable talents to demonstrating the errors of judicial activism."). See also 133 CONG. REC. S14659 (1987) (statement of Sen. Grassley) ("Judge Bork's critics do not care about principle or even democracy. To them, it is all a matter of what are the results. To them, law is just politics; judges some how they are just politicians in robes.").

30. See Doug Bandow, *Here Come the Leftie Judges*, CATO INST. (Jan 1, 2021), <https://www.cato.org/commentary/here-come-leftie-judges> [https://perma.cc/N57E-9L2Y] (arguing that judges appointed by Democrats invent constitutional rights that conform to the liberal agenda). See also Matt London, *Roger Stone Judge's Bias May Have Jeopardized Entire Trial: Former Democratic Party Lawyer*, FOX NEWS (Feb. 21, 2020, 10:37 AM), <https://www.foxnews.com/media/roger-stone-judge-trial-amy-berman-jackson-president-trump> [https://perma.cc/KZM9-ZCTV] (arguing that the judge in Trump confidante Roger Stone's case was politically biased); JCN (@judicialnetwork), TWITTER (Mar. 15, 2023, 10:19 AM), <https://twitter.com/judicialnetwork/status/1636009166815854593> [https://perma.cc/G3QN-RZJU] ("Joe Biden is nominating radical left-wing individuals who will serve as politicians in robes on the federal bench. The American People deserve better."); Justin Reimer (@Justin_Reimer), TWITTER (July 1, 2021, 11:21 AM), https://twitter.com/Justin_Reimer/status/1410619658785411078 [https://perma.cc/5JDJ-ZU9Y] (GOP lawyer implying that "Obama-appointed judges" and "liberal 9th circuit" rule consistently with liberal policy).

31. See Jay Willis, *Stop Playing Nice With the Federalist Society*, BALLS & STRIKES (Nov. 11, 2021), <https://ballsandstrikes.org/legal-culture/federalist-society-stop-playing-nice/> [https://perma.cc/WLG3-JW9D] (arguing that Federalist Society events discuss "familiar right-wing grievances overlaid with the thinnest legalistic veneer imaginable"). See also James P. Donohue, *I Was a Federal Judge. My Former Colleagues Must Stop Attending Federalist Society Events*, SLATE (Nov. 12, 2019, 9:57 AM), <https://slate.com/news-and-politics/2019/11/federalist-society-federal-judges-unethical.html> [https://perma.cc/C6MU-UAQJ] (arguing that the Federalist Society is a political organization that judges are ethically bound to avoid); Elie Mystal, *Newly Released Documents Show Conservative Judges Are Violating Ethics Guidelines by Appearing at Federalist Society Events*, ABOVE LAW (Sept. 3, 2019, 12:47 PM), <https://abovethelaw.com/2019/09/newly-released-documents-show-conservative-judges-are-violating-ethics-guidelines-by-appearing-at-federalist-society-events/> [https://perma.cc/R5RM-ELZC] ("The only reason FedSoc even maintains a facade of being a non-partisan organization is so the judges—and lawyers who want to be judges—can support the FedSoc, show up at their events, and maintain and

all judges are politically biased.³² Part of the reason why the public might give up hope of identifying illegitimate judicial decisions and holding individual judges accountable is that accusations of partisanship themselves can be a political weapon used to delegitimize an undesired opinion or outcome. These public attacks are compounded by the media, which often highlights the political affiliation of judges rather than the legal issues involved.³³

Much has been written about how judges decide cases, including the role that political and other personal preferences play, and we do not intend to venture far into those waters.³⁴ Our focus is not on the normative question of whether politics should have a role in judicial decision-making or the descriptive question of how much of a role politics does play. We undertake to explore reasons for declining faith and offer prescriptions for restoring legitimacy to the judiciary. In particular, the public should have confidence that judges belong to and embrace a distinct profession with its own norms and practices. These act as a brake or limit on political and other biases. The brake can be strong or weak; its power can ebb and flow, but the rule of law depends on a basic faith in its existence. In order to earn this trust, the judiciary, in turn, ought to work both to buttress, and reassure the public of, the power of professional identity.

The idea of politicians in robes is premised on the belief that judges are

intellectually dishonest stance that they're just there for the lobster rolls.”).

32. Jay Willis, *Just Call Supreme Court Justices “Republicans” and “Democrats”*, BALLS & STRIKES (Sept. 29, 2022), <https://ballsandstrikes.org/legal-culture/supreme-court-term-preview-republicans-and-democrats/> [https://perma.cc/6QJC-ZDFT]; Zalman Rothschild, *Judges’ Politics Absolutely Sway How They Decide Cases. I Crunched the Numbers*, GUARDIAN (Oct. 12, 2020, 6:13 PM), <https://www.theguardian.com/commentisfree/2020/oct/12/supreme-court-judges-amy-coney-barrett> [https://perma.cc/AA2D-FELW]; Jenna Greene, *For Trump, No Such Thing as an Unbiased Judge*, LITIG. DAILY (June 6, 2016), https://www.bloomberglaw.com/product/blaw/document/X56S50800000?criteria_id=00e3a60bb63f5d5384ba0263d7c65984&searchGuid=913a7948-c410-472f-8ef8-4f0f064d0881&search32=cOrHnZ_r7n1ntyINozLsPw%3D%3DCz8nyxLqf926pquioOcTOObo7cf6fIFqTbiQ3eUNUw31iTvDXCSlcqPUEMaU5cxK2Hr7pjD8nuOsKA3t755pehsS3qveIT-lqIPyG4kYRqcubbsubvckeR48YzMR7E-9N4_k_5oV8AHKsDi3eYXQOOQ%3D%3D [https://perma.cc/SNY7-W2WW].

33. See, e.g., *The Judge Assigned to Oversee Trump’s Criminal Case Was Appointed By Trump Himself*, NPR (June 9, 2023), <https://www.npr.org/2023/06/09/1181310860/aileen-cannon-trump-indictment> [https://perma.cc/D2A6-DTH4]; Devan Cole, et al, *Trump Does Not Have Presidential Immunity in January 6 Case, Federal Appeals Court Rules*, CNN (Feb. 6, 2024), <https://www.cnn.com/2024/02/06/politics/trump-immunity-court-of-appeals/index.html> [https://perma.cc/JZR6-6VAV]; Rachel Maddow, *Trump Appointed Judge Cannon To Initially Oversee Trump Indictment Case*, MSNBC (June 9, 2023), <https://www.msnbc.com/andrea-mitchell-reports/watch/trump-appointed-judge-cannon-to-initially-oversee-trump-indictment-case-181435973806> [https://perma.cc/6DKA-U68A].

34. See, e.g., Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1482 (2003) (concluding that ideology plays a role in how judges decide cases). For theories of judging see for example, Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013) (arguing that judges should act as public fiduciaries); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987) (arguing for a “constrained dialog theory of judging,” which focuses on communication between judges and different actors, like juries, litigants, and lawyers); Jeffrey Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 572 (1997) (arguing that judging accounts for and integrates psychological biases).

influenced—perhaps in a dispositive way—by their political preferences, rather than employing neutral tools of interpretation consistently across cases. Our perception is that the scales, having been lifted from the public’s eyes, can never be replaced.³⁵ Regardless of one’s normative views or empirical assumptions, judges will never persuade the public that they entirely leave politics out of how they decide cases and particularly out of how they resolve uncertain questions of law. This is true for several reasons.

First, there is invariably a gap between judges’ decision-making processes—that is, how judges reach decisions in the privacy and opacity of their chambers—and how judges explain their decisions to the public through their opinions. This may reflect judges’ interest in conveying that they are not legislating from the bench,³⁶ but there are other reasons as well. Judges often make decisions in their chambers without reasoning out loud as they reach conclusions. Judges’ actual thought processes may be hard for the judges themselves to recall, capture, and articulate. And sometimes, their opinions are written by law clerks, not the judges themselves. But more importantly, the conventions of judging do not invite or permit judges to be fully candid about why they reach decisions. Judges are required to justify decisions by applying the law to the facts—and where the governing law is uncertain, to use certain conventional tools to ascertain it. The tools of interpretation, while constraining judges, do not dictate invariable outcomes in many cases. That is why so many Supreme Court decisions have dissents and why there are disagreements among lower courts that are left for the Supreme Court to resolve. Consequently, judges have the ability privately to make some decisions in any way they would like, as long as they can plausibly justify their decisions using conventional tools of legal reasoning.

Second, because of the opacity of judges’ decision making, and judges’ leeway in reaching results, it will ordinarily be impossible for the public to discern all the factors that dictated a judge’s decision.³⁷ Judges’ motivations, emotions, and reasons may be hidden even from judges themselves. The recent biography of Judge Irving R. Kaufman of the Second Circuit provides an illustration.³⁸ Judge Kaufman is best known—and often reviled—as the federal trial judge who presided over Julius and Ethel Rosenberg’s espionage trial before sentencing them to death. Based on interviews with Judge Kaufman’s law clerks, the biography makes it plain that Judge Kaufman did not use conventional legal tools

35. Lawrence H. Tribe, *Politicians in Robes*, N.Y. REV. (Mar. 10, 2022), <https://www.nybooks.com/articles/2022/03/10/politicians-in-robles-justice-breyer-tribe/> [<https://perma.cc/2FS6-LFDY>] (arguing that it is destructive and counterproductive to perpetuate the myth that judges are not influenced by politics).

36. See Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge’s Views*, 51 DUQ. L. REV. 3, 3 (2013) (“[J]udges tend not to be candid about how they decide cases” in part because “[t]hey want to be thought of as technicians, as experts, rather than as politicians in robes”).

37. Geyh, *supra* note 18, at 206–14 (arguing that there is a growing consensus about the many factors that influence judicial decisions but it is hard to tease out which factors play a role at any given moment).

38. See generally MARTIN J. SIEGEL, *JUDGMENT AND MERCY: THE LIFE AND TURBULENT TIMES OF THE JUDGE WHO CONDEMNED THE ROSENBERGS* (2023).

to reason his way to results but decided what results he wanted and directed his law clerks to find a way to justify them in writing.³⁹ Even with the benefit of the biography's revealing account of Judge Kaufman's life and judgeship, it would be impossible to say why Judge Kaufman favored particular outcomes—for example, whether he was implementing social or political preferences derived from his upbringing or his legal education, whether he favored rulings that would garner the most positive publicity or best position him to advance to the Supreme Court, or whether he sought to expiate guilt over the Rosenberg trial. It is also possible that he intuited what he thought the law would require and was therefore not as divorced from judicial norms of reasoning as it might at first seem.

Third, the politicization of judicial decision-making largely is not susceptible to restraint or regulation other than through the ordinary appellate process—nor should it be, except in the most blatant and extreme situations. And in the highest court—as decisions such as *Bush v. Gore*⁴⁰ exemplify—there is no appellate accountability either. This is so even if judges sometimes appear forthrightly to interject political considerations into their judicial reasoning process. That is because, in most cases, one person's improper political consideration is another person's legitimate consideration of public policy. For example, in 2021, an Alabama disciplinary panel filed a complaint seeking to discipline an Alabama state judge for, among other things, interjecting political considerations into her judicial writings.⁴¹ Although a group of lawyers submitted a letter in her defense, asserting that “judges may take account of the social and political context in which procedural law is implemented and comment on its relevance,”⁴² the panel insisted that she had abandoned her neutral role.

While political considerations are an inevitable aspect of judicial decision-making, they are not, in most cases, the only ones. As Charles Geyh has previously observed, judges are trained and acculturated to engage in a special form of reasoning.⁴³ Judicial reasoning preserves and favors rule of law values, as does the culture that fosters it. The judicial robes are not simply a costume or disguise but serve to remind the public and the judges themselves of a common identity, which limits the reach of politics and imposes a degree of fairness and

39. *Id.* at 216, 240, 253, 341.

40. *Bush v. Gore*, 531 U.S. 98 (2000).

41. See Complaint, *In the Matter of Tracie Todd*, No. 58 (Ala. Ct. Judiciary Apr. 6, 2021). The investigation into Justice Earls involves a similar disagreement over where proper judging ends and improper political considerations begin. See note 106 and accompanying text, *infra*.

42. Judge Tracie Todd and Judicial Independence, Nov. 30, 2021 (on file with the journal). The letter was signed by more than forty lawyers and was principally drafted by Bruce Green, a co-author of this essay.

43. For a discussion of how legal culture may work along with the particular beliefs and characteristics of an individual to create a special form of reasoning, see Charles Garner Geyh, *Considering Reconsidering Judicial Independence*, 168 UNIV. PA. L. REV. ONLINE 35, 44–45 (2019). In this article, Geyh draws on this description of judges as inhabiting a legal culture that serves as a partial break on personal or political convictions to conclude that accountability ought to be stronger. *Id.* at 45. With regard to the regulation of extrajudicial activities, we disagree, arguing instead that judges should do most of the work not regulators.

regularity on the process of judging. The judiciary's aim should not be to convince the public that judges are entirely free from personal or political bias but, more realistically, to convey that judges endeavor to remain above the political fray and, in their work, can be expected largely to do so. This occurs because they are more consistently and deeply affected by their professional education, role, and reputation; and more motivated by professional values and reputation than by ideological outcomes or partisan reward. As we discuss below, to do so, judges should distance themselves from politics and related activity sufficiently to ensure that professional identity dominates both in reality and in the public eye.

In some judicial cultures outside the United States, future judges are trained separately from future lawyers and then graduate into career-long judgeships.⁴⁴ This process for educating, selecting, and promoting judges may inspire public confidence that judges are being professionally socialized to adopt and implement prevailing judicial values. In the United States, however, judges have trained to become lawyers, almost invariably practice law before joining the bench, and may later leave the bench to resume law practice. Some even serve as part-time judges while still practicing law.⁴⁵

While lawyers' practice and legal education share some of the same values as judging, they are not identical. In crucial ways, they are at odds. Although it is important for advocates to cultivate the ability to look at questions objectively, so that they can anticipate opposing arguments and counsel clients realistically, both fiduciary norms and advocacy norms ultimately encourage a high degree of partisanship, not even-handedness between the client and the opposing party. Thus, a U.S. litigator's preparation for the bench is likely to be, and appear, far less effective in encouraging judges to internalize a nonpartisan professional identity—one that offsets their political preferences and predispositions. That said, lawyers practice before judges or in the shadow of judge-made law, so the judicial cast of mind is not alien. And lawyers who become judges likely make the shift to the bench both thoughtfully and intentionally.

Self-serving assurances from Supreme Court Justices and lower court judges will not in themselves, however, persuade the public that judges operate in a professional realm with a set of norms and traditions different from those of other public officials. That is particularly true if judges' off-the-bench activities convey a contrary impression. To cultivate public confidence in the power of judicial norms and values when judges are presiding over cases and making decisions in them, judges should avoid other activities that needlessly convey that their professional values have been eclipsed or relegated to secondary status. Judges who appear to prioritize political activities in other aspects of their judicial work and professional and personal lives off the bench—to which we now turn—will

44. See generally John Bell, *Judiciaries Within Europe* (2007) (comparing the different education and appointment systems for judges in European countries and discussing the process of professionalization and development of independence within those systems).

45. See, e.g., Peter A. Joy, *Lawyers Serving as Judges, Prosecutors, and Defense Lawyers*, 51 WASH. U. J. L. & POL. 23 (2016) (discussing part-time municipal judges in St. Louis).

not inspire confidence that they are fair and impartial when they perform the judicial function, much of which, such as the internal deliberation process, is not visible.

III

JUDGES AS POLITICAL CANDIDATES

Even if it were desirable to isolate judges from politics entirely, doing so would be impossible because of the role of politics in judicial elections and appointments. Outside the courtroom, most judges are, and always have been, politicians of a sort. The process of attaining judicial office, whether through election or appointment—or reelection or reappointment—calls on lawyers and judges to be politically engaged and, in the case of elected judges, to be politicians in the most literal sense. Contentious political campaigns for elected judgeships create the unavoidable impression that judges are politicians. If judges are politicians when they aspire to the bench, the public may doubt that they transform into something else entirely when they don judicial robes. Rules of judicial conduct prevent the starkest appearances of partisanship by regulating how candidates for judicial office may campaign, but the rules are limited by First Amendment case law and by the exigencies of the political process.⁴⁶ For example, a candidate for judicial office cannot hold a leadership position in a political organization,⁴⁷ endorse or oppose a candidate for political office,⁴⁸ or accept endorsements from a political organization.⁴⁹

The judicial election process, like other political processes, seems increasingly partisan as high-profile state judges campaign not on their professional reputation or experience, but on their ideological commitments. A case in point is the 2023 election for a seat on the Wisconsin Supreme Court, which reportedly flipped the court from conservative to liberal after well-financed campaigns focusing on abortion rights, redistricting, and other partisan political issues.⁵⁰ While politics has always driven judicial elections, recent Supreme Court decisions on abortion and gun regulations have changed the tenor of states' judicial selection processes, with the result that overtly partisan candidates with a track record for ideological commitment often prevail.⁵¹ This erodes faith in

46. ABA MODEL CODE OF JUD. CONDUCT, r. 4.1 (AM. BAR ASS'N 2020).

47. *Id.* r. 4.1(A)(1).

48. *Id.* r. 4.1(A)(3).

49. *Id.* r. 4.1(A)(7).

50. Adam Edelman, *Liberals Gain Control of the Wisconsin Supreme Court for the First Time in 15 Years*, NBC NEWS, (Apr. 4, 2023), <https://www.nbcnews.com/politics/elections/wisconsin-supreme-court-election-liberals-win-majority-rcna77190> [<https://perma.cc/MJ4S-XE5X>].

51. See Eric Gritz, *A Justice for Some? After Roe, State Supreme Court Races Turn Political*, NBC NEWS (Oct. 22, 2022), <https://www.nbcnews.com/politics/2022-election/justice-roe-overturned-state-supreme-court-races-turn-political-rcna52702> [<https://perma.cc/6CKS-26DH>]; Rebecca Roiphe, *The Right Way to Replace New York's Chief Judge*, DAILY NEWS (July 30, 2022), <https://www.nydailynews.com/opinion/ny-oped-right-way-new-york-chief-judge-20220730-wn4bk42cdrb53tpoevt5lfsa-story.html> [<https://perma.cc/2AUT-RKHK>].

courts, not because the public expects judging to be entirely devoid of politics, but because the public perceives that politics has eclipsed the professional qualities and commitments that ensure fair judging. Candidates could theoretically counter this trend by seeking to distance themselves from politics as they campaign and rely instead on professional qualifications, but the incentives make this unlikely. Even if this were possible, it may not be desirable to eliminate politics entirely from the campaign, but be better to dampen its importance and relegate it to a position subordinate to professional qualifications.

Appointing judges, a cause championed by the late Justice O'Connor following her retirement,⁵² may be better than electing judges in reducing the appearance of partisanship and also perhaps in ensuring judges' qualifications, but it is no panacea. The process of securing an appointment, advancing within the judiciary—such as from a trial court to an appellate court—and, often, promoting one's status within the judiciary all call for a sort of political engagement.⁵³ Controversial Supreme Court confirmation hearings convey that nominees campaign in the Senate for a position on the high court against the background of a partisan divide.⁵⁴ On the state level, political party ties are often the primary factor in securing an appointment, hardly a process designed to convey the importance of professional values. Moreover, even if nominees for federal- and state-appointed judgeships were all passive recipients of political largesse, the public would perceive the process as political because of other politicians' and political candidates' campaign rhetoric regarding judicial appointments and interest groups' rhetoric about the kinds of nominees that the president or other public officials should appoint.

Judges' involvement in the process for appointing other judges to the bench can contribute to the perception that judges remain engaged in politics long after putting on the robes. Sometimes federal judges not only time their retirement to allow a president of their political party to appoint their successors but predicate their retirement on an understanding about who will succeed them. For example, Justice Kennedy's retirement was reportedly part of an arrangement with President Trump to appoint Brett Kavanaugh, the Justice's former law clerk.⁵⁵ Although these sorts of interchanges are usually concealed, in 2022, an eighty-five year-old federal district judge publicly reversed his retirement plans out of

52. See John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES (Dec. 23, 2009), <https://www.nytimes.com/2009/12/24/us/24judges.html> (describing Justice O'Connor's work as the chair of the Judicial Selection Initiative to prevent judges from being "politicians in robes").

53. The recent biography of Irving R. Kaufman offers an excellent illustration of the lengths to which a lawyer might go in politicking to achieve a seat on the federal bench and to then ascend. See Siegel, *supra* note 36, at 152, 158 (describing Kaufman's efforts to obtain a seat on the Second Circuit); *id.* at 269–70 (noting Kaufman's unsuccessful politicking for appointment to the Supreme Court).

54. See David F. Levi et al., *Losing Faith: Why Public Trust in the Judiciary Matters*, 106 no. 2 JUDICATURE 71, 72 (2022) ("[T]he confirmation process is portrayed, in the press at least, as this grand fight between Camp A and Camp B, between liberals and conservatives, and who's going to get this pre-ordained result." (quoting Judge Wood)).

55. RUTH MARCUS, *SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER* 2–4 (2019).

dissatisfaction with his announced successor.⁵⁶ Judges' engagement in the appointments process may be motivated by nonpartisan considerations, such as a desire to preserve the retiring judge's legacy, to advance a professional colleague's career, or to ensure that the court is left in good hands. But because the process of appointing judges, like the process for appointing other office holders, is inherently political if not partisan, judges' active involvement belies the image of judges as being politically disengaged. Perhaps just as judges must limit their involvement in electoral politics for the sake of appearances,⁵⁷ they should refrain from involvement in political appointments.

For the most part, however, if judges seek to promote public confidence in the judiciary by appearing to be politically uninvolved, there is relatively little they can do in the context of the judicial selection and advancement processes because judges will always have a stake in their own judicial careers. Perhaps life tenure and lengthy terms of judicial tenure promote confidence that, once they become judges, many or most will abandon ambitions that call for further politicking. But there is little possibility that the United States will make judicial selection appear to be nonpolitical by instituting judicial bureaucracies, as in some countries.⁵⁸ More promising is the possibility that additional states will move from judicial elections to meritocratic appointment processes that reduce the importance of politicking publicly.⁵⁹

IV

JUDGES AS POLITICAL ADMINISTRATORS

Judges serve as administrators with hiring and managerial responsibilities. Recognizing the possibility for politics to intrude in that work, judicial conduct rules forbid judges from making patronage appointments, meaning they cannot take account of political affiliation when it is irrelevant to job qualifications.⁶⁰ An

56. H. Rose Schneider & Eduardo Cuevas, *Federal Judge in NY Reverses Retirement Plans in Snit Over Biden's Choice for Successor*, OBSERVER-DISPATCH (Aug. 13, 2022), <https://www.uticaod.com/story/news/2022/08/12/utica-federal-judge-reverses-retirement-over-successor/65400188007/> [<https://perma.cc/F5RQ-HP3Y>].

57. See note 47-52, and accompanying text, *supra*.

58. In any event, judicial bureaucracies do not necessarily ensure that judges are nonpolitical. See generally, Neil Chisholm, *The Faces of Judicial Independence: Democratic versus Bureaucratic Accountability in Judicial Selection, Training, and Promotion in South Korea and Taiwan*, 62 AM. J. COMP. L. 893, 934-40 (2014) (comparing courts' independence from politics in bureaucratic as compared with democratic systems for selection and promotion).

59. See James F. Blumstein, *Judicial Retention Elections for State Appellate Judges: The Implications of the Ballot-Access Cases*, 17 DUKE J. CNST. LAW & PUB. POL'Y 99, 109 (2022) (since 1940, 35 states and the District of Columbia have adopted "some form or component of a merits-election system").

60. 2 GUIDE TO JUDICIARY POL'Y, Pt. A, Ch. 2 CODE OF CONDUCT FOR U.S. JUDGES, Canon 3(B) (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/4VQE-6ZBX>]; *Rutan v. Republican Party*, 497 U.S. 62, 63-64 (1990) (holding that government hiring decisions based on political views violates the First Amendment when such views are not relevant for the job).

advisory opinion urges judges to be conscious of political bias in hiring law clerks, in particular.⁶¹

The media and good government watchdogs have tended to ignore the administrative side of judges' work, and so, to the extent that judges politicize their administrative function, public perceptions have probably been unaffected. But this may be changing. In law schools and the legal profession, there is a perception that many prominent federal judges hire law clerks based on ideology, not just merit—for example, that membership in the Federalist Society is a strong credential, if not a prerequisite, for a clerkship with certain conservative judges, just as it was a strong credential for lawyers seeking federal judicial appointments in the last Republican presidential administration. It is hard to know how widespread this practice is in federal courts and how far it extends into the state judiciary. To the extent it does exist, it may not violate the relevant judicial conduct rule, since judges can plausibly deny that political ideology affects whom they hire; indeed, fifty federal appellate judges who participated in a recent survey did in fact deny that ideology played a role in their hiring decisions.⁶² Judges can rationalize that they seek law clerks who share their interpretive philosophy—for example, as an originalist or a textualist—and that membership in the Federalist Society corresponds with that shared approach. They might go further and suggest that these interpretive methodologies are more consistent with impartiality than any other. However they rationalize it, judges' practice of hiring law clerks who, in effect, share their political or ideological commitments may reinforce the perception that judges make politically-motivated decisions in the privacy of their chambers. If they choose to be surrounded and assisted by law clerks who evidently share their ideological preferences, it becomes harder to believe that they put aside their ideological preferences in deciding and presiding over cases.

Circuit Judge James Ho's highly publicized speech to a Federalist Society chapter might similarly be perceived as exploiting administrative power toward ideological ends. Judge Ho announced that he would stop hiring Yale Law graduates in response to the law school's failure to adequately protect the right to free speech.⁶³ Several federal judges then announced their support for the hiring policy, which soon extended to another school that had similarly disregarded free speech principles.⁶⁴ While the federal judges might have said

61. 2 GUIDE TO JUDICIARY POL'Y, Pt. B, Ch. 2 PUBLISHED ADVISORY OPINIONS, Op. No. 115: Appointment, Hiring, and Employment Considerations: Nepotism and Favoritism (2022), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

62. Jeremy Vogel et al., *Law Clerk Selection and Diversity: Insights From Fifty Sitting Judges of the Federal Courts of Appeals*, 137 HARV. L. REV. 588, 616–19 (2023).

63. Nate Raymond, *Trump-Appointed Judge Boycotts Yale Over 'Cancel Culture'*, REUTERS (Sept. 30, 2022), <https://www.reuters.com/legal/government/trump-appointed-judge-boycotts-yale-law-clerks-over-cancel-culture-2022-09-29/>.

64. Andrew Goudsward, *Conservative Judges Extend Boycott to Stanford After Disrupted Speech*, REUTERS (Apr. 3, 2023), <https://www.reuters.com/legal/government/conservative-judges-extend-clerk-boycott-stanford-after-disrupted-speech-2023-04-03/>.

that their aim was politically neutral—for example, to promote free speech and open dialog on law school campuses—others might perceive their aim to be fostering certain ideological perspectives on law school campuses. Indeed, one federal appeals judge who criticized the hiring policy noted that she, for one, did not “worry too much about a student’s ideological persuasion,”⁶⁵ implying that Judge Ho’s boycott reflected an ideological preference.

In part because the media framed this as a partisan issue,⁶⁶ the incident underscored the ideological divisions within the legal profession, including within the bench, and magnified their prominence. It also highlighted how neutral values like free speech have themselves become politicized, coded as a conservative concern. How would a judge truly committed to rule of law values at law schools seek to ensure their perpetuation without being perceived as political? Given the polarized political climate, Judge Ho’s threatened use of his hiring power to influence law schools might undermine public confidence in judges’ impartiality, whether by suggesting that judges use their authority to promote their favored ideologies—regardless of whether that was Judge Ho’s motivation—or by suggesting that the federal bench is divided by ideology as much as it is united by shared rule-of-law norms.

Unlike the judicial selection and advancement process, the hiring of law clerks is a judicial administration process where the appearance of partisanship is usually avoidable. For decades, judges hired law clerks without the public becoming aware of any political preference or, for that matter, interpretive philosophy. Most judges likely hired law clerks with little regard to the candidate’s politics. Many still do without noticeable harm to the quality of their chambers’ work. Precisely because hiring ideologically or philosophically simpatico law clerks seems so irrelevant to judges’ ability to decide cases evenhandedly and objectively, it is hard to escape the appearance that judges are exploiting their hiring authority simply to promote the careers of young lawyers who share their conservative political views and, in doing so, are closing their minds to views that challenge their political preferences. Unlike problematic appearances inherent in the political selection process, those occasionally arising in the judicial administrative process are avoidable.

Perhaps in making administrative decisions, judges will sometimes conclude that other considerations justify some appearance of partisanship, but even so, judges should weigh the interest in staying above the political fray. For example, after an intermediate appellate judge excoriated his court for deferring to a transgender defendant’s chosen pronouns,⁶⁷ the Michigan Supreme Court took

65. Colin Kalmbacher, *More Judges Are Going on the Record Against Trump-Appointed Judge’s ‘Ugly’ and ‘Regrettable’ Ban on Hiring Clerks From Yale Law*, LAW & CRIME (Oct. 11, 2022), <https://lawandcrime.com/judiciary/more-judges-are-going-on-the-record-against-trump-appointed-judges-ugly-and-regrettable-ban-on-hiring-clerks-from-yale-law/> [].

66. Nate Raymond, *Trump-Appointed Judges Behind Yale Clerk Boycott to Speak on Campus*, REUTERS (Mar. 8, 2023), <https://www.reuters.com/legal/legalindustry/trump-appointed-judges-behind-yale-clerk-boycott-speak-campus-2023-03-08/>.

67. *People v. Gobrick*, No. 352180, 2021 Mich. App. LEXIS 7185, at *25–26 (Mich. Ct. App. Dec.

the initiative to study and, ultimately, adopt a new court rule on the politically contentious subject of misgendering. The court's rule for the state judiciary, the first of its kind, requires judges to respect parties' preferred pronouns and forms of address.⁶⁸ Although the rule had substantial support, it was also opposed, especially by representatives of religious groups,⁶⁹ and some might have perceived that the court was politicizing the court rules. While inaction also might have been viewed as taking a side on a contentious issue, the court could probably have achieved its objective without seeming to make a political statement, such as by modeling respectful behavior or by issuing a decision interpreting the professional conduct rule of civility, which requires judges to be courteous and to require lawyers and others in their courtrooms to be courteous to litigants and witnesses.⁷⁰ We have previously explained why this rule "should be cautiously enforced,"⁷¹ but if necessary, the court could also sanction lower-court judges who fail to show and enforce appropriate respect for parties and witnesses. Although the conduct required of judges would be the same, the court rule reads like a judicial pronouncement on a hotly contested issue of public policy, far more so than would a disciplinary opinion or decision applying the general principle of courtesy.

On the other side of the culture wars divide, in response to a policy of the Florida Bar's Business Law Section requiring its Continuing Legal Education (CLE) programming to have diverse faculty, the Florida Supreme Court adopted a rule in 2021 denying credit to Florida lawyers for attending certain Business Law Section-sponsored programs.⁷² The court interpreted the organization's policy, modeled on a similar ABA policy, as a "quota[] based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants."⁷³ Programs implementing this policy were unworthy of CLE credit, the court later explained, not because their quality would suffer, but for public policy reasons—because the diversity policy would "depart from the American ideal of treating people as unique individuals, rather than as members of groups," "foster stereotypes," and be "divisive."⁷⁴ Comments responding to the rule were almost entirely opposed.⁷⁵ Like the Michigan rule,

21, 2021) ("Once we start down the road of accommodating pronoun (or other) preferences in our opinions, the potential absurdities we will face are unbounded. I decline to start down that road, and while respecting the right of dictionary- or style-guide-writers or other judges to disagree, do not believe that we should be spending our time crafting our opinions to conform to the 'wokeness' of the day.").

68. MICH. CT. RULES, r. 1.109(d)(1)(B) (last updated Dec. 28, 2023).

69. MICH. SUP. CT., PUBLIC HEARING, (June 7, 2023), https://www.courts.michigan.gov/49d7ff/siteassets/rules-instructions-administrative-orders/public-hearing-transcriptsnotices/public-hearing-tr_06-07-2023.pdf [<https://perma.cc/RAP7-3YAG>].

70. ABA MODEL CODE OF JUD. CONDUCT, r. 2.8(B) (AM. BAR ASS'N 2020).

71. Bruce A Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 501 (2009).

72. In re Amend. to Rule Regulating the Fla. Bar 6-10.3, 315 So.3d 637, 639 (Fla. 2021).

73. In re Amend. to Rule Regulating the Fla. Bar 6-10.3, 335 So.3d 77, 79 (Fla. 2021).

74. *Id.* at 80.

75. *Id.*; *id.* at 82 (Labarga, J., dissenting).

the Florida rule might be viewed as an unnecessary administrative initiative designed to take a political stand on a hotly contested political question.

IV

JUDGES' POLITICALLY-ORIENTED EXTRAJUDICIAL ACTIVITIES

Perhaps the most fraught aspect of judges' conduct involves their personal and professional activities outside the courtroom. The Code of Judicial Conduct for United States Judges allows judges to be involved in extrajudicial activities that are consistent with their role but precludes overly political activities without drawing clear lines.⁷⁶ Two types of outside activities have elicited particular public concern: judges' involvement with organizations that, although not associated with a political party or candidate, appear to be politically-oriented and judges' social engagement with, and receipt of largesse from, individuals with strong political associations.

A. Involvement in Politically-Oriented Organizations

The ABA's Model Code of Judicial Conduct recognizes that "a judge should not become isolated from the society in which the judge lives" and that it is proper and beneficial for judges to engage in certain aspects of civic life: "As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice."⁷⁷ The Code of Judicial Conduct for United States Judges specifies that judges can be members of and take leadership positions in organizations devoted to the law,⁷⁸ but forbids them from taking leadership positions in political organizations, being members in political organizations,⁷⁹ giving speeches at political organizations,⁸⁰ or engaging in any other political activity.⁸¹

But the code does not define "political organizations" or "political activity,"⁸² nor does it specify which organizations are legal, as opposed to political, in nature. An advisory opinion defines a legal organization as one that is "directed

76. 2 GUIDE TO JUDICIARY POL'Y, Pt. A, Ch. 2 CODE OF CONDUCT FOR U.S. JUDGES, Canon 4 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/V4MZ-EF68>].

77. ABA MODEL CODE OF JUD. CONDUCT, Canon 4 (AM. BAR ASS'N 2020).

78. 2 GUIDE TO JUDICIARY POL'Y, Pt. A, Ch. 2 CODE OF CONDUCT FOR U.S. JUDGES, Canon 4(A)(3) (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/72LZ-SNUN>].

79. *Id.* at Canon 5(A)(1).

80. *Id.* at Canon 5(A)(2).

81. *Id.* at Canon 5(C).

82. The Commentary to the code offers a fairly narrow definition: "The term 'political organization' refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office." *Id.* at Canon 5 comment.

toward the objective of improving the law, [through] law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.”⁸³ And the Judicial Council of the Second Circuit has clarified that the ban against speaking at political organizations refers to “groups organized *primarily* for political purposes, such as political parties, rather than to groups organized primarily for other purposes, such as legal education or debate, even if there is sympathy between a particular group or its mission and partisan entities.”⁸⁴ The primary purpose of an organization may be contested and hard to discern.

There is little guidance about how involved with a political organization a judge may be, beyond the general prohibition against membership. At what point does the judge’s participation cease being a positive contribution to society and become a political affiliation that casts doubt on the judge’s impartiality?⁸⁵ Perhaps the code is intentionally vague because the regulatory line would be hard to draw and even harder to police fairly. The ambiguous and undefined term reminds regulators to avoid strictly enforcing the rule against judges. But conscientious judges seeking to conduct their work fairly inside the courtroom, inspire confidence in the justice system, and participate productively in a public debate still need guidance, and, as a matter of self-regulation, they might be expected to steer clear of the disciplinary prohibition.

Some level of involvement with politics off the bench can lead the public to conclude that the judge’s allegiance to a political party or politically-identified cause is strong enough to undermine the judge’s commitment to judicial training, standards, and norms of the profession. Several considerations are relevant in locating this tipping point.⁸⁶

The first is the extent of the judge’s involvement with a particular politically-identified organization, as well as the context, such as the judge’s other

83. 2 GUIDE TO JUDICIARY POL’Y, Pt. B, Ch. 2 PUBLISHED ADVISORY OPS., Op. No. 93: Extrajudicial Activities Related to the Law (2022), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.

84. *In re Charges of Jud. Misconduct*, 404 F.3d 688, 693 (Judicial Council 2d Cir. 2005) (finding that Judge Guido Calebresi did not engage in misconduct by speaking at an American Constitution Society event even though the organization defines itself as “left-leaning” because the primary purpose of the group is not political).

85. Some Advisory opinions offer guidance but tend to use terms like political or policy debate that are open to interpretation. *See* 2 GUIDE TO JUDICIARY POL’Y, Pt. B, Ch. 2 PUBLISHED ADVISORY OPS., Op. No. 46: Acceptance of Public Testimonials or Awards (2022), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf (advising against accepting awards from organizations that take positions in contested policy debates); 2 GUIDE TO JUDICIARY POL’Y, Pt. B, Ch. 2 PUBLISHED ADVISORY OPS., Op. No. 85: Membership and Participation in the American Bar Association (2022), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf (concluding that judges can be members of organizations that take positions on policy debates as long as the judge is not involved in that work).

86. The California Supreme Court Committee on Judicial Ethics issued an opinion discussing factors for determining whether a court should invite an outside speaker. While the factors are not exactly the same as the ones we suggest, there is significant overlap. *See* CAL. SUP. CT. COMM. ON JUD. ETHICS, Formal Op. 2023-023 (July 19, 2023) (issuing guidelines for hosting educational presentations by outside speakers or groups).

affiliations. A speech at an organization that regularly represents a side in litigation is not as concerning as a series of speeches or membership in such an organization,⁸⁷ and these would be less concerning than a leadership or organizational role. Likewise, a speech to a group with political leanings is less concerning if the judge also participates in events hosted by organizations or individuals with different ideological views.

The second factor is the nature of the organization itself. Judges' involvement with an organization will create a stronger appearance that the judge is political if the organization is overtly partisan or dedicated to a particular issue or cause that will likely arise before the court,⁸⁸ as compared with an organization whose mission is more loosely correlated with a particular political ideology. The more overtly political the organization, the more limited the judge's involvement should be. For example, it would be more damaging to lend the prestige of the court to a partisan organization than to a neutral research group.

The third consideration is the nature of the organization's activity in which the judge participates. For example, New York's Advisory Committee on Judicial Ethics has cautioned state judges that it is not sufficient that a not-for-profit organization in which they participate is not a political organization. Even though the judge may be a member, the judge must avoid participating in particular activities that are political or publicly controversial.⁸⁹ Although largely leaving it to judges to decide whether proposed activities are off limits, the committee has occasionally engaged in line drawing. For example, the committee has forbidden judges from participating in events that involve lobbying legislators or gathering legislators to discuss potential legislation.⁹⁰ Perhaps a closer call was its conclusion that, rather than simply avoiding participation in the politically controversial issues addressed by a bar association task force established to monitor and discuss fiscal and human rights issues in Puerto Rico, a judge could not participate in the task force at all because the topics were "extraordinarily controversial and political in nature."⁹¹

The fourth consideration is the nature of the judge's own contribution. Attending a politically-oriented organization's event, or speaking at one of its events, creates less of an appearance that the judge is allied with certain political views than deeper involvement. Judges have been cautioned, for example, against the level of involvement that could be perceived as lending the court's

87. N.Y. ADV. COMM. ON JUD. ETHICS, Op. No. 22-22(A), at 1–2 (2022) (advising that a judge may be a regular member of the New York Civil Liberties Union, but not on the board of directors, due to the extensive lobbying, and litigation activity of the organization).

88. See, ABA MODEL CODE OF JUD. CONDUCT, Canon 4(B)(1) (AM. BAR ASS'N 2020) ("A judge should not serve [in a non-profit organization] if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.").

89. N.Y. ADV. COMM. ON JUD. ETHICS, Op. No. 20-128 (2020).

90. N.Y. ADV. COMM. ON JUD. ETHICS, Op. No. 20-41 (2020).

91. N.Y. ADV. COMM. ON JUD. ETHICS, Op. No. 20-209 (2021).

prestige to the organization.⁹² And even a speaking engagement can appear political, depending on the judge's remarks. For example, Judge Guido Calabresi apologized and was publicly chastised for remarks he made at an American Constitution Society (ACS) event criticizing the Bush administration.⁹³ Judges' remarks can constitute impermissible political criticism even if made in a neutral setting, such as a law review article,⁹⁴ but remarks that might otherwise seem to be non-ideological may take on a more partisan hue when presented to organizations that appear to be politically aligned.

The fifth consideration is whether the judge is formally compensated or receives other benefits. The rules generally permit reasonable compensation for speaking and other engagements as long as they do not give the appearance of influencing the judge.⁹⁵ While compensation and gifts may not buy a judge's allegiance, they can serve to lure a judge into a particular social world that could potentially compromise the judge's professional identity. If a community that sponsors a talk shares affiliation with a partisan organization, it can come with a standard or shared set of assumptions that might unconsciously affect the judge's approach to cases. Even if the judge is genuinely immune to such influence, the public may be unconvinced. Judges should therefore be careful in determining which organizations to support, how deeply their participation should run, and whether to accept compensation or other benefits from those with ties to political parties or partisan agendas.

Several high-profile stories help illustrate the relevance of these factors. A recent article discussing Justice Thomas' entanglement in elite conservative circles noted that he has been deeply involved in the Horatio Alger Association, an organization devoted to cultivating and honoring individual success through hard work and perseverance despite adversity.⁹⁶ The group is not overtly partisan, but its members are almost entirely conservative and its mission is aligned with certain conservative political goals,⁹⁷ including an opposition to affirmative action, an issue that the Supreme Court recently decided.⁹⁸ Justice Thomas not only speaks and lectures for the Horatio Alger Association, but also lends the Supreme Court's facilities to the organization for its annual award ceremonies.⁹⁹

92. ABA MODEL CODE OF JUD. CONDUCT, Canon 2(B) (AM. BAR ASS'N 2020).

93. *See generally* In re Charges of Jud. Misconduct, 404 F.3d 688 (Jud. Council 2d Cir. 2005).

94. *See, e.g.*, Resolution of Jud. Misconduct Complaints About District Judge Lynn Adelman, 965 F.3d 603 (Jud. Council 7th Cir. 2020) ("Judge Adelman has offered to take corrective action by publicly acknowledging that some points in the article are worded inappropriately, disavowing any intention to criticize the integrity of the Chief Justice or any other Justices, and reaffirming his commitment to impartial administration of justice . . .").

95. ABA MODEL CODE OF JUD. CONDUCT, Canon 4(D)(H) (AM. BAR ASS'N 2020).

96. Abbie VanSickle & Steve Eder, *Where Justice Thomas Entered an Elite Circle and Opened a Door to the Court*, N.Y. TIMES (July 9, 2023), <https://www.nytimes.com/2023/07/09/us/clarence-thomas-horatio-alger-association.html?smid=url-share>.

97. *Id.*

98. *See generally* Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 600 U.S. 181 (2023) (finding the affirmative action policies at issue to be unconstitutional).

99. *See* VanSickle & Eder, *supra* note 97.

Justice Thomas's involvement with this organization is so entrenched that his name has become virtually synonymous with its mission. While he has never held a leadership position, he is an honorary board member. The group is not a litigation-based organization whose mission is directly tied to particular issues that might appear before the Court. While its membership is largely conservative and its values of self-help and personal responsibility align with conservative ideology, it is not an overtly partisan organization.¹⁰⁰ Justice Thomas is not compensated for his work for the association, but it has given him access to a wealthy conservative elite, some of whom reportedly treat him to lavish dinners and events. These individuals may not have any direct involvement in litigation before the Supreme Court, but they do have a clear ideological interest in the outcome of many such cases. It would not be unreasonable to conclude that Justice Thomas's extensive exposure to this world, along with the material advantages it brings, might shape the way he thinks about the issues that face the Court, making it harder for him to approach the case with a more neutral judicial mindset. That said, given the nonpartisan and inchoate nature of the organization's mission, it seems unnecessary for him to entirely refrain from participation. It would be prudent, instead, for him to limit his involvement, for example, by declining to use the Supreme Court facilities for the organization's annual award ceremony.

Justice Thomas is not the only judge to spend time working closely with organizations whose goals may not be overtly political but align with a particular partisan agenda. Justice Ginsburg was involved with the National Organization for Women (NOW), lending her name to a lecture series.¹⁰¹ Unlike the Horatio Alger Association, NOW was engaged in litigation and appeared as a party in particular cases while Justice Ginsburg was on the bench.¹⁰² NOW is not affiliated with a party but, like the Horatio Alger Association, it is clearly aligned with a particular political ideology, and its membership is predominantly, if not entirely, liberal¹⁰³ Judicial codes of conduct do not specify what sort of involvement judges ought to have with such organizations but caution against activity that "would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."¹⁰⁴ Even when a group has no explicit partisan affiliation, the public might conclude that a judge with deep, ongoing ties to such an organization would be reluctant to decide a case in a way that harmed its central mission. If

100. Horatio Alger Association, *Who We Are*, <https://horatioalger.org/who-we-are/> [https://perma.cc/Q2JC-V9X8].

101. Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, L.A. TIMES (Mar. 11, 2004), <https://www.latimes.com/archives/la-xpm-2004-mar-11-na-ginsburg11-story.html> [https://perma.cc/Z63K-S4MR].

102. The rules governing federal judges warn judges against engaging in extrajudicial activity that is likely to result in frequent disqualifications. See ABA MODEL CODE OF JUD. CONDUCT, Canon 4(A) (AM. BAR ASS'N 2020).

103. See generally The National Organization for Women, <https://now.org/> [https://perma.cc/B3DJ-K9NQ].

104. *Id.* at Canon 3(C).

the mission is vague and less clearly linked to specific cases, then the concern is less pressing. To avoid appearing politically motivated, Justice Ginsburg might have limited her involvement with NOW to occasional speeches and, if she wanted to keep up the association, might have offered to give speeches at conservative organizations as well.

The proper scope of judges' extrajudicial involvement with politically-oriented organizations depends on how removed we think judges should be from politics and what image one wishes to convey to the public. It is potentially counterproductive to isolate judges from all political involvement or to try to convey the image that judges are entirely insulated from the political process. The public would be easily disillusioned if it expected judges to decide cases without any political or ideological preconceptions. The public would likely conclude that judges are no different from politicians, rather than understanding that despite judges' political commitments, judges apply a certain craft that limits the scope of their rulings and the range of possible opinions. To a certain extent, the current disillusionment with judges reflects such a misperception that judges and the media perpetuate. Judges should use their extrajudicial activity and speeches to correct this misperception and to encourage more realistic expectations.

A judge who is too deeply involved in political activity can lose the ability to approach a case fairly and to consider all sides of a legal argument. In other words, the judge's professional identity, which includes a certain form of reasoning and justification, could be replaced by an allegiance to a political or social group. A well-informed public with reasonable expectations might conclude that a judge who is immersed in extra-judicial political activity would be unable to consider all views and apply the law fairly, even if that is not true.

The public inevitably and reasonably might assume that a judge with ongoing ties to cause-oriented organizations involved in litigation have so aligned themselves with the group that they cannot and will not consider all sides of that issue fairly. Judges ought to avoid these sorts of deep affiliations. If the organization is less clearly associated with a particular movement or cause, but more loosely correlated with a political party, as the Horatio Alger Association is, then such an affiliation is less concerning. Justice Thomas might be more likely to view the world through the lens of personal responsibility that the group embraces, but because it is not a litigation-oriented, issue-based organization, he is less likely to be tied to—or perceived to be tied to—a particular outcome in a specific case by virtue of his relationship to the organization.

A judge's effort to balance these considerations is complicated by our political moment as the country grows increasingly polarized. There are fewer ways to involve oneself in the world that will not be perceived as partisan. Many organizations that would once have been seen as neutral have undertaken an ideological mission that is perceived as partisan. Thus, the Horatio Alger Association, which takes its name from a turn-of-the-century novelist whose central characters picked themselves up by their bootstraps, has now become

associated with conservative ideology.¹⁰⁵ The fact that more issues and institutions have a political valence compounds this phenomenon. For example, many view the Foundation for Individual Rights and Expression, an organization devoted to the neutral value of free speech, as conservative.¹⁰⁶

Some might take the view that, given our polarized times, judges should be more reclusive and removed from the world around them to help buttress faith in the judicial process. Given that almost all outside involvement can be coded as partisan, some might accept judges' greater isolation and sacrifice their unique contribution to public debate to minimize the perception that judges are partisan, or worse, tied to a particular political movement with special interests.¹⁰⁷

A committee of the U.S. Judicial Conference briefly toyed with a version of this idea in a proposed opinion forbidding judges from joining the conservative Federalist Society or its liberal counterpart, the ACS.¹⁰⁸ This would have reversed an earlier opinion allowing such memberships. The draft reasoned that it was appropriate for judges to join or take leadership positions in law-related organizations that promote improvement in the law or administration of justice generally, but inappropriate if the organizations take positions on controversial legal issues.¹⁰⁹ It then concluded that judges' membership in the ACS or the Federalist Society is impermissible because the organizations advocate liberal and conservative causes respectively, whereas judicial membership in the ABA is generally permissible as long as judges disassociate themselves from its controversial positions because its objective is "improvement of the law as a whole."¹¹⁰ This distinction was one of the most controversial aspects of the committee's draft opinion. While the committee ultimately tabled the opinion, the controversy illustrated how hard it is to categorize organizations as political or neutral because the observer's own bias often determines the outcome. Given this difficulty, it is inadvisable for regulators to define strict boundaries. Instead, judges who are familiar with the organizations ought to carefully consider the nature of the organizations with which they affiliate.¹¹¹

105. Brittany Shammass, *What is the Horatio Alger Association*, WASH. POST (July 9, 2023), <https://www.washingtonpost.com/politics/2023/07/09/horatio-alger-association-clarence-thomas/> [<https://perma.cc/4EGJ-WMJF>].

106. See Jeffrey Sachs, *Everyone's Wrong About FIRE*, CHRON. HIGHER ED. (Nov. 30, 2022), <https://www.chronicle.com/article/everyones-wrong-about-fire> [<https://perma.cc/Y66X-76A8>].

107. See Brandon Hasbrouk, *Movement Judges*, 97 N.Y.U. L. REV. 631, 667–71 (2022) (advocating "movement judges" and defining them as those who adhere to left leaning agendas).

108. See U.S. Judicial Conference, Comm. on Codes of Conduct, Exposure Draft Advisory Op. 20-117 (2020), <https://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf> [<https://perma.cc/2CKQ-UGJY>] ("The Committee advises that formal affiliation with the ACS or the Federalist Society, whether as a member or in a leadership role, is inconsistent with Canons 1, 2, 4, and 5 of the Code."); Deborah Cassens Weiss, *US Judiciary Drops Draft Opinion Telling Judges They Can't Be Federalist Society Members*, AM. BAR ASS'N J. (July 21, 2020), https://www.abajournal.com/news/article/us-judiciary-drops-draft-opinion-telling-judges-they-cant-be-federalist-society-members#google_vignette [<https://perma.cc/ZPC7-95Y2>].

109. Op. No. 20-117, *supra* note 95, at 2.

110. *Id.* at 5–11.

111. See Hon. Thomas B. Griffith, U.S. Ct. App., D.C. et al., *Professional Responsibility & Legal*

While political polarization might not justify restricting the type and level of extrajudicial activity in which judges choose to engage, it ought to counsel self-restraint because the cumulative effect of stories about judges' politically-oriented extrajudicial activity contributes to eroding faith in the judiciary. Should judges change their conduct and err on the side of avoiding any extrajudicial activity that could be perceived as political, not only because we live in such polarized times, but also because other judges are acting recklessly with regard to these obligations? Should they adjust their behavior to account for media representations of the judiciary as politically motivated? How should judges react to perceived biases in reporting? If conservative judges believe that the media disproportionately targets conservative judges for their extrajudicial activity, while turning a blind eye to liberal judges, should that play any role in their choice of when and whether to engage in such conduct?

In addition to political polarization, the role of money in politics and in litigation increasingly threatens the perception of judges as professionals. While professional identity—at least when it comes to lawyers—is no longer seen as antithetical to making money,¹¹² wealth and status gained through a lavish lifestyle could be seen as evidence that other interests have eclipsed the judge's professional socialization. High-profile cases often involve concerted efforts by well-funded political groups to use the courts to affect social change.¹¹³ Both liberals and conservatives have engaged in such efforts when it seems advantageous to do so.¹¹⁴ It is hard to maintain the professional vision of judging in the context of these cases, even though most cases involve fairly technical, noncontroversial application of law to facts.

B. Social Interaction with People with Political Interests

Perhaps the area of judges' extrajudicial life most difficult to regulate, but most in need of self-regulation, involves their social interactions with individuals with partisan political interests and, consequently, an interest, and sometimes a direct financial stake, in how courts make law. This has become a subject of concern, particularly with respect to Supreme Court Justices' social relationships over the past two decades—and most especially over the past few years. This has not occurred because it is the first period in history when judges, and especially Supreme Court Justices, have had rich and powerful friends with an interest in judge-made law. But, more likely, this has occurred because the media makes

Education: Freedom of Association in the Legal Profession (Nov. 10, 2020), <https://fedsoc.org/conferences/2020-national-lawyers-convention#agenda-item-professional-responsibility-legal-education>.

112. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368–72 (1977) (“[T]he assertion that advertising will diminish the attorney’s reputation in the community is open to question.”).

113. Emily Birnbaum, *Conservative Groups Secured Big Supreme Court Wins. Now They’re Trying to Do it Again*, BLOOMBERG (Oct. 3, 2023), <https://www.bloomberg.com/news/articles/2023-10-03/us-supreme-court-set-to-hear-cases-from-conservative-groups?embedded-checkout=true> [<https://perma.cc/SJM7-WQT8>].

114. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 1-13 (1996).

judges' social relationships more visible or because public expectations may be changing.

Two decades ago, after going on a hunting trip with Vice President Cheney that was sponsored by an energy company,¹¹⁵ Justice Scalia declined to recuse himself from a case involving the vice president in his official capacity and defended his own conduct by noting that there is a long history of friendships and social engagements between judges and political branch officials.¹¹⁶ But the relationship between Chief Justice Marshall and John Quincy Adams or between Justice Harlan and Rutherford Hayes may not be the right contemporary benchmark.¹¹⁷ Washington, D.C. has become more polarized. There is more money in litigation, which may lead the Supreme Court to decide more contentious social issues.¹¹⁸ These changes have not subsided since Justice Scalia defended his duck-hunting trip. If anything, they are more pronounced. Due to the changing nature of politics and litigation, the public may now be more skeptical of judges' social relationships and more concerned about their impact on how judges decide cases.

In an ideal world, to allay public concerns that judges are influenced by or beholden to politically committed acquaintances, judges would socialize with individuals with diverse political views and engage in social activities that cross the political divide. This would reassure the public that judges are not too steeped in a particular view or outlook, that they remain open to other positions, and that they prioritize judicial norms and practices. But if socializing in nonpartisan fashion was ever possible, it is increasingly unlikely today. Ideological silos dominate online and in real life.¹¹⁹ While they might aspire to do so, judges may not necessarily find their way to the increasingly rare universe in which those with different ideological views coexist.

Even if judges might understandably exploit the opportunity that their positions give them to make rich and powerful friends who share their basic political preferences, they need not accept gifts and other largesse that make it look like the judges are being bought. But the current Justices have not all viewed Justice Scalia's experience as a cautionary tale. There has been increasing controversy over Justices' personal relationships with wealthy and powerful individuals who have a strong partisan interest in certain issues that might appear before the Court.

115. Jeffrey Rosen, *The Nation: Social Court; The Justice Who Came for Dinner*, N.Y. TIMES (Feb. 1, 2004), <https://www.nytimes.com/2004/02/01/weekinreview/the-nation-social-court-the-justice-who-came-to-dinner.html>.

116. *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 916–17 (2004) (refusing to recuse in a case involving Sierra Club in which Cheney was named as a defendant in his official capacity).

117. *Id.* at 916–17 (noting these relationships and others between presidents, other politicians, and Supreme Court Justices).

118. *See generally*, Richard L. Hasen, *Polarization and the Judiciary*, 22 *Ann. Rev. L. & Pol. Sci.* 261 (2019) (describing the effects of political polarization on the Court).

119. *How Politics Has Pulled the Country in Different Directions*, WSJ (Nov. 10, 2020), <https://www.wsj.com/graphics/polarized-presidential-elections/> [<https://perma.cc/RZ2K-LX45>].

Watchdog organizations and ethicists, for instance, criticized Justice Thomas for his personal relationship with Harlan Crow, a Republican donor and political activist, and for accepting a loan from a wealthy friend to purchase a luxury RV.¹²⁰ Apparently, these sorts of relationships are not an aberration. Ever since his contentious confirmation hearings, Justice Thomas has been welcomed into elite conservative circles, often treated to a taste of the luxury that wealth and status bring.¹²¹

Likewise, Justice Alito was recently criticized for the largesse he received from Republican donor Paul Singer, a billionaire whose hedge fund had cases before the Supreme Court. Specifically, Singer financed Justice Alito's flight on a private plane and his stay in a luxury fishing lodge.¹²² Justice Alito defended his conduct,¹²³ but given the public reaction, it might be reasonable to conclude that judges simply should not accept such lavish social hospitality.

Although rules of judicial conduct do not, and should not, regulate judges' friendships and social circles, the Judicial Conference has published regulations governing the propriety of gifts, and state judiciaries have similar guidelines. The rules prohibit judges from receiving gifts from an individual whose interests might be substantially affected by the performance of the judge's job.¹²⁴ But this standard leaves room for interpretation and, however interpreted, is not terribly restrictive. In contrast, some government conflict-of-interest rules flatly forbid public officials from accepting expensive gifts—as opposed to ordinary social hospitality—from individuals who are not family members. Even absent a highly restrictive rule, however, it is reasonable to expect judges to promote public confidence in the judiciary's impartiality by exercising self-restraint. For example, after becoming a judge, Justice Thomas was certainly entitled to develop social relationships with the rich and powerful, forged as a result of his accomplishments, rather than inheritance, and it might have been necessary to accept certain social hospitality to maintain these relationships. But it is reasonable for many members of the public to be skeptical of his decision to accept lavish benefits, such as private flights, from friends who have an interest in how the Court develops the law.¹²⁵

120. Jo Becker & Julie Tate, *Clarence Thomas' \$ 267,230 RV and the Friend Who Financed It?*, N.Y. TIMES (Aug. 5, 2023), <https://www.nytimes.com/2023/08/05/us/clarence-thomas-rv-anthony-welters.html>.

121. VanSickle & Eder, *supra* note 97.

122. Justin Elliott et al., *Justice Alito Took Luxury Fishing Trip With GOP Billionaire Who Later Had Cases Before the Supreme Court*, PROPUBLICA (June 20, 2023), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/D2L7-R7HH>].

123. Among other things, Justice Alito took issue with ProPublica's characterization of the lodge, calling it "rustic." Samuel A. Alito, *ProPublica Misleads its Readers*, WALL ST. J. (June 20, 2023), <https://www.wsj.com/articles/propublica-misleads-its-readers-alito-gifts-disclosure-alaska-singer-23b51eda>.

124. 2 GUIDE TO JUDICIARY POL'Y, Pt. C, Ch. 6 GIFTS TO JUD. OFFICERS & EMPS. § 620.35, <https://www.uscourts.gov/sites/default/files/vol02c-ch06.pdf> [<https://perma.cc/4RMV-AERU>].

125. Josh Gerstein, *Clarence Thomas Discloses Private Jet Trips Provided by Billionaire Harlan Crow*, POLITICO (Aug. 31, 2023), <https://www.politico.com/news/2023/08/31/clarence-thomas-disclosure-harlan->

This problem does not easily lend itself to regulation. It hardly seems fair or desirable for rules to regulate judges' friendships, especially since some will have been born into wealth with access to elite social circles, while others, like Justice Thomas, have not. Regulating gifts is also tricky. If a judge flew on his wealthy friends' private jets before becoming a judge, we might not expect the judge to disengage from similar social activities afterwards because we might not view this largesse as implied compensation for deciding cases favorably to friends. Similarly, as Justice Scalia noted, judges have long had personal relationships with politicians. Our system of judicial ethics tends to assume that judges can put these sorts of friendships aside when deciding cases, and the public ought to understand this expectation. But it also seems reasonable to ask judges to decline large gifts or lavish hospitality from individuals who have a clear interest in cases that come before the court, even if those individuals are not parties in the case. Judges' professional identity does not require an ascetic or reclusive life, but pushing the limits of propriety might lead the public to believe that wealthy friends with strong political interests can influence judges, leading them to subordinate their professional identity to a partisan one.

Judges' avoidance of partisan entanglements would not only promote the judiciary's image as impartial but also reinforce judges' role as case managers, rather than as arbiters of major social problems. Justice Alito's connection to Paul Singer and Justice Thomas' free trips and other gifts from Harlan Crow compounded the public's loss of faith in the Court, reinforcing a sense that judges are in the business of adjudicating social values. Given that we cannot eliminate the increasingly polarized nature of civic life or the vast sums of money in politics, it may be best for judges both to diversify their friendships and to avoid unusually lavish hospitality. While we recommend greater circumspection on the part of judges, we do not recommend stricter rules—in part because strict limits could alienate judges from their social circles or deter less wealthy individuals from pursuing judgeships.

V

CONCLUSION

Judicial regulators should avoid over-regulating conduct that appears to politicize the judiciary, not only because the politicization of judging is unavoidable, but also because lines are difficult to draw, excesses are hard to police, and regulators themselves are subject to the same biases they seek to weed out. Preserving public faith in judicial decision-making requires complex line drawing and intricate balancing of competing values. It inevitably involves multiple factors, which themselves shift with a changing set of external circumstances. Regulators are subject to their own biases, which will inevitably lead them to interpret and enforce the rules in light of their own ideological views. Vigorous enforcement of certain judicial conduct rules would threaten to chill

useful judicial activity and speech.¹²⁶

A recent example illustrates the point. Justice Earls of the North Carolina Supreme Court was investigated for comments she made in an interview about the lack of diversity among lawyers and judges in the state.¹²⁷ She was accused of violating code provisions that require judges to act with impartiality devoid of partisan interest. But of course, what the regulators view as partisan interest would seem to many as a legitimate critique of the legal system, something judges are permitted and even encouraged to do.¹²⁸ Enforcement along this line will likely chill useful activity and speech and be skewed by the political position of the majority of regulators. Thus, the very real problem of politicization, and the legitimacy concerns that come along with it, should largely be managed by judges themselves, rather than policed through enforcement of disciplinary rules.

Professional identity formation is not something that can be mandated. In fact, it is possible that by requiring judges largely to police themselves, the vague and under-enforced rules lead judges to think more deeply about the nature and import of their role.¹²⁹ To preserve the professional identity of judges, and for the sake of public confidence in the judiciary, individual judges should limit the appearance that their administrative decisions—particularly clerkship decisions—are politically influenced. Additionally, they should limit their involvement in evidently political extrajudicial activities, even if the judges are not, and should not be, legally or professionally compelled to do so. Being mindful of the vitality of professional identity as a restraint on other impulses or allegiances is a way for judges to measure their engagement in arguably political speech or activity.

The lack of enforced regulatory mandates does not mean that judges should simply leave it to others to preserve the legitimacy of courts. Nor is it enough, or even desirable, to withdraw from the public eye. Judges should worry about the politicization of their work and the public's declining faith in them. They should work to strengthen a common professional culture and to project the power of

126. Our theory of judges' professional identity as a check on purely political or personal decision-making is in many ways consistent with Charles' Geyh's "legal culture paradigm." But in this respect, we depart from his conclusion. Geyh argues that more regulation is needed once we acknowledge the wide discretion judges have to resolve indeterminacy in the law. We think the opposite. Recognizing what we call judicial professional identity development as the difference between politics and law requires less regulation, not more. Geyh, *supra* note, 9.

127. Hayley Fowler, *N.C. Justice Sues Over Bid to 'Chill' Her Diversity Commentary*, LAW 360 (Aug. 29, 2023), <https://www-law360-com.nyls.idm.oclc.org/articles/1715999/nc-justice-sues-over-bid-to-chill-her-diversity-commentary> [<https://perma.cc/T8DE-M9G2>]. Complaint, *Earls v. N.C. Jud. Standards Comm'n*, No. 1:23-cv-00734, (M.D.N.C. Aug. 29, 2023), <https://www.courtlistener.com/docket/67739090/1/earls-v-north-carolina-judicial-standards-commission-her/> [<https://perma.cc/3VDD-QPH8>].

128. Hayley Fowler, *N.C. Suit Addresses Strain Between Free Speech, Judiciary*, LAW 360 (Aug. 30, 2023), <https://www-law360-com.nyls.idm.oclc.org/articles/1716439/nc-suit-addresses-strain-between-free-speech-judiciary> [<https://perma.cc/96V4-H359>] (quoting co-author Rebecca Roiphe that "one man's comment on the justice system is another man's partisan diatribe").

129. See Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. L. STUD. 1 (2000) (arguing that penalties can be counterproductive in certain contexts).

professional norms to the public. Without creating unreasonable expectations of a completely apolitical or unbiased judiciary, judges can work on cultivating, maintaining, and telegraphing a professional culture devoted to rule of law values. In their speeches to the public as well as in selecting extra-judicial activities, judges can, and should, emphasize the existence and power of judicial norms to create fairness and regularity in the courtroom. Shaping their involvement in the community with professional identity in mind is the best way to minimize political influence on judicial decision-making and to project the image of a professional judiciary dedicated to norms and traditions that support rule of law values.

Of course, judges who choose this route will not be without obstacles. The increased polarization and external forces that lead the public to lose faith in the judiciary also pose a problem for the formation of a strong professional identity that can serve as a break on personal or political bias. The more polarized legal education and practice is, the less likely lawyers and future judges are to embrace neutral values. It is more likely that they will mistake desired outcomes for well-functioning processes. If professional identity is expected to work as a limit on partisan or other personal bias, we need to focus on how to cultivate such an identity in increasingly polarized times. Increased polarization creates the conditions in which partisan loyalty could subsume professional identity.

Presumably, the professional identity of judges is not just acquired on the job—other institutions of the legal profession have a socializing role. For example, although law school trains students to become lawyers, not judges, students read judicial opinions and learn about the process of judging as part of their education. Graduates who serve as judicial law clerks learn more about what it means to be a judge. And even practicing lawyers spend time anticipating how judges will react to their arguments and, in so doing, study the nature of judging. But professional identity itself only works as a brake on partisan bias if it is common to all judges, like the color of their robes. If legal education and legal practice become balkanized and lawyers learn and practice in partisan silos, the existence of such a professional identity itself will be in jeopardy, potentially giving way to political preconceptions, rather than a practice that is truly committed to certain forms of reasoning. Thus, if we care about the legitimacy of the judiciary, we must work to ensure that law schools and law practice emphasize legal skills, norms, and values.

If judges consciously build on this foundation and work to develop a collective professional judicial identity devoted to neutral values by curating their involvement in outside activities, then perhaps we can restore some faith in judges. While it has not been a part of their job traditionally, judges can also use their words both inside and outside the courtroom to educate the public on how judges reach decisions, what part of those decisions involve a neutral application of law to facts, and which parts invariably draw on personal beliefs and ideological commitment. By adjusting expectations about judicial decision-making and proselytizing faith in judicial identity, norms, and values, judges can

help reinforce the legitimacy of their role.