

Judicial Ethics and Identity

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ABSTRACT

This Article seeks to untangle a cluster of controversies and conundrums at the epicenter of the judiciary's role in American government, where a judge's identity as a person and role as a judge intersect. Part I synthesizes the traditional ethics schema, which proceeds from the premise that good judges decide cases on the basis of facts and law, unsullied by the extralegal influences of identity that make judges who they are as human beings. Part II discusses the empirical evidence, and the extent to which identity influences judicial decision-making in ways that contradict tenets of the traditional schema. Part III summarizes the state of judicial politics, wherein judges are called to task for departing from the traditional script and accepting the empirical evidence, which creates a three-way collision between the traditional model, the empirical evidence, and political reality. Finally, Part IV develops a framework for evaluating the relationship between judicial ethics and identity through which codes of judicial conduct can be deployed to mediate the perpetual and constructive tension between the salutary, tolerable, and unacceptable influences of identity on judicial conduct. Relying on a roadway metaphor, I argue that judicial ethics, properly understood, averts collisions between the traditional model, the empirical evidence, and political reality, by replacing an unrestricted intersection with a cloverleaf that channels the proper and improper influences of identity. Armed with this new framework, the Article illustrates the framework's application with reference to recent controversies, to the end of showing how it helps to resolve easy problems, elucidate hard ones, and isolate unavoidable pressure points that remain.

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INTRODUCTION

Judicial ethics controversies and reform have suddenly made national headlines. In March of 2022, Supreme Court Justice Clarence Thomas was criticized for failing to disqualify himself from a case in which he voted to stay an order directing President Trump to obey a subpoena for records that included correspondence from Justice Thomas's spouse.¹ In March, the Senate Judiciary Committee quizzed Supreme Court nominee Ketanji Brown Jackson on whether she would recuse herself from a pending case against Harvard University, where Jackson had served on the University's Board of Overseers.² That same month, Congress enacted legislation³ reforming financial disclosure requirements for federal judges following a report that 131 judges had failed to disqualify themselves from cases in which they had financial interests.⁴ In May, a draft of the Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade*, was leaked to the press, which, if revealed by a Justice, was done in disregard of a ubiquitous ethics directive against judges disclosing nonpublic information they acquire as judges for purposes unrelated to their official duties.⁵ Likewise in May, a Senate subcommittee held hearings on, and a House committee approved, bills directing the Supreme Court to adopt its own code of conduct and establishing procedures for judicial disqualification requests to be decided by judges other than the one whose disqualification is sought.⁶

The conduct of the judges giving rise to these ethics issues is inextricably intertwined with the identities of those judges as individuals. Viewed broadly, judicial

1. *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022); see Jacqueline Alemany, Josh Dawsey & Emma Brown, *Ginni Thomas Corresponded with John Eastman, Sources in Jan. 6 House Investigation Say*, WASH. POST (June 15, 2022), <https://www.washingtonpost.com/national-security/2022/06/15/ginni-thomas-john-eastman-emails/> [<https://perma.cc/UH97-QHUQ>].

2. Lauren Camera, *Jackson Will Recuse Herself from Harvard Affirmative Action Case if Confirmed to Supreme Court*, U.S. NEWS (Mar. 23, 2022), <https://www.usnews.com/news/politics/articles/2022-03-23/jackson-will-recuse-herself-from-harvard-affirmative-action-case-if-confirmed-to-supreme-court> [<https://perma.cc/RCC8-2QUM>].

3. Debra Cassens Weiss, *Bill Toughening Financial Disclosure for Federal Judges Heads to Biden's Desk*, ABA J. (Apr. 28, 2022), <https://www.abajournal.com/news/article/bill-toughening-financial-disclosure-congress-for-federal-judges-heads-to-bidens-desk> [<https://perma.cc/E4TL-YH6L>].

4. Andrew Levinson, Coulter Jones, Ava Sasani, Joe Palazzolo & James V. Grimaldi, *Federal Judges with Financial Conflicts*, WALL ST. J. (Sept. 28, 2021), <https://www.wsj.com/articles/hidden-interest-judges-financial-conflicts-graphic-11632834079> [<https://perma.cc/3BNJ-Y9YD>].

5. Politico Staff, *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> [<https://perma.cc/6EZF-9GG4>]; see CODE OF CONDUCT FOR U.S. JUDGES Canon 4(D)(5) (JUD. CONF. 2019); MODEL CODE OF JUD. CONDUCT R. 3.5 (AM. BAR ASS'N 2004) [hereinafter MODEL CODE].

6. See *An Ethical Judiciary: Transparency and Accountability for 21st Century Courts*, COMM. ON THE JUDICIARY, SUBCOMM. ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION & FEDERAL RIGHTS (May 3, 2022), <https://www.judiciary.senate.gov/meetings/an-ethical-judiciary-transparency-and-accountability-for-21st-century-courts> [<https://perma.cc/VXK8-UGGE>]; Justin Wise, *House Judiciary Panel Advances Supreme Court Ethics Bill*, LAW360 (May 11, 2022), <https://www.law360.com/articles/1491956/house-judiciary-panel-advances-supreme-court-ethics-bill> [<https://perma.cc/3E8D-8MDJ>].

ethics as a body of law seeks to regulate the impulses of judges to act upon the influence of their identifying attributes and predilections as individuals, to the detriment of their impartiality, independence, and integrity as judges. Thus, recent disqualification controversies concern conflicts created by the identities of judges as spouses, stockholders, and university board members. Commentators have speculated that the release of the *Dobbs* draft was motivated by the ideological identity of the leaker.⁷ This is particularly relevant in the context of the deeply divisive issue of abortion rights, where the extent to which the rule of law has been influenced by the ideological and religious identities of Supreme Court Justices is a longstanding concern.⁸ Worries over Justice Jackson's disqualification from the Harvard case were dwarfed by harsh criticism of her nomination as a manifestation of "identity politics" in which President Biden kept a campaign promise to appoint the first Black woman to the Court.⁹ Legislation directing the Supreme Court to promulgate its own ethics code has been prompted by identity-driven ethical lapses of Justices on both ends of the Court's ideological spectrum, whose conduct violated the code of conduct applicable to lower federal court judges.¹⁰ Proposals to implement procedures that bar judges from ruling on their own disqualification are motivated by the suspicion that judges cannot distance themselves from their identities sufficiently to assess their own real or reasonably perceived partiality, or worse, that they can, but choose to disavow their conflicts and indulge their biases.¹¹

Webster's Dictionary defines "identity" as "the distinguishing character or personality of an individual."¹² "Personal identity" concerns one's "sense of self," delineated by the "set of physical, psychological, and interpersonal characteristics

7. Matt Stieb, *A Running List of Theories About the Supreme Court Leaker*, INTELLIGENCER (May 8, 2022), <https://nymag.com/intelligencer/2022/05/who-leaked-the-supreme-court-draft-overturning-roe-v-wade.html> [<https://perma.cc/9PEP-E5X5>].

8. See Jessica Glenza, *'Historical Accident': How Abortion Came to Focus White, Evangelical Anger*, GUARDIAN (Dec. 5, 2021), <https://www.theguardian.com/world/2021/dec/05/abortion-opposition-focus-white-evangelical-anger> [<https://perma.cc/EG5F-3QPG>].

9. See Brendan O'Neill, *Joe Biden and the Poison of Identity Politics*, SPIKED (June 9, 2022), <https://www.spiked-online.com/2022/06/09/joe-biden-and-the-poison-of-identity-politics/> [<https://perma.cc/B6C9-KL86>]; Rich Lowry, *It's Now Racist to Think Supreme Court Justices Should be Selected on the Merits*, NAT'L REV. (Jan. 30, 2022), <https://www.nationalreview.com/come/its-now-racist-to-think-supreme-court-justices-should-be-picked-on-the-merits/> [<https://perma.cc/7E3K-PBXD>].

10. See AMANDA FROST, COMM. ON THE JUDICIARY, SUBCOMM. ON FEDERAL COURTS, OVERSIGHT, AGENCY ACTION & FEDERAL RIGHTS, AN ETHICAL JUDICIARY: TRANSPARENCY AND ACCOUNTABILITY FOR THE 21ST CENTURY COURTS (May 3, 2022), <https://www.judiciary.senate.gov/imo/media/doc/Frost%20Testimony.pdf> [<https://perma.cc/7Q55-PUGJ>] (criticizing *inter alia* Justices Clarence Thomas and Ruth Bader Ginsburg for ethical lapses).

11. MATTHEW MENENDEZ & DOROTHY SAMUELS, BRENNAN CTR. FOR JUST., JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 4–11 (Nov. 30, 2016), <https://www.brennancenter.org/our-work/research-reports/judicial-recusal-reform-toward-independent-consideration-disqualification> [<https://perma.cc/3GGC-CKKT>].

12. *Identity*, MERRIAM-WEBSTER (2022), <https://www.merriam-webster.com/dictionary/identity> [<https://perma.cc/X9ND-ZNSG>].

that is not wholly shared with any other person,” together with “a range of affiliations (e.g., ethnicity) and social roles.”¹³ To the extent that the sense of self is defined with reference to one’s affiliations and social roles, personal identity bleeds into “social identity”: “the part of the self-concept that derives from group membership.”¹⁴ So conceptualized, identity is both fluid and situational: one’s sense of self can change over time, in relation to the groups with which one affiliates, and in light of circumstances that can render a given attribute of identity more or less pertinent to one situation than another.¹⁵

Issues of identity can arise in myriad contexts, from discrimination, criminal culpability, and affirmative action to political mobilization, workplace training, and educational programming. The permutations of identity are many and varied, and how one taxonomizes those permutations is a context-dependent undertaking. Some settings may call for differentiation based upon the extent to which a given facet of identity is established at birth, a matter of choice, subject to change, historically relevant, assigned by others, or internalized by the individual. In the context of judicial ethics, the focus is on how components of a judge’s identity influence her conduct as a judge, the extent to which the judge is in a position to detect and control those influences, and how such influences are regulated—bearing in mind that being a judge is itself a component of a jurist’s personal and social identity. Accordingly, the task is to differentiate between identity-driven influences that are more or less remote, self-regulable, and problematic.

Thus, some facets of a judge’s identity are too innocuous and remote from what she does as a judge to have a meaningful impact on her judicial conduct. That Judge X is a cat-loving, poetry-writing, acrophobic with big feet is likely to affect the judge’s thinking in ways too attenuated or cases too unusual to worry about. Conversely, other attributes of identity present a risk of influence so direct and deleterious as to be conversation-stoppers. Few would contest the need for judges to withdraw from cases in which they identify as the spouse of the plaintiff, a major stockholder in the corporate defendant, or a lawyer who represented the plaintiff in the case before the judge closed her practice to ascend the bench.

Between the extremes of the obviously innocuous and obviously problematic are other attributes of identity, such as the judge’s ideology, race, gender, religion, or emotional makeup. Such attributes fall below the radar of patent conflicts but can nonetheless affect how the person who wears the robe perceives the world in ways that bear on her interpretation of the facts and law in cases over which she presides. The judge is typically conscious of these attributes of identity: an

13. *Identity*, AM. PSYCH. ASS’N DICTIONARY OF PSYCH. (2022), <https://dictionary.apa.org/identity> [https://perma.cc/N5ZH-6WVH].

14. *Social Identity*, OXFORD REFERENCE (2022), <https://www.oxfordreference.com/view/10.1093/oi/authority.20110810105901500> [https://perma.cc/2GK-K7G8].

15. Michael Lange, *Understanding the Concept of Identity*, CHAMPLAIN COLL. WRITING CTR. (Aug. 17, 2020), <https://writing.champlain.edu/2020/08/17/understanding-the-concept-of-identity/> [https://perma.cc/3HNP-SQN4].

American-Asian, female, Catholic, progressive is likely to self-identify as such. But judges may or may not be conscious of the extent to which these characteristics influence their interpretation of factual events or legal issues. A judge may self-identify as a white man but may or may not be aware of the ways in which that influences his thinking about a given event or issue. Or the judge may be convinced that she is simply following the law, unaware of the extent to which her understanding of operative law is colored by her liberal or conservative predilections.

In addition, some attributes contributing to a judge's identity as a person can themselves be subconscious. A judge's subconscious attitudes and stereotypes about race, derived from the culture in which the judge is immersed, can engender implicit bias that operates independently of the race with which the judge self-identifies.¹⁶ Similarly, judges can misperceive the extent of their own impartiality and proceed on the assumption that they are fully able to assess their own real or reasonably perceived bias in the context of disqualification requests when that is not necessarily the case.¹⁷ Thus, a judge's level of self-awareness is a distinct attribute of identity that can affect the extent to which other attributes of identity wield influence.

When attributes of a judge's identity as a person influence her findings of facts and conclusions of law, such influences can be denoted "extralegal" because they fall outside the four corners of the law and facts before the court. The question thus becomes whether and to what extent these extralegal influences are incompatible with the conduct of a good judge. And here, seeming contradictions abound:

- Judges take an oath to uphold the law impartially, without regard to race, gender, ethnicity, religion, personal whims, or ideological preferences, against the backdrop of social science research showing that the decisions judges make are subject to those forbidden influences.¹⁸
- Judges who allow their own race, gender, or ethnicity to influence their decision-making are criticized for doing so and are put at risk of discipline and removal, except when such influences are praised for the perspective that they afford in campaigns to diversify judicial ranks.¹⁹
- Judicial disqualification rules presume that a judge's race, gender, ethnicity, religion, or ideology does not call the judge's impartiality into question

16. One study, for example, found that Black and white judges both tend to sentence Black defendants more harshly than white defendants. Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197, 1197, 1200 (1990) (finding that "judicial race has relatively little predictive power" and "that both black and white judge [sic] sentence black offenders more severely than white offenders").

17. See *infra* notes 157–60 and accompanying text.

18. See *infra* notes 29–32, 56–105 and accompanying text.

19. See *infra* notes 45, 107–09, 125–27 and accompanying text.

when those characteristics are at issue in a case despite the social science research showing that those characteristics hold sway in such cases.²⁰

- As to race, research tells us that most judges exhibit implicit bias, which judicial systems acknowledge and seek to mitigate in judicial education programs but ignore in disqualification proceedings.²¹
- The archetype of the good judge is a dispassionate arbiter of facts and law, who keeps her emotional self in a box alongside her politics, race, gender, and religion. And yet, contrary to that archetype, the discretion that the law requires good judges to exercise is unavoidably informed by emotions ranging from compassion to disgust.²² In a related vein, empathy is characterized as a desirable emotion for judges to deploy when seeking to understand the facts of a dispute from the perspective of the parties, except when it is derided as an unacceptable departure from the duty to decide cases impartially “without respect to persons.”²³

These seeming contradictions give rise to a host of questions that logically fall within the ambit of judicial ethics to answer: what defines a good judge? What should influence the rulings that a good judge makes? Where should we draw the line between proper and improper influences, and how should that line be regulated? In this Article, I hope to show that these contradictions can indeed be lessened and competing perspectives reconciled when viewed through the lens of judicial ethics writ large.

The problem is that, for the most part, judicial ethics has been writ small. It is framed as a body of narrowly focused rules that are trotted out in advisory opinions and disciplinary proceedings to answer case-specific questions, concerning whether Judge X violated Rule Y, by doing or saying Z. In a recent article, I argued that judicial ethics is underutilized because of the parochial way in which it has been conceptualized. There, I proposed a broader architectural framework for thinking about ethics issues.²⁴

This Article deploys that framework to untangle a cluster of dilemmas at the epicenter of the judiciary’s role in American government, where a judge’s ethics and identity meet. In Part I, I begin by summarizing the traditional conception of an ethical judge. This conception is deeply embedded in the symbolic trappings of judicial office, the oath judges take upon ascending the bench, and codes of judicial conduct to which judges are bound. It proceeds from the premise that a good judge decides cases on the basis of facts and law, unsullied by the extralegal influences of identity that make judges who they are as human beings. In Part II, I discuss the empirical evidence, and the extent to which identity influences

20. See *infra* notes 43, 56–105 and accompanying text.

21. See *infra* notes 43, 112–14 and accompanying text.

22. See *infra* notes 52, 94–105 and accompanying text.

23. See *infra* notes 129–33 and accompanying text.

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

judicial decision-making in ways that contradict tenets of the traditional model. In Part III, I summarize the state of judicial politics, wherein judges are called to task for departing from traditionalist cant and accepting the empirical evidence.

The state of affairs described in Parts I, II, and III, creates a three-way collision between the traditional model, the empirical evidence, and political reality. In Part IV, I develop a framework for evaluating the relationship between judicial ethics and identity through which codes of judicial conduct can be deployed to mediate the perpetual and constructive tension between the salutary, tolerable, and unacceptable influences of identity on judicial conduct. Relying on a roadway metaphor, I argue that judicial ethics, properly understood, averts collisions between the traditional model, the empirical evidence, and political reality, by replacing an unrestricted intersection with a cloverleaf that channels the proper and improper influences of identity. Throughout the course of developing this framework, I illustrate its application with reference to the recent ethics controversies described at the outset of this Article. In so doing, I seek to show how the framework I propose helps to resolve easy problems, elucidate hard ones, and clarify the unavoidable pressure points that remain.

I. THE TRADITIONAL CONCEPTION OF A GOOD JUDGE

The traditional trappings of judicial office are awash with symbols emphasizing the principle that good judges bracket out their identities and predilections as individuals and decide cases with exclusive resort to applicable facts and law. When judges ascend the bench, they literally ascend a bench, which situates them above the people they judge, underscoring the power and authority that separates them as individuals from them as judges.²⁵ In England, judicial vestments were adorned with ermine fur to symbolize the judge's purity of heart, and American courts retained the ermine metaphor to evoke judges' commitment to the rule of law undefiled by their personal passions and interests.²⁶ In America, the robe is typically worn in basic black, which, as Justice Amy Coney Barrett has explained, "shows that justice is blind. We all address the law the same, and . . . it shows that once we put it on, we are standing united, symbolically, speaking in the name of the law. Not speaking for ourselves as individuals."²⁷ The ubiquitous courthouse presence of Justitia—the blindfolded Lady Justice—reinforces the message that judges, as the alter ego to Justitia, weigh the merits of disputes in

25. See John N. Hazard, *Furniture Arrangement as a Symbol of Judicial Roles*, 19 ETC: REV. OF GEN. SEMANTICS 181, 181 (1962).

26. See *Harrison v. Wisdom*, 54 Tenn. 99, 111–12 (1872).

27. Philip Ewing, *Why Do Judges Wear Black Robes? Amy Coney Barrett Has the Answer*, NAT'L PUB. RADIO (Oct. 13, 2020, 5:46 PM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923427849/why-do-judges-wear-black-robos-amy-coney-barrett-has-the-answer> [https://perma.cc/DB24-XHB7].

the scales without regard to their identities or the identities of the people who appear before them.²⁸

The legal profession's commitment to this traditional conception of the judicial role transcends symbols. The oath of office requires federal judges to swear that they will "administer justice without respect to persons and give equal right to poor and rich,"²⁹ which is best read as "a promise to ignore morally irrelevant personal traits"³⁰ such as race, religion, or property ownership.³¹ The "persons" whose irrelevant traits the oath calls upon judges to disregard logically include the judges and judged alike: a judge who presides over a breach of contract case should not allow a person's race to influence the judge's decision-making, regardless of whether that person is the judge or a litigant. Given the accompanying duty that the oath imposes to follow the law "faithfully and impartially," the irrelevant personal traits that judges swear to disregard broaden to include their own partisan, ideological, and personal preferences—preferences that, if acted upon, would undermine their impartial judgment.³²

Codes of judicial conduct, adopted by the high courts of all fifty states and the Judicial Conference of the United States, elaborate on the principles embedded in the judicial oath.³³ The ABA *Model Code of Judicial Conduct* ("Model Code"), after which all state and federal codes are fashioned, directs judges to "uphold and apply the law" and "perform all duties of judicial office fairly and impartially,"³⁴ with "impartially" separately defined to mean the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before the judge."³⁵ With redundancy that underscores the primacy of the principles in play, the *Model Code* further declares that "a judge shall perform the duties of judicial office . . . without bias or prejudice," "including but not limited to" bias or prejudice based upon "race, sex, gender, religion, national origin, ethnicity, disability,

28. Dani Rhys, *Lady Justice—Symbolism and Meaning*, SYMBOLSAGE, <https://symbolsage.com/lady-justice-meaning/> [<https://perma.cc/L3Z6-J9ZP>].

29. 28 U.S.C. § 453.

30. Richard M. Re, "Equal Right to the Poor," 84 U. CHI. L. REV. 1149, 1170–71 (2017) (citing Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1662 n.425 (2012)).

31. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 226 (1946) (Frankfurter, J., dissenting) ("The process of justice must of course not be tainted by property prejudice any more than by racial or religious prejudice. The task of guarding against such prejudice . . . is embraced in the duty, formulated by the judicial oath, to 'administer justice without respect to persons, and do equal right to the poor and to the rich.'").

32. See Raymond McKoski, *Judicial Disqualification After Caperton: What's Due Process Got to Do with It?* 63 BAYLOR L. REV. 368, 380–81 (2011) (discussing a duty imposed by the oath to "decide cases impartially without regard to personal predilections") (citing § 453); Thomas L. Jipping, *Winners and Losers Versus How You Play the Game: Should Ideology Drive Judicial Selection?*, 15 REGENT U. L. REV. 1, 10 (2002–03) (arguing that "[j]udges deciding cases on the basis of ideology rather than law" violates the oath of office).

33. CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 38 (2016).

34. MODEL CODE R. 2.2.

35. MODEL CODE terminology.

age, sexual orientation, marital status, socioeconomic status, or political affiliation.”³⁶ In a related vein, the *Model Code* admonishes judges to rule independently of external influences that could contort their decision-making, with the directive that “a judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.”³⁷

Rules embedded in codes of conduct and elsewhere include a catchall that requires judges to disqualify themselves from cases in which their “impartiality might reasonably be questioned”³⁸—a standard that obligates a judge to withdraw under circumstances in which a fully informed, reasonable observer might doubt the judge’s impartiality.³⁹ In addition, codes of conduct require disqualification when judges confront specified conflicts of interest (for example, when the judge is a party, the defendant’s mother, or a key witness), and judges are generally in accord with the need for disqualification when these bright(ish) lines are crossed.⁴⁰ The same may be said, albeit with less confidence, about conflicts that, while unspecified in the laundry list, raise similar concerns and may lead to disqualification under the catchall. Thus, for example, in the Harvard case alluded to in the introduction, Justice Jackson concluded (albeit as a Supreme Court nominee whose confirmation hung in the balance) that her identity as a member of Harvard’s Board of Overseers created a perceived conflict sufficient to require her disqualification from Harvard’s pending affirmative action case, even though the disqualification statute does not list her role vis-à-vis the university among the enumerated conflicts for which disqualification is automatic.⁴¹

Outside of these garden-variety conflicts, however, the need for disqualification is tempered by the oath that judges take and the codes of conduct to which they are bound, which create a presumption that judges will live up to the standards of conduct they have agreed to follow.⁴² This presumption of impartiality supports the categorical default that a judge’s race, gender, religion, sexual orientation, partisan affiliation, and other personal attributes do not call the judge’s impartiality into question in cases where the judge shares an attribute with a

36. MODEL CODE R. 2.3(A), (B).

37. MODEL CODE R. 2.4(B).

38. MODEL CODE R. 2.11(A); 28 U.S.C. § 455(a).

39. CHARLES GARDNER GEYH, *JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 20–23* (3d ed. 2020).

40. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, *JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES* 67 (1995).

41. Kimberly Strawbridge Robinson, *Jackson Vows to Recuse from Harvard Race-Based Admissions Case*, BLOOMBERG L., (March 23, 2022, 4:22 PM), <https://news.bloomberglaw.com/us-law-week/jackson-says-shed-recuse-from-harvard-affirmative-action-case> [<https://perma.cc/HQ47-J4BH>].

42. CHARLES GARDNER GEYH, JAMES J. ALFINI & JAMES SAMPLE, *JUDICIAL CONDUCT AND ETHICS* § 4.07 (6th ed. 2020) (discussing the “presumption of impartiality” to which judges are entitled); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) (“There is a ‘presumption of honesty and integrity in those serving as adjudicators.’ All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”) (internal citation omitted).

litigant who seeks the enforcement of a right that would benefit people with that attribute—including the judge.⁴³

The presumption of impartiality is rebuttable. Judges who, via words or conduct, manifest favoritism toward or bias against participants in court proceedings based on irrelevant traits that the judge or court participants possess, are subject to disqualification and discipline.⁴⁴ Indeed, when the wall of presumptive impartiality yields to evidence of explicit bias, it can fall on the bad judge like a ton of bricks, culminating in removal from office.⁴⁵

That said, disqualification procedure fortifies the wall of presumed impartiality against lesser assaults: the general rule (contested by the pending legislation discussed in the introduction) remains that judges whose impartiality is challenged can be trusted to rule impartially on their own impartiality.⁴⁶ When judges rule in favor of themselves and their own impartiality, their decisions are typically subject to a deferential standard of review on appeal.⁴⁷ Comments in court proceedings indicative of bias are discounted by the “extrajudicial source rule,” which posits that, when presiding over a matter, a judge’s favorable or unfavorable reactions to the parties, lawyers, witnesses, or evidence are disqualifying only in extreme cases, and that ordinarily, disqualifying bias must emanate from an extrajudicial source.⁴⁸

The traditional way in which the judiciary characterizes its world produces variations on a common theme: good judges, as Justice Barrett put it, do not speak for themselves “as individuals,” but “all address the law the same.”⁴⁹ Like umpires, Chief Justice Roberts has said, good judges “don’t make the rules,” but apply them; their job is to “call balls and strikes, and not to pitch or bat.”⁵⁰ Justice Stephen Breyer has added—and Wisconsin Chief Justice Shirley Abrahamson has echoed—that good judges decide cases according to “the law” and not their own “whims” or prejudices.⁵¹

43. GEYH, ALFINI & SAMPLE, *supra* note 42, at § 4.07[8] (citing and discussing cases); GEYH, *supra* note 39, at 26–28 (citing and discussing cases).

44. In the federal system, for example, judges are subject to disqualification on their own initiative or at the request of a party. 28 U.S.C. § 455(a); GEYH, *supra* note 39, at 71. With respect to the disciplinary process, “any person” (including judges, lawyers, parties, and others) can file a complaint that is then reviewed by the circuit chief judge and, in appropriate cases, investigated by a committee and resolved by the circuit judicial council with the imposition of discipline ranging from a private reprimand to a temporary suspension. *See* 28 U.S.C. § 351–363.

45. GEYH, ALFINI & SAMPLE, *supra* note 42, at §§ 3.03–04.

46. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 571 (2005).

47. *Id.*

48. GEYH, *supra* note 39, at 32–34.

49. Ewing, *supra* note 27.

50. *Chief Justice Roberts Statement—Nomination Process*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> [<https://perma.cc/6DKW-2NBF>].

51. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS L.J. 989, 989 (1996); Shirley Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 3 (2003).

Within this traditional schema, the behavior of a good judge is circumscribed by logic and reason. As they do with their prejudices, judges are expected to set their passions aside and follow the law. As Professor Terry Maroney has observed, “to call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason.”⁵² Disqualification procedures that authorize judges to rule on their own disqualification, and effectively excuse in-court bias because it does not emanate from an extrajudicial source, underscore just how deeply embedded the presumption of dispassionate judicial impartiality is.

For a legal profession in which good judges strive to be the same, put their self-identities to one side, and follow the law, efforts to diversify a predominantly white and male bench serve sharply circumscribed purposes. The bench and bar mainstream seek to promote public confidence in the courts, and are concerned by data showing that the perceived legitimacy of courts is lower within communities underrepresented on the bench.⁵³ Accordingly, it is generally acceptable to encourage a diverse array of aspirants to seek judicial service as a means to promote the judiciary’s perceived legitimacy within those underrepresented communities and the general public.⁵⁴ When these goals are confined to altering public perception, a diversification agenda is not in tension with the traditional view of the judicial role. However, going further and arguing that judges whose race, gender, or other attributes are underrepresented on the bench bring different perspectives to bear that can change court rulings for the better is a more threatening departure from the canon.⁵⁵

II. THE TRADITIONAL CONCEPTION OF A GOOD JUDGE MEETS THE EMPIRICAL EVIDENCE

Studies that measure the impact of identity on the decisions judges make have produced mixed results.⁵⁶ Nevertheless, they tend to support a common-sense

52. Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 631 (2011).

53. AM. BAR ASS’N, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 60, 78–79 (July 2003) (arguing that “increasing the diversity of the judicial branch . . . is a necessity” because “recent surveys reveal an alarming erosion of trust and confidence in the justice system among people of color” and “the lack of racial or ethnic diversity among legal professionals exacerbates these perceptions”).

54. *Id.* at 60–65; DIVERSITY ACTION PLAN, AM. BAR ASS’N, STANDING COMMITTEE ON DIVERSITY IN THE JUDICIARY (2012), <https://www.americanbar.org/groups/judicial/committees/scdj/diversity-action-plan/> [<https://perma.cc/7G8N-5SN6>] (“The Judicial Division recognizes that diversity in the judiciary in racial and ethnic, gender identity, sexual orientation, age, disabilities and religion is essential to maintaining public trust and confidence in the legal system.”).

55. John Kass, *Asian American Judge Challenges Racism Inherent in “Equity,”* CHI. TRIB. (March 31, 2021, 5:00 AM), <https://www.chicagotribune.com/columns/john-kass/ct-john-kass-judge-ho-20210331-efikgkqmbdo3jbni2ijyjaqki-story.html> [<https://perma.cc/7MJ7-Q8MA>] (quoting testimony of circuit court judge James Ho that he would “never suggest” that his perspective as an Asian man could enable him to reach a “better conclusion than a white judge,” because such a claim “would be antithetical to our legal system and poisonous to civil society”).

56. For a fine overview of the empirical research across categories of extralegal influences on judicial decision-making, see Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 1 (2017).

generalization that is in tension with the traditional schema: the greater the judge's latitude for discretion and judgment in resolving a given legal issue, and the more pertinent the bearing of the judge's identity on the issue before the court, the more pronounced the influence of a judge's identity on her decision-making is likely to be. In this part of the Article, I summarize available data to the end of illuminating the circumstances in which given facets of a judge's identity can hold sway in judicial decision-making. It is, however, beyond the scope of this Article to capture the nuances of the phenomena at work here in all their complexity. Thus, for example, I do not address the understudied issue of intersectionality, and the extent to which different facets of identity, such as gender and race, combine to influence judicial behavior in ways distinct from each facet in isolation.

A. IDEOLOGY

The "attitudinal model" of judicial decision-making posits that the choices judges make can be explained with reference to the ideological attitudes or identities of those judges as individuals.⁵⁷ Proponents of the attitudinal model have demonstrated a robust correlation between ideology and voting behavior on the U.S. Supreme Court.⁵⁸ This finding is not especially startling on a Court that limits its docket to under a hundred cases a year, where the operative law is often indeterminate and hotly contested, most case outcomes can be classified as liberal or conservative, and the Court enjoys vast discretion to rule as it deems fit. Even here, however, half the recent cases that the Supreme Court has heard have been decided by unanimous vote,⁵⁹ and a substantial percentage of the cases that the Court decides cannot be explained based on attitudinal factors alone.⁶⁰ This suggests that the influence of ideology is nuanced and has its limits.

The correlation between ideology and decision-making is weaker but still measurable in the lower federal courts.⁶¹ Across the federal circuit courts,

57. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 62 (1993).

58. Jeffrey Segal, *What's Law Got to Do with It: Thoughts from "The Realm of Political Science,"* in *WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHAT'S AT STAKE, AND WHY IT MATTERS* 17, 26 (Charles Gardner Geyh ed., 2011).

59. Devin Dwyer, *Supreme Court Defies Critics with Wave of Unanimous Decisions*, ABC NEWS (June 29, 2021, 5:12 AM), <https://abcnews.go.com/Politics/supreme-court-defies-critics-wave-unanimous-decisions/story?id=78463255> [<https://perma.cc/S5HV-5AZQ>].

60. Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1164, 1193 (2004) (A study that created a model to predict future Supreme Court decision-making found that naïve attitudinal assumptions alone were insufficient to predict case outcomes accurately, and that a more nuanced, fully-developed model "did have some success at using general case characteristics to predict outcomes," but it also "missed a full quarter of the decisions.").

61. See generally Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013); Frank B. Cross, *Decision-making in the U.S. Court of Appeals* 51, 229 (2007); Cass Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (2006).

indeterminate, policy-laden issues arise with some frequency. At the same time, circuit judges are constrained by Supreme Court precedent, and difficult, ideologically charged cases are offset by a multitude of routine, mandatory appeals that seek reversal of trial court errors, where the “right” result is often clear, and the opportunity for ideological influence is correspondingly limited.⁶² The influence of ideology is likewise attenuated in the federal district courts, for similar reasons.⁶³ But again, ideology has been shown to influence district court rulings in a range of issue areas.⁶⁴

State judges in thirty-nine states stand for some kind of popular election.⁶⁵ In systems that select judges via partisan elections, judges’ partisan identities, and the ideological preferences such identities imply, are presumptively germane to the decisions those judges make, and hence to voters for whom candidate party affiliation is the only information ballots supply to educate voters on their choices.⁶⁶ The same is true in nominally “non-partisan” election systems, where candidates’ party affiliations are scrubbed from the ballot, but where the campaign process is often conducted in an openly partisan manner in which candidates differentiate themselves to voters on the basis of their ideological preferences.⁶⁷ The impact of ideological self-identity on state supreme court decision-making was underscored in the decades straddling the turn of the twenty-first century, when interest groups spent unprecedented sums in judicial races to elect conservative or liberal judges who would vote to change or retain state tort

62. Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 683 (2004) (finding that lower-court standing decisions are “above politics” when “lower federal courts are subject to clear and unambiguous standing rules and when effective judicial monitoring exists”).

63. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 394–96 (2007) (summarizing data on the role of law and ideology in the decision-making of district courts); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 24–57 (1996) (reviewing data regarding attitudinal influences on district courts and their limits); Orley Ashenfelter, Theodore Eisenberg & Stewart Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 257 (1995) (“Unlike the political science findings of ideological influence in published opinions, we find little evidence that judges differ in their decisions with respect to the mass of case outcomes.”); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 746 (2005) (“[T]o suggest that partisan or ideological preferences are prevalent influences in deciding most cases or are invariably powerful variables in deciding even the most controversial and open-ended of legal issues is a dubious extrapolation from the empirical evidence.”).

64. See, e.g., Lydia Tiede, Robert Carp & Kenneth L. Manning, *Judicial Attributes and Sentencing-Deviation Cases: Do Sex, Race, and Politics Matter?*, 31 JUST. SYS. J. 249 (2010) (finding ideological influence on district court sentencing behaviors); Gregory C. Sisk & Michael Heise, *Cracks in the Wall: The Persistent Influence of Ideology in Establishment Clause Decisions*, 54 ARIZ. ST. L.J. 625 (2022) (finding ideological influence on circuit and district court rulings in establishment clause cases).

65. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. AT NYU L. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [https://perma.cc/7USX-C85BJ].

66. CHARLES GARDNER GEYH, *WHO IS TO JUDGE? THE PERENNIAL DEBATE OVER WHETHER TO ELECT OR APPOINT AMERICA’S JUDGES* 92 (2019).

67. *Id.* at 80, 92.

liability standards.⁶⁸ That said, there is evidence that elections incentivize judges to moderate their attitudinal preferences and vote strategically. One meta-analysis of multiple studies found that ideological predilection, measured in terms of a justice's party affiliation, was less influential on the decisions of state supreme courts than the U.S. Supreme Court.⁶⁹ Studies have shown that judges sentence criminal offenders more harshly as elections impend, which suggests that judges make strategic choices in the shadow of elections that may override their attitudinal preferences, if not their commitment to the rule of law.⁷⁰

B. RACE

Empirical studies evaluating the influence of judges' race on their decision-making support three general conclusions. First, studies that have examined the influence of race on judicial decision-making have failed to find measurable correlations, or have produced inconsistent results, where the relevance of race to the substantive legal issue under study is attenuated or indirect. One study found no correlation between the judge's race and decision-making in sexual harassment cases.⁷¹ In a similar vein, sentencing studies that investigate the influence of race on the decision to incarcerate and the length of sentence imposed have reached inconclusive and sometimes inconsistent results. Some sentencing studies have found no meaningful correlations.⁷² One found that minority judges treat defendants more leniently than their white counterparts.⁷³ One found that

68. *Id.* at 60–62. For an excellent case study, see generally LAURENCE BAUM, DAVID KLEIN & MATTHEW J. STREB, *THE BATTLE FOR THE COURTS: INTEREST GROUPS, JUDICIAL ELECTIONS, AND PUBLIC POLICY* (2017).

69. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 233–36, 240–43 (1999), <https://www.jstor.org/stable/27976992> [<https://perma.cc/34UE-YGK6>].

70. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004).

71. Carol T. Kulik, Elissa L. Perry & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 L. & HUM. BEHAV. 69, 80 (2003) (finding “no effects of judge . . . race” in a study of 292 sexual harassment cases decided between 1981 and 1996).

72. Cassia Spohn, *Decision Making in Sexual Assault Cases: Do Black and Female Judges Make a Difference?*, 2 WOMEN & CRIM. JUST. 83, 96 (1990) (finding that Black judges deciding sexual assault cases in Detroit from 1976–85 “convicted and incarcerated defendants at about the same rate as did white judges”); Spohn, *supra* note 16, at 1197 (finding that “judicial race has relatively little predictive power” and “that both black and white judge [sic] sentence black offenders more severely than white offenders”); Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 884 (1978) (finding that “as a group black judges establish sanctioning patterns only marginally different from those of their white colleagues” and that “individual judicial behavior . . . is more strongly associated with case outcome”); Max M. Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 85 (2005) (finding that “despite large, persistent racial disparities in sentencing, the . . . racial composition of a district’s bench has no general effect on the punishment of black and Hispanic offenders”).

73. Claire S.H. Lim, Bernardo S. Silveira & James M. Snyder, *Do Judges’ Characteristics Matter? Ethnicity, Gender, and Partisanship in Texas State Trial Courts*, 18 AM. L. & ECON. REV. 302, 322 (2016) (finding that “African American judges tend to assign shorter sentences, although the magnitude of the effect is small”); see also Susan Welch, Michael Combs & John Gruhl, *Do Black Judges Make a Difference*, 32 AM. J. POL. SCI. 126 (1988).

minority judges treat defendants more harshly.⁷⁴ Others found that the sentencing disparity between Black and white defendants was less pronounced in sentences imposed by Black judges relative to white.⁷⁵

Second, studies have correlated race to decision-making more consistently where the relationship of race to the substantive legal issue under study is direct.⁷⁶ Thus, multiple studies have shown that Black judges are more likely than white judges to favor racial discrimination and racial harassment claims.⁷⁷ Black judges are likewise more likely than white judges to support claimants in Voting Rights Act cases, where judges' race has been found to be more influential than their

74. Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 758 (2001) (examining 40,000 sentencing decisions by judges in four Pennsylvania counties between 1991–94 and finding that “black judges are harsher in the incarcerate decision but not in the length-of-term decision, where their sentences are comparable to those of white judges” and that Black judges are “more likely to sentence both black and white offenders to prison”).

75. David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 374 (2012) (finding that “African-American judges are associated with a smaller racial gap in sentence length”); Welch, Combs & Gruhl, *supra* note 73, at 126 (“[A]nalysis of the decisions to incarcerate made by black and white trial judges in a large northeastern community reveal that black judges are more evenhanded in their treatment of black and white defendants than are white judges, who tend to treat white defendants somewhat more leniently.”).

76. Rachlinski & Wistrich, *supra* note 56, at 207 (“A judge’s race seems to matter most when race is a central issue in the case.”). Two early studies did not find such correlations. See Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton’s District Court Appointees*, 53 POL. RES. Q. 137, 144 (2000) (Finding that “black judges are not significantly different from their white counterparts in their support of a variety of issues before their benches. Most notable is the absence of any race differences for black issues; black judges are clearly no more supportive of black claims than white judges.”); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 614 (1985) (finding that “[i]n none of the areas probed did significant differences associated with race emerge”). Later studies, which found correlations between race and decision-making that these earlier studies did not, attribute the difference to “research design limitations” of the earlier studies. Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges’ Sex and Race*, 69 POL. RSCH. Q. 788, 788 (2016).

77. Boyd, *supra* note 76, at 793–94 (2016) (finding that “there is a 126 percent increase in the likelihood of a black trial judge ruling in favor of the EEOC’s race discrimination claim in a dispositive motion over a white trial judge”); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 5 (2011) (finding disparity in dismissal rates of race discrimination cases between white and Black judges after the Supreme Court changed pleading standards to authorize dismissal of claims deemed implausible); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1141 (2009) (finding that “[i]n cases where African American judges presided, plaintiffs had the highest success rate (45.8%),” whereas “[c]ases with Hispanic judges had the lowest plaintiffs’ success rate (19%) followed closely by White judges (20.6%)”); Jill D. Weinberg & Laura B. Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 346 (2012) (finding that “[w]hite judges are far more likely to dispose of any employment discrimination case at the summary judgment phase than are minority judges” and that “white judges tend to dismiss cases involving minority plaintiffs at a much higher rate than cases involving white plaintiffs”); Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1232 (2000) (Studying decisions by the Michigan Supreme Court between 1985–98 and finding that, “[w]ithin the two issue areas of Discrimination and Feminist Issues, race played an important role. In these two issue areas, black Democrats have the highest probability of casting a liberal vote when compared to all the other justices.”).

partisan affiliation.⁷⁸ Additionally, Black judges are more sympathetic than white judges to affirmative action claims.⁷⁹

Taken together, the first two conclusions support the generalization that when courts resolve issues of substantive law, the race of the judge matters when race is pivotal to the issue, but not otherwise. The third “conclusion” is more of a caveat: there is evidence that with respect to issues of procedural law and justice, the judge’s race may influence decision-making even when race is not central to resolution of the issue. In an important federal circuit court study of class action certifications, Stephen Burbank and Sean Farhang found that the presence of a Black judge on a circuit panel increased the likelihood of a pro-certification result.⁸⁰ The authors theorize that “it would be rational for judges to take into consideration how class-certification doctrine in a case that does not implicate issues on which they have distinctive preferences might affect certification in cases that do.”⁸¹ More broadly, this suggests the possibility that mass-access to justice may be a higher priority to a race of people whose subjugation was preserved and prolonged by its absence. Corroborative of that possibility, two earlier studies found correlations between a judge’s race and decision-making in relation to criminal procedure and due process issues where race was not central to resolution of the matter.⁸²

C. GENDER

The findings of studies on the influence of gender in judicial decision-making parallel those for race. First, there is no general correlation between a judge’s gender and decision-making. When the relationship between gender and the

78. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 1 (2008) (finding that “a judge’s race appears to have an even greater effect on the likelihood of her voting in favor of minority plaintiffs than does her political affiliation: minority judges are more than twice as likely to favor liability”).

79. Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167 (2013) (studying 546 votes cast by federal circuit judges in affirmative action cases spanning three decades and finding that “black judges are significantly more likely than nonblack judges to support affirmative action programs”).

80. Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 264 (2020) (Finding that “panels with one African American have a statistically significantly higher probability of a procertification outcome than all-white/other panels in published cases over the full period . . . All white/other panels have a predicted probability of 41% to produce a procertification outcome, and for panels with one African American the probability is 50%.”). Panel effects research is discussed in greater detail at *infra* notes 162–65 and accompanying text.

81. *Id.* at 231.

82. Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655, 668 (2004) (Finding that “black judges are much less likely to uphold the legality of a search or seizure in which there are allegations of misconduct by the police. Holding everything else constant, the probability that a black judge will uphold the legality of a search or seizure is eighteen percentage points less than a white judge. This is true even controlling for other sociopolitical variables, such as ideology.”); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1457–58 (1998) (finding the race variable was insignificant across multiple phases of the study, with “one powerful exception” that while “58% of all judges addressing the due process claim invalidated the Guidelines on this basis, 90% of the minority judges did so”).

substantive legal issues before the court is less than direct, studies have failed to detect a measurable influence of gender on decision-making. As Susan Haire and Laura Moyer conclude in their survey of the literature: “After decades of research . . . with few exceptions scholars have largely found that the voting behavior of women and men on the bench is more alike than different.”⁸³ Rachlinski and Wistrich reach a similar conclusion: “Overall, female judges are not particularly more or less conviction prone than their male counterparts, nor do they clearly favor or disfavor plaintiffs in civil cases.”⁸⁴

Second, the exceptions to which Haire and Moyer allude concern cases in which the substantive legal issue before the court directly relates to gender. In such cases, there is empirical support for the proposition that the judge’s gender influences judicial decision-making.⁸⁵ Thus, studies have found a correlation between gender and decision-making in sexual harassment cases and gender-based employment discrimination cases.⁸⁶

Third, recent research suggests that gender may influence decision-making in the context of procedure and process, despite a more remote relationship between

83. Susan Haire & Laura P. Moyer, *Gender, Law, and Judging*, OXFORD RSCH. ENCYCLOPEDIA OF POL. 1, 6 (2019).

84. Rachlinski & Wistrich, *supra* note 56, at 207.

85. See Haire & Moyer, *supra* note 83, at 4–6; Rachlinski & Wistrich, *supra* note 56, at 207.

86. See, e.g., SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS 34 (2015) (finding that female judges are more likely to vote similarly to their male counterparts, except in cases of sex discrimination within the U.S. Courts of Appeals); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 21 n.42 (2001) (citing Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996* (1999) (unpublished Ph.D. dissertation, University of Chicago)) (finding that female judges were more likely than male judges to vote in favor of plaintiffs in employment discrimination cases claiming gender but not racial bias); Christina L. Boyd, Michael Heise & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (finding that the effects of a female judge on a panel in the federal circuits on sex discrimination cases “actually causes male judges to vote in a way they otherwise would not—in favor of the plaintiff”); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 325 (2004) (finding that “[w]omen appear to influence their male colleagues, modifying the content of decisions from what is rendered, ceteris paribus, by all-male panel” on federal circuit cases concerning minority and women plaintiffs); Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals*, 56 J. POL. 425, 436 (1994) (finding a correlation between gender and decision-making in discrimination cases but not obscenity or search and seizure cases); Matthew Knepper, *When the Shadow Is the Substance: Judge Gender and the Outcomes of Workplace Sex Discrimination Cases*, 36 J. LAB. ECON. 623, 624 (2018) (examining 1,000 workplace sex discrimination cases brought by the EEOC between 1997-2006 and finding “female plaintiffs filing workplace sex discriminations are 6–7 percentage points more likely settle (off a baseline of 85.5%) and 5–7 percentage points more likely to win compensation (off a baseline of 88.8%) whenever a female judge is assigned to the case”); Boyd, *supra* note 76, at 795 (finding that “[f]emale trial court judges, when deciding dispositive motions in sex discrimination cases, are about 15 percent more likely to rule in favor of the discrimination claimant than male judges”); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1779 (2005) (finding that the presence of a female judge on a circuit panel increased plaintiffs’ likelihood of success in sexual harassment and sex discrimination cases); Jonathan P. Kastlelec, *Race, Context, and Judging on the Courts of Appeals: Race-Based Panel Effects in Death Penalty Cases*, JUST. SYS. J. 1, 2 (2020) (finding that the addition of a single woman to an all-male panel in gender-based cases significantly increases the chances of a liberal decision).

gender and the substantive legal issues at stake. In their study of class action certifications, Burbank and Farhang found that female judges were more likely than male to vote in favor of certification.⁸⁷ Other research is corroborative of the possibility that female judges may approach procedural justice differently, by focusing more than their male counterparts on equity, consensus, and compromise.⁸⁸ Thus, female judges may be more likely to settle cases,⁸⁹ or advocate for positions that represent a middle ground between the parties.⁹⁰

D. RELIGION

In a similar vein, studies show that a judge's religion exerts an influence in cases where religion is an issue before the court, or where the issue is freighted with religious implications. Several studies have shown that differences in judges' religious affiliations correlate to differences in case outcomes when a litigant's right to free exercise of religion or the prohibition on government establishing a religion are at issue.⁹¹ One study found that relative to judges with other religious affiliations, Evangelical Protestants tended to vote more conservatively in obscenity, death penalty, and gender discrimination cases.⁹² More generally, however, studies have failed to find measurable correlations between religion and decision-making in cases that did not directly implicate issues of religion.⁹³

87. Burbank & Farhang, *supra* note 80, at 232. Unlike race, however, where the researchers found that the presence of a single black judge on an appellate panel increased the likelihood of a pro-certification panel result, the presence of a single female judge did not have the same effect. *Id.*

88. See Haire & Moyer, *supra* note 83, at 7–8.

89. Christina L. Boyd, *She'll Settle It?*, 1 J.L. & CTS. 193, 194 (2013).

90. Susan B. Haire & Laura P. Moyer, *Diversity, Deliberation, and Judicial Opinion Writing*, 1 J.L. & CTS. 303 (2013).

91. See, e.g., Barbara M. Yarnold, *Did Circuit Courts of Appeals Judges Overcome Their Own Religions in Cases Involving Religious Liberties? 1970-1990*, 42 REV. RELIGIOUS RES. 79, 83 (2000) (finding that Baptist and Catholic judges were more likely to take a pro-religion stance on free exercise and establishment clause cases); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 614 (2004) (finding that “the single most prominent, salient, and consistent influence on judicial decisionmaking was religion”); Rachlinski & Wistrich, *supra* note 56, at 207 (finding that “religious orientation matters when core aspects of the judges' religion are at play in the cases they decide”).

92. Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507 (1999) (finding that evangelical Protestant justices voted conservatively when deciding cases dealing with obscenity, the death penalty, and gender discrimination in comparison to colleagues of other religions in state supreme courts).

93. See, e.g., George, *supra* note 86, at 25–26 (finding that contrary to hypotheses that judges from minority religions would “favor underdogs,” studies “repeatedly failed to find a significant relationship between a judge's religion and her decisions”); Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917, 930 (1975) (finding that religion was not “negatively correlated” to Southern federal judges and their decisions concerning race-related litigation in 1970); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460, 473, 474 tbl. I (1991) (finding that “non-Protestant religion [was] not significantly related” to decision-making).

E. EMOTION

Apart from ideology, race, gender, and religion, the extralegal influence of emotion on judicial decision-making deserves special mention. The meaning of “emotion” in relation to law gives rise to a “perpetual definitional dilemma.”⁹⁴ In a 1988 article that helped to catalyze a new era of study, Justice William Brennan argued against “formal reason severed from the insights of passion,” and defined “passion” as “the range of emotional and intuitive responses to a given set of facts or arguments.”⁹⁵ Professor Terry Maroney, in turn, has proposed a six-part taxonomy to aid in defining the scope of law and emotion research in this emerging field of study.⁹⁶

Definitional challenges aside, the “cultural script of judicial dispassion” embedded in traditional conceptions of the judicial role has been thoroughly debunked.⁹⁷ The script itself is fraught with continuity errors: judges, while historically prided for their dispassion, have just as historically been called upon to reject jury awards that “shock” their conscience; strike pleadings they deem “scandalous;” stiffen sentences for “heinous” conduct; and exercise judgment in innumerable other ways pursuant to rules of law that employ emotional yardsticks. A generation of scholars have explored the interplay between law and emotion across a range of contexts, revealing the many and varied ways in which emotion informs the interpretation, application, and implementation of law.⁹⁸ And Maroney has authored a body of theoretical work that highlights the influence of emotion on judicial decision-making for mostly better but sometimes ill.⁹⁹

To date, most empirical research investigating the relationship between emotion and American judicial decision-making has been qualitative.¹⁰⁰ Quantitative work, while less common, has nonetheless documented the influence of emotion (or something like it) on decision-making in an array of contexts. One study

94. Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 124 (2006).

95. William J. Brennan Jr., *Reason, Passion, and ‘The Progress of Law,’* 10 CARDOZO L. REV. 3, 9, 17 (1988).

96. Maroney, *supra* note 94 at 126 (subdividing law and emotion scholarship into work that explores: 1) how a particular emotion is or should be reflected in law; 2) mechanisms by which emotions are experienced, and how these phenomena are or should be reflected in law; 3) a particular theory of how emotions may be understood and reflected in law; 4) how emotion is or should be reflected in a particular area of legal doctrine; 5) theories of emotion embedded or reflected in a particular theoretical approach to the law; and 6) how a particular legal actor’s performance of the assigned legal function is or should be influenced by emotion).

97. *See* Maroney, *supra* note 52.

98. *See generally* SUSAN BANDES, JODY LYNEÉ MADEIRA, KATHRYN D. TEMPLE & EMILY KIDD WHITE, RESEARCH HANDBOOK ON LAW AND EMOTION (Susan Bandes ed., 2021).

99. *See, e.g.,* Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B. C. L. REV. 2085 (2020); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012); Terry Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011); Maroney, *supra* note 52.

100. Terry A. Maroney, *Empirically Investigating Judicial Emotion*, 9(5) OÑATI SOCIO-LEGAL SERIES 799 (2019) (proposing an empirical research agenda and summarizing research to date).

called upon judges to evaluate narrow questions of statutory interpretation, and found that their interpretations were influenced by seemingly irrelevant narratives that portrayed an affected party in sympathetic or unsympathetic terms.¹⁰¹ Another study found that the emotional content of questions posed and comments made by Supreme Court justices during oral argument were predictive of their subsequent votes.¹⁰² Other studies have shown that judges sentence criminal offenders more leniently on the defendant's birthday,¹⁰³ and more harshly after a hometown football team loss,¹⁰⁴ while a study in Israel found that judges' parole decisions could be influenced by when those decisions were made relative to a food break.¹⁰⁵

III. POLITICAL REALITY: WHEN THE TRADITIONAL SCHEMA AND EMPIRICAL EVIDENCE COLLIDE

Judges are not oblivious to the intrusion of empirical evidence upon the province of their role, traditionally conceived. They have addressed the encroachment of extralegal influences on a paradigm that disavows such influences, in a variety of ways.

A. CONDEMN AND DEFLECT

Entrenched traditionalists acknowledge that the rulings judges issue can be subject to extralegal influences that judges bring to the bench as individuals, and criticize (other) judges for falling prey to such influences. With respect to the influence of ideology, for example, District Judge Gerald Rosen admonishes his wayward colleagues not to “search for ambiguity as a ruse to mask a policy agenda. Such jurisprudential adventures do not serve ‘justice;’ they promote disrespect for the judiciary and undermine the institution’s . . . mission of deciding cases and rendering justice under the law.”¹⁰⁶ As to race, Circuit Judge James Ho testified before a House subcommittee that unlike other judges, he would “never suggest” that his experience as a racial minority might influence his decision-making for the better.¹⁰⁷ In his view, such a claim would be “antithetical to our

101. Andrew J. Wistrich, Jeffrey J. Rachlinksi & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 898–900 (2015).

102. Ryan C. Black, Sarah A. Treul, Timothy R. Johnson & Jerry Goldman, *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 579 (2011).

103. Daniel L. Chen & Arnaud Philippe, *Clash of Norms: Judicial Leniency on Defendant Birthdays*, 1, 2 (2020), available at <https://ssrn.com/abstract=3203624> [<https://perma.cc/7AN2-NFPM>].

104. Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J.: APPLIED ECON. 171, 190 (2018).

105. See Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889 (2011).

106. Gerald Rosen & Kyle R. Harding, *Reflections Upon Judicial Independence as We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution's "Crown Jewel,"* 29 FORDHAM URB. L.J. 791, 808 (2002).

107. Kass, *supra* note 55.

legal system and poisonous to civil society,” because “[e]veryone should win or lose based on the law, period. That’s why Lady Justice wears a blindfold. That’s why judges wear black robes.”¹⁰⁸ And in a speech that sought to debunk the suspicion that the Supreme Court was staffed with “political hacks,” Justice Amy Coney Barrett alluded to the problem of extralegal influences on judicial decision-making, which she blamed on inattentive judges who must be “hyper-vigilant to make sure that they’re not letting personal biases creep into their decisions . . . since judges are people, too.”¹⁰⁹

B. MINIMIZE

A second approach is to concede that judges’ attributes, experiences, and perspectives as individuals can influence their decisions as judges—but to characterize that impact as small. Justice Elena Kagan, for example, has opined that “it’s obviously true that people bring their backgrounds and experiences to the job in some sense,” but that “I don’t think that those traits have all that much to do with the way we decide cases.”¹¹⁰ In a related vein, Indiana Court of Appeals Judge Nancy Vaidik has acknowledged a gap where the law is unclear and judges must exercise discretion by evaluating a legal issue “through the prism of [their] personal and professional experiences,” but that the gap is “tiny,” and noticeable only because—like the gap between some celebrities’ teeth—it is “right in the middle of their face.”¹¹¹

C. REMEDIATE

Implicit racial bias represents an exceptional instance in which the judiciary has acknowledged that its conduct is subject to an unwelcome extralegal influence and has sought ways to remediate it. The Federal Judicial Center,¹¹² the National Judicial College,¹¹³ and the National Center for State Courts¹¹⁴—organizations that provide continuing education and informational resources to federal

108. *Id.* Judge Ho positioned himself in opposition to Justice Sotomayor, whom he paraphrased. For a discussion of Justice Sotomayor’s views, see *infra* notes 122–26 and accompanying text.

109. Martin Pengelly & Joan E Greve, *Amy Coney Barrett Claims Supreme Court ‘Not Comprised of Partisan Hacks,’* GUARDIAN (Sept. 13, 2021, 12:31 PM), <https://www.theguardian.com/us-news/2021/sep/13/amy-coney-barrett-supreme-court-not-partisan-hacks-abortion> [<https://perma.cc/M9SU-SJ9D>].

110. Alexis Blue, *Justice Kagan Discusses Inner Workings of Supreme Court*, U. ARIZ. NEWS (Sept. 1, 2016), <https://news.arizona.edu/story/justice-kagan-discusses-inner-workings-supreme-court> [<https://perma.cc/R5JS-LTNM>].

111. Frank Sullivan, Nancy Vaidik & Sarah Evans Barker, *Three Views from the Bench, in* WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE 328, 334 (Charles Gardner Geyh ed., 2011) (statement of Judge Nancy Vaidik).

112. Jason A. Cantone, *Federal and State Court Cooperation: Reducing Bias*, FED. JUD. CTR., <https://www.fjc.gov/content/337735/reducing-bias> [<https://perma.cc/UX4C-RN5Z>].

113. KATHERYN L. YETTER & BRIAN M. LEE, NAT’L. JUD. COLL., *JUDGING THE BOOK BY MORE THAN ITS COVER: A SYMPOSIUM ON JURIES, IMPLICIT BIAS, AND THE JUSTICE SYSTEM’S RESPONSE* (2021).

114. JENNIFER K. ELEK & ANDREA I. MILLER, NAT’L. CTR. FOR STATE CTS., *THE EVOLVING SCIENCE ON IMPLICIT BIAS: AN UPDATED RESOURCE FOR THE STATE COURT COMMUNITY* (2021).

and state judges—have developed programs and materials on implicit bias and ways to combat it. As extralegal influences go, implicit bias is arguably *sui generis* because it is subconscious by definition and nearly ubiquitous in prevalence. That enables judges to acknowledge implicit bias as a problematic departure from the traditional model without stigmatizing the afflicted as isolated deviates and bad judges who openly flout their oaths—as long as reforms are limited to general education and training (and do not extend to disqualification, discipline, or removal).

D. EMBRACE

When extralegal influences on judicial decision-making are framed as explicit biases that lead judges to disregard the law and indulge their prejudices or impose their personal preferences, the legal profession is in accord that such influences must be avoided. But for some judges, extralegal influences—qua perspectives drawn from life experience that do not trump the rule of law but inform the way that a judge interprets operative facts in relation to applicable law—stand on different footing. Those judges have, in effect, embraced the empirical evidence by integrating it into their conception of the judicial role. Some judges report that their gender¹¹⁵ and race¹¹⁶ can improve their decision-making by enabling them to better understand the dispute and empathize with the perspective of parties with whom the judge shares life experience. Other judges have noted that their “religious identity” gives rise to “life and educational experiences,” that “impart values and inform our judgments about the conduct of others,” which, if “widely shared,” “might be useful to judges looking for guidance in areas of legal uncertainty.”¹¹⁷ Still other judges report being unfazed by data showing that ideology influences judicial decision-making. For them, such influences are an inevitable byproduct of legal indeterminacy in which different judges with different backgrounds, interpretive philosophies, and policy perspectives, have discretion and judgment to exercise, and parse ambiguous laws in relation to ambiguous facts in different ways.¹¹⁸

115. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 608 (2011) (“Who you are does affect your decision making. . . . Your gender informs your decisions.”).

116. Rehan Alimohammad & Jeff Leung, *Perspectives from Asian Judges: A Look at Judgeship, the Pandemic, and Diversity*, WONG FLEMMING ATT’YS AT L. (July 1, 2021), <https://www.wongfleming.com/perspectives-from-asian-judges-a-look-at-judgeship-the-pandemic-and-diversity/> [<https://perma.cc/SAN4-PYFR>] (Asian American Texas state judge Linda Chew states that “[b]eing a minority gives you different values and experiences,” which can enable parties to “feel that they are understood.”).

117. Kermit V. Lipez, *Is There a Place for Religion in Judicial Decision-Making?*, 31 TOURO L. REV. 133, 138 (2015).

118. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999) (judge on the United States Court of Appeals for the D.C. Circuit expressing a “ho-hum reaction” to data showing that the decisions of circuit judges are subject to ideological influences).

Judges are aware, however, that when discussing the desirability or inevitability of extralegal influences on their decision-making they must negotiate the terrain like a minefield, because—as Judge Richard Posner has noted (in relation to ideology)—conceding such influences “challenges orthodox conceptions of the judicial process,” and is “heresy to the legal establishment.”¹¹⁹ Unsurprisingly, then, some judges have confined their candid concessions to empirical evidence and the influence of identity on judicial decision-making to times when they were poised to retire,¹²⁰ or circumstances in which they could remain anonymous.¹²¹

Justice Sonia Sotomayor’s story offers a cautionary tale of what can happen when judges speak too openly about how their decision-making is influenced by identity, and in so doing step on a landmine. In 2001, Sotomayor—then a judge on the United States Court of Appeals for the Second Circuit—gave a speech in which she embraced the traditional schema in a number of ways.¹²² She accepted the traditional view that judges should aspire to “transcend their personal sympathies and prejudices” and follow the law.¹²³ And she acknowledged that it would be “myopic” to believe that judges are “incapable of understanding the values and needs of people” different from themselves—noting that *Brown v. Board of Education* was decided by nine white men.¹²⁴ She observed, however, that judges can lack the time, life experience, or desire to acquire such an understanding, and therefore, that “the presence of women and people of color on the bench” makes a difference because “[p]ersonal experiences affect the facts that judges choose to see.”¹²⁵ Consequently, in the context of race and gender discrimination cases, she opined, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”¹²⁶

Eight years later, when she was a Supreme Court nominee, Sotomayor’s “wise Latina” remark was plucked from the context of her speech and widely derided by conservatives as troubling and unbecoming of a candidate for the high court.¹²⁷ During her testimony before the Senate Judiciary Committee, she responded by backpedaling on her prior statement multiple times in multiple ways. She characterized her chosen words as “a bad idea;” disavowed that “any

119. RICHARD A. POSNER, *HOW JUDGES THINK* 28 (2008) (discussing political influences generally).

120. Wald, *supra* note 118, at 236 (expressing a lack of concern for data showing that circuit judges are subject to ideological influences, in an article published the year that Judge Wald retired).

121. Scherer, *supra* note 115, at 608 (quoting a judge who was interviewed on the condition of anonymity for the proposition that her gender influenced her decision-making for the better).

122. Sonia Sotomayor, *Lecture: ‘A Latina Judge’s Voice,’* N.Y. TIMES (May 14, 2009), <https://www.nytimes.com/2009/05/15/us/politics/15judge.text.html> [<https://perma.cc/58YJ-P2LF>].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Frank James, *Sotomayor’s ‘Wise Latina’ Line Maybe Not So Wise*, NAT’L PUB. RADIO (May 27, 2009), https://www.npr.org/sections/thetwo-way/2009/05/sotomayors_wise_latina_line_ma.html [<https://perma.cc/8MPW-ZNN6>].

ethnic, racial or gender group has an advantage in sound judging;” insisted that she “wasn’t encouraging the belief” that life experiences should “drive the result,” because “impartiality is an understanding that the law is what drives the result;” and emphasized that, as judges, it was their “job,” to recognize their “feelings and put them aside.”¹²⁸

President Obama tripped an adjacent landmine when discussing the vacancy Justice Sotomayor would later be nominated to fill, signaling that he would seek a nominee who possessed the “quality of empathy, of understanding and identifying with people’s hopes and struggles,” which he viewed as “an essential ingredient for arriving at just decisions and outcomes.”¹²⁹ The comment provoked a firestorm of criticism from conservatives, who argued that “empathy” was “a code word for judicial activism”¹³⁰ that licensed judges to rule on the basis of their “feelings,”¹³¹ and violated the judge’s oath to decide cases without respect to persons.¹³² When introducing Judge Sotomayor as his nominee three weeks later, President Obama purged his statement of any reference to “empathy,” choosing instead to focus on her “rigorous intellect;” her “recognition of the limits of the judicial role;” and her “experience.”¹³³

IV. IDENTITY AND JUDICIAL ETHICS: RE-ENVISIONING THE MODEL

The foregoing summary of issues at the intersection of a judge’s identity as a person, and role as a judge, resembles a crash site. It describes a three-way collision between 1) the traditional model, which proceeds from the premise that a good judge resists the influences of who she is as a person, and follows the law; 2) empirical reality, which shows that judges are subject to the influences that the traditional model disavows; and 3) political reality, which stigmatizes judges who make concessions to empirical evidence and pledge less than full-throated allegiance to the traditional schema. Scattered about the site are bent signage and detached bits that cannot readily be snapped back into place: disqualification standards and procedures, implicit bias programming, diversity initiatives, etc.,

128. *Sotomayor Explains “Wise Latina” Comment*, CBS NEWS (July 14, 2009, 1:25 PM), <https://www.cbsnews.com/news/sotomayor-explains-wise-latina-comment/> [<https://perma.cc/D6QW-JJHH>].

129. Jesse Lee, *The President’s Remarks on Justice Souter*, WHITE HOUSE PRESIDENT BARACK OBAMA (May 1, 2009, 4:23 PM) <https://obamawhitehouse.archives.gov/blog/2009/05/01/presidents-remarks-justice-souter> [<https://perma.cc/XG26-KT8Q>].

130. John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama’s “Empathy Standard,”* 120 YALE L.J. ONLINE 89 (2010), <https://www.yalelawjournal.org/forum/reversed-on-appeal-the-uncertain-future-of-president-obamas-qempathy-standardq#:~:text=Iowa%20Senator%20Chuck%20Grassley%20voiced,an%20absurd%2C%20dangerous%20standard.%E2%80%9D> [<https://perma.cc/D7GB-K7CX>].

131. *Id.*

132. 155 Cong. Rec. S6982 (daily ed. June 24, 2009) (statement of Sen. Brownback).

133. Barack Obama, *Transcript: Obama on Supreme Court Nominee*, NAT’L PUB. RADIO (May 26, 2009, 12:32 PM), <https://www.npr.org/templates/story/story.php?storyId=104542818> [<https://perma.cc/C7JZ-XJH4>] (In describing the importance of experience, President Obama came closest to resurrecting empathy, noting that experience “can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live.”).

which regulate encroachments of the judge's identity as a person upon her role as a judge, and often operate in tension with the traditional schema, empirical evidence, or both.

The balance of this Article is devoted to showing that these tensions and contradictions can be explained and lessened when viewed through the lens of judicial ethics re-envisioned. Judicial ethics concerns the principles, norms, and rules that delineate between good and bad judicial conduct. Insofar as the disagreements at issue in this Article focus on whether and to what extent good judges can, should, and do avoid extralegal influences when rendering decisions, judicial ethics offers a logical forum in which to arbitrate such disputes. Moreover, an ethics-based approach has the potential to achieve broader consensus insofar as it is derived from a body of law adopted by every judicial system in the United States, and so lays its foundation on common ground.

A. THE TRIPARTITE JUDICIAL ETHICS FRAMEWORK

In a recent article, I sought to conceptualize the architecture of judicial ethics.¹³⁴ In that piece, I subdivided judicial ethics into three components: macro-ethics, micro-ethics, and relational ethics.

Macro-ethics encompasses overarching values associated with being a good judge, principally impartiality, integrity, and independence, but also competence (or capability), which subsumes diligence, and judicial temperament. Systems of judicial conduct regulation recognize that macro-ethics values are not ends in themselves but are instrumental to promoting three objectives: the rule of law, access to justice, and public confidence in the courts. Thus, the preamble to the *Model Code of Judicial Conduct* declares that embracing these four macro-ethics values enables judges to play “a central role in preserving the principles of justice and the rule of law,” as they “strive to maintain and enhance confidence in the legal system.”¹³⁵

Macro-ethics values are implemented by means of micro-ethics rules. Micro-ethics rules refer to more narrowly crafted directives, typically embedded in codes of conduct, as interpreted in disciplinary rulings, advisory opinions, and disqualification proceedings—rules which date back to the early twentieth century and reify the more specific dos and don'ts of judicial ethics, guided by macro-ethics values.¹³⁶

134. Geyh, *supra* note 24.

135. MODEL CODE pmb. (“The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.”).

136. Micro-ethics rules, as I use the term here, also include legislative enactments with ethical dimensions, such as disqualification statutes, which have a deeper historical pedigree than codes of conduct. See Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. OF LIT. 672, 677–90 (2011) (summarizing history of disqualification reform, including legislation).

The boundaries of good judicial conduct that macro-ethics values and micro-ethics rules seek to delineate and impose, however, can be constrained by at least four competing concerns that I denominate “relational ethics” interests: 1) guarding against micro-ethics rules that promote macro-ethics values in unconstitutional ways; 2) encouraging extrajudicial engagement with the communities judges serve at the risk of reducing the detachment that can foster impartiality and independence; 3) promoting effective and efficient court operations by restricting the reach of unduly burdensome micro-ethics rules; and 4) avoiding overly aggressive imposition of micro-ethics rules, which undermines public trust in the courts by fostering the misperception that ethical misconduct is more prevalent than it is. Relational ethics, then, embody countervailing interests and values that operate in relation to macro-ethics principles to constrain the reach of micro-ethics rules and judicial ethics regimes.

Relational ethics values promote the same objectives as the macro-ethics principles they constrain: the rule of law, access to justice, and court legitimacy. Micro-ethics rules that regulate judicial ethics in unconstitutional ways (by, for example, infringing upon the First Amendment rights of judges or judicial candidates) undermine the rule of law.¹³⁷ Extrajudicial community engagement brings judges closer to the people they serve in ways that inspire public confidence in the courts and facilitate access to justice by enabling judges to better understand the people whose problems judges adjudicate. Rules that retard the judiciary’s operational effectiveness diminish access to justice. And ethics rules that overregulate judicial conduct convey the misimpression that the courts are more troubled than they are, thereby undermining public confidence in the courts to the detriment of the judiciary’s perceived legitimacy. The overriding objective of judicial ethics, then, is to design an ethics regime that strikes a balance between macro- and relational ethics values to the end of optimizing the shared ends each seeks to further—with the terms of micro-ethics rules (as interpreted by courts and advisory committees) serving as the means by which that balance is struck.

B. IDENTITY AND THE JUDICIAL ETHICS FRAMEWORK

With the tripartite ethics framework in hand, it is possible to revisit, and in large part resolve, the seeming conflicts and contradictions discussed in Parts II and III. First, I will show how the traditional model fits comfortably within this new ethics schema most of the time, when the law and facts are relatively clear, and the extralegal influence of identity is unnecessary and inappropriate. Second, I will shift focus to cases in which the law or facts are indeterminate, where challenges to the traditional model acquire bite. Here, the need for judgment and

137. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (invalidating state ethics rule that barred judicial candidates from announcing their views on issues they would likely decide as judges, concluding that the rule did not advance the state’s interest in promoting judicial impartiality sufficiently to overcome the First Amendment rights of the judicial candidates).

discretion gives rise to a “sweet spot,” where the influence of identity is unavoidable, appropriate, and sometimes salutary, subject to limits that I discuss. Third, I will reexamine disqualification rules and practice, to the end of explaining the extent to which the approach I advocate reconciles seeming tensions and contradictions.

1. ETHICS, IDENTITY, AND THE TRADITIONAL MODEL

The traditional model’s conception of the judicial role can be explained and defended with recourse to micro-ethics rules, guided by macro-ethics principles. Impartial, independent, forthright, and capable judges uphold and apply the law without bias or prejudice, and do not allow their family, social, political, financial, or other interests or relationships to influence their judgment. The good judge, in other words, does not allow her identity as a person to affect her conduct as a judge. Political reality adds gravitational pull to the traditional model by exacting a toll on those who deviate.

It bears emphasis that codes of conduct are instrumental to preserving this traditional schema. An ethics-based approach to curbing the problematic influences of identity on judicial conduct proceeds from the premise that by subjecting themselves to codes of conduct that they approve, judges encourage buy-in to a system of micro-ethics rules that inculcate macro-ethics values and constrain the improper influences of identity to the end of protecting the rule of law, access to justice, and court legitimacy.¹³⁸ Commitment to that premise is the engine that drives support for legislation directing the Supreme Court to adopt its own code of conduct, as discussed in the Introduction to this Article. Supreme Court exceptionalism offers scant justification for why its justices should be excused from complying with a code to which all other judges in the United States are beholden, subject only to the caveat that the influence of ideology on the Supreme Court in its lawmaking role may be *sui generis*.¹³⁹ If, as Chief Justice Roberts has argued in opposition to the need for such a proposal,¹⁴⁰ the Justices already consult the Code of Conduct for U.S. Judges (applicable to the lower federal courts), they have not consulted it closely enough to avoid flagrant Code violations. The *Dobbs* leak is a recent example, assuming that the opinion was released by a member of the Court (or a member of Court staff at a justice’s direction).¹⁴¹

138. Geyh, *supra* note 24, at 2398–99.

139. See discussion *infra* notes 178–82 and accompanying text.

140. 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–7 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/RZ3K-SXMT>] (Chief Justice Roberts discussing his objections to Code of Conduct proposal).

141. See Politico Staff, *supra* note 5. Other examples of recent Code violations include Justices Scalia and Thomas serving as featured speakers at Federalist Society fundraising events, in violation of Canon 4(C), and Justice Ginsburg’s public statements opposing Donald Trump’s presidential candidacy, in violation of Canon 5 (A)(2). Geyh, *supra* note 24, at 2374–76.

Empirical evidence poses little threat to the traditional model when the law is unambiguous, the facts are clear, and the relevance of and opportunity for identity-influenced discretion and judgment are limited. Studies have failed to show correlations between ideology, race, or gender and decision-making in routine cases where the facts and law tolerate but one conclusion and there is too little opportunity for the influences of identity to gain purchase.¹⁴² In such cases, the good judge reaches the right result and extralegal influences have no place. The cohort of judges who condemn and deflect the influence of identity in judicial decision-making are thus rising to the defense of this traditional conception of their role.

On the other hand, when the facts are uncertain, the law is ambiguous, or judicial discretion is broader, empirical evidence exposes the Achilles's heel of the traditional model. If the operative facts and law are indeterminate, ascertaining what the facts of the case are, which facts matter, what the law says, and how the law applies to the facts of the case require the exercise of judgment. Judgment entails resolving uncertainties with recourse to the judge's best assessment of what the dispositive facts and law are—an assessment aided by the judge's experience, wisdom, and common sense. And judgment, experience, wisdom, and common sense resolve legal problems with unavoidable resort to extralegal influences that are bound up in the judge's identity. They are informed by the judge's way of looking at the world, as elucidated by her upbringing, education, religious and moral sensibilities, emotional intelligence, policy perspectives, and lifelong exposure (on and off the bench) to situations and relationships, filtered through the experience of her race and gender, which frame her point of view on the issues she is called upon to adjudicate. The judge's way of looking at the world can influence her interpretation of material facts and operative law: facts, with reference to life experiences that facilitate her understanding of the parties and circumstances that bring them to court, and law, with reference to life experiences that inform her judicial philosophy.

2. REGULATING IDENTITY IN AND AROUND THE SWEET SPOT

Indeterminacy thus creates an interval, or “sweet spot,” where identity plays a proper (and unavoidable) role in a judge's exercise of discretion and judgment. Scholars have alluded to similar phenomena in adjacent contexts as the “Goldilocks zone” where emotion properly influences decision-making, and “doctrinal intervals” where indeterminacy enables a judge's ideology to influence her rulings without fear of Supreme Court reversal.¹⁴³ Judges who acknowledge

142. See Ashenfelter, Eistenberg & Schwab, *supra* note 63, at 281 (Finding that “in the mass of cases that are filed, including civil rights and prisoner cases, the law—not the judge—dominates the outcomes. Judges may treat most cases in which political interests are irrelevant or cannot change the outcome. In the select few cases that are appealed or lead to published opinions, individual judges have a greater role in shaping outcomes. In such close cases, this may not be disturbing.”).

143. Maroney, *supra* note 52, at 672 (discussing the “Goldilocks zone”); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1646 (1994) (discussing “doctrinal intervals”).

but minimize this sweet spot rightly seek to contextualize it relative to the larger array of ordinary cases in which the good judge has neither need nor opportunity to bring identity to bear in the service of resolving ambiguity.

Within the sweet spot, judicial ethics accounts for, accommodates, and constrains the role of identity in judicial decision-making in nuanced ways. The influence of a judge's identity on her decision-making can be in tension with the detachment, neutrality, and openness of mind that the macro-ethics value of impartiality embodies. But complete detachment begets isolation that disconnects judges from the people judges serve, the lives those people lead, the laws they enact through their elected representatives, and the problems that bring them to court.

In easy cases, where the law and facts are clear, isolation may pose no problem insofar as there is no meaningful role for judgment or discretion. In difficult cases, however, isolation can undermine the objectives impartiality seeks to further. The isolated judge who is ignorant of the broader milieu in which difficult cases arise lacks the context life experience can supply to assess ambiguous facts in relation to indeterminate law intelligently. In the absence of a meaningful frame of reference to evaluate the parties' comparably plausible arguments in support of divergent conclusions, the isolated judge must fill the vacuum of her inexperience by working harder to acquire the understanding she lacks. If she does not have the time or inclination to do so, she must rely on uninformed hunches and preexisting biases to the detriment of her ability to uphold the law, ensure access to justice, and promote the court's perceived legitimacy. Identity qua life experience can thus inform judicial decision-making in ways that optimize the objectives that macro-ethics values serve—the point that judges who embrace empirical evidence emphasize.

This is where the relational ethics interest of engagement comes into play.¹⁴⁴ By heightening the involvement of judges in their communities, engagement breeds familiarity between judges and the people they serve, which promotes public confidence in the courts; and by cultivating better informed and involved public citizens, engagement frames the perspective of judges in ways that provide them with a better context in which to evaluate the facts and law of the disputes they adjudicate. In other words, engagement improves the courts by making judges well-rounded people, thereby nurturing their identities as individuals in ways that make them better judges.¹⁴⁵ It is a form of enrichment that better equips judges to resolve indeterminacy intelligently and exercise discretion wisely.

144. "Engagement," as I use it here, runs the gamut from more active pursuits—seeking out educational opportunities as teacher or student, participating in the activities of civic, charitable, religious, or fraternal organizations, testifying before governmental bodies, or engaging in community outreach—to more passive activities, like keeping up with current events, remaining attuned to popular culture, and staying alert to community developments.

145. GEYH, ALFINI & SAMPLE, *supra* note 42, at § 1.02 ("It is frequently said that impartial judges should be neutral and detached, but this does not mean that judges have to isolate themselves . . . [T]o place judges in a

Because engagement can offset isolation in ways that promote the rule of law and court legitimacy, codes of conduct encourage engagement. But unlike impartiality, which is a macro-ethics value that micro-ethics rules require of judges as an ethical obligation, extrajudicial engagement is a relational ethics value with a dark side. Problematic forms of engagement (for example, joining organizations that practice invidious discrimination) can entrench perspectives in ways that close minds and cultivate bias, to the detriment of the judge's real or perceived impartiality and the objectives that impartiality (and positive forms of engagement) further. And so, codes of conduct differentiate between the kinds of extrajudicial engagement that are encouraged, tolerated, and forbidden.

Thus, *Model Code* commentary counsels that "a judge should initiate and participate in community outreach activities," which promote "public understanding of and confidence in the administration of justice."¹⁴⁶ The *Model Code* permits judges to engage in extrajudicial activities generally,¹⁴⁷ and accompanying commentary "encourage[s]" judges to do so because it "helps integrate judges into their communities."¹⁴⁸ Explanatory reporters' notes elaborate that "through such activities [judges] can avoid becoming isolated from the communities in which they live and work."¹⁴⁹

At the same time, the *Model Code* forbids forms of extrajudicial engagement that would appear to "undermine the judge's independence, integrity, or impartiality."¹⁵⁰ The *Model Code* prohibits judges from joining organizations that practice "invidious discrimination";¹⁵¹ and as to participation in educational, religious, charitable, fraternal, or civic organizations generally, the *Model Code* includes commentary warning judges to refrain from activities "that reflect adversely on a judge's independence, integrity, or impartiality."¹⁵²

Micro-ethics rules thus create an interval within which judges are encouraged to participate in extrajudicial activities that connect them more closely to the people they serve, circumscribed by a proscription on activities that cultivate real or perceived biases inimical to their role. The net effect is not just to promote public confidence in the courts, but to encourage judges to nurture their identities by avoiding isolation and seeking out life experiences that will make them better judges in difficult cases where the facts and law are uncertain and life experience informs their perspective, common sense, and judgment.

monastery or an ivory tower would diminish their judicial ability. . . . Involvement in the outside world enriches the judicial temperament and enhances a judge's ability to make difficult decisions. As Justice Holmes once said: '[T]he life of the law has not been logic: it has been experience.'")

146. MODEL CODE R. 1.2 cmt. 6.

147. MODEL CODE R. 3.1(C).

148. MODEL CODE R. 3.1 cmt. 2.

149. CHARLES G. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 56 (2009).

150. MODEL CODE R. 3.1(C).

151. MODEL CODE R. 3.6.

152. MODEL CODE R. 3.7 cmt. 2. *See also* GEYH, ALFINI & SAMPLE, *supra* note 42, at §§ 8.06, 905[4].

The *Model Code* acknowledges the resulting sweet spot where identity properly influences judicial decision-making. The rule directing judges to “uphold and apply the law” is followed by a comment new to the 2007 *Model Code*, which alludes to the contours of this duty by noting: “although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”¹⁵³ As the Reporters’ notes explain, this comment was added to “underscore” that while the good judge does not allow her identity, specifically, her “unique background and personal philosophy,” to trump her duty to interpret and apply the law, “a judge’s understanding of the law [is] inevitably and properly influenced by upbringing, education, and life experience.”¹⁵⁴

So conceptualized, there are two junctures where the influence of the judge’s identity can be inappropriate—and the *Model Code* addresses them both. First, identity should not affect decision-making in easy cases where its influence would undermine the judge’s duty to uphold and apply the law.¹⁵⁵ Second, in hard cases, where indeterminacy requires judgment that renders the influence of identity inevitable, such influence is proscribed to the extent that it biases rather than informs judgment by closing the judge’s mind or prejudicing her for or against a party.¹⁵⁶

Appeal and mandamus can correct bias-induced errors, while disqualification and discipline can remediate or sanction more patent manifestations of real or reasonably perceived bias. The lingering peril, however, concerns more latent and often subconscious forms of bias, (particularly implicit bias) which fly below the radar of appellate, disqualification, and disciplinary processes, and arise when judges exercise discretion and judgment with recourse to tainted “experience” and “common sense.”¹⁵⁷

Judges and judicial systems that seek to remediate implicit bias, have done so by means of education and training. Such education and training can apprise judges of the ubiquity of implicit bias, sensitize them to its presence in their own thought-processes, and offer them techniques to counter it. Yet because such bias is implicit by definition, judges may not see it or may refuse to acknowledge the possibility of its presence. The cognitive theory of naïve realism helps to explain this phenomenon: people generally (and correctly) think that others perceive the world subjectively, through their own interpretive lenses, but naïvely (and incorrectly) think that they themselves see the world as it is and make decisions on the

153. MODEL CODE R. 2.2 cmt. 2.

154. GEYH & HODES, *supra* note 149, at 27.

155. MODEL CODE R. 2.2.

156. MODEL CODE R. 2.2, 2.3(A).

157. For an excellent discussion of the vagaries of tainted “common sense,” see Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009).

basis of this “objective reality.”¹⁵⁸ Thus, people “report being less susceptible than their peers to various cognitive and motivational biases,”¹⁵⁹ are oblivious to their own biases, take their perceptions of the world as objectively correct, and default to attributing contradictory perspectives to bias in others, rather than themselves.¹⁶⁰ One study found that when administrative law judges were asked about their capacity to avoid bias, ninety-seven percent rated themselves in the top half of their cohort.¹⁶¹

This is where the goals of diversification reenter the conversation. Studies on “panel effects” reveal that with respect to issues where the judge’s gender, race, or ideology have been shown to produce differences in decision-making, those differences are diminished on appellate panels that are diverse vis-a-vis the attribute of identity in play.¹⁶² One possible explanation for this dynamic is what Burbank and Farhang call “suppressed dissent”: judges on panels tend to agree, not because they have been persuaded by their co-panelists, but because they want to get along or are too busy to write separately¹⁶³—an explanation that would seem to make liars of judges who explain the choices they make with reference to their ethical duty to uphold and apply the law. An alternative, “modified content” explanation, reconciles the ethical duty to uphold the law with the influence of panel effects by positing that judges are persuaded in the deliberative process to moderate the content of their views.¹⁶⁴ Burbank and Farhang regard the modified content explanation as “most plausible,” and theorize that the influence of diverse panel affects is attributable to “cue-taking,” in which judges “give greater weight to the views of judges they regard as more credible and expert.”¹⁶⁵

This data suggests the possibility that the deliberative process on collegial courts enables a diverse bench to police bias, by creating opportunities for judges with varied identities to share differing perspectives on operative facts and law, learn from each other, gut check their prejudices, and seek consensus. Without disputing the ways in which a diverse judiciary can otherwise create role models and improve public confidence in the courts, panel-effects research suggests that a diverse bench also exerts a substantive and salutary influence on the decisions judges make in that interval where identity properly and unavoidably holds sway.

Panel effects research thus vindicates Justice Sotomayor’s point that “the presence of women and people of color on the bench” makes a difference because

158. Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism*, 83 ST. JOHN’S L. REV. 231, 271 (2009).

159. Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCH. BULL. 369, 374 (2002).

160. *Id.*

161. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

162. See Burbank & Farhang, *supra* note 80, at 239–51.

163. *Id.* at 244.

164. *Id.* at 246.

165. *Id.* at 248.

“[p]ersonal experiences affect the facts that judges choose to see,”¹⁶⁶ but adds a complication. The “wise Latina” judge’s life experience enables her to make “better” decisions than judges who lack such experience, in cases raising issues where that experience affords her unique insights into the essential facts and their relationship to the law.¹⁶⁷ By necessary implication, however, there are other cases, raising other issues, in which the wise Latina judge lacks the life experience that other judges possess. Diverse panels can address this problem at the appellate level, but in the vast majority of cases the administration of justice begins and ends with a single trial judge.¹⁶⁸

There are, however, mechanisms in place that can be augmented to serve as a rough proxy for panel-effects at the trial level. As an initial matter, insofar as trial courts listen to what appellate courts say and take pride in being upheld on appeal, vertical interactions between judges on diverse appellate courts and the trial court judges they oversee may yield some of the benefits produced by horizontal interactions between judges on diverse appellate courts. More germane to the trial bench per se, codes of judicial conduct prohibit *ex parte* communications generally but authorize two exceptions relevant here. First, the *Model Code* authorizes judges to “consult . . . other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.”¹⁶⁹ Thus, judges are permitted to supplement experiential deficits by soliciting colleagues for their perspectives in difficult cases within the sweet spot where identity properly operates and where experiential gaps could skew “the facts that judges choose to see.”¹⁷⁰ Second, *Model Code* commentary explains that judges are permitted to “consult ethics advisory committees, outside counsel, or legal experts concerning the judge’s compliance with this Code.”¹⁷¹ Because the Code requires judges to act impartially and without bias, consultations on pending cases initiated for the purpose of helping judges spot and avoid their own implicit biases would be proper. Implicit bias training and education are already the subjects of programs for new and experienced judges; such programs can be supplemented to encourage—and perhaps regularize—consultations that the rules authorize.

To the extent that these mechanisms offer a proxy for panel effects at the trial level, it is at best a rough one. The interactions between appellate and trial judges in the course of appellate review are fundamentally different from the interactions between judges on appellate panels. And it may be unduly optimistic to hope that

166. See Sotomayor, *supra* note 122.

167. *Id.*

168. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEG. STUD. 659, 659 (2004) (reporting that 10% of nontried cases are appealed).

169. MODEL CODE R. 2.9(A)(3).

170. See Sotomayor, *supra* note 122.

171. MODEL CODE R. 2.9 cmt. 7.

busy trial judges will seek out opportunities to consult with colleagues and others to check their own biases in a manner comparable to how panels of appellate judges can and do. But viewing the problem of identity from the perspective of judicial ethics (as this Article does), the point here is more limited: ethics rules proscribe bias that a diverse judiciary can informally police via deliberative processes; and while this kind of policing is more easily implemented at the appellate level, ethics rules authorize processes through which some measure of informal policing can occur at the trial level. Thus, a diverse judiciary, augmented by implicit bias education and training, has ways to supplement appellate, disqualification, and disciplinary processes to manage bias.

3. REGULATING IDENTITY VIA DISQUALIFICATION

Judicial disqualification rules, practice, and procedure present added complications. Micro-ethics rules that subject judges to disqualification when their impartiality “might reasonably be questioned” seek to preserve the rule of law, ensure litigants access to justice, and promote public confidence in the courts by limiting the pool of judges deemed qualified to preside over a case to those whose perceived commitment to the macro-ethics value of impartiality is uncompromised by identity-driven, extralegal influences.¹⁷²

That said, the presumption of impartiality, the extrajudicial source rule, half a century of interpretive precedent, and the norm that judges rule on their own disqualification sharply limit the extent to which a judge’s identity will call her impartiality into question and lead to disqualification—social science data to the contrary notwithstanding.¹⁷³ These limits on the application of disqualification rules can be explained, and in large part justified, by relational ethics interests in promoting the efficiency of court operations and avoiding overly aggressive imposition of micro-ethics rules that threaten public trust in the courts. The presumption of impartiality creates a default in favor of the judiciary’s legitimacy that would be undermined by a norm that was agnostic to whether judges took their oaths of impartiality seriously. The extrajudicial source rule recognizes that judges are judgmental by design. To infer bias and require disqualification whenever judges react positively or negatively to a party because of something learned in court proceedings would impugn the impartiality of judges for doing their jobs

172. See *supra* note 4 and accompanying text. The Courthouse Ethics and Transparency Act, discussed in the Introduction, stands on slightly different footing. It sought to facilitate compliance with a subpart of the federal disqualification statute that requires judges to recuse themselves from cases in which they have a financial interest “however small,” which includes stockholdings in corporate parties too trivial to cast doubt on the judge’s impartiality. GEYH, *supra* note 39, at 14. To the extent that judges’ reported failure to comply with this bright-line rule did not impugn their impartiality per se, it nonetheless called into question their diligence and respect for operative law. The Act may thus be seen as creating a micro-ethics rule that furthers the macro-ethics value of a diligent, capable judiciary, by reducing technical violations of the disqualification statute to the end of promoting the rule of law and public confidence in the courts.

173. See discussion *supra* notes 42–48 and accompanying text.

to the detriment of the judiciary's legitimacy and the efficiency of court operations. Interpretative precedent that rejects the need for judges to disqualify because of their race, gender, religion, or partisan affiliation—despite empirical evidence that such attributes can exert extralegal influence—recognizes the twin perils associated with presumptively characterizing the potential for “influence” as disqualifying bias. First, presuming that judges' characteristics as individuals render them incapable of ruling fairly would engender unwarranted distrust of the courts because such characteristics can influence decision-making in salutary ways by informing perspectives and promoting empathy without cultivating bias. Second, in issue areas where a judge's race, gender, or ideology is likely to influence decision-making, all judges are subject to such influences because no judge is race, gender, or ideology-free, and if the risk of those influences were deemed presumptively disqualifying judges would be disqualified en masse and the administration of justice would grind to a halt.

The norm of judges ruling on their own disqualification, in turn, promotes efficient court operations by sparing judges the time required to familiarize themselves with each other's cases and rule on their colleagues' fitness to preside, in the context of often meritless disqualification requests. Here, however, recent developments—most notably criticism of Justice Thomas's non-disqualification from a case in which his wife's correspondence was among the records he voted to keep from congressional investigators, and proposed legislation restricting the ability of judges to rule on their own disqualification—suggest the need to rethink. The ability of a micro-ethics disqualification rule to promote the instrumental, macro-ethics value of impartiality and thereby preserve public confidence in the judiciary, is diminished by procedures that rely on self-disqualification, given the perils of naïve realism and the suspicion (supported by data) that judges are unlikely to detect and concede their own biases. Litigants are predisposed to suspect that their judge is biased while their own assessment of that bias is clear-eyed.¹⁷⁴ Meanwhile, judges are predisposed to regard themselves as fair-minded, and litigants' claims to the contrary as manifestations of unreasonable fear, or a disingenuous ploy to besmirch an impartial judge and replace her with someone who is likelier to favor their cause on the merits. Yes, the diminished capacity of self-disqualification to police impartiality to the satisfaction of a skeptical public must be balanced against offsetting relational ethics concerns for the operational burdens imposed by new procedures requiring judges to adjudicate the disqualification of their colleagues. But as public confidence in the impartiality of the judiciary generally—and the Supreme Court in particular—becomes more precarious, the argument for reform becomes more compelling.

174. GEYH, *supra* note 33, at 89–90.

C. THE ETHICS AND IDENTITY CLOVERLEAF

The ethics schema summarized here avoids the three-way collision described at the outset of Part IV by replacing an unregulated intersection with a cloverleaf.¹⁷⁵ The cloverleaf delineates when identity should matter, when it should not, and how identity qua life experience should be managed to optimize its proper influence in judicial decision-making. The multiplicity of seemingly contradictory perspectives summarized earlier in this Article can be validated and accommodated—and collisions minimized—if these perspectives stay in their lanes.

Thus, traditionalists are right that identity is irrelevant in garden-variety cases where the facts, law, and outcome are clear. In these straightforward cases, they properly reject the influence of identity and understandably take umbrage at the claim that judges of one race decide cases differently or better than judges of another race, or that the choices judges make are all about ideology or personal preference. To the extent identity influences outcomes in these cases, it is improper, and judges who deviate from the lane that facts and law require invite the wrath of political reality.

In difficult cases, however, where the facts are ambiguous or the law is indeterminate, empirical evidence shows that identity influences decision-making.¹⁷⁶ Ethics rules accommodate that reality by acknowledging the interval where a judge's background and experience properly and unavoidably influence her decisions, and by encouraging forms of extrajudicial engagement that inform, rather than bias discretion and judgment in that interval. Judges who concede but minimize the impact of identity rightly recognize that its effects are limited to this zone and play no role where the facts and law are clear enough to obviate the need for extralegal influences. Meanwhile, judges who embrace empirical evidence focus on cases where it is properly in play, and here, they are right to say that identity informs perspectives that can improve decision-making.

Judges who seek to remediate implicit bias rightly acknowledge the empirical evidence that identity can contort decision-making within the interval where it properly exerts influence—as well as outside that interval, where all agree that identity should have no bite. To claim that a diverse judiciary makes better decisions is not to say that people of a given race or gender make superior judges, or that identity should trump facts and law. Rather, it is to say that a diverse judiciary brings a multiplicity of perspectives to the enterprise of judging that enable judges to better police their own biases and adjudicate disputes of the diverse communities that judges serve, with a deeper appreciation for the contexts in which disagreements over the operative facts and applicable law arise. Viewed in this light, recent criticism of Justice Jackson's appointment as an unacceptable

175. Carl Llewellyn analogized systems of regulation to roadway cloverleaves that direct behaviors in desirable grooves. LAWRENCE M. FRIEDMAN, *IMPACT: HOW LAW AFFECTS BEHAVIOR* 147 (2016).

176. *See supra* Part II.

manifestation of “identity politics,”¹⁷⁷ as alluded to in the introduction, is misplaced. Insofar as criticism was driven by the view that a justice’s identity should be irrelevant to her selection, the claim is belied not only by history,¹⁷⁸ but by panel effects research showing that impartial judicial decision-making is augmented by a diverse bench that regulates its biases with a broader array of perspectives in its deliberative process.

Properly understood, the cloverleaf that the prevailing ethics schema creates averts head-on collisions between perspectives, but does not eliminate the risk of fender-benders on the ramps where perspectives merge. Unlike roadways, where eliminating the risk of collision is a laudable, if unattainable, goal, some friction at the merge points of perspectives on the role of identity in judicial ethics and decision-making is a necessary result of a process that manages and mediates inevitable uncertainties at the margins. Such merge points include 1) the point at which the law or facts become ambiguous enough to tolerate, if not require, the interpretive influences of identity to resolve indeterminacy; 2) in the sweet spot, where the law or facts are ambiguous enough to tolerate, if not require, the influence of identity to resolve indeterminacy, the point at which a judge’s identity ceases to inform her interpretation of ambiguous facts or law, and biases her judgment in ways that override her duty to uphold the law in light of the facts; and 3) the point at which identity-driven influences manifest real or reasonably perceived partiality sufficient to require disqualification.

1. THE POINT AT WHICH THE INFLUENCE OF IDENTITY BECOMES ACCEPTABLE

Those who claim that the influences of identity can be purged from judicial decision-making are mistaken or dissembling. But disagreement over whether the law and facts of a given case are sufficiently clear to obviate the need for such influences is healthy because it monitors the line between influences that properly inform and improperly subvert a judge’s interpretation of facts and law. And in a constitutional structure that calls upon the judicial branch of government to interpret the law that the legislative and executive branches make and enforce, an ethics regime serves the vital role of keeping the judiciary in its lane by admonishing good judges to restrict the influence of identity to circumstances in which it fills gaps in the law that they interpret, in light of the facts that they find.

177. See *supra* note 9 and accompanying text.

178. Supreme Court Justices have long been appointed with reference to the geographic diversity they brought to the Court, and more recently with reference to preserving a “Jewish justice” seat on the Court. William J. Daniels, *The Geographic Factor in Appointments to the United States Supreme Court: 1789–1976*, 31 W. POL. Q. 226 (1978) (finding that “membership on the Court has tended to be representative geographically”); DAVID DALIN, *JEWISH JUSTICES OF THE SUPREME COURT: FROM BRANDEIS TO KAGAN* (2017) (discussing emergence of the Jewish Justice seat).

2. THE POINT AT WHICH OTHERWISE ACCEPTABLE INFLUENCES OF IDENTITY DEVOLVE INTO BIAS

In close cases where the need for exercise of discretion or judgment is conceded and the influence of identity is inevitable, disagreement and deliberation elucidate the point at which viewpoint-enhancing influences devolve into bias. The objective here is to differentiate between empathy, in which identity informs a judge's understanding of disputed material facts; perspective and judicial philosophy, in which identity frames a judge's understanding of ambiguities in operative law; and partiality, in which identity commandeers the judge's interpretive role and closes the judge's mind to the facts and law.

The elephant in the room of recent developments discussed in the introduction is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade*.¹⁷⁹ Persistent disagreement over whether the U.S. Constitution guarantees a right to privacy sufficiently capacious to protect abortion rights indicates that the question is indeterminate enough to render identity-influencing differences of perspective inevitable. And one can argue that the majority in *Dobbs* did not allow the influence of its identity to degenerate into bias, insofar as the opinion employs a strict construction of the Constitution that conservatives have employed to challenge the rightness of *Roe*, dating back to the dissenters in *Roe* itself.¹⁸⁰ But in this case, the five most conservative members of the Court, all of whom were raised Catholic,¹⁸¹ opted to disregard precedent spanning half a century and end abortion rights less than two years after those five achieved their majority, with the senior member of that majority identifying other cases not before the Court that he hoped to overturn next.¹⁸² Such circumstances fuel understandable suspicions that the *Dobbs* ruling had less to do with promoting the rule of law on a case-by-case basis than implementing an ideological agenda. Public support for the Supreme Court has gradually shifted from diffuse to specific—from general confidence in the Court as an institution to support that hinges on agreement or disagreement with the Court's latest decisions—which parallels the emergence of a Supreme Court that is viewed in increasingly partisan, political terms.¹⁸³ *Dobbs* serves to punctuate the point that in difficult cases, when the Supreme Court is acting in its law-making role, it is a unique and more political kind of court—a Court

179. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022).

180. *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J. dissenting) (“To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.”).

181. Peter Smith, *Anti-Roe Justices a Part of Catholicism's Conservative Wing*, ASSOCIATED PRESS (June 30, 2022), <https://apnews.com/article/abortion-supreme-court-catholic-ee063f7803eb354b4784289ce67037b4> [<https://perma.cc/VH3E-TXG9>].

182. *Dobbs*, No. 19-1392 (Thomas, J., concurring).

183. Charles Gardner Geyh, *Judicial Independence at Twilight*, 71 CASE W. RES. L. REV. 1045, 1082–83 (2021).

whose members indulge their ideological identities in ways that would be unacceptable on other courts.

3. THE POINT AT WHICH THE RISK OF PARTIALITY IS SUFFICIENT TO WARRANT DISQUALIFICATION

Here, disagreements concern the drawing of a different line. The rights of litigants to a fair proceeding before an impartial judge must be enforced by rules that are not so exacting as to force mass disqualifications that would deny litigants access to judges (and justice), or would delegitimize the judiciary unfairly as an institution peopled by bigots. The negotiation of this macro-ethics, relational-ethics merge point is complicated unnecessarily by self-disqualification, as argued earlier.¹⁸⁴ But tension between under-disqualification diminishing public and litigant confidence in an impartial judiciary, on the one hand, and over-disqualification diminishing the efficient and effective administration of justice, on the other, is constructive and inevitable.

CONCLUSION

The American judiciary has been undergoing a political transformation for the better part of the past century.¹⁸⁵ The rule of law paradigm, which proceeds from the premise that ours is a government of laws in which capable, forthright, and independent judges impartially interpret and apply the law on a case-by-case basis has been challenged with increasing intensity as counterfactual, if not mythological, by social scientists, pundits, politicians, and the public.¹⁸⁶ Recently, that critique has become noticeably more partisan and shrill.¹⁸⁷ Core to that critique is a suspicion, corroborated by empirical evidence, that judges do not set extralegal influences aside and uphold the law, as the paradigm posits, but (consciously, or not) allow their identities as individuals to cloud their judgment.

Against this backdrop, the sudden surge of interest in judicial ethics reflected in the recent events recounted at the outset of this Article embodies a reinvigorated commitment to judicial ethics as a meaningful way to regulate the influence of identity on judicial conduct. The schema developed here supplies a framework for understanding and evaluating developments such as these as they arise at the intersection of ethics and identity.

184. See *supra* note 174 and accompanying text.

185. GEYH, *supra* note 33, at 42–43.

186. *Id.* at 23–43; 47–60.

187. See generally Geyh, *supra* note 183, at 1084–105.