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Judicial Partisanship in a Partisan Era: A Reply to Professor Robertson

Dmitry Bam

JUDICIAL PARTISANSHIP IN A PARTISAN ERA: A REPLY TO PROFESSOR ROBERTSON

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INTRODUCTION

Professor Cassandra Burke Robertson's outstanding article, *Judicial Impartiality in A Partisan Era,*[1] is timely given the increasing politicization of the judiciary. The political debate and controversy around the Judge Garland nomination and the Justice Kavanaugh confirmation to the United States Supreme Court, only served to reaffirm that the judiciary is not immune from the growing political polarization in America. And it is not just senate judicial confirmation battles that have become highly bitter and partisan. Scholars writing about the substantive work of the Court have argued that it is more akin to a political body than a judicial one,[2] and others have called for constitutional issues to be taken away from the Court.[3] The recent spate of 5–4 decisions upholding President Trump's immigration policies will further convince many people that Supreme Court justices are nothing more than politicians in robes.[4]

To the extent that partisan bias is a problem, I agree with Professor Robertson that recusal is not the solution. Allowing potentially partisan judges to make their own recusal decisions will not instill public confidence in judicial nonpartisanship.[5] I also agree with her that structural changes, including giving laypeople a greater role in the judicial process by restoring the power of the jury, are critical to rehabilitating confidence in judicial independence and impartiality.[6]

But in this short response I will highlight three important distinctions that Professor Robertson's article elides, or at least blurs. All three distinctions challenge some of the suggestions in Professor Robertson's

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* Professor and Associate Dean for Academic Affairs, University of Maine School of Law.

1. Cassandra Burke Robertson, *Judicial Impartiality in A Partisan Era*, 70 FLA. L. REV. 739 (2018).

2. *See generally* ERIC SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012) (discussing the growing politicization of the Supreme Court).

3. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing that reduced judicial supremacy will be beneficial for protecting our liberties); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (discussing the history of judicial review and arguing for reduced judicial supremacy).

4. *See, e.g.*, Neilsen v. Preap, 139 S. Ct. 954, 958 (2019); Trump v. Hawaii, 138 S. Ct. 2392, 2402 (2018).

5. *See* Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 633 (2015).

6. For a similar argument exploring the demise of the civil jury in recent decades see Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 863 (2016).

piece, and all three are highly underexplored in the legal academic scholarship.

I. PARTISAN BIAS VS. JUDICIAL PHILOSOPHY

Perhaps the most important distinction that Professor Robertson recognizes, but does not explore in any great detail, is the one between improper partisan bias and entirely appropriate judicial philosophy.[7] One basic premise underlying her piece is that public skepticism about judicial impartiality in politically charged cases creates difficulties in figuring out when judges should recuse themselves for bias. But this raises a more basic question: is political bias the *type* of bias that warrants recusal? Does partisan (or ideological) bias implicate impartiality in the same way that, say, financial or personal bias does? Professor Robertson suggests that the two can have the same effect on impartiality, comparing political bias to bias in favor of the judge's own social circle.[8]

Underpinning Professor Robertson's article is an assumption of an irreconcilable tension between impartiality and partisanship.[9] In passing, Professor Robertson acknowledges that "political bias is especially hard to pin down" because "politics, ideologies, and theories of governance and interpretation shade into one another."[10] Each one of those concepts requires exploration and a clear definition. As evidence of partisan bias, Professor Robertson points out that Republican appointees are less likely to reverse a capital verdict than their Democrat-appointed colleagues.[11] Of course, there is little doubt these days that partisan affiliations influence how judges decide cases.[12] Nobody can deny that the identity of the judge is often the most important predictor of how the case will be resolved. But is that evidence of partisan *bias*? Or is it simply evidence that judicial philosophy and partisan ideology are inextricably linked, perhaps closely correlated, but not one and the same. The article raises but does not answer that question.

Supporting her assertion, Professor Robertson explains that "[r]egardless of whether the judges were elected or appointed, their rulings 'appear to behave roughly the same in terms of partisan favoritism

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7. Robertson, *supra* note 1, at 764.

8. *Id.* at 761.

9. *Id.* at 756–57 (describing conflicting public expectations of impartiality and the "hope for the judiciary . . .[to] move forward [the public's] desired policies"); *id.* at 758 ("Although people generally see judges as impartial, they also want judges on the bench who share their political views.").

10. *Id.* at 763 (citing Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947, 950 (2006)).

11. *Id.*

12. *See* Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1418 (2016); Cite attitudinal theory.

that would cater to their party audience.'"[13] But this, too, does not prove improper bias. A judge elected on an originalist platform, who then goes on to decide cases in a way that lines up with conservative political views, may be doing so because of a legitimate legal analysis rather than improper partisan bias.[14] The difficulty, however, is that one person's political bias is another person's (entirely proper) judicial philosophy.[15] Although "[a]dhering to a particular judicial philosophy tends to correlate with a particular ideology," we generally think of them as separate (though interconnected) notions.[16]

The Supreme Court explored the various definition of impartiality in *Republican Party of Minnesota v. White*.[17] Striking down Minnesota's attempt to regulate the speech of judicial candidates running for judicial office, the Supreme Court explained that impartiality can be implicated in a few different ways.[18] Most importantly, impartiality can refer to "the lack of bias for or against either *party* to the proceeding."[19] Partisan bias can, of course, take this shape. For example, a judge may rule in favor of a litigant because of that litigant's political affiliation. No doubt this kind of partisan bias is no different than any kind of personal or financial bias in favor of the litigant. But the examples that Professor Robertson offers in the introduction to her Article—one involving Judge Scheindlin and one involving Ohio's Justice Sharon Kennedy[20]—do not clearly implicate this kind of bias. The Justice Kennedy example did not involve statements in favor of (or against) any particular party. Rather, the concern was whether she would be viewed as pro- or anti-abortion because she spoke to a right-to-life group.[21] And it is not clear that the partisan bias that troubles the public takes the form bias in favor or against a particular *party* in a legal proceeding.[22]

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13. Robertson, *supra* note 1, at 763 (quoting Michael S. Kang & Joanna M. Shepard, *The Long Shadow of* Bush v. Gore: *Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1444 (2016)).

14. *See* Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 30 (2011). Admittedly, studies showing that lame-duck and retiring judges do not follow a similar pattern, suggests that partisan bias, rather than ideological decision-making, is the driving force. However, it is hard to find conclusive evidence.

15. *See* Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1, 14–15, 18–21 (2005).

16. Francisco J. Benzoni & Christopher S. Dodrill, *Does Judicial Philosophy Matter?: A Case Study*, 113 W. VA. L. REV. 287, 295 (2011).

17. 536 U.S. 765 (2002).

18. *See id.* at 775–78, 788.

19. *Id.* at 775.

20. *See* Robertson, *supra* note 1, at 740–44.

21. *See id.* at 742–43.

22. For example, it is hard to argue that the conservative members of the Supreme Court are biased in favor of a state in upholding an abortion restriction, while at the same time are biased against a state in striking down a campaign finance regulation.

Rather, in some ways, what Professor Robertson seems to mean by partisan bias is actually more aligned with the Court's second possible definition of impartiality—"a lack of preconception in favor of or against a particular *legal view*."[23] The Court concluded, however, that ensuring this kind of impartiality is not a compelling government interest, explaining that a "judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason."[24] In short, it is not at all clear that recusal for political bias is a valid basis for disqualification recognized by the Courts. And given how we select our judges, with heavy emphasis on political connections and experience, both state and federal, requiring recusal for partisan bias may become not only undesirable but unworkable. When we ask our judges to resolve the most difficult and bitter political issues facing the nation, from health care to immigration to national security, what can we expect when those judges get earn their positions on the bench based on their partisan connections (for federal judges and some state judges) or based on running for office (for most state judges).

II. ALL JUDGES ARE CREATED EQUAL

A second distinction that is worth considering is the one between elected judges and appointed judges. Professor Robertson's article adopts the unilocular, "a judge is a judge" approach. And typically, when we talk about universal judicial values like independence and impartiality, we expect all judges to abide by them. But should we expect the same commitment to partisan impartiality from elected judges as we do from appointed one? Should the method of selection influence how a judge decides cases?[25] For most lawyers, judges, and legal scholars, the answer is a resounding "no." In the words of Justice Scalia, "[t]o expect judges to take account of political consequences . . . is to ask judges to do precisely what they should not do."[26] But scholars should at least explore the possibility that "jurisprudential norms *should* change when the selection and retention methods change."[27]

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23. *Republican Party of Minn.*, 536 U.S. at 777.

24. *Id.*

25. We know that the selection method *does* influence judicial decisions. *See, e.g.*, Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 174–76 (2009).

26. Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 920 (2004) (Scalia, J., mem.). Likewise, during oral argument in *Williams-Yulee v. Florida Bar*, Justice Breyer asked rhetorically whether "the fundamental role of the judge" changes based on the selection methodology in the state. Transcript of Oral Argument at 47, Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015) (No. 13-1499).

27. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2084 (2010).

When "We the People" chose to appoint our federal judges for life in the United States Constitution,[28] we made the decision to place judicial independence and impartiality as a primary virtue of the judicial branch. Likewise, when the states chose to shift their selection methods to judicial elections, as most states have done, that choice envisioned a somewhat different judicial role. If a judge must campaign to obtain, or retain, judicial office, it is arguably less troubling when that judge decides a case according to political, rather than strictly legal, views. In fact, the desire to link judicial decision-making to partisan politics is perhaps the *sine qua non* of judicial elections. It would be anomalous to demand that judges run for office like politicians, but then act apolitically once in office.

Not only may we be more accepting of partisan bias for elected judges, but the appearance of partisan bias is also arguably less problematic. After all, while most voters recognize that elected judges may in fact be biased, those voters continue to support the practice of electing judges.[29] This suggests that a "reasonable person" is untroubled by, or at least tolerant of, political biases in elected judges.

Another distinction worth considering is the one between judges at different levels of the state or federal judiciary. Perhaps political impartiality is equally important for all judges. But there are a few reasons why partisanship is more prevalent, and more unavoidable, for Supreme Court justices at the state and federal levels. Supreme Court justices decide the most difficult and most controversial questions that have divided the lower courts and are often politically laden. Appellate judges generally engage in more law-making, which is harder to separate from politics.[30] We would therefore expect trial court decisions to be less ideological than decisions by courts of last resort, including those of the United States Supreme Court.[31] And while this may not be a distinction that most lay people would consciously acknowledge, it is one worth considering in any discussion of partisan bias in the judiciary.

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28. U.S. CONST. art. III, § 1.

29. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO STATE L.J. 43, 52 (2003)

30. Richard Lempert, *The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board*, 23 LAW & SOC'Y REV. 347, 368 n.36 (1989) ("[T]he courts that do the law making are ordinarily appellate courts rather than trial courts."); HERBERT JACOB, JUSTICE IN AMERICA COURTS, LAWYERS, AND THE JUDICIAL PROCESS 35–37 (4th ed. 1984) (distinguishing between the law- and policy-making function of appellate courts and the law-enforcement function of trial courts).

31. Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1481 n.162 (2003) (citing Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 236 tbl.3 (1999)).

III. APPEARANCE OF IMPARTIALITY VS. REALITY OF PARTISANSHIP

There is little question that appearances are important to the judicial branch. Without the power of the sword or the purse, public confidence in judicial decisions are critical to the rule of law. But generally, when we talk about the appearance of impartiality, it is to supplement the reality of impartiality. If judicial decisions are political or partisan, is the *appearance* of impartiality still an important value when it is used to cover up the *reality* of partisan bias? I believe we should not defend the appearance of partisan impartiality to perpetuate the myth of apolitical judging.

Whether political ideology and partisan biases actually influence judicial decisions is much too big of a topic to cover in the pages of this short reply. There is simply a great deal of scholarship exploring the role of ideology in judicial decisions. Legal realists and "crits"[32] have been exploring this fertile ground for a century. Likewise, political scientists have long argued that politics drive Supreme Court decisions.[33] These scholars have demonstrated empirically that judges' political views are closely correlated with their judicial votes.[34] In other words, Republican judges frequently vote for conservative results, while Democratic judges more frequently vote for liberal results.[35]

This data is hard to ignore and "[n]o serious scholar of the judiciary denies that the decisions of judges, especially at the Supreme Court level, are at least partially influenced by the judges' [political] ideology."[36] It is cliché to observe that we are all legal realists now.[37] We *know* that judges decide cases influenced by partisan politics. We know that elected judges decide cases more aligned with political majorities.[38] And of course, in the most controversial cases, the ones where the public pays attention, politics have the greatest influence.

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32. The term "crits" refers to adherents of Critical Legal Studies. *See* Mark Tushnett, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1522 (1991).

33. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (explaining the attitudinal model of judicial decision-making).

34. *See id.* at 89.

35. Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 UMKC L. REV. 347, 356 (2008).

36. Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 237, 237 (Cornell W. Clayton & Howard Gillman eds., 1999).

37. *See* Joseph William Singer, Book Review, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988).

38. *See* Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 271 (2005) ("It would appear indisputable, though distasteful to many observers, that elected judges do take public opinion into account.").

So when Professor Robertson says that "[i]n an increasingly partisan era . . . there is a growing skepticism of the judiciary's neutrality on politically sensitive issues,"[39] my first reaction is not that we should try to address the skepticism, but rather that we should encourage it. If the skepticism is well-founded, if it is based on an accurate evaluation of the Supreme Court's work product, do we want the public to have confidence that the judiciary is neutral on politically sensitive cases? I do not disagree with Professor Robertson's assertion that "[p]ublic faith in the impartiality of our courts is the bedrock of American democracy and the rule of law."[40] But to the extent there is, indeed, a "growing skepticism of the judiciary's neutrality on politically sensitive issues,"[41] perhaps this is a healthy skepticism in light of all that we know.

39. Robertson, *supra* note 1, at 740.
40. *Id.*
41. *Id.*