

GIVING UP ON IMPARTIALITY
THE THREAT OF PUBLIC CAPITULATION TO CONTEMPORARY
ATTACKS ON THE RULE OF LAW

HON. CHASE T. ROGERS

&

STACY GUILLON

September 2019

For reprint permission, please contact IAALS.
Copyright © 2019 IAALS, the Institute for the Advancement of the American Legal System
All rights reserved.



INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



UNIVERSITY *of*
DENVER

IAALS, the Institute for the Advancement of the American Legal System, published this paper as part of its series entitled “Are We at a Boiling Point?” IAALS serves only as the forum for this conversation. To offer a broader perspective than IAALS’ own empirical research could, IAALS invited several writers to offer their (often conflicting) analyses of the decidedly troubling level of public mistrust in the American legal system. The views expressed in this paper and its companion papers are the authors’ alone.¹ To read all the papers in IAALS’ “Are We at a Boiling Point?” series, visit iaals.du.edu/boilingpoint.

I. INTRODUCTION

Professor Benjamin Barton, who penned this paper’s companion article, has concluded that public trust in our legal system is cyclical and that we should not concern ourselves too much with the inevitable ups and downs. Unlike Barton, we are not historians, so we do not take the contrary position by making any attempt to compile what (little) information there is about public opinion of the courts since the 1780s. And we are well aware of the psychological phenomenon of declinism: the “belief, often due to cognitive bias, that a society or institution is trending towards decline or failure and right now that belief is widespread.”² Thus, we do not write to add our voices to the chorus claiming that America has never faced challenges so great or that the rule of law is hopelessly doomed.

Instead, we opine that, where so many barriers exist between most individuals and civil courthouses, sensationalized and editorialized news shapes and skews American opinions about the legal system, making the public cynical about—or perhaps even indifferent to—judicial independence. Without the public to defend it, judicial independence is especially vulnerable to today’s many-fronted attacks, including those by state legislatures and other political actors around the country.

¹ Hon. Chase T. Rogers is the retired Chief Justice of the Connecticut Supreme Court. She now practices appellate law at Day Pitney LLP. Stacy Guillon is a litigator at the firm Lewis Roca Rotherger Christie, and she consulted on IAALS’ public trust and confidence work.

² Dale Archer, *Declinism: Why You Think America Is in Crisis*, PSYCHOLOGY TODAY (Feb. 18, 2017).

II. THE RULE OF LAW'S RELIANCE ON JUDICIAL INDEPENDENCE

The law is meant to serve as the great equalizer. Thus, for the rule of law to succeed, the courts must hold everyone before them to the same standards.³ Our country's Founding Fathers recognized that would not be possible unless the courts were independent from other branches of government and from politics at large.

In eighteenth century England, judges answered to Parliament, which could overturn any court's decision and also remove judges from the bench. Being under Parliament's thumb incentivized judges—at least those who wanted to keep their jobs—to consider the political popularity of their decisions. In the constitution of the Commonwealth of Massachusetts and later during the drafting of the United States Constitution, John Adams insisted that approach was a threat to liberty.

The dignity and stability of government and all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and the executive, and independent upon both, that so it may be a check upon both as both should be a check on that.⁴

Alexander Hamilton agreed.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that there is no

³ We refer to the more detailed history and definition of the rule of law in James Lyons' companion paper.

⁴ JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776).

liberty, if the power of judging be not separated from the legislative and executive powers.⁵

But for judicial independence, Hamilton argued, the Constitution would not have any protection from politics. For example, he pointed out that the legislative branch itself can be a threat to the Constitution and to individual freedom, and “where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution,” only the judiciary can be trusted to resolve the conflict in the Constitution’s favor.⁶ In addition to protecting the Constitution, Hamilton wrote that judicial independence is essential to “safeguard[ing] against the effects of occasional ill humors in the society,” such as “the injury of the private rights of particular classes of citizens, by unjust and partial laws.”

Thus, the Founders believed we must empower judges to set political pressures and trends aside if they are to be accountable first and foremost to the law. According to Hamilton, judges should be bound by “strict rules and precedents, which serve to define and point out their duty in a particular case that comes before them”—rather than to the political tastes of the day or the will of the majority. To accomplish that end, he wrote, “nothing can contribute so much to [the courts’] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the

⁵ THE FEDERALIST NO. 78 (Alexander Hamilton) (internal quotation marks omitted). Hamilton was responding to Brutus’ March 1788 accusation that the Constitutional framers had:

made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul [sic] any of their decisions. There is no authority that can remove them, and they cannot be controuled [sic] by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

Id.

⁶ *Id.*

citadel of the public justice and the public security.”⁷ In the words of Justice Sandra Day O’Connor, an “independent judiciary is the only way to ensure that the tenets of our Constitution will be upheld even when they may be unpopular.”⁸

History has repeatedly proven the importance of judicial independence to individual freedom, justice, and the rule of law. The constitutional approach is sometimes an unpopular one. But, where judges have the power and independence to side with the minority when the Constitution or the law requires it, the people are protected from, as Hamilton euphemistically called them, the “occasional ill humors” of the majority. Examples of occasions when the courts protected individual rights in the face of heated political pressure are many. To name just a few, the United States Supreme Court required the dismantling of the unjust but popular (at least in the South) school segregation system,⁹ overturned death penalty statutes for highly unsympathetic child rapists,¹⁰ and insisted upon the unwavering importance of the First Amendment even in the face of hateful speech.¹¹ Without the independence of the judiciary, these just decisions made in the face of strong political pressure would have required, at the very least, a group of judges willing to commit career suicide. But when the judiciary is insulated from political blowback, justice requires only that judges do their jobs.

⁷ *Id.* (limiting such permanency to judges who “hold their offices DURING GOOD BEHAVIOR” (emphasis in original)).

⁸ Justice Sandra Day O’Connor, *The Importance of Judicial Independence*, STAN. LAWYER (May 15, 2008).

⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁰ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

¹¹ *Matal v. Tam*, 582 U.S. 1744 (2017).

III. ATTACKS ON JUDICIAL INDEPENDENCE AND THE LEGITIMACY OF THE COURTS

Unfortunately, in today's climate, judicial independence is under attack from many directions.¹²

A. POLITICAL OPPOSITION TO JUDICIAL RETENTION

Although judges are supposed to be insulated from political pressure, recent campaigns in several states have urged ouster of appellate judges in the wake of politically unpopular decisions. Perhaps the most egregious example is that of Iowa's 2010 judicial retention election. Iowa, like many other states and the federal government, appoints rather than elects its judges. Many experts in the field—including Justice Sandra Day O'Connor and IAALS, the Institute for the Advancement of the American Legal System—favor appointing rather than electing judges through merit-based selection processes, precisely because they promote judicial independence, while elections all but dismantle it.¹³ Unlike federal law, however, Iowa law provides for retention elections once judges have served a certain term.¹⁴ In theory, retention elections offer voters the opportunity, after reviewing judicial performance evaluations, to remove judges based on their job performance, not the popularity of their decisions.¹⁵ In the words of Iowa's bar association, the state's appointment and retention system is intended to: “[c]urb[] the influence of political parties and special interest groups in the selection of Iowa's judges” and “[e]mphasize[]

¹² In his companion paper, James Lyons writes about President Trump's engagement with issues of judicial independence. We focus on other attacks on the judiciary.

¹³ Justice Sandra Day O'Connor & Inst. for the Advancement of the Am. Legal Sys., *The O'Connor Judicial Selection Plan*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (June 2014), iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf.

¹⁴ *Selection and Retention of State Judges: Methods from Across the Country*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 2014), iaals.du.edu/sites/default/files/documents/publications/selection_and_retention_of_state_judges_charts.pdf.

¹⁵ O'Connor & Inst. for the Advancement of the Am. Legal Sys., *supra* note 13.

the selection of judges based upon their professional qualifications.”¹⁶ Typically, over 70 percent of voters vote to retain judges whom the evaluators recommend.¹⁷

In 2010, three Iowa Supreme Court justices were up for retention election. All three justices’ performance evaluations were strong, and 82.8 percent, 83.7 percent, and 72 percent of respondents recommended Justices Baker, Streit, and Ternus for retention, respectively.¹⁸ However, a political group called Iowa for Freedom opposed the justices’ retention because of one controversial decision. The year before the retention election, the Iowa Supreme Court’s unanimous opinion in *Varnum v. Brieni* held that denying marriage licenses to same-sex couples violated the state constitution¹⁹—drawing a legal conclusion similar to the one the United States Supreme Court would draw in *Obergefell v. Hodges* six years later.²⁰ The decision triggered Iowa for Freedom’s million-dollar campaign²¹ urging voters to oust the justices up for retention that year because they had “ignor[ed] the will of voters” by “imposing same-sex marriage on Iowa.”²² In other words, the message was that these judges should be removed not because they

¹⁶ 2010 Iowa State Bar Association Plebiscite, IOWA STATE BAR ASS’N, nebula.wsimg.com/223c9246d151bdb8c386faed15614292?AccessKeyId=42FEDB903B3EA90283F3&disposition=0&alloworigin=1.

¹⁷ Roy A. Schotland, *Iowa’s 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 114 COURT REV. 46, 120 (2010).

¹⁸ *Id.* at 5 (basing evaluations on surveys of attorneys who appeared before the justices).

¹⁹ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

²⁰ *Obergefell v. Hodges*, 576 U.S. ____ (2015).

²¹ Schotland, *supra* note 17, at 120 (“The campaign spending against the justices totaled almost \$1 million, including more than \$900,000 from three out-of-state organizations: the National Organization for Marriage based in Washington, D.C.; the American Family Association’s AFA Action, Inc. of Tupelo, Mississippi; and the Campaign for Working Families PAC of Arlington, Virginia. The main in-state sum spent against the justices was \$10,178, by the Iowa Family Policy Center ACTION.”).

²² Iowa for Freedom, Television Ad: Send Them a Message, www.youtube.com/watch?v=Y0Or8tGuleY. The following year, Iowa for Freedom called for the resignation of the remaining justices who voted in *Varnum*, and, when they refused, backed an unsuccessful legislative effort to impeach them. Brian Tashman, *Iowa GOP Tries to Impeach State Supreme Court Over Marriage Equality*, RIGHT WING WATCH, Apr. 22, 2011,

were somehow shirking their judicial duties but because they had bravely performed those duties in spite of political pressure, which is precisely what the Founders intended judges do.

Of course, evaluating judges as we evaluate politicians—by demanding they put Iowa law second to the political powers of the day—flies in the face of judicial independence. The justices themselves refused to campaign to avoid further politicizing the judiciary, though Justice Ternus said publicly that the opponents to her retention “want[] our judges to be servants of the group’s ideology, rather than servants of the law. . . . They simply refuse to accept that an impartial, legally sound and fair reading of the law can lead to an unpopular decision.”²³ Iowa voters did not see it that way, and approximately 55 percent of the electorate unseated all three justices,²⁴ while all the other judges, including the district court judge who had initially overturned the law preventing same-sex marriage, were retained by large margins.²⁵

Other state supreme courts saw politically contentious retention elections that year. Campaign spending skyrocketed. From 2000 to 2009, retention elections drew less than 1 percent of campaign spending. But twice that ten-year total was spent on judicial retention elections in 2010 alone in the states of Alaska, Colorado, Illinois, and Iowa.²⁶ By 2014, ten times the 2001-2008 average was being spent per judicial retention election.²⁷ For example, in Colorado, the Clear the Bench movement unsuccessfully attempted to unseat Justices Bender,

www.rightwingwatch.org/post/iowa-gop-tries-to-impeach-state-supreme-court-over-marriage-equality/ (quoting at length an *Iowa Independent* article by Lynda Waddington, which is no longer available online).

²³ Melissa S. May, *Judicial Retention Elections after 2010*, 46 IND. L. REV. 59, 64 (2013).

²⁴ *Iowa Judicial Elections 2010*, BALLOTPEDIA, https://ballotpedia.org/Iowa_judicial_elections,_2010.

²⁵ May, *supra* note 23.

²⁶ *Id.* at 60. Importantly, much of \$4.6 million spent was from out-of-state organizations. *Id.*

²⁷ *Rethinking Judicial Selection*, 24 PROF. LAWYER 1 (2017) (average spending per retention election in 2001-08 was \$17,000; in 2009-14, it was \$178,000).

Martinez, and Rice—all of whose judicial performance evaluations had recommended their retention—by alleging that several of their decisions were unconstitutional. The justices did not campaign, although several nonprofit groups, including IAALS, joined together to put the judicial performance evaluations online at KnowYourJudge.com, as the evaluations were not available in the information booklet distributed to voters with their ballots. Clear the Bench’s funding was a mere fraction of the Iowa groups’, though it did cause the majority favoring retention to shrink as compared to prior years.²⁸ Clear the Bench mounted similar campaigns in the subsequent elections but has so far been unsuccessful.

Likewise, politically motivated groups have mounted oppositions to retention elections in a handful of states since 2010, ranging from Florida to Indiana.²⁹ These concerted efforts to oust judges for politically unpopular decisions are not unprecedented, but, until recently, they were exceedingly rare. Although we cannot ignore the power of movements many years ago that implemented full-scale partisan elections for judges in nine states³⁰ (as well as other states that have since rolled them back³¹), politically motivated campaigns in judicial retention elections had successfully unseated only four American judges before 2010.³² Nearly that many were removed in 2010 alone, and many others have faced the same threat since, suggesting a recent sea change in the focus on judicial independence at the ballot box.

²⁸ May, *supra* note 23, at 66-67.

²⁹ *Id.* at 73-80.

³⁰ *Selection and Retention of State Judges*, *supra* note 14, at 3.

³¹ Malia Reddick, *West Virginia Ends Partisan Elections for Judges*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Apr. 3, 2015), iaals.du.edu/blog/west-virginia-ends-partisan-elections-judges.

³² May, *supra* note 23, at 60.

B. LEGISLATIVE IMPEACHMENT EFFORTS

Legislatures are also considering judicial impeachments on political grounds. As one of the checks and balances between the separated branches of government, state legislatures are often given the same limited role the Founders gave to Congress: to impeach judges who engage in “high Crimes and misdemeanors” or fall short of “good Behaviour.”³³ In that context, impeachments have generally occurred only when a judge engages in severe criminal or ethical misconduct.³⁴ Former Chief Justice Rehnquist wrote that early impeachment attempts, especially the failed ones, established a norm that:

. . . judicial acts—their rulings from the bench—would not be a basis for removal from office by impeachment and conviction. And that has been the guiding principle of the House of Representatives and the Senate from that day to this; Federal judges have been impeached and convicted—happily, only a very few—but it has been for criminal conduct such as tax evasion, perjury, and the like.³⁵

However, recent years have brought increased attempts to impeach judges for political gain. For example, in 2018, allegations arose that five justices of the West Virginia Supreme Court had spent lavishly to redecorate their chambers and used taxpayer money for other inappropriate purposes. While \$32,000 for a public servant’s blue suede sofa rightfully raises serious concerns,³⁶ aspects of the impeachment efforts that ensued have markers of a political

³³ U.S. CONST. art. III, § 1.

³⁴ Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUSTICE (Mar. 23, 2018), www.brennancenter.org/blog/impeachment-and-removal-judges-explainer.

³⁵ Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996.

³⁶ Kevin Townsend, *A Supreme Court Impeachment Fight That’s Already Underway*, THE ATLANTIC, Oct. 31, 2018.

effort to change the balance of the state’s high court.³⁷

Of the five-member West Virginia Supreme Court, the FBI investigated and indicted Justice Loughry of the infamous suede sofa, and Justice Ketchum immediately resigned.³⁸ We do not mean to understate our grave concern about the wrongdoing of those two justices. The FBI investigation of Justice Loughry eventually resulted in a judicial suspension, a conviction on eleven federal charges, and two years’ prison time.³⁹ Meanwhile, the investigation of Justice Ketchum revealed that he “used a state government credit card to put gasoline in a state-owned vehicle to go on a personal golf trip to Bristol, Virginia. He also used a state-owned car to commute from his home, in Huntington, to the court.”⁴⁰ Those justices’ misdeeds reflect poorly not only on the two of them individually but on the West Virginia Supreme Court as a whole.

The three other justices on the court at that time were also caught in the crossfire. Once Justice Loughry’s and Justice Ketchum’s wrongdoing was exposed, we would expect an investigation of the full court to ensue. An independent judicial commission took that on, and the

³⁷ *Legislative Assaults on State Courts – 2018*, BRENNAN CTR. FOR JUSTICE (Feb. 7, 2018), www.brennancenter.org/analysis/legislative-assaults-state-courts-2018.

³⁸ Press Release, U.S. Attorney’s Office for the S. Dist. of W. Va., Former WV Supreme Court of Appeals Justice Menis Ketchum II Pleads Guilty to Wire Fraud (Aug. 23, 2018), www.justice.gov/usao-sdww/pr/former-wv-supreme-court-appeals-justice-menis-ketchum-ii-pleads-guilty-wire-fraud (describing the charges to which Ketchum pled as “personal use of a State of West Virginia vehicle and State fuel credit card over the course of 2011 through 2014 in connection with his travel from his home in Huntington, West Virginia to and from a private golf club in western Virginia. The roundtrip mileage for each of these golf outings was approximately 400 miles and cost the taxpayers of West Virginia approximately \$220 per trip.”).

³⁹ Steven Allen Adams, *West Virginia Supreme Court Impeachment Saga Comes to an End*, PARKERSBURG NEWS & SENTINEL, Nov. 22, 2018; Phil Kalber, *Former Supreme Court Justice Loughry Sentenced to 24 Months in Federal Prison*, CHARLESTON GAZETTE-MAIL, Feb. 13, 2019.

⁴⁰ Kate Mishkin, *Ex-WV Supreme Court Justice Ketchum Avoids Jail Time*, CHARLESTON GAZETTE-MAIL, Mar. 6, 2019.

investigation cleared the remaining three justices.⁴¹ The independent commission determined that, although Justices Davis, Walker, and Workman might have spent more than was prudent on the office renovations and certain restaurant lunches, the evidence did not support accusations that they had misappropriated taxpayer funds.⁴²

Nevertheless, the legislature proceeded with impeachment efforts of all the justices (other than the already-retired Justice Ketchum). Rather than taking timely action or conducting its own investigation, as the legislature should have done if its concern was actually excess spending, the legislature suspiciously delayed until the very the day when state law removed the power to replace unseated justices from the voters' hands and placed it in the governor's.⁴³ Just after midnight that day, the legislature, revealing its true motives, impeached the four remaining justices—including the three whom the independent commission had exonerated.⁴⁴

Justice Davis announced her retirement almost immediately, declining to put herself through an impeachment trial. In short, as a result of the Republican-controlled legislature's actions, the Republican governor suddenly had the opportunity to replace not only Justice Ketchum but Justice Davis as well, switching the majority of the court from Democrat to

⁴¹ Hoppy Kercheval, *3 Members of WV Supreme Court Cleared by Judicial Investigation Commission, but Troubles Not Over*, METRONews, July 25, 2018; David Beard, *JIC Clears Workman, Davis, Walker in Ethics Complaint*, METRONews, July 23, 2018; Press Release, Judicial Investigation Commission, *Judicial Investigation Commission Closes Complaints against Justices Davis, Walker, and Workman* (July 23, 2018), s3.amazonaws.com/wvmetro-uploads-prod/2018/07/JIC-closes-complaints.pdf?x43308.

⁴² *Id.*

⁴³ According to West Virginia law, the governor's temporary appointee may sit on the bench only until the next general election—unless the seat is vacated fewer than 84 days before that election. The legislature initiated the 2018 impeachment proceedings exactly 84 days before the 2018 election. Accordingly, the governor's appointees would have sat in any ousted justices' seats until November 2020, the maximum length permitted under the law, before voters had their say. Isaac Stanley-Becker, *West Virginia House Votes to Impeach Entire State Supreme Court*, WASH. POST, Aug. 13, 2018.

⁴⁴ Townsend, *supra* note 36.

Republican.⁴⁵ In fact, the governor appointed Republican legislators to fill both seats, including the Speaker of the House,⁴⁶ saying the speaker’s “conservative values” as the reason for the selection.⁴⁷ (Note: though this paper identifies certain state actors by their political party for clarity’s sake, we do not lay this problem at the feet of one party or the other. Leaders from both parties have engaged in these attacks across the country.⁴⁸).

Justice Workman challenged the constitutionality of her impeachment and Justice Walker’s.⁴⁹ While the case was pending, the legislature acquitted Justice Walker. Justice Workman’s case made its way up to an acting supreme court composed of circuit judges from around the state. That court identified that the state constitution provides the legislature the power to impeach only in select circumstances, and, because none of those was present in this case,⁵⁰ the impeachment effort violated the state constitution’s separation of powers doctrine.⁵¹

⁴⁵ Justices Ketchum and Davis retired before the deadline to fill their seats by special election. Thus, the governor’s appointments were temporary, but the voters allowed the governor’s appointees to stay on the bench. *West Virginia Supreme Court of Appeals Special Elections, 2018*, Ballotpedia, ballotpedia.org/West_Virginia_Supreme_Court_of_Appeals_special_elections,_2018.

⁴⁶ *Justice Tim Armstead*, W. VA. JUDICIARY, www.courtswv.gov/supreme-court/current-justices/justice-armstead.html.

⁴⁷ Erin Beck, *Justice: Supreme Court Appointees Selected for Their Conservatism*, TIMES W. VIRGINIAN, Aug. 26, 2016.

⁴⁸ *Legislative Assaults on State Courts 2018*, *infra* note 65.

⁴⁹ Justice Workman’s suit also reached the other justices’ impeachment, though Justice Davis’ retirement and Justice Loughry’s suspension and eventual resignation mooted the decision’s application to them. Davis filed a similar suit challenging the impeachment in federal court. Lacy Pierson, *Former WV Justice Seeks Injunction to Stop Impeachment*, THE HERALD-DISPATCH, Sept. 27, 2018.

⁵⁰ W. VA. CONST. art. IV, § 9 (“Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor.”). The *Workman* court determined that the charges brought against Justice Workman constituted none of these; rather, the charges amounted only to alleged violations of a Canon of the Code of Judicial Conduct, over which the judicial branch holds exclusive jurisdiction. *State ex rel. Workman v. Carmichael*, 819 S.E.2d 251, 284-27 (W. Va. 2018).

⁵¹ *Id.* As a result of this case, Justices Workman returned to the bench alongside Justice Walker.

Specifically, the court found the legislature’s proceedings had skipped a crucial step of due process: making any findings of fact whatsoever.⁵² This omission further evidences the legislature’s improper motives. Impeachment power is the limited power to remove judges who are failing to do their judicial duties; but, instead of inquiring into whether Justice Workman was indeed falling down on the job, the legislators simply sought to replace her with someone their party deemed more politically favorable. In that, the legislature misused its limited impeachment power for political gain, which is a serious threat to judicial independence.

Other states have also seen judicial impeachment efforts on questionable grounds. For instance, the Pennsylvania legislature attempted to remove judges who threw out as unconstitutional and replaced a heavily gerrymandered election map.⁵³ These impeachment efforts—both actual and threatened—prompted *The Washington Post*’s editorial board to decry a “trend” of legislative attempts to exert undue pressure over judges’ legal decision-making.⁵⁴

C. OTHER LEGISLATIVE EFFORTS TO INFLUENCE JUDICIAL DECISION-MAKING

Some state lawmakers have made blatant attempts to restrict the state courts’ authority to review certain legislative actions, including the Kansas legislature in 2018. The year before, the Kansas Supreme Court struck down the legislature’s school finance law, determining that it

⁵² *Id.* at 289 (“We are gravely concerned with the procedural flaws that occurred in the House of Delegates. Basic due process principles demand that governmental bodies follow the rules they enact for the purpose of imposing sanctions against public officials. This right to due process is heightened when the Legislature attempts to impeach a public official. Therefore we hold, in the strongest of terms, that the Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer.”).

⁵³ Liz Navratil, Pa. Republican State Legislator Moves to Impeach Four State Supreme Court Justices, PHILA. INQUIRER, Mar. 20, 2018.

⁵⁴ Editorial Bd., *Pennsylvania Lawmakers Threaten to Impeach Judges. It’s a Dangerous Trend*, WASH. POST, Mar. 27, 2018.

unconstitutionally disadvantaged students in poorer communities.⁵⁵ The legislature struck back by introducing an amendment that would have precluded any judicial review of school finance laws.⁵⁶ Essentially, the legislature sought the ability to act outside the bounds of the constitution by debilitating their only constitutional referee.

Other state legislatures have led a more multifaceted campaign on the courts' review of legislation. For example, after seeking to limit executive authority via a series of bills signed in the 2016 session, the North Carolina legislature turned its crosshairs on the state courts. Between 2011 and 2018, the North Carolina courts had overturned 14 laws passed by the legislature, and some argue those rulings spurred the legislature's subsequent attack on judicial independence and authority.⁵⁷ In December 2016, the legislature held a special session; although allegedly intended to aid disaster victims, the session was largely spent debating a court-packing plan, which would have allowed the outgoing Republican governor to appoint two additional state supreme court justices before the incoming Democrat took office.⁵⁸ When the plan failed in the face of the public's "massive outcry,"⁵⁹ the legislature tried another tack: politicizing judicial elections. In the eleventh hour of the outgoing governor's term, the legislature passed a bill

⁵⁵ Hunter Woodall, *Kansas Supreme Court Rules New School Finance Law is Unconstitutional*, KANSAS CITY STAR, Oct. 2, 2017.

⁵⁶ Hunter Woodall, *Constitutional Amendment on Education Funding Heads to House Floor*, KANSAS CITY STAR, Apr. 4, 2018.

⁵⁷ Ari Berman, *Courts Keep Thwarting North Carolina Republicans. So They're Trying to Remake the Courts*, MOTHER JONES, Jan. 23, 2018 ("North Carolina's Republican-led legislature has repeatedly passed controversial laws in recent years only to have them thrown out in court. Now the legislature is striking back with an effort to radically transform the makeup of the state's courts.").

⁵⁸ *North Carolina's War on Judicial Independence*, BRENNAN CTR. FOR JUSTICE, www.ncvce.org/content/history-attacks-judicial-independence.

⁵⁹ *Id.*

politicizing state appellate court races and creating a process for the Court of Appeals to overrule panel decisions by convening *en banc*, thereby reducing the panels' influence.⁶⁰

Early in the following term, the legislature passed a companion bill to politicize superior and district court elections by listing a judge's party affiliation on the ballot and adding partisan primaries to judicial races,⁶¹ making it more difficult for independents to become judges. The new governor vetoed this latter bill expressly to protect judicial independence, saying:

North Carolina wants its judges to be fair and impartial, and partisan politics has no place on the judges' bench. . . . We need less politics in the courtroom, not more. . . . Judges make tough decisions on child abuse, divorce, property disputes, drunk driving, domestic violence and other issues that should be free from politics. This bill reverses that progress.⁶²

But the legislature overrode the veto,⁶³ making North Carolina the first state since 1921⁶⁴ "to return to the widely-considered bad policy of partisan judicial elections."⁶⁵ Indeed, legal thought leaders (including IAALS) spurn partisan elections as direct contraventions of the principle that,

⁶⁰ Dan Way, *Update: McCrory signs judicial reform bill*, CAROLINA J., Dec. 15, 2016 (quoting one state senator saying the bill was intended to "make litigation costlier and create delays by allowing the Republican-dominated Court of Appeals to take cases heard by a three-judge panel on an *en banc* basis before sending them to the Supreme Court."); *see also* Gen. Assembly of N.C., S.L. 2016-124, Senate Bill 4, www.ncleg.gov/Sessions/2015E4/Bills/Senate/PDF/S4v7.pdf.

⁶¹ The legislature had made state Supreme Court elections partisan by a bill passed in the eleventh hour of the outgoing governor's term.

⁶² Craig Jarvis, *Cooper's First Veto: Partisan Judicial Elections*, NEWS & OBSERVER, Mar. 17, 2017.

⁶³ Craig Jarvis & Anne Blythe, *Veto Override Means Voters Will Know Judges' Party Affiliations*, NEWS & OBSERVER, Mar. 23, 2017.

⁶⁴ *Id.*

⁶⁵ *Legislative Assaults on State Courts 2018*; BRENNAN CTR. FOR JUSTICE (Feb. 7, 2018), www.brennancenter.org/analysis/legislative-assaults-state-courts-2018 (listing state actions).

for judges to do their jobs well, they must be insulated from politics—not made to act as politicians themselves.⁶⁶

Still, the state’s legislature had not finished its siege on the courts. The following month, the Republican-controlled chambers passed a bill reducing the size of the state’s Court of Appeals by three judges in an effort to prevent the new Democrat governor from making judicial appointments to fill seats on the bench vacated between elections.⁶⁷ The bill also limited the Court of Appeals’ authority, sending certain types of cases from the trial courts directly to the state Supreme Court, including class action certification appeals, business appeals, and cases to terminate parental rights.⁶⁸ Again, the Governor’s office condemned the bill as a politicization of the courts. “The Republican effort to reduce the number of judges on the Court of Appeals should be called out for exactly what it is—their latest power-grab, aimed at exerting partisan influence over the judicial branch and laying the groundwork for future court-packing.”⁶⁹ But, once more, the legislature overrode the Governor’s veto.⁷⁰ Interestingly, the Republican legislators experienced a “change of heart” in 2019, restoring the three seats on the Court of Appeals just days before the Governor’s challenge of the original bill removing those seats was

⁶⁶ O’Connor & Inst. for the Advancement of the Am. Legal Sys., *supra* note 13, at 3 (“Judges must not engage in partisan politics, which threatens independent decision-making and erodes public confidence in the judicial system.”).

⁶⁷ Expressing concern for this power grab, Republican Court of Appeals judge Douglas McCullough retired before the legislature overrode the veto, thus allowing the Democrat governor to appoint his replacement. Berman, *supra* note 57.

⁶⁸ Craig Jarvis, *Bill Trimming Appeals Court Heads to Governor*, NEWS & OBSERVER, Apr. 11, 2017.

⁶⁹ *Id.*

⁷⁰ CJ Staff, *Update: Legislature Overrides Cooper Veto, Shrinks Court of Appeals from 15 Judges to 12*, CAROLINA J., Apr. 26, 2017. Between the veto and the override, however, one Court of Appeals judge retired early, expressly to avoid the elimination of his seat. *Conflicts Between Gov. Roy Cooper and the North Carolina General Assembly*, BALLOTPEDIA, ballotpedia.org/Conflicts_between_Gov._Roy_Cooper_and_the_North_Carolina_General_Assembly.

set to be heard in the state Supreme Court.⁷¹ Lastly, in 2018, the legislature referred an amendment to the ballot that would have eliminated the Governor’s authority to fill mid-term judicial vacancies, which the voters rejected.⁷² In short, in the wake of a series of decisions overturning their statutes, the North Carolina legislature has tried many approaches to stop the courts from checking it going forward.

The legislative actions summarized here are mere examples of a much broader trend. According to the Brennan Center for Justice, in 2018 alone, “legislators in at least 18 states considered at least 60 bills that would have diminished the role or independence of the judicial branch, or simply made it harder for judges to do their job—weakening the checks and balances that underlie our democratic system.”⁷³ So far in 2019, Brennan has identified that “legislators in at least 22 states are considering at least 42 bills to diminish the role or independence of state courts,” including bills allowing legislatures to “interfer[e] with judicial decision-making” and bills to “shield the legislature from court rulings.”⁷⁴

At its core, a judge’s role as an independent, apolitical arbiter, has been under attack from all fronts in recent years, threatening judicial independence’s place as the centerpiece of our society’s thinking about the courts. Voters in some contested and retention elections have declined to prioritize judicial independence, and legislatures are attacking it with vigor and impudence.

⁷¹ Melissa Boughton, *Cooper Signs Bill Restoring State Court of Appeals Bench to 15 Judges*, PROGRESSIVE PULSE (Mar. 1, 2019), pulse.ncpolicywatch.org/2019/02/28/cooper-signs-bill-restoring-state-court-of-appeals-bench-to-15-judges/.

⁷² *North Carolina Judicial Selection for Midterm Vacancies Amendment*, BALLOTPEDIA, ballotpedia.org/North_Carolina_Judicial_Selection_for_Midterm_Vacancies_Amendment (2018).

⁷³ *Legislative Assaults on State Courts 2018*, *supra* note 65.

⁷⁴ *Legislative Assaults on State Courts 2019*, BRENNAN CTR. FOR JUSTICE, www.brennancenter.org/analysis/legislative-assaults-state-courts-2019.

The Constitutional framers anticipated attacks on the courts from the executive and the legislative branches,⁷⁵ but they counted on the people to hold the line.⁷⁶ They counted on the people to recognize that judges' fealty must belong to the law and the law alone.⁷⁷ "The citizens must understand that it is ultimately in their self-interest for judges not to be influenced by their policy preferences because of the possibility that one day they will be in a position in which their own cherished rights are politically unpopular."⁷⁸

But this citizen defense of judicial independence may be faltering. According to Justice O'Connor, the public is suffering a grave "misperception about the role of the judiciary"—namely, the belief that, like politicians, judges should represent the views of constituents rather than the law.⁷⁹ In 2008, Justice O'Connor attributed the problem to skepticism that judges can be fair, arising largely from electing certain state judges. "If you do not believe that judges are or can be fair and impartial," she wrote, "you will want . . . a judge who is partial to you."⁸⁰ People try to achieve this end through political "accountability" and pressure, disregarding Alexander

⁷⁵ THE FEDERALIST NO. 78 (Alexander Hamilton) ("[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches.")

⁷⁶ See, e.g., *id.* ("[Y]et it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.")

⁷⁷ O'Connor, *supra* note 8 ("People must understand the role of the judiciary so that they can properly uphold its independence and ensure its accountability to the law of the land." (citing THE FEDERALIST NO. 78 (Alexander Hamilton))).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

Hamilton’s warning that “no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today.”⁸¹

Certainly, long-standing systems of partisan judicial elections play a role. But, as the above examples demonstrate that this misperception continues to spread, we posture that two other cultural drivers are significantly exacerbating—or at least impeding defenses against—this problem.

IV. DIRECT ACCESS TO THE COURTS

Perhaps these kinds of attacks on the courts’ independence and legitimacy are not unprecedented. But, in today’s climate, the courts are less equipped to defend against them. First, the citizenry, which has the unique power and responsibility to defend judicial independence, feels removed from and uninvested in the civil court system, in part because there are so many barriers to entry.⁸²

When evaluating an institution, people naturally use their own personal experience with that institution—if they have any—as their primary touch point.⁸³ This experience can be

⁸¹ THE FEDERALIST NO. 78 (Alexander Hamilton).

⁸² Certainly, the public continues to have “access”—for better or worse—to the criminal courts. Fair treatment in a criminal court is critically important to the rule of law and to individual freedom. But the criminal courts cannot do that job alone. Many of the most controversial legal issues of our time—including constitutional questions—will be resolved in the civil courts, which are most often the objects of attacks on judicial independence.

⁸³ *Perceptions of the U.S. Justice System*, AM. BAR ASS’N (February 1999); SUSAN E. HOWELL, CITIZEN EVALUATION OF THE LOUISIANA COURTS: A REPORT TO THE LOUISIANA SUPREME COURT (Univ. of New Orleans 1998) (identifying that court users say that their experience was the main source of their information about the courts); David B. Rottman, *Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?*, COURT REV. (Winter 2008), available at aja.ncsc.dni.us/courtrv/cr35-4/CR35-4Rottman.pdf.

extremely influential in the formation of an opinion about the institution and can even withstand a significant barrage of contrary, secondhand information.⁸⁴

But today, few Americans have personal experiences with the civil courts. Though many Americans report facing civil justice situations that negatively impact their lives, only 8 percent⁸⁵ to 14 percent⁸⁶ say they involved courts or tribunals of any kind. Likewise, the number of civil cases filed in courts is falling. Before 2009, case filings had been rising year over year—with increases exceeding those explained by population growth.⁸⁷ From 2009 to 2015, state court case filings declined 21 percent.⁸⁸ When population growth is factored in, that decline is closer to 25 percent.⁸⁹ Although a comprehensive study is not yet available, that trend seems to have continued through 2018.⁹⁰ Civil case filings in federal courts are also declining. Since 2014, filings are down 8.8 percent.⁹¹ These numbers suggest more people are simply choosing not to get the courts involved in solving their problems.

⁸⁴ For analysis of influence of personal experience on opinions about the courts specifically, *see* Rottman, *supra* note 83.

⁸⁵ Rebecca L. Sandefur, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY, AM. BAR FOUND. (Aug. 8, 2014), www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf.

⁸⁶ Rebecca L. Sandefur, *Civil Legal Needs and Public Legal Understanding*, AM. BAR FOUND., http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf.

⁸⁷ NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF THE 2015 STATE COURT CASELOADS 4 (Nov. 2015), www.courtstatistics.org/~media/microsites/files/csp/ewsc%202015.ashx.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See, e.g., Court Statistics Reveal Civil Lawsuit Filings Are Dropping*, ILL. TRIAL LAWYERS ASS'N (2018), www.iltla.com/court-statistics-reveal-civil-lawsuit-filings-dropping/ (“Civil case filings in Illinois have dropped 47 percent since 2010.”)

⁹¹ *Federal Judicial Caseload Statistics 2018*, U.S. COURTS, www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 (last visited Sept. 2, 2019).

With the number of cases initiated going down, civil cases that end in jury trials are all but extinct. Even before the decline in filings, the number of federal civil cases decided by a jury had fallen to 1.8 percent by 2004, compared to 11.5 percent in 1962.⁹² Jury trials in state courts are even rarer—between 1976 and 2009, the number of civil cases ending in a jury trial fell from 3.5 percent to 0.5 percent⁹³ and have not rebounded. This is especially problematic because jury trials are “one of the key sources of public trust and confidence in the American justice system, especially among minorities.”⁹⁴ Not only does this mean that litigants no longer benefit from the centerpiece of American justice—trial by a jury of one’s peers—it also means that few people serve as civil jurors. Historically, civil jury service put the power in the hands of the citizens, and it allowed them to see firsthand how the civil justice system works.

While many people choose not to do anything at all about their legal disputes—simply and tragically accepting limitations of their rights or infringements on their property—others are turning to privatized dispute resolution. This usually takes the form of binding arbitration, where the parties hire their own private judge, who decides the case in a conference room, typically issuing a confidential order. The total number of private arbitrations is more difficult to track, but experts have concluded that “[m]ost of the litigants who have the resources and legal sophistication to do so have already abandoned the civil justice system either preemptively through contract provisions (e.g., for consumer products and services, employment, and health

⁹² Patricia Lee Refo, *The Vanishing Jury Trial*, 30 LIT. ONLINE 2, 2 (Winter 2004), www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement_authcheckdam.pdf.

⁹³ Victor E. Flango, *Revitalizing the Jury*, TRENDS IN STATE COURTS 97 (2016), www.ncsc.org/~media/Microsites/Files/Trends%202016/Revitalizing-the-Jury.ashx.

⁹⁴ *Id.* at 90.

care) or after filing a case in court through private ADR services.”⁹⁵ The heightened reliance on arbitration has many consequences. It curbs development of a body of law on which the public can rely and to which legislative and executive decisionmakers can respond. But, more importantly for the purposes of our discussion here, the popularity of arbitration is a poor reflection on the effectiveness of the civil courts. According to the National Center for State Courts, increases in arbitration indicate that “[i]neffective civil case management . . . has an outsized effect on public trust and confidence” in the courts.⁹⁶

People have several rationales for not taking their cases to court. Some are concerned about cost.⁹⁷ Indeed, litigation is extremely expensive, with attorney and expert witness fees alone costing a median of \$43,000 in automobile cases, \$66,000 in real property cases, \$91,000 in contract cases, and \$122,000 in medical malpractice cases.⁹⁸ Presumably because legal assistance is so expensive, of the people who *do* make their way to court, less than a quarter have consulted with an attorney at all.⁹⁹ Under- and unrepresented parties face myriad hurdles in getting the outcome they think they deserve, and many emerge from the process feeling “frustrated, lost, disempowered, and disillusioned.”¹⁰⁰

⁹⁵ NAT’L CTR. FOR STATE COURTS CIVIL JUSTICE INITIATIVE, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* (2015), www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx.

⁹⁶ *Id.*

⁹⁷ Sandefur, *supra* note 85.

⁹⁸ NAT’L CTR. FOR STATE COURTS, *CASELOAD HIGHLIGHTS: ESTIMATING THE COST OF CIVIL LITIGATION* (Jan. 2013), www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx.

⁹⁹ Sandefur, *supra* note 86.

¹⁰⁰ Rebecca Love Kourlis & Riyaz Samnani, *Court Compass: Mapping the Future of User Access through Technology*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (May 2017), iaals.du.edu/publications/court-compass-mapping-future-user-access-through-technology; *see also* Rebecca Love Kourlis, *Rule of Law Under Attack: Ideas for Building Trusted Courts*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (May 8, 2017), iaals.du.edu/blog/rule-law-under-attack-ideas-building-trusted-courts.

Other people attribute not going to court to not knowing where to go for advice on the process and a lack of understanding that their issues were legal ones.¹⁰¹ But, perhaps most troubling, some people say they do not go to court because they do not believe it would make a difference.¹⁰² Indeed, public perception studies reveal the public believes the courts are often unavailable or unequipped to resolve their legal disputes.¹⁰³

In the absence of an effective court process, one study has shown that up to 86 percent of low-income Americans' legal needs go unmet,¹⁰⁴ which is damaging not only to the individuals experiencing those needs but also to the function of the rule of law in our society more generally. In short, civil court access has reached a crisis point, and that means few Americans have personal experience to inform their judgments about the courts' role and effectiveness.

V. TODAY'S PUBLIC DISCOURSE ABOUT THE COURTS

In the absence of first- or secondhand experience with the courts, the public looks to the media to fill the blanks in their understanding of the legal system.¹⁰⁵ Of course, relying on the

¹⁰¹ Sandefur, *supra* note 85.

¹⁰² *Id.*

¹⁰³ See, e.g., NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: 1999 NATIONAL SURVEY (1999); cf. *Majority of Americans Think U.S. Criminal Justice System Is Broken, Ineffective; See Need for Change*, OPEN SOCIETY FOUND. (Feb. 13, 2002), www.opensocietyfoundations.org/press-releases/majority-americans-think-us-criminal-justice-system-broken-ineffective-see-need.

¹⁰⁴ *The Justice Gap: Measuring the Unmet Legal Needs of Low-Income Americans*, LEGAL SERV. CORP. (June 2017), www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf (discussing unmet legal needs of the poor); see also Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES., Mar. 15, 2013 (identifying 80 percent of the poor's legal needs go unmet); but see Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016).

¹⁰⁵ David Rottman et al., *Perceptions of the Courts in Your Community: The Influence of Experience, Race and Ethnicity*, NAT'L CTR. FOR STATE COURTS (Jan. 21, 2003) (national media "effects are strong in shaping the image of courts").

news for a comprehensive view on any complex institution is flawed; it has long been the case that the news emphasizes the negative and reveals only discrete, curated snapshots.¹⁰⁶

The advent of the internet and other unprecedented influences on the media are exacerbating this problem. Thanks in large part to digital technology and social platforms, the media is undergoing one of the most dramatic shifts in history, perhaps second only to the invention of the printing press. Not only has the internet made receipt of information easier, it has made dissemination an option for citizen reporters and commentators. Professional reporting is changing, too, as journalists' mandate and the content they generate focus less on the needs of our democracy and more on drawing attention.¹⁰⁷ The result is an unhealthy, corroded dialogue about our courts, undermining the public's understanding of them and the public's commitment to safeguarding an independent judiciary.

But before we can thoroughly comment on how the public conversation affects the courts specifically, we must first describe the changing state of the media in general. In this, we ask for our readers' patience, as we need to lay some significant groundwork before being able to bring the discussion back to the legal system.

¹⁰⁶ Steven Pinker, *The Media Exaggerates Negative News. This Distortion has Consequences*, THE GUARDIAN, Feb. 17, 2018 (“Whether or not the world really is getting worse, the nature of news will interact with the nature of cognition to make us think that it is. News is about things that happen, not things that don’t happen. We never see a journalist saying to the camera, ‘I’m reporting live from a country where a war has not broken out’— or a city that has not been bombed, or a school that has not been shot up.”)

¹⁰⁷ We acknowledge the initial appearance of irony in a paper attacking the reliability of the media, while also itself relying largely on news articles as its cited sources. This criticism may be all the more apt when lodged at the section *infra* in which we cite journalists to support our criticism of modern journalism. But this reliance exemplifies our society's dependency on the press as our primary—or perhaps only—source of information for current events. We have relied on media reports where we had no other option, which is the very basis of the greater concern we discuss here.

A. THE PUBLIC CONVERSATION’S DEPARTURE FROM OBJECTIVITY AND THE ECHO CHAMBERS THAT RESULT

The shift in journalism has been building for many years. In the late 1990s and early 2000s, a majority of journalists expressed concerns in a Pew Research Center survey that journalism was changing for the worse, with the influence of news organizations’ bottom lines going up and the quality of coverage going down.¹⁰⁸ Specifically, journalists tied the quality problems to decreasing staff sizes, less attention paid to complex stories, the 24-hour news cycle, journalists who “let their ideological views show in their reporting,” and, relatedly, news outlets with a “decidedly ideological point of view.”¹⁰⁹ Meanwhile, researchers identified a “continuing rise” in journalists who believed that news reports “are full of factual errors.”¹¹⁰ In Pew’s words, a tension was arising between the press as the “fourth branch of government” and as “a business—one whose ability to serve the public is dependent on its ability to attract eyeballs and dollars.”¹¹¹

The revenue of the three major cable news channels (Fox News, MSNBC, and CNN), for instance, has risen steadily since the early 2000s.¹¹² But employment in cable newsrooms (and in news divisions of other media) has fallen in that time.¹¹³ Newspaper circulation (including digital circulation) and revenues have dropped off significantly since their peaks in the 1980s and

¹⁰⁸ *Bottom-Line Pressures Now Hurting Coverage, Say Journalists*, PEW RESEARCH CTR. (May 23, 2004), www.people-press.org/2004/05/23/bottom-line-pressures-now-hurting-coverage-say-journalists/ (discussing 1999 and 2004 surveys of journalists).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *State of the News Media*, PEW RESEARCH CTR., pewresearch.org/topics/state-of-the-news-media/.

¹¹² *Cable News Fact Sheet*, PEW RESEARCH CTR., www.journalism.org/fact-sheet/cable-news/.

¹¹³ *Id.*; *Audio and Podcasting Fact Sheet*, PEW RESEARCH CTR., www.journalism.org/fact-sheet/audio-and-podcasting/; *Newspapers Fact Sheet*, PEW RESEARCH CTR., www.journalism.org/fact-sheet/newspapers/.

2000s, respectively.¹¹⁴ Perhaps because of these pressures, Pew identified a substantial shift in the content produced on cable news. Relative to factual reporting, the proportion of commentary and opinion programming on these channels has skyrocketed, reaching 55 percent of airtime on Fox News and an astounding 85 percent on MSNBC.¹¹⁵ And, while this would be difficult to study, it is our perception that, as the news has crossed over from impartial, fact-based coverage to a medium for opinionated sound bites, it has undermined the prior expectation of decorum and respect for people with opposing views.

At the same time, consumers increasingly rely on non-traditional news sources, including tweets, blogs, and podcasts, which are generated by both professionals and non-professionals.¹¹⁶ This increase in citizen journalism has advantages, but it also raises questions about reliability. One CBS journalist (which we note because of the potential for bias) wrote that “reporters go to great lengths to authenticate information whenever possible, as the standards and practices of their news organization requires. Citizen journalists don’t play by the same rules.”¹¹⁷

¹¹⁴ *Id.* (identifying difficulties with precisely calculating online readership of newspapers and noting that “independently produced reports” from the *New York Times* and the *Wall Street Journal* report rises in online circulation in 2016 and 2017); Michael Barthel, *Despite Subscription Surges for Largest Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RESEARCH CTR. (June 1, 2017), www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/.

¹¹⁵ Mark Jurkowitz et al., *The Changing TV News Landscape*, PEW RESEARCH CTR., (Mar. 17, 2013), www.journalism.org/2013/03/17/the-changing-tv-news-landscape/ (“Traditionally known for its attention to breaking news, daytime cable’s cuts in live event coverage and its growing reliance on interviews suggest it may be moving more toward the talk-oriented evening shows. This transition may cut the costs of having a crew and correspondent provide live event coverage.”).

¹¹⁶ See, e.g., Alessandra Rose Miguel-Descalzo, *The Medium Is the Message: The Rise of Citizen Journalism and Podcasting*, BORN2INVEST, Feb. 1, 2015; *State of the News Media of 2016*, PEW RESEARCH CTR., (June 15, 2016), assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf (reporting increase in listenership for podcasts, including news podcasts).

¹¹⁷ Brian Montopoli, *The Rise of Citizen Journalism*, CBS NEWS (Sept. 21, 2005), www.cbsnews.com/news/the-rise-of-citizen-journalism/.

Furthermore, while there was once a time when professional ethics required unbiased reporting, that requirement seems to have fallen by the wayside, perhaps because bloggers and other non-professionals do not subscribe to the same ethical code or answer to the same mandate.

According to the Center for Journalism Ethics, “[t]he culture of traditional journalism, with its values of accuracy, pre-publication verification, balance, impartiality, and gate-keeping, rubs up against the culture of online journalism which emphasizes immediacy, transparency, partiality, non-professional journalists and post-publication correction.”¹¹⁸

This is especially problematic where, according to a 2018 Pew study, “Americans need to quickly decide how to understand news-related statements that can come in snippets or with little or no context.”¹¹⁹ And, in turn, they have difficulty distinguishing facts from opinions,¹²⁰ correctly making the distinction only three of five times, with less politically aware respondents being especially vulnerable to misleading.¹²¹ Although people seem aware of this problem—with nearly 70 percent of global respondents saying they worry about fake news and nearly 60 percent saying they have difficulty telling if the author of a piece of news is reputable¹²²—they are left

¹¹⁸ Stephen J.A. Ward, *Digital Media Ethics*, CTR. FOR JOURNALISM ETHICS, ethics.journalism.wisc.edu/resources/digital-media-ethics/.

¹¹⁹ Drew Desilver, *Q&A Telling the Difference Between Factual and Opinion Statements in the News*, PEW RESEARCH CTR., (June 18, 2018), pewresearch.org/fact-tank/2018/06/18/qa-telling-the-difference-between-factual-and-opinion-statements-in-the-news/ (quoting Amy Mitchell, the Center’s director of journalism research).

¹²⁰ Given the propensity for confusion, we should be clear: *this* paper is an opinion paper.

¹²¹ Amy Mitchel et al., *Distinguishing Between Factual and Opinion Statements in the News*, PEW RESEARCH CTR. (June 18, 2018), www.journalism.org/2018/06/18/distinguishing-between-factual-and-opinion-statements-in-the-news/.

¹²² *2018 Edelman Trust Barometer*, EDELMAN (Jan. 21, 2018), www.edelman.com/research/2018-edelman-trust-barometer.

with little recourse. Perhaps as a result of these changes, in 2017, Pew identified that Americans' faith in the media as a political watchdog¹²³ is waning.

Research has also identified that increased consumption of opinion-based, ideological media content creates echo chambers and promotes tribalism. Certain media outlets are expressly aligned with one political party, allowing consumers to pick and choose the viewpoints to which they expose themselves; for instance, conservatives are “clustered around” Fox News.¹²⁴ Additionally, online news consumption allows outlets that are themselves apolitical to present different information to different viewers, typically choosing content likely to suit the viewer's political preferences.¹²⁵ For example, Facebook—which 61 percent of millennials consider their primary source of news about politics and government¹²⁶—collects data to categorize users by their political views, and the platform filters content accordingly.¹²⁷ “Facebook is not alone in this. Google also filters the search results based on your location and previous searches and clicks. The social bubbles that Facebook and Google have designed for us are shaping the reality

¹²³ Amy Mitchell & Michael Barthel, *Americans' Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RESEARCH CTR. (May 10, 2017), www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/ (reporting that, in 2017, 89 percent of Democrats and 49 percent of Republicans say “news media criticism keeps leaders in line (sometimes called the news media's ‘watchdog role’),” as compared to 74 percent of Democrats and 77 percent of Republicans in early 2016).

¹²⁴ Amy Mitchell et al., *Political Polarization & Media Habits*, PEW RESEARCH CTR. (Oct. 21, 2014), www.journalism.org/2014/10/21/political-polarization-media-habits/.

¹²⁵ See, e.g., Jon Keegan, *Blue Feed, Red Feed*, WALL ST. J. (May 18, 2016); Mostafa M. El-Bermawy, *Your Filter Bubble Is Destroying Democracy*, WIRED, Nov. 18, 2016.

¹²⁶ Amy Mitchell et al., *Facebook Top Source for Political News Among Millennials*, PEW RESEARCH CTR. (June 1, 2015), www.journalism.org/2015/06/01/facebook-top-source-for-political-news-among-millennials/.

¹²⁷ El-Bermawy, *supra* note 125; see also Jeremy B. Merrill, *See How Facebook Labels You*, N.Y. TIMES, Aug. 23, 2016 (identifying that Trump's campaign was even able to target advertisements at users Facebook identified as moderate).

of your America. We only see and hear what we like.”¹²⁸ This selective reporting was simply not possible in a prior era, as professional reporters were tasked with objectivity—including telling both sides of a story or interviewing people with conflicting opinions—and outlets published the same version of a given story to all their users. In the end, according to Pew, “[w]hen it comes to getting news about politics and government, liberals and conservatives inhabit different worlds.”¹²⁹ Indeed, a 2014 Pew study¹³⁰ found almost no overlap in what conservatives and liberals deem trustworthy media sources.

This tribalism also impacts political discussions in social contexts, further limiting people’s exposure to contrary opinions. Sixty-six percent of conservatives report that “most of their close friends share their views on government and politics.”¹³¹ Meanwhile, 44 percent of liberals have “blocked or “defriended” someone on a social network because of politics, and 24 percent have ended a personal friendship for that reason.¹³² In 1958, 72 percent of people said they did not care whether their children married Democrats or Republicans; by 2016, that number had dropped to 45 percent.¹³³ In short, we have surrounded ourselves (only in part by choice) with people and content compatible our existing ideologies, excluding contrary viewpoints that might provide new information or expand our thinking. And, more problematically, the public—perhaps following the lead of many of its elected officials—no longer seems to believe that we can (or should) hear out those with whom we disagree.

¹²⁸ El-Bermawy, *supra* note 125.

¹²⁹ *Id.*

¹³⁰ Mitchell, *supra* note 124.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Lynn Vavreck, *A Measure of Identity: Are You Wedded to Your Party?*, N.Y. TIMES, Jan. 31, 2017.

Formal education is further sealing the echo chamber. A new cultural demand to protect people from ideas they do not like is gutting the college-level liberal arts education previously touted for teaching critical thinking skills. According to George Lukianoff and Jonathan Haidt—the lawyer and psychologist who penned the bestseller *The Coddling of the American Mind*—“[a] movement is arising, undirected and driven largely by students, to scrub campuses clean of words, ideas, and subjects that might cause discomfort or give offense.”¹³⁴ Lukianoff and Haidt cite a string of recent incidents at institutions of higher learning, including regular requests that law professors remove rape cases from the curriculum for fear of triggering and campuses’ disinventions of speakers and even comedians the student body considered controversial. University administrator training now includes warnings about objectionable “microaggressions” from which they should shield their students—statements like “America is the land of opportunity” and “I believe the most qualified person should get the job.” While some argue that shielding all people from microaggressions promotes learning, we fear it fosters ignorance, while stroking young Americans’ conviction that they need neither consider nor even permit views contrary to their own. Rather than the heady discussion once so common in colleges that it became a comic cliché, this cultural shift can promote flawed emotional reasoning (“I feel it,

¹³⁴ Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC, Sept. 2015; see also GREG LUKIANOFF & JOHATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (Penguin Press 2018); see also MARY KATHERINE HAMM & GUY BENSON, END OF DISCUSSION: HOW THE LEFT’S OUTRAGE INDUSTRY SHUTS DOWN DEBATE, MANIPULATES VOTERS, AND MAKES AMERICA LESS FREE (AND FUN) (Random House 2015) (identifying instances when universities silenced controversial speakers).

therefore it must be true”),¹³⁵ as well as political animosity and fear of those with opposing political views—which has nearly tripled since the 1990s.¹³⁶

These changes in the public discourse reach nearly every governmental topic, and the courts are no exception. When the public looks to the media and other influencers to fill in blanks in their information, the media’s new ideological approach affects the public’s level of trust in the legal system and the rule of law. And, as the public discourse about the courts becomes political, so, too, has the public’s view of the courts; according to Gallup polling “[c]onfidence in the [Supreme C]ourt has become more politically polarized over the past two decades.”¹³⁷ Republican and Democrat views began to split in 2001, and the divide has since increased, with one of the most powerful drivers being the public conversation about presidential nominations to the high court.¹³⁸ In the end, the political, polarized media talks about the courts as political and polarized, shifting the public’s focus away from an independent judiciary and perhaps even making the judiciary less independent.

B. CASE STUDY OF SUPREME COURT CONFIRMATIONS

Nowhere has this politicization of the American dialogue played out more clearly than in the confirmation hearings of Supreme Court nominees. For nearly one hundred years,¹³⁹ the

¹³⁵ Lukianoff and Haidt, *supra* note 134.

¹³⁶ *Partisan Animosity, Personal Politics, Views of Partisanship*, PEW RESEARCH CTR. (Oct. 5, 2017), www.people-press.org/2017/10/05/8-partisan-animosity-personal-politics-views-of-trump/. This is the most recent (reliable) study we could find on this issue, but we expect political animosity has further increased since 2017.

¹³⁷ Megan Brennan, *Confidence in Supreme Court Modest, but Steady*, GALLUP (July 2, 2018) (this study has not been updated since the Kavanaugh hearings).

¹³⁸ *Id.*

¹³⁹ *The Senate Rejects a Supreme Court Nominee*, U.S. SENATE, www.senate.gov/artandhistory/history/minute/Judicial_Tempest.htm (noting that, before 1894, the Senate “reject[ed] or otherwise block[ed] nearly one out of every three high court nominees”).

Senate did not treat the legal rulings of Supreme Court nominees as proxies for their politics, and nominees were not asked to answer questions about why they favored or disfavored certain policies. Although we confess a bit of nostalgia, this sounds to us as if the Senate better understood that a judge’s ruling was the product of applying of the law to the particular facts of the case, not his or her own political ideology. During that time, the Senate did reject certain nominees, but not often and not for political reasons. Between 1894 and 1968, the Senate declined to confirm only one nominee: John J. Parker. Although an opinion Parker had written about union contracts was at issue, the centerpieces of his opponents’ campaign were inherently political and abjectly racist statements Parker (who was once a partisan politician) made during his gubernatorial campaign, which earned the ire of the NAACP and other powerful adversaries.¹⁴⁰ The next nomination kerfuffle was in 1968, when bi-partisan concerns about cronyism and financial impropriety—not a legal opinion or political stance—defeated President Johnson’s 1968 nomination of his old friend, Associate Justice Abe Fortas, to the chief justiceship.¹⁴¹ During that long period of American history, Supreme Court nominations were largely uncontroversial and apolitical.¹⁴² In the years after the Fortas nomination, “senators and the interest groups aligned with their parties resourcefully expanded the list of ostensibly

¹⁴⁰ *Id.* (quoting Parker as saying during his campaign that “The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.”).

¹⁴¹ *Filibuster Derails Supreme Court Appointment*, U.S. SENATE, www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm (identifying that the cronyism concerns arose when the Senate learned Fortas “regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam”); Joan Biskupic, *Supreme Court Nominees Who Faced Controversy*, CNN (Oct. 4, 2018), www.cnn.com/2018/10/03/politics/supreme-court-controversial-nominations-justice/index.html.

¹⁴² David Greenberg, *How Supreme Court Nominations Lost Their Apolitical Pretense*, POLITICO MAG., June 30, 2018 (during the century preceding the Bork nomination, “nobody would admit to voting for or against a nominee because of his or her partisan affiliation”).

apolitical sins that might he used, fairly or unfairly, to torpedo candidates of the wrong persuasion,” but, at the very least, a “pretense” that confirmations were apolitical endured.¹⁴³

President Ronald Regan’s 1987 nomination of Robert Bork changed the game. While some senators kept their objections focused on Bork’s “temperament and understanding”¹⁴⁴—which are ostensibly apolitical concerns—others attacked Bork’s ideology and legal opinions dead on. Senator Ted Kennedy famously categorized Bork’s rulings as “oppositions” to certain policies and decried his “extremist view of the Constitution” and “Neanderthal” interpretation of free speech.¹⁴⁵ According to Kennedy:

Bork’s America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, and school children could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of the millions of citizens for whom the judiciary is and is often the only protector of the individual rights that are the hearts of our democracy. . . . [I]n the current and delicate balance of the Supreme Court, his rigid ideology will tip the scales of justice against the kind of country America is and ought to be. The damage that President Reagan will do through this nomination, if it is not rejected by the Senate, could live on far beyond the end of his presidential term. President Reagan is still our president, but he should not be able to reach out from the muck of Iran-gate, reach into the muck of Watergate, and impose his reactionary vision of the Constitution on the Supreme Court and on the next generation of Americans. No justice would be better than this injustice.¹⁴⁶

And, with those sensational words, the Senate’s commitment to apolitical judiciary confirmations began to shatter. The Senate had begun allowing its regular proceedings to be

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Senator Kennedy Opposes Bork Nomination*, C-SPAN (July 1, 1987), www.c-span.org/video/?c4594844/senator-kennedy-opposes-bork-nomination.

¹⁴⁶ *Id.*

televised just one year earlier,¹⁴⁷ and the media circled around Bork’s now controversial confirmation. Several months later, the Senate rejected Bork’s nomination 58-42.¹⁴⁸ The verb “bork” soon made its way into American English, meaning “to attack or defeat (a nominee or candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification.”¹⁴⁹ “In the years that followed, politicians on both left and right would adopt the practice of ‘borking’ judicial nominees—vigorously questioning their legal philosophy and political views in an effort to derail their confirmation.”¹⁵⁰

In 2001, shortly after the Supreme Court issued its controversial ruling in *Bush v. Gore*,¹⁵¹ Senator Chuck Schumer went one step further, attacking the notion that the Senate should even attempt to make confirmations apolitical.¹⁵² They were necessarily ideological, political inquiries, he wrote in a *New York Times* op-ed, and any perception to the contrary was the result of an inexplicable taboo that had long ago driven senators’ “legitimate consideration and discussion of ideology underground.”¹⁵³ Citing nomination proceedings in the earliest decades of our union but trivializing the long history of apolitical confirmations described above, Schumer argued that, after Bork’s hearings, ideological discussion had been sent back into the

¹⁴⁷ *Live Television from the Senate Chamber*, U.S. SENATE,

www.senate.gov/artandhistory/history/minute/live_television.htm.

¹⁴⁸ Associated Press, *Bork Loses by a 58-42 Senate Vote*, REGISTER GUARD (Oct. 24, 1897), news.google.com/newspapers?id=sOhVAAAAIIBAJ&sjid=eeEDAAAAIIBAJ&pg=5283%2C5697645.

¹⁴⁹ *Bork*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/bork.

¹⁵⁰ Sarah Pruitt, *How Robert Bork’s Failed Confirmation Led to a Changed Supreme Court*, HISTORY (Sept. 21, 2018), www.history.com/news/robert-bork-ronald-reagan-supreme-court-nominations.

¹⁵¹ 531 U.S. 98 (2000) (on December 12, 2000, halting the Florida recount of Presidential votes, giving Florida’s electoral votes to George W. Bush over Al Gore).

¹⁵² Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001.

¹⁵³ *Id.* (“For one reason or another, examining the ideologies of judicial nominees has become something of a Senate taboo. . . . The not-so-dirty little secret of the Senate is that we do consider ideology, but privately.”).

shadows, whereas conventional wisdom was just the opposite. And, in the end, Schumer argued that, because of the close margin of the President George W. Bush’s victory and the divided Senate, “the president and the Senate must collaborate in judicial appointments.” Whenever the President exercised his right to nominate justices unilaterally, Schumer urged the Senate to engage in an “open and rational debate about [the] ideology” of the nominees.¹⁵⁴ Schumer was not alone in promoting the politicization of judges; leaders from both political parties have taken similar positions.¹⁵⁵

This attempt to reduce the apolitical, impartial nature of the bench to a mere charade proved effective. Justices nominated in subsequent years have endured grueling confirmation proceedings and have been asked to take positions on policy, essentially requiring nominees to decide cases before hearing them—in direct contravention of the principles of balanced jurisprudence. During this era of political judicial confirmations, Senators have increasingly registered nay votes; in fact, of the justices whose confirmation drew the most nay votes in history, five of the top eight were nominated since 1991.¹⁵⁶

This tension reached new heights in 2016, when the Senate declined even to vote on President Barack Obama’s nomination of Judge Merrick Garland. There was little pretense that

¹⁵⁴ *Id.*

¹⁵⁵ See, e.g., *The Judicial Nomination and Confirmation Process: Hearings Before the S. Subcomm. on Admin. Oversight and the Courts*, 107th Cong. (2001), www.govinfo.gov/content/pkg/CHRG-107shrg79825/html/CHRG-107shrg79825.htm; Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. R. 619 (2003) (politicians from both parties publicly subscribe to the “ideological orientation model” of judicial selection).

¹⁵⁶ *Senate Confirmation Votes on U.S. Supreme Court Nominations: Overview*, EVERYCRSREPORT.COM (Sept. 13, 2018), www.everycrsreport.com/reports/IN10966.html (in order, the justices who drew the most nay votes are: Matthews, Kavanaugh, Thomas, Clifford, Lamar, Gorsuch, Alito, and Kagan) (the authors added Kavanaugh to this list, as it was written before Kavanaugh was confirmed with 51.02 percent of the vote).

the Senate’s decision was based on anything other than raw politics. Few doubted the nominee’s qualifications—he had been confirmed to the D.C. Circuit Court by an overwhelming majority of a Republican-controlled Senate—yet, the Republican majority chose to wait out the Democrat president’s term in hopes of securing a more conservative Supreme Court nominee. The Senate Majority Leader even announced that, “[o]ne of my proudest moments was when I looked Barack Obama in the eye and I said, ‘Mr. President, you will not fill the Supreme Court vacancy.’”¹⁵⁷

Still, nothing compares to the politicization of Justice Brett Kavanaugh’s confirmation proceedings, which gives rise to our larger concern about the politics driving the process. On July 30th, 2018—21 days after Kavanaugh’s nomination—Dr. Christine Blasey Ford set a letter to Senator Dianne Feinstein claiming that Kavanaugh had sexually assaulted her several decades before. Feinstein, however, waited to raise the issue until September 13th, then discussing Ford only as an “anonymous” source.¹⁵⁸ In the words of the White House, by that time, “Judge Kavanaugh [] had 65 meetings with senators—including with Senator Feinstein—sat through over 30 hours of testimony, addressed over 2,000 questions in a public setting and additional questions in a confidential session,” but Feinstein waited until the “eve of his confirmation” to raise the accusation, calling it “new information.”¹⁵⁹ The letter threw the Senate into chaos, and the ensuing proceedings were an all-out political brawl, the likes of which this country has never seen in a judicial confirmation. Dr. Ford testified extensively, abandoning her privacy and safety

¹⁵⁷ Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NPR (June 29, 2018), www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

¹⁵⁸ Molly Ball, *Brett Kavanaugh’s Supreme Court Confirmation Is Now the Ultimate Test of Political Power in 2018*, TIME, Sept. 20, 2018.

¹⁵⁹ Robert Donachie, *White House: Feinstein is Trying for an ‘11th Hour’ Delay of Kavanaugh*, WASH. EXAMINER, Sept. 13, 2018.

and that of her family; she and her family received death threats requiring security and other extreme measures.¹⁶⁰ For his part, Judge Kavanaugh testified for over 32 hours over four days.¹⁶¹ And, with the help of a “special prosecutor,” the Senate staged a “courtroom trial” over Kavanaugh’s guilt or innocence.¹⁶² In short, in the words of an angry Senator Lindsey Graham, the hearings became a “circus.”¹⁶³

Media coverage also kicked into high gear, fueling the spectacles in the Senate and taking an already over-politicized conversation to new heights. Like the Senate, the media purported to try Kavanaugh, and asked its readership to do the same. *New York Magazine* published an article in which the writer determined Kavanaugh is “guilty,”¹⁶⁴ drawing a conclusion typically reserved for juries and judges after formal, structured court proceedings designed to promote due process and avoid this very temptation to jump to conclusions. Other news outlets asked voters to determine whether Kavanaugh or Ford was telling the truth,¹⁶⁵ and journalists discussed these poll results as if they should determinatively preclude Kavanaugh’s appointment.¹⁶⁶ Headlines

¹⁶⁰ Anna North, *Christine Blasey Ford has a Security Detail Because She Still Receives Death Threats*, VOX, Nov. 8, 2018.

¹⁶¹ Bloomberg Government, *Kavanaugh Hearing: Transcript*, WASH. POST, Sept. 27, 2018.

¹⁶² *Updates from the Riveting Testimonies of Christine Blasey Ford and Brett Kavanaugh*, N.Y. TIMES, Sept. 27, 2018.

¹⁶³ Emma Dumain, *A Lawyer and a Senator: Graham Struggles to Play Both Parts in Kavanaugh Drama*, MCCLATCHY, Sept. 21, 2018.

¹⁶⁴ Jonathan Chait, *Why Brett Kavanaugh’s Hearings Convinced Me that He’s Guilty*, N.Y. MAGAZINE’S INTELLIGENCER, Sept. 27, 2018; *see also*, Robert Epstein, *Decades of Research Don’t Lie: Christine Blasey Ford is More Credible than Brett Kavanaugh*, USA TODAY, Oct. 4, 2018.

¹⁶⁵ NPR/PBS NewsHour/Marist Poll Results October 2018, Marist Poll, maristpoll.marist.edu/?page_id=43080#sthash.RL3lWgJC.3N1bs7fC.dpbs (“College professor Dr. Christine Blasey Ford has accused Brett Kavanaugh of sexually harassing her at a party when they were both in high school. Both Christine Blasey Ford and Brett Kavanaugh testified before the Senate Judiciary Committee last week. Who do you think is telling the truth about what happened at the party in high school?”).

¹⁶⁶ Natasha Bach, *Republicans Push Kavanaugh’s Confirmation—But More Americans Believe Ford Than Kavanaugh*, FORTUNE, Oct. 4, 2018.

even converted Kavanaugh’s confirmation process into the “Kavanaugh-Ford hearings”¹⁶⁷ (or sometimes even the “Ford/Kavanaugh hearings”¹⁶⁸).

The round-the-clock coverage and public hunger for more and more spurred controversial reporting. For example, *The New York Times* admitted¹⁶⁹ it should not have published as an apparent “news story” an article¹⁷⁰ by an author who admittedly set out not to convey a factual account of events but rather to convince the American people that Kavanaugh would “harm the democratic process & prevent a more equal society.”¹⁷¹ Similarly, *USA Today* faced blowback for distasteful exaggerations,¹⁷² and *The New Yorker* drew ire¹⁷³ for printing a story¹⁷⁴ substantiated only by the writer’s conclusion that the accuser did not exhibit “the behavior of someone who is fabricating something.”¹⁷⁵ One *Washington Post* columnist responded that the writer’s “judgment substituted for journalistic principles such as the need for multiple sources

¹⁶⁷ Janet Hook et al., *Stark Divide, Raw Emotion in Kavanaugh-Ford Hearing*, WALL ST. J., Sept. 27, 2018.

¹⁶⁸ See, e.g., Doreen St. Félix, *Ford-Kavanaugh Hearing Will Be Remembered as a Grotesque Display of Patriarchal Harassment*, NEW YORKER, Sept. 27, 2018; *The Ford-Kavanaugh Hearing*, MSNBC, www.msnbc.com/all-in/watch/the-ford-kavanaugh-hearing-1331242563789; *How Major Newspapers Covered The Ford/Kavanaugh Hearing*, DIGG, Sept. 28, 2018.

¹⁶⁹ Joe Concha, *New York Times Says It Should Not Have Assigned Kavanaugh Critic to Story: ‘She is Not a News Reporter’*, THE HILL, Oct. 2, 2018.

¹⁷⁰ Emily Bazelon & Ben Protess, *Kavanaugh Was Questioned by Police After Bar Fight in 1985*, N.Y. TIMES, Oct. 1, 2018.

¹⁷¹ Michael Gerson, *The Media Mishandled Kavanaugh – and Made Trump a Winner*, WASH. POST, Oct. 8, 2018 (quoting Emily Bazelon’s Twitter post).

¹⁷² *Id.* (quoting a *USA Today* story—no longer available on *USA Today*’s website—that made unfounded insinuations that Judge Kavanaugh poses a predatory threat to his young daughter’s peers).

¹⁷³ Jason Schwartz, *The New Yorker Under Fire over Latest Kavanaugh Allegations*, POLITICO, Sept. 24, 2018.

¹⁷⁴ Ronan Farrow & Jane Meyer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, from Brett Kavanaugh’s College Years*, NEW YORKER, Sept. 23, 2018 (“updated” after publication; the original version of the article is no longer available on *The New Yorker*’s website).

¹⁷⁵ Gerson, *supra* note 171 (quoting Farrow’s explanation on *Good Morning America*).

and corroborating evidence,”¹⁷⁶ and another conservative editorialist called the reporting “grossly irresponsible.”¹⁷⁷ The same *Washington Post* columnist went on to express concern about the hearing coverage generally, writing:

The reputation of journalism was weakened when news outlets covered a hostile tweet disputing the details of Kavanaugh’s lost virginity as though it contributed to some broader case. The reputation of journalism was weakened when MSNBC interviewed one woman about her unsupported claims of routine gang rapes attended by Kavanaugh in high school, only to have the accuser walk back many of her accusations. . . . I think some editors and bosses in newsrooms did not do enough to prevent the lowering of journalistic standards in service to what many journalists clearly regarded as a good cause. And I don’t think that even commentators should be exempt from standards of basic fairness and civility.¹⁷⁸

Cable news fared no better than print, drawing criticism for editorialized captions running on the screen and tainting the actual reporting.¹⁷⁹

¹⁷⁶ *Id.*

¹⁷⁷ Charles C.W. Cooke, *The New Yorker’s Grossly Irresponsible Story*, NAT’L REV., Sept. 24, 2018 (“After that throat clearing, it is acknowledged that the person making the accusation around which the piece revolves had not mentioned it until Kavanaugh was nominated, ‘was reluctant to characterize Kavanaugh’s role in the alleged incident with certainty,’ and agreed to make the charge on the record only after she had spent ‘six days [] carefully assessing her memories and consulting with her attorney.’ . . . Indeed, we learn late in the piece that the authors could not establish that Kavanaugh was even *there*. ‘*The New Yorker*,’ the tenth paragraph begins, ‘has not confirmed with other eyewitnesses that Kavanaugh was present at the party.’”).

¹⁷⁸ Gerson, *supra* note 171. This also raises a related concern: “Most importantly, a horrific precedent is now set for anyone even thinking of serving in government or on a high court: A world where anyone can be accused of anything that occurred decades ago without providing evidence or corroborating witnesses to support the claim – all while it destroys that person’s career and family as a consequence.” Joe Concha, *Media Bias Against Kavanaugh is Overwhelming*, THE HILL, Oct. 3, 2018.

¹⁷⁹ Aaron Williams et al., *How Cable News Networks Covered the Kavanaugh-Ford Hearing*, WASH. POST, Sept. 27, 2018 (collecting chyrons from major networks) (“These captions — also called lower-thirds chyrons — not only tell viewers what the news is, they tell them what the network wants them to make of it.”).

These stories beg a larger problem. One commentator identified, “[s]ome individual journalists [and] many, many commentators [] were lining up against him.”¹⁸⁰ Another agrees: “I’d be hard pressed to think of another time that the mainstream media so gleefully jettisoned basic journalistic standards in the service of pushing an agenda.”¹⁸¹ With journalists¹⁸² and the public¹⁸³ alike expressing concerns that the Kavanaugh confirmation exposed a new level of media bias, the proceedings raise an important question our society has yet to answer:

Is journalism a profession that serves the public by maintaining high standards, or is it a social construct that should be redesigned to directly serve certain social goods? Some argue that all journalism involves bias, either hidden or revealed. But it is one thing to say that objectivity and fairness are ultimately unreachable. It is another to cease grasping for them.¹⁸⁴

Of course, this comment is particularly apropos in this paper, as our overarching concern is about the public’s conclusion that judges, too, are inherently biased, and thus their appointment proceedings and their subsequent decision-making should free themselves from the “farce” of objectivity.

In short, Senator Feinstein’s late revelation of Dr. Ford’s accusations and the Senate’s pseudo trial of Kavanaugh incited a circus not only in the Senate but in the media as well, and the American people watched with rapt attention.¹⁸⁵ Kavanaugh was tried in the court of public

¹⁸⁰ *Id.* (quoting Brian Stelter of CNN. The original video of Stelter’s comment is no longer available online).

¹⁸¹ Marc Giller, *The Washington Post Performs an Autopsy on the Media*, THE RESURGENT, Oct. 9, 2018.

¹⁸² See, e.g., articles cited *supra* notes 177-179; Dan Backer, *Kavanaugh Outrage Exposes Media Bias – Yet Again*, THE HILL, Sept. 27, 2018.

¹⁸³ *45 Percent Say Media Coverage was Biased Against Kavanaugh*, THE HILL, Oct. 8, 2018 (citing an American Barometer survey conducted by Hill.TV and the HarrisX polling company).

¹⁸⁴ Gerson, *supra* note 171.

¹⁸⁵ Joe Otterton, *Kavanaugh-Ford Hearing Draws Over 20 Million Viewers Total*, VARIETY, Sept. 28, 2018 (citing Nielson data for television viewership); see also DIGG, *supra* note 168

opinion, with too little discussion of his qualifications for the position and the shortcomings of the confirmation process. With this kind of news coverage informing the public conversation, even Professor Barton—who urges serenity in this paper’s companion article because America has endured comparable periods of public distrust in the courts before—identifies that the hearings will cast a long shadow on the legitimacy of Kavanaugh’s votes. Barton said, “[w]hen we have a whole string of 5-4 decisions with Kavanaugh on there, it will make it seem like a partisan body, which is terrible for the Supreme Court and bad for the country.”¹⁸⁶ The media went much further, claiming Kavanaugh brings “a virus of illegitimacy and partisanship” to the entire Supreme Court.¹⁸⁷ Regardless of one’s view of Dr. Ford or Justice Kavanaugh, we agree that the real damage here—besides the self-inflicted wounds to the Senate—will be to the Court itself. Indeed, a Fox News poll identified that, during 2018, the number of respondents who said the judiciary is the branch of government they trust most fell from 45 percent to 35 percent.¹⁸⁸

In the end, we recognize that many people believe judges are wholly political actors, reverse engineering a legal analysis to justify the outcome they personally believe is “right” rather than allowing pure application of the law to lead to whatever outcome results. Many—but, importantly, not all—of those who subscribe to this belief cite as their primary evidence the

(depicting the front page coverage in all major newspapers); Grace Dobush, *See How Newspaper Front Pages Covered the Emotional Kavanaugh-Ford Hearings*, FORTUNE, Sept. 28, 2018 (same).

¹⁸⁶ Adam Edleman, ‘Cloud.’ ‘Legitimacy crisis.’ ‘Taint.’ *Legal Experts on Kavanaugh Joining the Court*, NBC, Oct. 7, 2018.

¹⁸⁷ Ronald Brownstein, *Kavanaugh is Patient Zero*, THE ATLANTIC, Oct. 1, 2018.

¹⁸⁸ Debra Cassens Weiss, *Confidence in Judiciary Drops, Poll Finds; Which SCOTUS Justices are Favorites?*, ABA J. (Jan. 31, 2019). Still, relative trust in the judicial branch was two percent lower in 2005, the first year in which the poll included this question. *Id.* Perhaps more troublingly, the same poll identified that trust in the judiciary among Democrats dropped from 67 percent in 2017 to 37 percent in January 2019, while it rose from 23 percent to 34 percent among Republicans, suggesting a politicization of the courts. *Id.*

decisions of the United States Supreme Court justices,¹⁸⁹ nine of the 31,000 judges in our country.¹⁹⁰ We disagree that most judges are simply politicians in robes, driven by their own ideological biases. Most judges aspire to be impartial, seeing impartiality as the foremost element of their job description,¹⁹¹ and we believe the aspiration itself helps guide behavior. Some judges are proactively going further, building tools to help them overcome implicit biases they may unintentionally allow to influence them.¹⁹²

¹⁸⁹ See, e.g., Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. OF L. AND POLITICS 1212, 1212 (Oct., 2010) (“The result is a set of findings that robustly support the widely held perception that judges’ policy preferences influence their decision making to a greater extent at higher levels of the judicial hierarchy than lower ones”); Roger Guimerà, *Justice Blocks and Predictability of U.S. Supreme Court Votes*, RPLoS ONE 6(11): e27188 (2011), doi.org/10.1371/journal.pone.0027188 (“We argue that, within our framework, high predictability is a quantitative proxy for stable justice (and case) blocks, which probably reflect stable a priori attitudes toward the law.”); see also, Joshua B Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J. L. & POL’Y 133 (2009) (discussing flaws in certain analyses of judicial ideology’s impact on judicial behavior). We note that we are personally unpersuaded that the predictability of a justice’s decision is proof the justice’s politics drove the decision. In our experience, there are elements of a judge’s jurisprudential philosophies (textualism, originalism, etc.) that guide legal analyses and applications in ways that make a case’s outcome predictable, but do not suggest the judge favors that outcome for political reasons.

¹⁹⁰ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FAQs: JUDGES IN THE UNITED STATES 3 (there are 1,700 federal judges and 30,000 state court judges in the United States).

¹⁹¹ See, e.g., Judge Bobby R. Baldock et. al., *A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit.*, 74 DENV. U. L. REV. 355, 357 (1997) (“Judge Seymour: I see the role of the federal judiciary as the guarantors and dispensers of impartial justice in our system. . . . Judge Baldock: . . . [I]f a judge acts not in accordance with law, but with his or her own personal views and agenda, that judge invades the political process and causes harm to us all.”); Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 625 (1985); see also Code of Conduct for United States Judges, Canon 3 (“A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently. . . A judge should be faithful to . . . the law and should not be swayed by partisan interests. . .”).

¹⁹² See, e.g., *Florida Courts Fairness & Diversity Repository*, www.flcourts.org/Administration-Funding/Court-Administration-About-Us/Fairness-Diversity-Repository.

But the debate over judicial activism versus impartiality—perhaps one of the most central threats to public trust and confidence in our legal system—is far too important and complex to be resolved on the sidelines of this paper. We simply hope that many of our readers can come together on two foundational points: first, that the Founders took explicit steps to prevent judges from being political actors,¹⁹³ and, second, that our country is far better off if judges are indeed apolitical. Unfortunately, if we nominate and confirm judges for their politics and assume those politics drive their decisions, we will make that a reality.

VI. CONCLUSION

The perceived legitimacy of the courts is essential to the effectiveness of their role in our democracy and to the rule of law. Our system relies almost entirely on an informed citizenry to ward off the predictable attacks on judicial independence from the other branches of government. But, while those branches' attacks are increasing in frequency and vitriol, the public is less equipped to stand up to or even recognize them. With little to no personal experience with the courts and their role in our society, the people turn to the media to keep them informed. But when it comes to the courts, the media has fallen down on the job. While coverage of political battles over the courts is prolific, the issue of judicial independence is almost never raised. Thus, our citizenry has lost sight of the critical importance of an apolitical, impartial judiciary.

To us, the heart of the problem seems to be that the public is allowing the perfect to be the enemy of the good. Complete, unblemished judicial impartiality is surely a lofty goal, as are apolitical judicial nominations and wholly objective journalism. But, rather than trying to inch closer to those ideals, Americans seem to have “cease[d] grasping” for them.¹⁹⁴ If the American

¹⁹³ See discussion of the support for judicial independence at the time of the Constitution's adoption in Section III *infra*.

¹⁹⁴ Gerson, *supra* note 171.

public accepts the baseless assumption that incapacity to be perfectly impartial means we should complacently accept unfettered politicization and bias, judicial independence has lost its most powerful defender.

While our legal system has weathered periods of public distrust before, barriers to civil court access and the recent shift in the role of the news have neutralized the courts' civilian protectors. Thus, from our perspective, the most dangerous message to the public today is complacency and the belief that everything will work out as it always has. The public is the sole guardian of the rule of law, and our democracy depends on the public to do that job well. To accomplish that end, the public needs access to real information about the ongoing threats to judicial independence, and it must be poised to take meaningful action in response.