

1-2020

The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality

Stuart Chinn
University of Oregon School of Law

Follow this and additional works at: <https://dc.law.utah.edu/ulr>



Part of the [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Chinn, Stuart (2020) "The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality," *Utah Law Review*. Vol. 2019 : No. 5 , Article 1.

Available at: <https://dc.law.utah.edu/ulr/vol2019/iss5/1>

This Article is brought to you for free and open access by Utah Law Digital Commons. It has been accepted for inclusion in Utah Law Review by an authorized editor of Utah Law Digital Commons. For more information, please contact valeri.craigle@law.utah.edu.

THE MEANING OF JUDICIAL IMPARTIALITY: AN EXAMINATION OF
SUPREME COURT CONFIRMATION DEBATES AND SUPREME COURT
RULINGS ON RACIAL EQUALITY

Stuart Chinn *

Abstract

Three years into the Trump presidency and especially in the aftermath of Justice Kavanaugh's elevation to the Supreme Court, the ideal of judicial impartiality is once again central in our public discourse. Because we have, in turn, a president especially skeptical of the judiciary's separation from partisanship, heightened political polarization, and heightened stakes around judicial rulings in this age of gridlocked governance, the question of how judges approach their work has assumed a significance that goes beyond concern over the outcomes they will reach.

However, as important as the concept of judicial impartiality may be, it is worth pausing to examine what speakers generally mean when they mention the term. In this Article, I argue that at its core, the invocation of "judicial impartiality" in political discourse speaks to an ideal of fairness: an impartial judge is a person who acts fairly toward all parties in a case appearing before them. My focus in this article is on examining the concept of judicial impartiality in this familiar sense, with the hope of providing some insight into the underlying norms that structure our public discourse around judicial appointments, judicial rulings, and responses by elected officials to judicial rulings.

This Article seeks to advance three claims. First, I claim that the divergent Democratic and Republican views on judicial impartiality—as illustrated in the context of the Supreme Court confirmation hearings and debates for Chief Justice John Roberts and Justice Sonia Sotomayor—are rooted in each party's distinct electoral coalitions and ideological histories. Secondly, I claim that notwithstanding these divergences, both Democratic and Republican-appointed justices on the Supreme Court share a common institutional environment at present of judicial uncertainty. This shared institutional condition, I argue, alters how Democratic and Republican-appointed justices are able to implement their respective visions of judicial impartiality in actual adjudication. On this point, I discuss some of the Roberts Court's recent rulings on race and equal protection to help anchor the examination of judicial impartiality in constitutional doctrine. Finally, in the final portion of the Article, my argument takes a normative turn in making my third claim: accepting that

* © 2019 Stuart Chinn. Associate Dean for Programs and Research, Associate Professor, Kenneth J. O'Connell Senior Fellow, James O. and Alfred T. Goodwin Senior Fellow, University of Oregon School of Law.

some degree of partiality is inevitable in the judicial role, judicial impartiality is best understood as denoting a consistent, good-faith engagement with the claims and interests of those who lie outside the social groups that are aligned with a judicial actor. I conclude the Article with a few words on what this conception of judicial impartiality might imply, or even demand, of Democratic and Republican-appointed judicial actors seeking to uphold the ideal of judicial impartiality in the present time.

In response to then-Judge Brett Kavanaugh's testimony in front of the Senate Judiciary Committee on an allegation of sexual assault, more than 2400 law professors signed a public letter opposing his nomination to the Supreme Court. The letter stated in part:

Even in his prepared remarks, Judge Kavanaugh described the hearing as partisan, referring to it as “a calculated and orchestrated political hit,” rather than acknowledging the need for the Senate, faced with new information, to try to understand what had transpired. Instead of trying to sort out with reason and care the allegations that were raised, Judge Kavanaugh responded in an intemperate, inflammatory and partial manner, as he interrupted and, at times, was discourteous to senators.

...
We have differing views about the other qualifications of Judge Kavanaugh. But we are united, as professors of law and scholars of judicial institutions, in believing that he did not display the impartiality and judicial temperament requisite to sit on the highest court of our land.¹

The following month, in response to a ruling by Judge Jon Tigar of the U.S. District Court on asylum claims, President Trump remarked that the ruling was “not law,” “a disgrace,” that in “[e]very case that gets filed in the Ninth Circuit we get beaten,” and that Judge Tigar “was an Obama judge.”² These comments set off a noteworthy exchange with Chief Justice John Roberts, who in turn stated: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”³ Rather, Roberts maintained that “[w]hat we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent

¹ Opinion, *The Senate Should Not Confirm Kavanaugh*, N.Y. TIMES (Oct. 3, 2018), <https://nyti.ms/2OBGfjC> [<https://perma.cc/YK2K-NWJ8>]. I should note that I was a signer of this letter.

² Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a Disgrace*, N.Y. TIMES (Nov. 21 2018), <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html> [<https://perma.cc/F9RE-23GW>].

³ *Id.*

judiciary is something we should all be thankful for.”⁴ In response, Trump commented in a tweet: “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country.”⁵

We are thus at a moment where judicial impartiality is once again central in public discussion. Because we have, in turn, a president especially skeptical of the judiciary’s separation from partisanship,⁶ heightened political polarization, and heightened stakes around judicial rulings in this age of gridlocked governance, the question of *how* judges approach their work has assumed a significance that goes beyond concern over the outcomes they will reach.⁷

However, as important as the concept of judicial impartiality may be, it is worth pausing to examine what speakers generally mean when they mention the term.⁸ This seems a timely question, if only because there are a number of reasons to be concerned about the dynamics of federal judicial appointments for the remainder of the Trump presidency and beyond. Public and scholarly anxieties about federal judicial appointments—particularly Supreme Court appointments—are hardly new.⁹ Extreme partisanship and the breakdown of senatorial norms surrounding Supreme

⁴ *Id.*

⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018 12:51 PM), <https://twitter.com/realDonaldTrump/status/1065346909362143232> [<https://perma.cc/7Y6T-E2CP>].

⁶ In a similar vein, then-candidate Trump had also raised a racially-charged claim that U.S. District Court Judge Gonzalo P. Curiel, who was overseeing a class-action lawsuit against Trump University, was biased against him because Judge Curiel was of Mexican heritage. See The Editorial Board, *Donald Trump and the Judge*, N.Y. TIMES (May 31, 2016), <https://www.nytimes.com/2016/06/01/opinion/donald-trump-and-the-judge.html?module=inline> [<https://perma.cc/R8M5-BBE8>]; Liptak, *supra* note 2.

⁷ See *infra* Part III on contemporary political polarization.

⁸ Charles Geyh very helpfully disaggregates the concept of judicial impartiality along three distinct dimensions—a procedural dimension, a political dimension, and an ethical dimension—though he also acknowledges the possibility or even the likelihood of overlap across them on certain issues. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 493, 511–14 (2014). I believe my discussion of judicial impartiality implicates all three dimensions he identifies. Beyond that, my core concerns in this article are primarily within the area that Geyh labels the political dimension, and secondarily within the procedural dimension. Thus, as the following paragraphs will clarify, my examination of judicial impartiality is much less expansive than his, and focused on particular components of this ideal.

⁹ See, e.g., Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935–42 (1995) (urging greater exploration of a judicial nominee’s substantive views in the Senate’s confirmation hearings and debates); Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 442–54 (2010) (attributing the increasing divisiveness of the Supreme Court confirmation process after 2000 to a broader public perception about the politicization of the Court).

Court nominations has long been a point of public discussion.¹⁰ Still, there is good reason to think that the increasing polarization of partisan politics since the start of the Trump presidency—alongside the heightened frequency of “constitutional hardball”¹¹ tactics during this time—will only amplify already-significant concerns around appointments to the federal judiciary, and the inability of judicial actors to remain impartial.¹²

The focus of my attention in this Article is on the ideal of judicial impartiality, particularly as described in Supreme Court confirmation debates and as applied in the Court’s more recent cases dealing with race under the Equal Protection Clause.¹³ As is the case with terms like “judicial activism” or “judicial independence,” “judicial impartiality” is a term that encompasses, and plausibly intersects with, a wide range of legal and ethical concerns. At its core, however, one might say without courting too much controversy that “judicial impartiality” speaks in some measure to a norm of fairness: an impartial judge is a person who acts in a fair or unbiased

¹⁰ See, e.g., Grace Sparks, *Americans Think the Supreme Court Nomination Process Is Way Too Partisan*, CNN (June 27, 2018), <https://www.cnn.com/2018/06/27/politics/scotus-partisanship-poll/index.html> [<https://perma.cc/WP29-SLVJ>]; Livia Gershon, *How Supreme Court Nominations Became Political Battles*, JSTOR DAILY (Feb. 18, 2016), <https://daily.jstor.org/how-supreme-court-nominations-became-political-battles/> [<https://perma.cc/7S8A-WERL>].

¹¹ As Mark Tushnet defines the term, constitutional hardball:

consists of political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings. . . . [I]ts practitioners see themselves as playing for keeps in a special kind of way . . .

Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

¹² Dan Kahan stated the following in 2011:

[T]here is something different now: a widespread sense of futility, and even cynicism. We take for granted that “shaping the Court” is part and parcel of the major parties’ political agendas — at issue not just in elections of presidents, but also in the everyday operation of the Senate, which routinely blocks appointment of lower court nominees whose potential elevation to the Court might decisively shift its ideological balance. Professions of “impartiality” ritualistically extracted from Supreme Court nominees in their confirmation hearings are contemptuously jeered as theater.

Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 5 (2011). See also *id.* at 4–6.

¹³ U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which . . . [will] deny to any person within its jurisdiction the equal protection of the laws.”).

manner toward all parties in a case appearing before them.¹⁴ As such, I proceed from the view in this Article that common invocations of the ideal of “judicial impartiality” really speak to an ideal of “judicial fairness,” or one’s confidence that a judge will treat the litigants and issues in front of her with fairness. My focus in this Article is on examining the concept of judicial impartiality in this familiar sense. Furthermore, my goal is to examine this issue by trying to gain some understanding of how Supreme Court nominees/justices and Senators have themselves addressed this issue in confirmation hearings, confirmation debates, and in a focused set of judicial opinions. In a general sense, I hope that by illuminating the contours of judicial impartiality in the present time, we might gain some understanding of the status of this concept within our broader legal and political culture. This, in turn, might give us some insight into the nature of judicial legitimacy within the contemporary context.

Hence my goals here are in good measure descriptive and explanatory; I intend to explicate some dimensions of judicial impartiality as that ideal and concept is presently understood.¹⁵ However, there is a normative component to my argument as well. As I will discuss below, I do believe that within present debates, there are areas of potential convergence as to what judicial impartiality entails. Highlighting and elaborating on those points of convergence may, in turn, provide some useful guidelines for those political and judicial actors who feel compelled to uphold and further the ideal of judicial impartiality.

In the pages below, I proceed with a more focused look at these issues by concentrating on two sets of items meant to provide a preliminary exploration of these themes in the contemporary context. First, in Part I, I proceed by initially fleshing out some preliminary concepts tied to judicial impartiality as they have been discussed in the legal literature. As this Part will clarify, my focus on judicial impartiality is limited to one specific, though still significant, component of that ideal: the degree to which judicial actors should feel bound to engage in general applications of the law versus more context-sensitive applications of the law. Stated otherwise, should an impartial judge take into account social facts about the litigants before her or not?

With this conceptual background in place, I move on in Part II to examine the confirmation hearings and debates for Chief Justice John Roberts and Justice Sonia Sotomayor. This Part provides much of the basis for the descriptive claims in this paper, as the entryway into understanding how the concept of judicial impartiality is commonly deployed in public discourse. My choice to focus on Chief Justice

¹⁴ See *The Senate Should Not Confirm Kavanaugh*, *supra* note 1.

¹⁵ In his insightful article, “Legitimacy and the Constitution,” Richard Fallon disaggregates constitutional legitimacy into three types of legitimacy: legal, sociological, and moral. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005). Fallon’s discussion of sociological legitimacy builds upon the influential work of H.L.A. Hart and aligns with my focus upon the popular acceptance of legal norms and principles. *Id.* at 1790–92, 1805–06, 1825, 1848.

Roberts stems in part from his place in the Court's history as the first Supreme Court nominee since Justice Breyer's nomination more than a decade earlier, his arrival marked the start of the "Roberts Court" in 2005.¹⁶ Beyond this, Chief Justice Roberts' hearings were also notable for his famous comparison of judges to umpires—a catch-phrase or slogan that was widely-repeated in the aftermath of his elevation to the Court.¹⁷ Similar reasons account for my focus on Justice Sotomayor's confirmation hearings and debates. Aside from the appeal of her providing some partisan balance as a Democratic nominee alongside the Republican-nominated Chief Justice Roberts, judicial impartiality was also front-and-center in her nomination due to her references to race, bias, and the perspective of a "wise Latina" in a prior speech that became a focal point of Senate questioning and discussion.¹⁸ What emerges from this discussion in Part II is an apparent divergence between Democrats and Republicans: while Democrats tended to believe that judicial impartiality demands the judicial recognition of certain social facts about the parties involved in a case, Republicans consistently endorsed a view of judicial impartiality as demanding a more universal, general application of the law.

With this foundation in place for understanding judicial impartiality both conceptually and within political discourse, I move on in Part III to examine divergent Democratic and Republican views of judicial impartiality. In this Part, I elaborate on two of the three main claims of this paper: first, I claim that the divergent Democratic and Republican views on judicial impartiality, as illustrated in Part II, are rooted in their distinct electoral coalitions and ideological histories. However, I also make a second claim that, notwithstanding these divergences, both Democratic and Republican justices on the Supreme Court share a common institutional environment at present of *judicial uncertainty*. This shared condition, I argue, ultimately alters how Democratic and Republican-appointed justices can implement their respective visions of judicial impartiality in actual adjudication.

Part IV provides some tentative support for the preceding point, where I discuss some of the Roberts Court's recent rulings on race and equal protection, to help anchor this examination of judicial impartiality in an especially relevant body of constitutional doctrine. I offer a selective examination of some of the highest-profile race and equal protection cases decided by the Roberts Court thus far: *Parents*

¹⁶ Maura Reynolds, *Roberts Is Sworn in as Chief Justice*, L.A. TIMES (Sep. 30, 2005), <https://www.latimes.com/archives/la-xpm-2005-sep-30-na-roberts30-story.html> [<https://perma.cc/J75A-ABE9>] (acknowledging that Roberts was "the first new appointee to the court in more than a decade"). See Ballotpedia, *History of the Supreme Court*, BALLOTPEDIA, (last visited June 30, 2019), https://ballotpedia.org/History_of_the_Supreme_Court [<https://perma.cc/WQZ7-6FYV>] (listing the "Roberts Court" as the current among other eras of the Supreme Court).

¹⁷ Indeed, it was a point of discussion in Sonia Sotomayor's confirmation hearings and debates four years later. See *infra* Section II.B. Mark Tushnet notes that the umpire metaphor has since been a cause for mild regret from Roberts in subsequent years. MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 72 (2013).

¹⁸ See *infra* Part II.B.

Involved in Community Schools v. Seattle School District No. 1,¹⁹ *Fisher v. University of Texas (Fisher I)*,²⁰ and *Fisher v. University of Texas (Fisher II)*²¹ and *Schuette v. BAMN*.²² This discussion will demonstrate how, within the context of actual adjudication, the present political context inescapably alters how partisan ideals of judicial impartiality are applied by sitting Supreme Court justices.

Finally, in Part V, my argument takes a normative turn. In that Part, I set forth my third and final claim: accepting that some degree of partiality is realistically inevitable in the judicial role, judicial impartiality is best understood as denoting a *consistent, good-faith engagement* with the claims and interests of those who lie outside the social groups that are aligned with a judicial actor.²³ I conclude the Article with a few words on what this conception of judicial impartiality might imply, or even demand, of Democratic and Republican-appointed judicial actors seeking to uphold the ideal of judicial impartiality in the present context.

I. GENERALITY AND PARTIALITY

As noted in the preceding section, my focus on judicial impartiality centers on a more specific question in relation to that concept: namely, whether judicial impartiality or judicial fairness demands attentiveness or ignorance of social facts about the parties in a given case. Before delving into the nuances and complexities of thoughtful answers to this question in the context of actual adjudication, we might first probe this issue in more abstract, conceptual terms by thinking about two more principled answers.

One answer is that judicial impartiality demands no recognition of any social facts about the parties appearing before a judge.²⁴ This perspective would equate judicial impartiality with a demand for generality in the application of the law. Another answer might emphasize the necessity of judges taking such social facts into account.²⁵ This perspective would thus suggest that judicial impartiality, properly understood, demands at least some degree of partiality or differential treatment of individuals under the law. Hence, at first glance, a conceptual fuzziness may emerge when individuals invoke “partiality” as necessary to judicial *im*-partiality. However, this oddity may easily be explained once we recognize that speakers often have “judicial fairness” in mind when they invoke “judicial

¹⁹ 551 U.S. 701 (2007).

²⁰ 133 S.Ct. 2411 (2013).

²¹ 136 S. Ct. 2198 (2016).

²² 134 S.Ct. 1623 (2014).

²³ Aligning with this point, Geyh notes that “[i]f perfect impartiality is unattainable, the more pragmatic objective is to ensure that judges are ‘impartial enough’ to fulfill the role assigned them under state and federal constitutions: to uphold the rule of law.” Geyh, *supra* note 8, at 497.

²⁴ See *infra* notes 29–33 and accompanying text.

²⁵ See *infra* notes 34–42 and accompanying text.

impartiality.”²⁶ Thus, contrary to the common image, under the latter view Lady Justice should not be blind, but should instead be sensitive to context, structure, and relevant social facts.

Each perspective possesses distinct attributes, so let us consider generality first. Perhaps the core normative appeal of generality in the law lies in the promise of regularized, equal treatment. General and consistent application of legal principles by judicial actors ensures that similar cases will be treated alike, and individuals will be treated fairly and equally regardless of (supposedly) irrelevant characteristics such as ancestry, wealth, race, gender, sexual orientation, or other markers of social status.²⁷ The intrinsic appeal of generality is such that it is closely identified among scholars and non-scholars with other similarly weighty normative commitments such as the rule-of-law and rule-formalism.²⁸

For example, Lon Fuller famously identified eight elements required for a system of law to exist, and the first was a requirement of generality in legal rules. Generality ensures that a legal basis for a decision or action in a given case necessarily has applicability beyond the case in question to other similar cases.²⁹ A similar orientation is apparent in Herbert Wechsler’s likewise-famous call for “neutral principles” to guide Supreme Court decision-making—a point he made in relation to his critique of the *Brown v. Board of Education*³⁰ ruling. As Wechsler stated,

I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?³¹

²⁶ For an example of this, see *infra* note 75 (statement of Sen. Leahy).

²⁷ See *infra* notes 29–33 and accompanying text.

²⁸ *Id.*

²⁹ LON L. FULLER, *THE MORALITY OF LAW* 38–39, 46–49, 110, 210 (Rev. Ed. 1969). Interestingly, Fuller’s requirement of generality via legal rules was focused more on the notion of equal treatment across similar cases, and less on the related, but as he saw it, distinct problem of legal rules that targeted specific individuals or classes of individuals. *Id.* at 47–48.

³⁰ 347 U.S. 483 (1954).

³¹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

Numerous scholars since Fuller have emphasized the equality benefits inherent in the judicial utilization of categorical rules, as opposed to more flexible standards, in deciding legal cases.³² Cass Sunstein, for example, makes these points simply:

Rules are associated with impartiality. Their impartiality is captured in the notion that the Goddess justice is blindfolded. Rules are blind to many features of a case that might otherwise be relevant and that are relevant in some social contexts—religion, social class, good looks, height, and so forth—and also to many things on whose relevance people have great difficulty agreeing. . . . A comparative disadvantage of rule-free decisions is that they increase the risk that illegitimate considerations will influence decisions. . . . With rules, people who are similarly situated are more likely to be similarly treated.³³

Notwithstanding these well-known virtues of generality in the law, it also possesses some well-known potential drawbacks. These items of concern, in turn, speak to the virtues of partiality in the orientation and application of the law. For example, consider the goals of equality and equal treatment again. If it is easy to see how these purposes might be effectuated with general rules and blind application of the law, it is also not hard to see how these goals might be subverted by them as well. A general legal rule or a mechanical administration of the law might, for example, undermine equality goals by *failing* to take into account compelling moral or sociological differences between cases or individuals—thus leading to superficially equal outcomes that mask dramatic inequities.³⁴

To take a familiar example from equal protection doctrine, one might consider the case of affirmative action policies in higher education admissions. Such policies' prolonged existence in American society signals, at the least, a degree of discomfort among higher educational administrators—and, one might presume, American society more broadly—with basing admissions solely on ostensibly neutral criteria like standardized test scores or high school GPAs. A general system of higher educational admissions based solely on these numerical indicators would seemingly be impartial and ensure superficially equal treatment for all. Because of socioeconomic advantages and disadvantages that accrue to different segments of

³² See, e.g., CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 104–05, 112–13 (1996); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8–9, 14–18 (1997) [hereinafter Fallon, “*Rule of Law*”]; Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 785–86, 791–92 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989); Frederick Schauer, *Formalism*, 97 YALE L.J. 506, 540, 543 (1988); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62 (1992).

³³ SUNSTEIN, *supra* note 32, at 104–05, 112–13.

³⁴ *Id.* at 113, 117–18, 132; Schauer, *supra* note 32, at 540, 543–44; Sullivan, *supra* note 32, at 62.

American youth in elementary and secondary education,³⁵ and because standardized test scores might reflect such disadvantages and benefits, such a system of admissions would still strike many as inequitable despite this apparent equality of treatment.³⁶

At least within the context of contemporary constitutional law, probably the most conspicuous examples of partiality in the law are those instances where judicial actors evaluate status-based classifications under equal protection-scrutiny analysis and apply different levels of scrutiny to different types of classifications.³⁷ Within these rulings, the doctrine applied by judges recognizes and is indeed constituted by, the presence of certain social characteristics residing within the challenged law or within the claims of litigants. More generally, partiality in the law often appears where judicial actors might deploy more flexible (or more judicial-discretion-friendly) *standards* to allow for the subjects involved, and the specifics of the case at hand, to influence the legal outcome.³⁸ Thus, to offer one well-known example, Justice Ginsburg articulated the following doctrinal principle for evaluating gender-based classifications in the case of *United States v. Virginia*,³⁹ where the Court struck down the Virginia Military Institute's exclusion of female students as an unconstitutional violation of the Equal Protection Clause:

To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding[,] and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those

³⁵ For an insightful and in-depth examination of the various challenges faced in the public school system of Newark, New Jersey, and the various reform strategies that public school reformers have recently tried there, see Dale Russakoff, *Schooled*, THE NEW YORKER (May 12, 2014), <https://www.newyorker.com/magazine/2014/05/19/schooled> [<https://perma.cc/9T8L-TE83>].

³⁶ This invokes the familiar image of a "fair" foot-race articulated by Lyndon Johnson: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair." President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), <https://teachingamericanhistory.org/library/document/commencement-address-at-howard-university-to-fulfill-these-rights/> [<https://perma.cc/73J6-WH34>].

³⁷ On the three tiers of scrutiny analysis between rationality review, intermediate scrutiny, and strict scrutiny, see STUART CHINN, *RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE* 272 (2014).

³⁸ Sullivan, *supra* note 32, at 58–59, 66.

³⁹ 518 U.S. 515 (1996).

objectives.” The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.⁴⁰

Finally, even though the previous example of partiality speaks to a modern sensibility about suspect classes that is familiar in contemporary constitutional law,⁴¹ the basic idea of partiality in the law is by no means limited to this context. Indeed, whether the focus is on legal rules regarding who is eligible to vote in which elections, or the scope of an individual’s various tax obligations, or legal standards such as the tiers of scrutiny in equal protection doctrine, partiality is inevitable in the law—at least in the minimal sense that the law and the judicial application of it almost always function to treat some individuals differently than others because of certain social facts.⁴²

Thus, most of us would hardly find it worthy of concern that a state might restrict automobile drivers to those at or above a certain age limit. Such a law and the age classification contained within it would reflect a governmental partiality toward people at or above that age who wish to drive, and a disfavoring of those below the age limit who wish to drive. Of course, partiality in the sense of an age restriction on driving is a rather mild case, and it would not run afoul of Fuller’s requirement that the law must be composed of general rules either: everyone in the state would be equally subject to such a law.

Still, the example underscores at least one point relevant for subsequent discussion: the conspicuous presence of generality and partiality themes in commonplace examples like age limits on driving suggests the utility of thinking about these concepts as situated on a continuum. It should not be surprising that the most normatively defensible perspectives on judicial impartiality will often be positioned in the middle, given the normative qualms raised by taking either view to the extreme. Extreme generality poses the troubling concern about potential blindness to morally and sociologically-relevant differences among subjects and cases.⁴³ At

⁴⁰ *Id.* at 532–33 (citations omitted).

⁴¹ The conventional starting point, doctrinally, for this sensibility is the famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (citations omitted) (“Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

⁴² As Tussman and tenBroek put it in their classic article on equal protection: “Here, then, is a paradox: The equal protection of the laws is a ‘pledge of the protection of equal laws.’ But laws may classify. And ‘the very idea of classification is that of inequality.’” Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).

⁴³ See *supra* notes 34–36 and accompanying text.

the same time, excessive partiality at the other end can introduce different concerns such as the specter of corruption, self-dealing, nepotism, and the absence of any of the benefits of regularity and generality offered by legal rules.⁴⁴

II. SENATE DEBATES OVER THE ROBERTS AND SOTOMAYOR SUPREME COURT NOMINATIONS

With some conceptual preliminaries out of the way, the more central questions in this Article lie in understanding how generality and partiality themes intersect with prevailing notions of judicial impartiality. As an initial step in gaining some insight into this question, I examine the Supreme Court confirmation hearings and debates for Chief Justice John Roberts and Justice Sonia Sotomayor. My general interest in focusing on Supreme Court nominations is perhaps not hard to intuit: there are few better contemporary contexts for seeing a public dialogue on legal and judicial legitimacy than a Supreme Court nomination.⁴⁵ To the extent we can reasonably assume legislators will say things that resonate with their voters—if only at the least, to aid their hopes for reelection⁴⁶—we can likewise realistically assume that the ideas and arguments that appear in these nomination efforts are generally ones that would resonate with at least some substantial portion of American voters. Likewise, for similar reasons, we might presume that the ideas and arguments that do *not* enjoy ready affirmation and endorsement in these dialogues are generally not ones that enjoy intense support from substantial portions of the electorate.

In the sections that follow, I focus on the arguments about generality and partiality that appear in these confirmation hearings and debates. My use of two case studies was to ensure a broader look at the relevant questions and themes while minimizing the effects of the peculiarities of a single case. Further, a benefit of pairing one nominee by a Republican president (George W. Bush) and one nominee

⁴⁴ Hence this phrase by Justice Marshall in *Marbury v. Madison* is often taken as a basic description of the rule of law: “The government of the United States has been emphatically termed a government of laws, and not of men.” 5 U.S. 137, 163 (1803). See also Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1499–1501 (1988) (stating that American constitutionalism is based on the premise “that the American people are politically free inasmuch as they are governed by laws and not men”); Fallon, “*Rule of Law*,” *supra* note 32, at 2–3; Radin, *supra* note 32, at 781.

⁴⁵ See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 782 (1983) (noting that the confirmation process is, like most rituals, “important primarily because it reveals to us some of the deep assumptions prevalent in the culture.”).

⁴⁶ See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 11–78 (1974) (“Congress has declined into a battle for individual survival. Each of the Congressmen and each of the Senators has the attitude: ‘I’ve got to look out for myself.’ . . . Most of them are willing only to follow those things that will protect them and give them the coloration which allows them to blend into their respective districts or their respective states. If you don’t stick your neck out, you don’t get it chopped off.”) (citation omitted).

by a Democratic president (Barack Obama) is that it allows for an examination of each political party's arguments within two distinct contexts: when each party was aligned with a nominating president, and when each party was not aligned with the nominating president.⁴⁷ In addition, given that the Roberts nomination occurred in 2005 and the Sotomayor nomination occurred in 2009, we have two case-studies transpiring somewhat close to each other in the recent past, thus ensuring a reasonably solid, contemporary examination of these themes.

Finally, most importantly, I focused on Roberts and Sotomayor specifically because the themes of impartiality and partiality were central points of discussion in both of their confirmation efforts. Roberts's reference to judges as "umpires,"⁴⁸ for example, garnered a great deal of attention during his hearings in front of the Senate Judiciary Committee and in the broader debate in the Senate.⁴⁹ Likewise, a focal point for skeptics of Sotomayor during her hearings were references to identity politics in a speech she gave at U.C. Berkeley Law School in 2001,⁵⁰ which intersected with a statement by then-Senator Obama on the importance of empathy in Supreme Court nominees during the Roberts confirmation.⁵¹

My approach was to review both the Roberts and Sotomayor confirmation hearings in front of the Senate Judiciary Committee, and the confirmation debates on both justices in the full Senate, looking for discussion of generality, partiality, and judicial impartiality by the nominees or the Senators. Since my focus was on grasping the complexities and subtleties in how these ideals were invoked, I focused less on exhaustively documenting each reference to these principles, and more on context-sensitive readings of the most extensive and substantive references to these themes. As will be clear, certain Senators loom a little larger than others in these discussions.

A. Defenses, Critiques, and Elaborations on Impartiality in the Roberts Nomination

Perhaps the least surprising finding from a review of the confirmation hearings of Justice Roberts is the strong link between judicial impartiality and generality within the broader discourse. In perhaps the most commonly-referenced line in his

⁴⁷ The partisan makeup of the Senate for the Roberts Confirmation was 44 Democrats, 55 Republicans, and 1 Independent. The partisan makeup for the Sotomayor nomination was 57 Democrats, 41 Republicans, and 2 Independents. See *Party Division*, UNITED STATES SENATE (June 23, 2019), <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/J67E-FHTH>].

⁴⁸ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong. 55 (2005) [hereinafter *Roberts's Confirmation Hearing*] (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁴⁹ See, e.g., 151 CONG. REC. 21408 (2005) (statement of Sen. Sessions).

⁵⁰ These remarks were published in Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002).

⁵¹ 151 CONG. REC. 21032 (2005) (statement of Sen. Obama).

testimony before the Senate Judiciary Committee, Roberts stated this about the judicial role:

My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.⁵²

He subsequently stated the following in an exchange with Senator Grassley (R-IA):

Judge ROBERTS. He [Alexander Hamilton] said judges should not have an absolute discretion; they need to be bound down by rules and precedents—the rules, the laws that you pass, the precedents that judges before them have shaped. And then their job is interpreting the law. It is not making the law. And so long as they are being confined by the laws, by the Constitution, by the precedents, then you're more comfortable that you're exercising the judicial function. It's when you're at sea, and you don't have anything to look to that you need to begin to worry that this isn't what judges are supposed to do.

Senator GRASSLEY. Well, is there any room in constitutional interpretation for the judge's own values or beliefs?

Judge ROBERTS. No, I don't think there is. Sometimes it's hard to give meaning to a constitutional term in a particular case. But you don't look to your own values and beliefs. You look outside yourself to other sources. This is the basis for, you know, that judges wear black robes, because it doesn't matter who they are as individuals. That's not going to shape their decision. It's their understanding of the law that will shape their decision.⁵³

We might see within these comments several significant themes. The first is a view of the law as objectively clear—like the rules of a sporting contest. Second, Roberts also offered an endorsement of judicial modesty and limiting judicial discretion, made possible in part by the clarity of the law and legal rules.

Third, there are implications for the treatment of individuals and groups that also flow from the umpire analogy. Given the modest role for judges that Roberts expressed, one ready implication is to see judges engaged in ensuring a kind of

⁵² *Roberts's Confirmation Hearing*, *supra* note 48 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁵³ *Id.* at 177–78 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States and Sen. Charles Grassley, Member, Senate Comm. on the Judiciary).

fairness: the equal treatment of all individuals under general rules. In response to a comment by Senator Durbin (D-IL)—a point that I will return to below—Roberts stated the following:

[S]omebody asked me, you know, “Are you going to be on the side of the little guy?” And you obviously want to give an immediate answer, but as you reflect on it, if the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win, well, then, the big guy is going to win, because my obligation is to the Constitution. That’s the oath. The oath that a judge takes is not that I will look out for particular interests, I’ll be on the side of particular interests. The oath is to uphold the Constitution and laws of the United States, and that’s what I would do.⁵⁴

All three themes were subsequently emphasized in the debates over the Roberts nomination within the full Senate. With respect to the umpire analogy, that line was thoroughly referenced throughout by a number of Senators,⁵⁵ along with additional elaboration on the proper modesty that should be attached to the judicial role. For example, as then-Senator Jeff Sessions (R-AL) stated in a straightforward reference to impartiality and the neutrality of general rules:

I saw Senator BURNS here. He used to be a football referee. I wanted to ask him: Senator BURNS. if you thought that the holding call was a little bit inadvertent and it wasn’t too bad a holding call but the penalty called for 15 yards, should the referee be free to impose 10 yards because they think that might be more fair? No. Of course, not. Those are the basic principles of rules.⁵⁶

With regard to the commitment to equal treatment, Senator Hatch (R-UT) referenced the above-noted comment by Roberts and was emphatic in affirming that view. For Hatch, the requirement of equal treatment across all persons via general rules was

⁵⁴ *Id.* at 448 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁵⁵ *See, e.g.*, 151 CONG. REC. 21191 (2005) (statement of Sen. Frist (R-TN)); 151 CONG. REC. 21207 (2005) (statement of Sen. Hatch (R-UT)); 151 CONG. REC. 21389 (2005) (statement of Sen. Smith (R-OR)); 151 CONG. REC. 21399 (2005) (statement of Sen. Burns (R-MT)); 151 CONG. REC. 21404 (2005) (statement of Sen. Talent (R-MO)); 151 CONG. REC. 21405 (2005) (statement of Sen. Thune (R-SD)); 151 CONG. REC. 21407 (2005) (statement of Sen. Vitter (R-LA)); 151 CONG. REC. 21631 (2005) (statement of Sen. Lott (R-MS)); 151 CONG. REC. 21407 (2005) (statement of Sen. Bunning (R-KY)); 151 CONG. REC. 21417 (2005) (statement of Sen. Bennett (R-UT)); 151 CONG. REC. 21425 (2005) (statement of Sen. Grassley (R-IA)).

⁵⁶ 151 CONG. REC. 21408 (2005) (statement of Sen. Sessions); *see also* 151 CONG. REC. 21206 (2005) (statement of Sen. DeWine (R-OH)).

so obviously correct that he wondered how anyone could possibly stake out a critical or opposing view. As he stated,

If my friends on the other side oppose this nomination, are they saying that judges should instead be partial, that judges should actually take sides, that people coming before the Court do not deserve the confidence that judges will be fair? If that is what they believe, I invite them to try to make that case to the American people. If not, if they agree with Judge Roberts that judges should be impartial, then they should confirm his nomination.

...

If my friends on the other side oppose this nomination, are they arguing that whoever the little guy might be must win, regardless of what the facts and regardless of what the law requires? Are they saying judges should disregard their oaths to do justice without respect to persons?⁵⁷

Nevertheless, at least three themes run through the comments of those somewhat more skeptical of the Roberts nomination and the arguments he put forth in front of the Senate Judiciary Committee. Perhaps the most noteworthy critical comment came from then-Senator Obama (D-IL), which encompassed critiques of all three themes noted by Roberts supporters: the image of the law as objectively clear; the claim of minimal discretion by judges in applying the law to specific cases; and the purported fairness of such an approach to judging. As Obama noted in a comment that explained his vote against Roberts's nomination—and that subsequently reappeared with a vengeance by critics of Sonia Sotomayor's nomination four years later⁵⁸—he memorably stated:

The problem I face—a problem that has been voiced by some of my other colleagues, both those who are voting for Mr. Roberts and those who are voting against Mr. Roberts—is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's

⁵⁷ 151 CONG. REC. 21208 (2005) (statement of Sen. Hatch). *See also* 151 CONG. REC. 21414, 21415 (2005) (statement of Sen. Cornyn (R-TX)); 151 CONG. REC. 21633 (2005) (statement of Sen. Bond (R-MO)); 151 CONG. REC. 21643, 21644 (2005) (statement of Sen. McConnell (R-KY)).

⁵⁸ *See infra* notes 70–73 and accompanying text.

deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.⁵⁹

Obama thus introduced concerns about the objectivity of the law and Roberts's claim that proper judging entails minimal judicial discretion. Rather, Obama invoked the possibility of "hard cases"⁶⁰ to underscore the point that the conventional tools of legal analysis may very well be unable to give us determinate answers in the types of very difficult cases that the Supreme Court is likely to hear. If one accepts Obama's claim that a degree of indeterminacy may exist with conventional methods of legal analysis, this in turn inevitably prompts skepticism about a second component of the Roberts claim: that the judicial role requires minimal discretion because the application of the law to a given case is generally nothing more than calling "balls and strikes." To the contrary, if legal analysis—and the content of the law itself—may be characterized by a degree of indeterminacy, then any correct evaluation of the judicial role has to grapple with the fact of inevitable judicial discretion, and better or worse ways of applying that discretion by judges. Third, this in turn led to Obama's invocation of "empathy" as a necessary element of the judicial application of the law.

Beyond Obama, probably the most interesting comment that directly took aim at Roberts's view of the law and the judicial role was a comment by then-Senator Joe Biden (D-DE) in the Senate Judiciary Committee Hearings. As Senator Biden stated:

[I]n major league baseball, they have a rule—Rule 2.00 defines the strike zone. It basically says from the shoulders to the knees. And the only question about judges is, "do they have good eyesight or not?" They don't get to change the strike zone. They don't get to say that was down around the ankles, you know, and I think it was a strike. They don't get to do that.

But you are in a very different position as a Supreme Court Justice. As you pointed out, some places of the Constitution define the strike zone—two-thirds of the Senators must vote, you must be an American citizen, to the chagrin of Arnold Schwarzenegger, to be President of the United States—I mean born in America to be a President of the United States. They are all—the strike zone is set out. But as you pointed out in the question of Senator Hatch, I think you said unreasonable search and seizure; what constitutes unreasonable?

...

And the same thing prevails for a lot of other parts of the Constitution. The one that we are all talking about and everybody here from left, right, and center is concerned about is the Liberty Clause of the 14th Amendment. It

⁵⁹ 151 CONG. REC. 21032 (2005) (statement of Sen. Obama).

⁶⁰ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81–83 (1977).

doesn't define it. All the things we debate about here, and the Court debates, the 5–4 decisions, they are almost all on issues that are ennobling phrases in the Constitution that the Founders never set a strike zone for. You get to go back and decide⁶¹

If one proceeds from the view that application of the law encompasses indeterminacy—and that judicial discretion is inevitable in this task—then one returns to the conclusion of Obama's statement: the need for an articulated standard by which we might evaluate better or more legitimate applications of judicial discretion.

Again, for Obama, the standard he emphasized was one linked to the incorporation of empathy by judges in making legal judgments—or more specifically, Obama endorsed a view of the judicial role where judges would show a special solicitude for the less powerful and less fortunate.⁶² Others seized on this theme to reject the Roberts view, and the view of his supporters, that proper and fair judging required blindness to these social facts.⁶³ One of the more eloquent statements in this regard was by Senator Durbin (D-IL) during the Judiciary Committee hearings:

[S]o frequently, when asked, you have said, appropriately, that you will be driven and inspired by the rule of law, which is an appropriate term but a hard and cold term by itself. We know you have the great legal mind and have proven it here. But the questions that have been asked more and more today really want to know what is in your heart, and I think those are appropriate.

When you look down from the bench or read a trial transcript, do you just see plaintiffs and parties and precedents, or more? Do you see the people behind the precedents, the families behind the footnotes? I think that is what many of us are driving at with these questions.

⁶¹ *Roberts's Confirmation Hearing*, *supra* note 48, at 185 (statement of Sen. Joseph Biden, Member, Senate Comm. on the Judiciary); *see also id.* at 512–13 (statement of Peter B. Edelman, Professor of Law, Co-Director, Joint Degree in Law and Public Policy, Georgetown University Law Center, Washington, D.C.).

⁶² 151 CONG. REC. 21032 (2005) (statement of Sen. Obama).

⁶³ *See, e.g.*, 151 CONG. REC. 21389, 21390 (2005) (statement of Sen. Harkin (D-IA)); 151 CONG. REC. 21429 (2005) (statement of Sen. Inouye (D-HI)); 151 CONG. REC. 21431 (2005) (statement of Sen. Clinton (D-NY)); 151 CONG. REC. 21630 (2005) (statement of Sen. Kennedy (D-MA)); 151 CONG. REC. 21630 (2005) (statement of Sen. Schumer (D-NY)); 151 CONG. REC. 21632 (2005) (statement of Sen. Akaka (D-HI)); 151 CONG. REC. 21637 (2005) (statement of Sen. Corzine (D-NJ)); 151 CONG. REC. 21639 (2005) (statement of Sen. Stabenow (D-MI)).

You have lived a comfortable life. Court cases often involve people who have not. Many times, contests between the powerful and the powerless, as someone said in the opening statement, are contests where the powerless just have the rule of law and the Constitution on their side, praying for relief for their day in court.

Aside from a few pro bono cases, as important as they are—and I salute you for being involved in them—what would the powerless, the disenfranchised, minorities, and others see in your life experience that would lead them to believe that they would have a fighting chance in your Court?⁶⁴

Encompassed within Durbin's statement, and others with the same view,⁶⁵ was the presumption that judicial and legal legitimacy rests on something beyond the aspiration toward pure procedural neutrality; more precisely, and more importantly, it rests on substantive outcomes that positively impact the welfare of the disadvantaged in American society. In other words, Durbin was invoking the legitimacy of partiality, when deployed toward equitable goals.

Finally, before moving on to the Sotomayor nomination, it is worth emphasizing some narrow points of commonality that might still be identified between the positions staked out by Roberts and his supporters, and the positions staked out by skeptics. First, recall the response by Roberts to the query from Senator Grassley about whether "there [is] any room in constitutional interpretation for the judge's own values or beliefs?" Roberts's reply, again, was:

No, I don't think there is. Sometimes it's hard to give meaning to a constitutional term in a particular case. But you don't look to your own values and beliefs. You look outside yourself to other sources. This is the basis for, you know, that judges wear black robes, because it doesn't matter who they are as individuals. That's not going to shape their decision. It's their understanding of the law that will shape their decision.⁶⁶

Roberts appeared to partially concede the point raised by Obama that legal indeterminacy exists and that the conventional tools of legal analysis cannot necessarily eliminate it. Furthermore, one suspects that Obama and other skeptics would concede the assertion made by Roberts that judges should not feel free to simply inject their own moral beliefs into legal interpretation without any sense of professional or ethical constraint. The gap between these two perspectives lies, however, with Roberts's insistence that one's understanding of the law can be

⁶⁴ *Roberts's Confirmation Hearing*, *supra* note 48, at 388 (statement of Sen. Richard Durbin, Member, Senate Comm. on the Judiciary).

⁶⁵ *See infra* note 71.

⁶⁶ *Roberts's Confirmation Hearing*, *supra* note 48, at 177–78 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

wholly separated from one's values and beliefs. One suspects that for Obama and others more comfortable with acknowledging the fact of judicial discretion, the idea that one's view of the law may indeed be linked to one's larger values (about the purpose of the Constitution, or the purpose of the American polity, or the meaning of equality) would be neither surprising nor necessarily problematic.

Second, in response to a question from Senator Kyl (R-AZ) on the umpire analogy, Roberts stated:

I know there are those theorists who think that is futile [to reach the "right" legal answer], or because it is hard in particular cases, we should just throw up our hands and not try in any case, and I do not subscribe to that. I believe that there are right answers, and judges, if they work hard enough, are likely to come up with them.⁶⁷

Again, most of Roberts's skeptics would likely have concurred with the view that there are indeed "right" answers to legal questions, so this comment perhaps minimized a point of likely convergence with them. Where there may have been divergence was in the disinclination of Roberts to acknowledge, as his skeptics might have, that there may be multiple right answers to a legal question, or that some answers may be *relatively* better than others. As such, having faith that there are correct legal answers does not eliminate having to potentially grapple with the complexities of judicial discretion, notwithstanding what Roberts appeared to suggest.

Third and finally, Roberts and Senator Durbin had an interesting exchange on how the latter viewed the equality implications flowing from the former's "neutral" view of judging. In response to the comment mentioned above by Roberts that he would rule in favor of "the little guy" or "the big guy" depending upon what the Constitution commanded, Durbin responded with the following comment:

Would you at least concede that you would take into consideration that in our system of justice the race goes to the swift, and the swift are those with the resources, the money, the lawyers, the power in the system, and that many times the powerless, the person who has struggled and clawed their way to your courtroom, went through a wall of adversity which the powerful never had to face? Is that part of your calculation?⁶⁸

Roberts responded by saying:

⁶⁷ *Id.* at 267 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁶⁸ *Id.* at 448 (statement of Sen. Richard Durbin, Member, Senate Comm. on the Judiciary).

Absolutely, and it is, again, what's carved above the doors to the Supreme Court: "Equal Justice Under Law." And the judicial oath talks about doing justice without regard to persons, to rich and to poor. And that, of course, is critically important . . . the judge's obligation is to appreciate that the rule of law requires that both of those be treated equally under the law.⁶⁹

Thus, even if Roberts steadfastly refused to recognize any room for partiality or special solicitude for the less fortunate in the legitimate exercise of judicial power, he and Durbin at least converged on the notion of equal access to justice and equal treatment for both rich and poor.

*B. Defenses, Critiques, and Elaborations on Impartiality
in the Sotomayor Nomination*

Picking up on his comments emphasizing the importance of empathy during the Roberts nomination, President Obama stated the following in announcing the retirement of Justice David Souter and his hopes for the next Supreme Court justice:

I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people's lives -- whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.

I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at [sic] just decisions and outcomes. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role.⁷⁰

Sonia Sotomayor was ultimately the nominee, and during her confirmation, those Senators who supported her tended to emphasize a range of arguments that spoke to the legitimacy of partiality in legal interpretation and as part of the judicial role. The first set of arguments tracked Obama's comments from both the Roberts nomination and from his retirement announcement of Justice Souter: recognizing that judicial discretion is part of the judicial role, and emphasizing the need for judges and justices who would utilize this discretion with an eye to the lived experience of

⁶⁹ *Id.* at 448–49 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁷⁰ *Obama's Remarks on the Resignation of Justice Souter*, reprinted in N.Y. TIMES, (May 1, 2009), <https://www.nytimes.com/2009/05/01/us/politics/01souter.text.html> [<https://perma.cc/949F-W5RN>]

“regular” individuals—especially disadvantaged individuals.⁷¹ As Senator Whitehouse (D-RI) stated on this:

Setting aside all this [sic] politics, we should also never forget, never overlook the historic role that judges play in protecting the less powerful among us. We should always appreciate how a real-world understanding of the real-life impact of judicial decisions is a proper and necessary part of the process of judging.

Judge Sotomayor’s wide experience, I hope, will bring her a sense of the difficult circumstances faced by the less powerful among us. . . . If Justice Sotomayor’s wide experience gives her empathy for those people so that she gives them a full and fair hearing and seeks to understand the real-world impact of her decisions on them, she will be doing nothing wrong—nothing wrong by the measure of history, nothing wrong by the measure of justice.⁷²

Beyond this, other Sotomayor defenders emphasized a legal tradition of judicial rulings and past legislation that aimed to rectify structural disadvantages faced by certain constituencies—and voiced their hope that Sotomayor would fall within this tradition.⁷³ Finally, others emphasized the benefits of Sotomayor herself adding to the diversity of the Supreme Court’s personnel, with attendant benefits for both the popular legitimacy of the institution and for the future development of the law itself. For example, as Senator Durbin (D-IL) noted, someone with Sotomayor’s distinctive life experiences should affect how a nine-person institutional body might grapple with difficult legal issues:

Does anybody believe there is a clear, objective answer to every case that comes before the Supreme Court? If they do, please explain to me why one-third of all rulings in that Court in the last term were decided by a 5-to-4 vote. Does anybody believe that women judges have not helped their male colleagues understand the realities of sex discrimination and sexual harassment in the workplace? Study after study has shown that men and women on the bench sometimes rule differently in discrimination cases. That is why diversity is so important. This doesn’t mean their rulings are based on personal bias. It simply means that Americans see the world through the prism of various experiences and perspectives. Our Supreme

⁷¹ See 155 CONG. REC. 20654 (2009) (statement of Sen. Leahy (D-VT)); 155 CONG. REC. 20661, 20662 (2009) (statement of Sen. Feinstein (D-CA)); 155 CONG. REC. 20778 (2009) (statement of Sen. Leahy); 155 CONG. REC. 20846 (2009) (statement of Sen. Durbin (D-IL)); 155 CONG. REC. 20848 (statement of Sen. Durbin).

⁷² 155 CONG. REC. 20667 (2009) (statement of Sen. Whitehouse (D-RI)).

⁷³ See, e.g., 155 CONG. REC. 20654, 20655 (2009) (statement of Sen. Leahy (D-VT)).

Court Justices should possess an equally rich and wide field of vision as they interpret the facts and the law.⁷⁴

The upshot of these various arguments was not necessarily a defense of partiality for its own sake. As some of these speakers emphasized, these more specific endorsements of partiality ultimately added up to a defense of a more nuanced and more substantive form of impartiality. As Senator Leahy (D-VT) noted, “What the partisan critics do not appreciate is that the opposite of empathy is indifference and a lack of understanding. Empathy does not mean biased or mean picking one side over another; it means understanding both sides.”⁷⁵ Developing this theme further, Senator Leahy pressed an almost Madisonian-esque argument that greater inclusion of diverse perspectives would ensure a checking of biases that might lead to a more realistically impartial judiciary:

By striving for a more diverse bench drawn from judges with a wider set of backgrounds and experiences we can better ensure there will be no prejudices and biases controlling our courts of justice. All nominees have talked about the value they will draw on the bench from their backgrounds. That diversity of experience and strength is not a weakness in achieving an impartial judiciary.⁷⁶

Not surprisingly, those more skeptical of the Sotomayor nomination emphasized the illegitimacy of partiality. In doing so, they had two targets. The first was Obama’s reference to empathy as part of his criteria in selecting a Supreme Court nominee. The second target was a portion of a speech given by Sotomayor herself in 2001 at the U.C. Berkeley Law School that specifically referenced her own ethnic identity as a laudable influence upon her ability to perform the judicial role. This was the comment in question:

Justice O’Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O’Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow

⁷⁴ 155 CONG. REC. 20847 (2009) (statement of Sen. Durbin). *See also* 155 CONG. REC. 20655 (2009) (statement of Sen. Leahy); 155 CONG. REC. 20663 (2009) (statement of Sen. Menendez (D-NJ)); 155 CONG. REC. 20678 (2009) (statement of Senator Brown (D-OH)); 155 CONG. REC. 20713-14 (2009) (statement of Sen. Leahy (D-VT)); 155 CONG. REC. 20761 (2009) (statement of Sen. Akaka (D-HI)); 155 CONG. REC. 20763 (2009) (statement of Sen. Merkley (D-OR)); 155 CONG. REC. 20774 (2009) (statement of Sen. Franken (D-MN)); 155 CONG. REC. 20865 (2009) (statement of Sen. Kerry (D-MA)).

⁷⁵ 155 CONG. REC. 20778 (2009) (statement of Sen. Leahy).

⁷⁶ 155 CONG. REC. 20874 (2009) (statement of Sen. Leahy). *See also id.* at 20656 (statement of Sen. Leahy).

has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.⁷⁷

The concerns raised by Sotomayor skeptics centered on at least three general themes that, not surprisingly, often intersected. One theme was the specter of illegitimate judicial activism. If empathy and solicitude for certain groups were accepted as a legitimate part of the judicial role, Sotomayor skeptics feared this would give free license to empathy-minded judges to proceed beyond the constraints of the law and find the outcomes dictated by their heart or sense of sympathy, rather than what was legitimately authorized in the Constitution or by federal statute. For example, then-Senator Sessions (R-AL) stated on this point:

Our legal system is built on a belief that there is a right answer to even the most difficult cases, and judges ought to give their absolute best effort to find that right answer. It is based on law and the facts and not what their personal views and values are. That is what we are all about. I think it is an important issue. And the activist, whether liberal or conservative, the activist judge allows those values and prejudices and political views and ideology to affect their rulings. It causes them to find some way to achieve a result that furthers an agenda they believe in. That is not justice, that is politics.⁷⁸

Second, and relatedly, critics claimed that judicial empathy would always be a matter of empathy toward some individual or specific group of individuals. This implied an additional, more pointed worry: that judges empowered to rule with empathy would be empowered to play favorites in the legal process, creating a constituency of the legally privileged. As a result, the Sotomayor/Obama perspective would imperil the very idea of impartiality as equal treatment through general rules and give rise to the possibility of the worst kinds of partiality, perhaps akin to nepotism or corruption. Indeed, Sotomayor herself explicitly articulated some self-consciousness about these concerns in her Berkeley speech:

Yet, because I accept the proposition that, as Judge Resnik describes it, “to judge is an exercise of power” and because as, another former law school

⁷⁷ Sotomayor, *supra* note 50, at 92.

⁷⁸ 155 CONG. REC. 20677 (2009) (statement of Sen. Sessions). *See also* 155 CONG. REC. 20736 (2009) (statement of Sen. Roberts (R-KS)); 155 CONG. REC. 20739 (2009) (statement of Sen. Crapo (R-ID)); 155 CONG. REC. 20755 (2009) (statement of Sen. Brownback (R-KS)); 155 CONG. REC. 20873 (2009) (statement of Sen. Sessions); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States*, 111th Cong. 39 (2009) [hereinafter *Sotomayor Confirmation Hearing*] (statement of Sen. Tom Coburn, Member, Senate Comm. on the Judiciary (R-OK)).

classmate, Professor Martha Minnow of Harvard Law School, states “there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging,” I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it’s an aspiration because it denies the fact that we are by our experiences making different choices than others.⁷⁹

As Senator McConnell (R-KY) stated in a comment that combined the favoritism concern with the judicial activism concern:

[W]hen it comes to judging—empathy is only good if you are lucky enough to be the person or group for whom the judge in question has empathy. In those cases, it is the judge, not the law, which determines the outcome. That is a dangerous road to go down if you believe, as I do, in a nation not of men but of laws.⁸⁰

Likewise, in the hearings before the Senate Judiciary Committee, Senator Coburn (R-OK) stated the following:

The American people expect their judges to treat all litigants equally, not to favor and not to enter the courtroom already prejudiced against one of the parties. That is why Lady Justice is always depicted blind and why Aristotle defined law as “reason free from passion.” Do we expect a judge to merely call balls and strikes? Maybe so, maybe not. But we certainly do not expect them to sympathize with one party over the other, and that is where empathy comes from.⁸¹

Third, and finally, it is not hard to detect a point of concern raised about Sotomayor’s reference to a “wise Latina” that, if not always explicit, seemed to be ever-present: at least some Sotomayor skeptics seemed to feel a degree of insult or annoyance about her remarks implying a kind of personal superiority of judgment or perspective. Not surprisingly, this would be a potent point of criticism when a life-

⁷⁹ Sotomayor, *supra* note 50, at 91.

⁸⁰ 155 CONG. REC. 20633 (statement of Sen. McConnell). *See also* 155 CONG. REC. 20657, 20658 (statement of Sen. Sessions (R-AL)); 155 CONG. REC. 20670, 20671 (statement of Sen. Hatch (R-UT)); 155 CONG. REC. 20677 (2009) (statement of Sen. Sessions); 155 CONG. REC. 20706 (2009) (statement of Sen. Grassley (R-IA)); 155 CONG. REC. 20739-40 (2009) (statement of Sen. Wicker (R-MS)); 155 CONG. REC. 20744 (statement of Sen. Kyl (R-AZ)); 155 CONG. REC. 20749 (2009) (statement of Sen. Coburn (R-OK)); 155 CONG. REC. 20854 (2009) (statement of Sen. Grassley); 155 CONG. REC. 20870 (2009) (statement of Sen. Johanns (R-NE)); 155 CONG. REC. 20873 (2009) (statement of Sen. Sessions).

⁸¹ *Sotomayor Confirmation Hearing*, *supra* note 78 (statement of Sen. Tom Coburn, Member, Senate Comm. on the Judiciary (R-OK)).

tenured position on the U.S. Supreme Court was on the line. For example, this was Senator Grassley's comment on the "wise Latina woman" phrase:

Since 1994, the judge has given a number of speeches where she responded to a remark by Justice O'Connor that a judge's gender should be irrelevant to [the] judicial decision-making process. Judge Sotomayor said that she "hope[d] that a wise Latina woman . . . would more often than not reach a better conclusion than a white male who hasn't lived that life."

This statement suggests, very contrary to the Constitution, that race and gender influence judicial decisions and that some judges can reach a "better conclusion" solely on the basis of belonging to a particular demographic.⁸²

Before elaborating on some of the deeper threads of commonality across the various perspectives on impartiality and partiality articulated in these two nomination efforts, I should preliminarily note a point of convergence between Roberts and Sotomayor. Compare these two comments—one is a passage from Sotomayor's Berkeley speech, and the other is a comment by Roberts during his hearings in front of the Senate Judiciary Committee:

Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.⁸³

[O]f course, we [judges] all bring our life experiences to the bench. But I will say this: that the ideal in the American justice system is epitomized by the fact that judges, Justices, do wear the black robes, and that is meant

⁸² 155 CONG. REC. 20706 (2009) (statement of Sen. Grassley (R-IA)). *See also* 155 CONG. REC. 20745 (statement of Sen. Kyl (R-AZ)); *Sotomayor Confirmation Hearing*, *supra* note 78, at 27 (statement of Sen. Lindsey Graham, Member, Senate Comm. on the Judiciary (R-SC)); *Id.* at 39 (statement of Sen. Tom Coburn, Member, Senate Comm. on the Judiciary (R-OK)).

⁸³ Sotomayor, *supra* note 50, at 93.

to symbolize the fact that they're not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law, not their own preferences, not their own personal beliefs. That's the ideal.⁸⁴

At the level of aspiration, one might say there is a great deal of convergence between the Sotomayor and Roberts perspectives on the judicial role. Their divergence seems more a matter of their respective optimism about judges being able to put aside their biases and to see beyond their own life experiences. Sotomayor was criticized for an undertone of superiority in her wise Latina comment.⁸⁵ However, it is ironic that she attracted this criticism relative to Roberts because her comments in that speech also demonstrated significantly greater humility about the exercise of judicial power and the potential pitfalls of sitting in judgment of others who have vastly different life experiences.⁸⁶ Ultimately these issues regarding the relative differences between Sotomayor and Roberts in recognizing and articulating the limits of a judge's perspective, and how to respond to this shortfall accordingly, marks the primary point of divergence between them—at least as suggested by the above quotations. With that point made, let me return below to drawing out in greater detail the points of convergence between these two justices, and their respective supporters.

C. Points of Commonality

The first area of notable convergence among all speakers in these confirmation efforts is the outwardly-expressed belief that legal and judicial legitimacy requires a kind of fairness implicating *both* legal process and legal outcomes. Namely, I would assert that a common thread across most of these speakers is an outwardly-expressed belief that legitimate judicial process—and the legitimate exercise of judicial power—requires that a “fair chance” within the legal system be given for those individuals similar to the speaker, or similar to constituencies that the speaker cares about. Of course, what individuals think a “fair chance” entails for such individuals is hardly a point of consensus in these debates, but I would maintain that this idea in a more abstract sense encompasses both a procedural and substantive normative ideal for speakers on both sides of these two confirmation efforts.

By way of beginning to unpack this point, consider the Republican side first—those who were more oriented toward a pro-Roberts and anti-Sotomayor position in

⁸⁴ *Roberts's Confirmation Hearing*, *supra* note 48, at 205 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

⁸⁵ I might add that the context of her comment suggested that Justice Sotomayor was also emphasizing the relatively greater value of the experience of a racial minority woman on issues specifically impacting racial minorities and women. Sotomayor, *supra* note 50, at 92.

⁸⁶ The parallels between her Berkeley comments and the above-noted Roberts comment, along with the irony mentioned here, did not escape her supporters during the confirmation debates either. *See, e.g.*, 155 CONG. REC. 20778 (2009) (statement of Sen. Leahy).

these debates. For these individuals, the procedural component of fairness was the centerpiece of many of their arguments: there were many speakers who emphasized that the essence of judicial fairness lay in the equal treatment of all according to general rules.

However, few Republican Senators would have taken such statements at face value and assumed that such defenses of impartiality were wholly divorced from substantive legal outcomes. Indeed, in the debates themselves, some of these speakers felt little hesitation in pairing this emphasis on generality and neutral procedures with emphatic defenses of specific substantive goals. Thus, for most Republican Senators, gun owners *should* fare better, in front of an impartial judge, than those who would propose greater gun restrictions. In such situations, the mark of judicial impartiality stemmed less from fidelity to any purportedly neutral process, and more from fidelity to specific outcomes. For example, this was the comment by Senator Coburn: “I remain concerned that Judge Sotomayor’s hostility to gun rights, abortion restrictions, and property rights, among others, stem from a ‘personal prejudice’ that will influence her decisions once she is untethered from precedent.”⁸⁷ Of course, this type of special solicitude for social groups aligned with the Republican Party would not qualify, under the Republican perspective, as illegitimate favoritism because the basis for the seemingly favorable treatment of these groups by like-minded judges would lie in the fact that these outcomes were dictated—at least in theory—by the impartial administration of clearly defined, and legitimately created constitutional rights.⁸⁸

The substantive component of fairness, as endorsed by the Republican side in these debates, is even more clearly illustrated in the critiques and attention they placed on Sotomayor’s “wise Latina” remarks. As noted above, Republican critiques about these remarks as antithetical to judicial impartiality were quite common, but some went further to emphasize their annoyance with the hint of superiority implied in Sotomayor’s assertion that someone with her background might reach a “better” legal conclusion than a white male judge.⁸⁹ From these starting points, it is not hard to connect such critiques to the types of concerns voiced by Senator Coburn above that focused on legal outcomes. Put more bluntly than what we saw in the debates, and in a way that links both the procedural and substantive, one might readily speculate that a Sotomayor critic worried that a judge like Sotomayor, with her

⁸⁷ 155 CONG. REC. 20750 (2009) (statement of Sen. Coburn).

⁸⁸ Many examples might be mentioned to support this point, but here I simply cite some additional instances of Republican Senators voicing a substantive concern about the future protection of gun rights with Sotomayor’s confirmation. *See, e.g.*, 155 CONG. REC. 20659 (2009) (statement of Sen. Sessions (R-AL)); 155 CONG. REC. 20740 (2009) (statement of Sen. Wicker (R-MS)); 155 CONG. REC. 20747 (2009) (statement of Sen. Kyl (R-AZ)); 155 CONG. REC. 20871 (2009) (statement of Sen. Hutchison (R-TX)). On the Republican Party commitment to gun rights, as reflected in Republican Party platforms from 1992–2016, see Stuart Chinn, *Political Parties and Constitutional Fidelity*, 102 MARQUETTE L. REV. 387, 427–28 (2018) [hereinafter Chinn, *Political Parties*].

⁸⁹ *See supra* Section II.B. at notes 77–82.

distinctive way of looking at the world—born out of her ethnic identity and her background—would be unlikely to look at the world in a way that would result in just or fair outcomes to those with different ethnic identities or backgrounds.

For Sotomayor supporters/Roberts critics, the intertwinement of procedural and substantive considerations in their larger notions of fairness and judicial legitimacy can also be gleaned in these Senate debates. The substantive elements were, for many, the central arguments in their skepticism about the Roberts’s nomination and their endorsement of the Sotomayor nomination. Whether tied to societal discrimination, unequal resources, or structural biases within the law itself, achieving impartiality or fairness—under this view—requires judicial actors to exhibit empathy or special solicitude for certain groups to reach a more substantive equality.⁹⁰ However, equally worthy of attention were the procedural elements within the Democratic view as well. On this, it bears emphasizing that Sotomayor had little appetite for expanding upon her anxieties about judicial impartiality during her confirmation hearings⁹¹ or elaborating on the role of empathy in judging.⁹² Her statement in response to a question from Senator Schumer during her confirmation hearings illustrates this point:

Senator SCHUMER. But let us start with the basics. Will you commit to us today that you will give every litigant before the court a fair shake and that you will not let your personal sympathies toward any litigant overrule what the law requires?

Judge SOTOMAYOR. That commitment I can make and have made for 17 years.⁹³

Notwithstanding some of the larger points she raised in her Berkeley speech, judicial legitimacy—even for Democrats like Senator Schumer—had to rest in part on broader procedural norms that constrain and limit the degree of judicial solicitude that might be extended to certain social groups under the law.

What emerges then is a view about impartiality and fairness that is quite similar across both parties, even if there might be more candor about this view from the Democratic side. Fairness necessarily entails a set of impersonal procedures one step removed from pressing controversies—in line with Wechsler’s famous definition of neutral principles⁹⁴—but the plausibility or attractiveness of those procedures is measured against the substantive outcomes they generate. We might go even one

⁹⁰ See *supra* Section II.A. at notes 59–65.

⁹¹ *Sotomayor Confirmation Hearing*, *supra* note 78, at 59 (statement of Sonia Sotomayor., Nominee to be an Associate Justice of the Supreme Court of the United States).

⁹² *Id.* at 121 (“We apply law to facts. We don’t apply feelings to facts.”).

⁹³ *Sotomayor Confirmation Hearing*, *supra* note 78, at 127 (statement of Charles Schumer, Member, Senate Comm. on the Judiciary and Sonia Sotomayor., Nominee to be an Associate Justice of the Supreme Court of the United States (D-NY)).

⁹⁴ Wechsler, *supra* note 31.

step further in highlighting convergence on the substantive requirements that would amount to, or legitimate, procedures: even here, I think senators from both parties converge on the abstract ideal that certain social groups be assured of receiving a fair chance or a fair shake in front of an impartial judge. The specific groups entitled to this solicitude, and the precise content of a “fair chance,” are clearly items where no likely consensus among Senators would occur. But one might presume a common aspiration that judges be able to look beyond themselves to see life through the eyes of those unlike them. Nothing about this perspective would sound foreign or misaligned with most Democratic arguments.⁹⁵ I believe this perspective underlies much of the concern about the Sotomayor nomination on the Republican side as well.⁹⁶

A second point of convergence lies in the apparent agreement of all that debates about legal and judicial legitimacy *should* be about something different than pure partisanship. To be sure, charges of base partisanship certainly appear in these debates. Neither party was shy about claiming that the other party had members motivated by less than noble purposes for the positions that they took in these nominations.⁹⁷ But in the very act of making these charges, and as apparent throughout the discussion in the preceding Part, speakers of all stripes acknowledged that legal legitimacy must rest on constraints that may be absent from a more general political debate. This is an unsurprising position for an individual, like Roberts, who claimed that the core value of judges lay in being impartial⁹⁸—the very antithesis of partisanship. Indeed, as Roberts himself insisted in his opening statement, “I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes.”⁹⁹ Equally significant, however, is that for those individuals who

⁹⁵ See *supra* notes 57–64, 71–76 and accompanying text.

⁹⁶ See *supra* notes 79–81 and accompanying text.

⁹⁷ For example, from the Roberts confirmation debates, see, e.g., 151 CONG. REC. 21409 (2005) (statement of Sen. Specter (R-PA)) (“I suggest it is in the national interest that there be a lowering of the decibel level of the partisan rhetoric. There is no doubt that the process for the nomination, hearings, and confirmation of a Supreme Court nominee is part of the political process. I further suggest partisanship has its limits. The core objection raised by certain Democratic political activists as outlined in the Washington Post story is frustration among party activists who think their elected leaders did not put up a serious fight against Judge Roberts.”); 155 CONG. REC. 21033 (2005) (statement of Sen. Obama (D-IL)) (“These groups on the right and left should not resort to the sort of broad-brush dogmatic attacks that have hampered the process in the past and constrained each and every Senator in this Chamber from making sure that they are voting on the basis of their conscience.”). In addition, from the Sotomayor confirmation debates, see, e.g., 155 CONG. REC. 20732 (2009) (statement of Sen. Lautenberg (D-NJ)) (“Yet, in one of the most scurrilous campaigns against a judicial nominee I have ever witnessed, the partisan attack mills begin to churn out piles of distortions and half-truths about Judge Sotomayor right after the President picked her to be his nominee. They had their gunsights settled on whoever it might be.”).

⁹⁸ See *supra* notes 51–53 and accompanying text.

⁹⁹ *Roberts’s Confirmation Hearing*, *supra* note 48, at 56 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

would endorse the legitimacy of some partiality in the law, this constraint was also very real.¹⁰⁰

Third and finally, it is possible to detect a middle ground in these debates about the nature of the law itself. On the one hand, the indeterminacy of the law in some respects is hard to deny. The prevalence of 5-4 votes in many high-profile areas of constitutional law¹⁰¹ provides skepticism about a more formalist view of the law where objectively right answers exist, waiting to be discovered by judges who simply work hard enough.¹⁰² However, no one—not even Sotomayor—had the appetite to go totally in the other direction and claim that the law was wholly indeterminate and subject to political whim or contingency. To go in this direction would be to entertain the fear of partisanship discussed above, but even more fundamentally, undermine the aspiration of the rule of law as a stabilizing force worthy of our respect, and capable of binding a diverse polity together.¹⁰³ So what we are left with is a view of the law as somewhere in between—partly indeterminate, but determinate enough to be different from mere political will.

III. PARTY IDEOLOGIES AND JUDICIAL MODESTY

As evident in the preceding discussion of the Roberts and Sotomayor hearings, themes of generality and partiality recurred in Senate discussions about the judicial role. Both ideals informed competing perspectives on judicial impartiality, specifically with respect to how judges might fairly or impartially apply the law to discrete parties. And while it is unlikely that any of the speakers quoted in the preceding Part would have subscribed to an ideal of generality or partiality in totality, the former aligned more frequently with Republican Senators (and Chief Justice Roberts), while the latter more frequently aligned with Democratic Senators (and Justice Sotomayor).¹⁰⁴

From that initial observation, this Part addresses two related questions. First, what might account for this divergence between Democrats and Republicans on the

¹⁰⁰ See *supra* note 93 and accompanying text.

¹⁰¹ See *infra* Part IV.

¹⁰² This is, of course, hardly a new insight in the legal scholarly literature. See generally Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984). In discussing some of the core ideas of the Critical Legal Studies movement, Singer notes that “legal reasoning is indeterminate and contradictory.” *Id.* at 5–6. Singer goes on to say that the real purpose of legal theory is to “‘edify,’ that is, it should ‘help . . . readers, or society as a whole, break free from outworn vocabularies and attitudes, rather than . . . provide ‘grounding’ for the institutions and customs of the present.’” *Id.* at 8 (citing RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* xiii (1st ed. 1979)). See also Tushnet, *supra* note, 45, at 824–27 (expressing skepticism about the attractiveness and workability of various constitutional theories as a legitimate guide for judicial actions).

¹⁰³ *Sotomayor Confirmation Hearing*, *supra* note 78 (statement of Sen. Tom Coburn, Member, Senate Comm. on the Judiciary) (singling out the rule of law as “the glue that binds us [the United States] together”).

¹⁰⁴ See *supra* Part II.

nature of judicial impartiality? That is, what elements within the Democratic and Republican parties might predispose each to a distinctive view of the judicial role? Second, even if we see this partisan divergence in the Senate debates, it nevertheless leaves unanswered the distinct question concerning how such ideals are actually applied in adjudication. Do these notions of generality and partiality, as articulated in the Senate debates, appear as such in the constitutional rulings written by the Court?

In this Part, I will offer some tentative answers to these questions. In doing so, I will ultimately flesh out, in a preliminary fashion, a descriptive argument about certain Supreme Court behaviors in the contemporary context. In brief, Sections A and B below will locate the Democratic affinity for partiality and the Republican affinity for generality within both the coalitional structure and the ideological orientation of each party. However, as I will discuss in Section C, we should not necessarily expect these elements of party ideology to be perfectly transposed into judicial opinions. Rather, notwithstanding their points of ideological divergence, more liberal and more conservative Supreme Court justices occupy a shared institutional environment by virtue of their shared membership on the Court. As such, justices of different ideological persuasions must navigate a common political and institutional context that, at least since the beginning of the Roberts Court, has been marked by persistent *judicial uncertainty*. Thus, only after judicial notions of partiality or generality are altered through this shared context of judicial-institutional caution can we finally get a glimpse of how these divergent notions of judicial impartiality are actually applied in contemporary adjudication.¹⁰⁵

A. Party Logics: Democrats

My first claim is that the divergence between the two parties on judicial impartiality is strongly linked to the coalitional and ideological characteristics of each party. For the Democrats, their affinity for partiality perhaps lies within the very DNA of the party. At root, an endorsement of partiality entails a belief that American society possesses distinct constituencies and social classes, and that some of these constituencies and social classes are subject to particular hardships and challenges that are worthy of being recognized by governmental actors.¹⁰⁶ The origins of this belief within the Democratic Party go back to the Jacksonian

¹⁰⁵ My focus then is in explaining certain types of judicial behavior as a product of party ideology intersecting with judicial-institutional considerations. This argument is related, though distinct, from others who focus on the connection between the elected branches and the Court by seeking to explain why elected officials may, at times, wish to support more expansive forms of judicial authority. *See, e.g.*, STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER 67–68 (2011); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 22–25, 283–84 (2007).

¹⁰⁶ *See infra* notes 107–15 and accompanying text.

Democrats, who emphasized the social welfare and worthiness of laborers and agrarians, as opposed to the more repugnant and corrupt investor and financial classes.¹⁰⁷ This is what Jackson himself stated in the most memorable passage of his veto of the Second Bank of the United States:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.¹⁰⁸

The Jacksonians incorporated this segmented view of American society into a larger view of federal governmental *laissez-faire*. For them, federal governmental action was to be discouraged since any such actions were perceived to more likely favor the investor and financial classes. In contrast, a posture of federal governmental *laissez-faire* would work to the advantage of the laboring and agrarian class.¹⁰⁹ Still, a segmented view of American society and a corollary belief in the special solicitude due to certain classes—what we might call a “class political” perspective¹¹⁰—does not logically require a belief in governmental *laissez-faire*. Indeed, toward the end of the nineteenth century, Democratic Party ideology would—thanks to the influence of agrarian populists—fuse a class political perspective with a *demand* for federal government intervention to alleviate the particular hardship of certain constituencies.¹¹¹

¹⁰⁷ Chinn, *Political Parties*, *supra* note 88, at 399–400.

¹⁰⁸ Andrew Jackson, U.S. Pres., *Veto Message Regarding the Bank of the United States* (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp [<https://perma.cc/6QUG-9FJG>].

¹⁰⁹ Chinn, *Political Parties*, *supra* note 88, at 401.

¹¹⁰ Stuart Chinn, *The Ideology Behind Brown v. Board of Education: Political Parties and “Jurisprudential Bundling,”* 92 DENV. U.L. REV. 45, 52–58 (2014) [hereinafter Chinn, *Ideology Behind Brown*].

¹¹¹ *Id.* at 61.

Aspects of this populist view ultimately culminated in the ideology of the New Deal Democrats in the 1930s, with its focus on urban workers and agrarians, and its commitment to a federal social welfare state to alleviate the Depression Era hardships of these and other worthy constituencies against the predation of “economic royalists.”¹¹² In many respects, this basic ideology still orients the modern Democratic Party. The constituent parts of the Democratic Party coalition have changed with the gradual disappearance of Southern Democrats from the Party through the course of the twentieth century (who have become Republicans) and the increased focus within the Party in recent years on social groups defined by status characteristics such as race, gender, and sexual orientation.¹¹³ Still, the class political perspective remains as central as ever.¹¹⁴ Accordingly, commentators have often characterized the modern Democratic Party as more a big-tent organization constituted by a diversity of social and interest groups and held together by a relatively thin ideology focused on significant policy positions.¹¹⁵ Unsurprisingly, such a party would be inclined to an ideal of partiality in the judicial application of the law.

Beyond its history and its ideology, the Democratic Party’s affinity for partiality is also evident in some of the key jurisprudential themes articulated by Democratic-appointed justices and progressive-leaning legal theorists over the twentieth century. To highlight a few brief examples: *Carolene Products*’s Footnote Four stands out as one of the most prominent statements in constitutional doctrine in defense of the ideal of partiality. Chief Justice Stone—himself an FDR appointee to the Chief Justice position—hinted in Footnote Four’s memorable third paragraph that heightened judicial scrutiny could be appropriate for laws that targeted “religious,” “national,” or “racial” minorities, or for laws that encompassed “prejudice against discrete and insular minorities.”¹¹⁶

A commitment to partiality was also front and center in the Warren Court’s assault on racial apartheid in the South in the middle of the twentieth century—including, most prominently, *Brown v. Board of Education*’s prohibition of segregation in public schools.¹¹⁷ And the significance of partiality was likewise

¹¹² WILLIAM E. LEUCHTENBURG, *FRANKLIN ROOSEVELT AND THE NEW DEAL, 1932-1940*, at 183–184, 195 (1963); 3 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL: 1935–1936* 584 (2003).

¹¹³ See, e.g., DEMOCRATIC PARTY, 2016 DEMOCRATIC PARTY PLATFORM 16–17 (2016) (including guaranteeing “civil rights,” “women’s rights,” and “Lesbian, Gay, Bisexual, and Transgender rights” as part of the party’s platform).

¹¹⁴ Chinn, *Political Parties*, *supra* note 88, at 416–17.

¹¹⁵ See, e.g., MATT GROSSMAN & DAVID A. HOPKINS, *ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS* 3, 299–300 (2016); WILLIAM G. MAYER, *THE DIVIDED DEMOCRATS: IDEOLOGICAL UNITY, PARTY REFORM, AND PRESIDENTIAL ELECTIONS* 8, 73–74 (1996); Jo Freeman, *The Political Culture of the Democratic and Republican Parties*, 101 *POL. SCI. Q.* 327, 329, 351 (1986).

¹¹⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

¹¹⁷ 347 U.S. 483 (1954).

evident in much of the legal scholarship inspired by the Warren Court's work, such as John Hart Ely's theory of representation-reinforcement¹¹⁸ and Owen Fiss's articulation of an anti-subordination or "group disadvantaging" principle in constitutional equal protection.¹¹⁹

Finally, one additional point should be noted about the Democratic Party's affinity for partiality in more recent years. As already indicated in the preceding Part, the Democratic endorsement of partiality has often been almost tentative. The most visible illustration of this in the prior Part was Sotomayor's apparent need to distance herself from the clear implication of her "wise Latina" speech, and to endorse generality-friendly platitudes in her confirmation hearings.¹²⁰

Sotomayor's hesitation in offering a full-throated defense of partiality reveals much about which values are dominant in public discourse. It also reveals the sense of caution a Supreme Court nominee might acutely feel about wading into topics perceived as controversial. But read more expansively, Sotomayor's comments might be seen to align with the observation of others that at the present time, the Democratic Party—and by implication, its preferred judicial appointees—lack a fully-formed coherent ideology about partiality.

Perhaps ironically, then-professor and now-Justice Elena Kagan once noted exactly this point in 1995, in the aftermath of the Ginsburg and Breyer confirmations to the Supreme Court: "Herein lies one of the mysteries of modern confirmation politics: given that the Republican Party has an ambitious judicial agenda and the Democratic Party has next to none, why is the former labeled the party of judicial restraint and the latter the party of judicial activism?"¹²¹

More recently, Robert Post and Reva Siegel said this about Democratic or progressive constitutional narratives:

Surprisingly, in recent years, it has been liberals, rather than conservatives, who have been unable to find ways to connect constitutional vision to living political values. In recent confirmation hearings, for example, liberals have defended the constitutional values of the Warren Court by invoking *stare decisis* and by emphasizing the importance of protecting constitutional law from the taint of politics . . .

It is telling that liberals invoke the authority of judges and cases, while conservatives invoke the Constitution itself. To advance their constitutional vision, progressives emphasize the importance of respecting

¹¹⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102 (1980).

¹¹⁹ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 107–08 (1976).

¹²⁰ See *supra* notes 90–92 and accompanying text.

¹²¹ Elena Kagan, *Confirmation Messes, Old and New*, 62 *U. CHI. L. REV.* 919, 929 n.19 (1995) (review of STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

precedent and assert the professional autonomy of judges. They have been maneuvered into upholding the very detachment of law from politics that is the central premise of the jurisprudence of originalism thereby contradicting liberalism's own insight about the importance of a living constitutionalism.¹²²

This tentative embrace of partiality also demands an explanation, and I think recent Democratic Party politics related to the courts contains a partial answer. After the Warren Court era and beginning with the Burger Court, Democrats have largely enjoyed the benefit of having key precedents align with their party values such as the right to an abortion or affirmative action.¹²³ At the same time, such issues have remained live legal controversies over the past several decades.

Numbers tell some of the story. In his 1957 article, Robert Dahl stated the following about trends in Supreme Court appointments up to that point in history:

[o]ver the whole history of the Court, on the average one new justice has been appointed every twenty-two months. Thus a president can expect to appoint about two new justices during one term of office; and if this were not enough to tip the balance on a normally divided Court, he is almost certain to succeed in two terms.¹²⁴

Recent history has not aligned with these averages. Presidents Clinton, W. Bush, and Obama were all two-term presidents, and each succeeded in making only two appointments to the Supreme Court—thus hardly doing much to shift the balance of the Court.¹²⁵ However, going a little further back into history, there was a sequence of Republican presidents who had significantly better luck with Supreme Court appointments. Perhaps most conspicuously, Nixon was able to make four appointments to the Court in the span of about five years, thus ushering in the transition from the Warren to the Burger Courts.¹²⁶ Ford made one more appointment—Justice Stevens—upon ascending to the presidency after

¹²² Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 571–72 (2006).

¹²³ See generally *Fisher v. U. Tex.*, 136 S. Ct. 2198 (2016) (addressing affirmative action); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming the essential holdings in *Roe v. Wade*, 410 U.S. 113 (1973), and adopting an undue burden test for determining whether State regulations had the purpose or effect of placing substantial obstacles in the path of a woman seeking an abortion before viability).

¹²⁴ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279, 284 (1957).

¹²⁵ See United States Senate, *Supreme Court Nominations: present-1789*, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [<https://perma.cc/A8BW-JTDT>] (last visited June 30, 2019).

¹²⁶ *Id.*

Watergate.¹²⁷ Following Carter's presidency, which yielded no Supreme Court appointments, Reagan added three new justices while also elevating Rehnquist to Chief Justice.¹²⁸ Finally, George H.W. Bush, in the span of one term, added two new justices—Souter and Thomas.¹²⁹

Focusing on the party identity of the president nominating a Supreme Court justice has obvious limitations as a means of trying to gain a sense about the ideological leanings of a Court—particularly since some of the justices appointed by Republican presidents during these years included some notable and regular defenders of liberal positions such as Justices Blackmun, Stevens, and Souter.¹³⁰ But the general point is that if one is inclined to look at the Supreme Court's ideological composition from a baseline of political party affiliation, Democratic-appointed justices have been able to keep some constitutional issues close—in terms of vote counts—in the past few decades solely because of support from the three justices noted above, and swing-voting Republican-appointed justices such as Powell, O'Connor, and Kennedy.¹³¹ Given the available votes on the Court in recent decades, it is no surprise that the past several decades have not seen the flowering of an aggressive and full-throated liberal jurisprudence. The votes have simply not been there. And even with respect to liberal Democratic justices, such as Ginsburg or Breyer, present on the Supreme Court during these years, they have not been as strongly liberal on issues of civil rights as earlier justices such as an Earl Warren or a William Brennan.¹³²

Given this context, it is perhaps not surprising that the Democratic Party's membership and leadership have either felt less compelled or less empowered to put forth a more empathic and principled defense of partiality (much less a more expansive liberal legal ideology). With little room to maneuver, and with a number of key precedents still on the books like *Roe v. Wade*¹³³ that require nothing more from Democrats than successful defense, perhaps it is not so surprising that the Party's approach has been one of incrementalism and caution.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Lee Epstein et al., *The U.S. Supreme Court Justices Database*, WASH. U. ST. LOUIS, <http://epstein.wustl.edu/research/justicesdata.html> [<https://perma.cc/TD2U-2D7P>] (last updated Feb. 11, 2019).

¹³¹ Ben Zimmer, *Tracing the Meaning of the "Swing Vote" as Justice Kennedy Retires*, WALL STREET JOURNAL (July 6, 2018), <https://www.wsj.com/articles/tracing-the-meaning-of-swing-vote-as-justice-kennedy-retires-1530883844> [<https://perma.cc/3RDU-D8XT>] (identifying Justices Powell, O'Connor, and Kennedy as successive "swing voters" that "held sway in closely contested 5-4 decisions").

¹³² One system of scoring the ideology of Supreme Court justices on a liberal-conservative spectrum on civil rights issues was created by Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson, and Jason Roberts. See Epstein et al., *supra* note 130.

¹³³ 410 U.S. 113 (1973).

B. Party Logics: Republicans

By way of contrast, consider the Republican Party's affinity for generality, as suggested by the discussion in Part II. At a basic level, Republican Party ideology has aligned with generality principles since the Party's roots in the Whig Party in the middle of the nineteenth century. The Whigs, like the Republican Party that later replaced it, were centered on an ideal of a relatively more class-less society, where in theory all held the equal opportunity to rise (or fall) on the basis of their talent and hard work.¹³⁴ According to this view, segmentations in American society were—if anything—only temporary divisions.¹³⁵ The Republican Party elevated such notions to be its organizing principle of free labor; hence, its opposition to the aristocracy of Southern slaveholders and slavery itself stemmed from a view of those constituencies as antithetical to an ideal of a relatively class-less, mobile, and fluid American society.¹³⁶ Such notions likewise help explain the Republican Party's roots in both the working-class *and* the wealthier classes, since the former could, again in theory, aspire to be the latter within a generation.¹³⁷ These notions subsequently informed the Republican Party's core beliefs behind key legislation such as the Civil Rights Act of 1866 and the Fourteenth Amendment, which enshrined, first statutorily and then constitutionally, a general principle of “equality before the law.”¹³⁸

Beyond its aversion to segmentation and class politics, there is an element of ideological fundamentalism in contemporary Republican discussions of the law as well, evident in the preceding Part. The fundamentalism likely has its roots, at least in part, in more recent political and legal history. First, if the modern Democratic Party is generally viewed as more pluralistic and focused on particular issues and groups without an overriding philosophy, Republicans have generally been perceived as more socially homogenous and ideologically cohesive.¹³⁹ No doubt a crucial reason for this has been, at least in part, the prominent place of “movement

¹³⁴ See, e.g., Sean Wilnetz, *Review: Whigs and Bankers*, 8 REV. IN AM. HIST. at 344–50 (1980) (reviewing a larger work describing the Whig party as a group that “remained certain that America was and would remain largely a classless, republican utopia”).

¹³⁵ Chinn, *Political Parties*, *supra* note 88, at 413, 442; Chinn, *Ideology Behind Brown*, *supra* note 110, at 53.

¹³⁶ ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 15–17, 20 (1995).

¹³⁷ Chinn, *Political Parties*, *supra* note 88, at 442; Chinn, *Ideology Behind Brown*, *supra* note 110, at 53.

¹³⁸ ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* 243–47, 256–58 (1988).

¹³⁹ GROSSMAN & HOPKINS, *supra* note 115, at 3, 299–300; Freeman, *supra* note 115, at 349–51.

conservatism” in the Republican Party since at least Reagan’s election in 1980.¹⁴⁰ The end result is a party oriented more toward well-defined markers of ideological commonality—one of which is the Party’s affinity for generality in the application of the law.¹⁴¹

Further, the actions of the Warren Court and its legacy have undoubtedly shaped the contemporary Republican Party as much as the contemporary Democratic Party.¹⁴² As the party situated on the conservative end of legal and policy disputes surrounding the rights of groups defined by race, gender, sexual orientation, and economic class, it is not surprising that Republican senators and a Republican nominee such as John Roberts would be more skeptical of ideals that demand special judicial solicitude for these groups. Further, the Republican Party’s long-running antipathy toward the Warren Court and its remaining precedents¹⁴³ likely played a role during the Roberts nomination in stoking this ideological zeal: indeed, the more emphatic ideological orientation of Republicans in promoting the ideal of generality might be understood as the work of the zealous reformer seeking to rally enough support to undo an unjust and illegitimate status quo.

Finally, although the topic of originalism garnered more attention in subsequent confirmation hearings and debates, it did get some discussion in the Roberts and Sotomayor hearings.¹⁴⁴ The originalist methodology, also rooted in Republican

¹⁴⁰ MARY C. BRENNAN, *TURNING RIGHT IN THE SIXTIES: THE CONSERVATIVE CAPTURE OF THE GOP* 1–5 (1995); HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 239–41, 273–74 (2014).

¹⁴¹ As Richardson describes movement conservatives, “[h]elping their cause was that they were so convinced they were right they refused to budge on anything. As they held fast, they forced the rest of America to leave the middle of the political spectrum and move toward them.” RICHARDSON, *supra* note 140, at 274.

¹⁴² See *infra* notes 143–48 and accompanying text.

¹⁴³ See Graber, *infra* note 158.

¹⁴⁴ Originalism received very little attention in the Sotomayor hearings. However, Republican Senator DeMint stated there: “That is how precedent has worked in our court system. Every time the Supreme Court bases a decision on a precedent rather than on the underlying Constitution, the original intent of the Founders is lost and becomes distorted.” 155 CONG. REC. 20827 (2009). In the Roberts nomination, Roberts resisted applying the “originalist” label to himself. See *Roberts’s Confirmation Hearing*, *supra* note 48, at 158 (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) (“Like most people, I resist the labels. I have told people when pressed that I prefer to be known as a modest judge, and to me that means . . . an appreciation that the role of the judge is limited, that a judge is to decide the cases before them, they’re not to legislate, they’re not to execute the laws.”). This point was subsequently mentioned in the debates a number of times. See, e.g., 151 CONG. REC. 21193 (2005) (statement of Sen. Specter); 151 CONG. REC. 21393 (2005) (statement of Sen. Wyden); 151 CONG. REC. 21409 (2005) (statement of Sen. Sessions); 151 CONG. REC. 21640 (2005) (statement of Sen. Kohl).

dissatisfaction with the work of the Warren Court,¹⁴⁵ exemplifies and embodies (at least in some forms) many of the themes encompassed within the comments supportive of, or voiced by, Roberts—a belief in the objectivity of the law;¹⁴⁶ a belief that judicial discretion can be limited; and, related to the preceding point, a belief that judicial impartiality is closely tethered to judicial modesty.¹⁴⁷ Likely because of the influence of movement conservatism, the Republican Party’s endorsement of originalism carries ideological confidence that is distinct from contemporary Democrats.¹⁴⁸ As noted above, from Democratic appointees we see an approach that is both more cautious and more pragmatic.

C. *Judicial-Institutional Logics*

Notwithstanding the various historical, institutional, and legal factors that have led Democrats to diverge from Republicans in their respective notions of judicial impartiality, and notwithstanding this divergence between the Democratic and Republican Supreme Court nominees discussed here, there is also a point of convergence for Supreme Court justices of both parties. Even if they may otherwise depart on many points, every member of the Court faces certain common broader judicial-institutional constraints.

The two factors that are worthy of emphasis here speak to constraints internal and external to the Court. First, the current Court, like the Rehnquist Court that

¹⁴⁵ Morton J. Horwitz, *Foreword: The Constitution of Change—Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30, 65 (1993); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601 (2004).

¹⁴⁶ Horwitz, *supra* note 145, at 99; Edwin Meese III, *Our Constitution’s Design: The Implications for Its Interpretation*, 70 MARQ. L. REV. 381, 382–83 (1987).

¹⁴⁷ Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 29 (1985); Whittington, *supra* note 145, at 602. Notably, however, in the academic literature the evolution of originalist thought has not surprisingly led to a number of distinct approaches or distinct originalisms. See Mitchell N. Bernman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8–16 (2009); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

¹⁴⁸ As Fishkin and Pozen note:

[D]ifferences in the constitutional philosophies of liberals and conservatives suggest different normative orientations toward constitutional hardball. We will return to this issue below. Among other potentially relevant differences, stronger commitments on the Republican side to the theory of originalism and the idea of a “lost” Constitution are apt to yield considerably less deference toward the constitutional status quo and the set of unwritten norms that have evolved to facilitate moderation and cooperation in government.

Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 942 (2018).

preceded it, has been marked by a perpetual state of close division.¹⁴⁹ Particularly in the area of equal protection, which speaks to the doctrinal focus in the next Part, sharply split votes are rather common.¹⁵⁰ Further, given the swing-voting status of Justices Lewis Powell, Sandra Day O'Connor, and Anthony Kennedy in this doctrinal area, they have had outsized influence in the major rulings during this period (though the appointment of Justice Kavanaugh, of course, is likely to shift the Court rightward).¹⁵¹

The second institutional constraint worthy of emphasis is the intensely competitive and polarizing nature of electoral politics outside the Court. As an indicator of the intensely competitive nature of current politics, divided government has been the dominant condition of the federal government since Richard Nixon's election in 1968.¹⁵² In the 26 Congresses elected from 1968 to 2018, 19 have been part of divided governments, while only 7 have been part of unified governments.¹⁵³ By comparison, in the 26 Congresses elected between 1914 through 1966, the numbers are almost exactly reversed: 20-unified and 6-divided.¹⁵⁴ In short, like the Court itself, the elected branches of the federal government have been subject to a persistent state of uncertainty, with neither party able to gain decisive control for any sustained period of time. Furthermore, this state of persistent, divided government has been marked by heightened political polarization and increased ideological homogeneity within each party.¹⁵⁵ Especially in comparison to the extended influence of the New Deal Democratic coalition in the middle portion of the twentieth century, it is difficult to identify any analogous dominance by either

¹⁴⁹ See Zimmer, *supra* note 131 (identifying three successive generations of "swing voters" that have pushed the court to 5-4 decisions).

¹⁵⁰ See *infra* Part IV.

¹⁵¹ See, e.g., *Regents of the University of California v. Fisher II*, 136 S.Ct. 2198 (2016) (4-3 vote, with majority opinion authored by Kennedy); *Fisher v. University of Texas (Fisher I)*, 133 S.Ct. 2411 (2013); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (5-4 vote; majority opinion by Roberts but significant concurrence provided by Kennedy); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (O'Connor authoring the majority opinion with a 5-4 vote); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (O'Connor authoring the majority opinion with a 5-4 vote); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (O'Connor authoring the majority opinion; five votes came together for the establishment of strict scrutiny for non-federal affirmative action programs); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 448, 265 (1978) (no single majority opinion, with Justice Powell situated as the swing vote between two voting blocs).

¹⁵² For a visual compilation of this widely available public information, see *Divided Government in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Divided_government_in_the_United_States [<https://perma.cc/C8X6-G877>] (last visited July 1, 2019).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* 1-18 (2018); SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* 7-8 (2008).

party at the federal governmental level in recent decades, where clear governing principles, as articulated by a dominant governing coalition, are present.¹⁵⁶

These two electoral dynamics—intense partisan competition and polarization—are plausibly related to one another. As Frances Lee notes about partisan competition in Congress, an intensely competitive environment heightens the impulses for partisan conflict.¹⁵⁷ The realistic and tantalizing possibility for either party to actually capture control of Congress—and subsequently pass their preferred legislation—drives both parties to dig in and focus on securing electoral victory.¹⁵⁸ Left by the wayside is any inclination to bipartisanship, which may bring about more concrete and timely legislative progress, but would do little to help either party advance its cause toward institutional control.¹⁵⁹ Lee contrasts the current intensely competitive context with the long era of Democratic dominance of Congress from the New Deal through 1980. During the latter period, she suggests that the lessening of partisan competition in that period may have contributed to greater congressional productivity.¹⁶⁰

The long-running delicate balance of votes on the Court, combined with a persistent state of intensely competitive electoral politics at the federal level, create a common institutional context of *judicial uncertainty* in some high-profile areas of constitutional law. That is, common to both Democratic and Republican justices in the contemporary era is that within these doctrinal areas, judicial majorities are narrow and thus, unstable. Further, while key jurisprudential markers set by the Court may be relatively free from persistent, direct congressional or presidential challenge given the fluid and competitive nature of electoral politics, this same electoral context also provides a weak foundation for long-term jurisprudential developments as well: if neither more liberal or more conservative of justices have to worry about a reliable and persistent enemy in the elected branches, neither group can reliably count on the elected branches for support too. Since the chances of either party attaining long-term dominance akin to the New Deal Democratic coalition seems unlikely in the foreseeable future, this condition of uncertainty seems likely to persist for judicial actors; justices of both parties on the Court will not be able to confidently rely upon a certain set of electoral conditions to exist.

Thus, what justices face today is a common context of uncertainty that is decidedly not conducive to fleshing out stable, orderly, and rational developments in controversial areas of the law. Where judicial majorities can be made or undone by the idiosyncrasies of a swing-voting justice or by the unpredictable timing of a justice's retirement or death, and where there is no real tethering of the Court to a

¹⁵⁶ See KAREN ORREN & STEPHEN SKOWRONEK, *THE POLICY STATE: AN AMERICAN PREDICAMENT* 6–7 (2017).

¹⁵⁷ FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 4–12 (2016).

¹⁵⁸ See Mark A. Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 *IND. L. REV.* 141–44 (2016).

¹⁵⁹ LEE, *supra* note 157, at 4–12.

¹⁶⁰ *Id.* at 3–4, 198, 207–08.

dominant governing coalition,¹⁶¹ justices must reckon with an especially heightened degree of uncertainty and unsteadiness about the possibilities and pathways for future legal developments.

This leads to a second claim: to understand how Democratic and Republican notions of judicial impartiality are articulated and applied in contemporary constitutional cases; one has to be attentive to the twin logics of the party and the judiciary. It is the intersection of these logics that explain this facet of judicial behavior. Stated in brief, for the Democrats, their already modest jurisprudential agenda is even further scaled down in a context of judicial uncertainty.¹⁶² Democratic or liberal justices may defend core party values in their opinions and votes, along with key precedents from the liberal high-point of the Warren Court era.¹⁶³ But for these justices, legal arguments center on technicalities and narrower precedent-based arguments that betray a cautious, pragmatic spirit.¹⁶⁴

In contrast to central rulings from the Warren Court era like *Brown*,¹⁶⁵ or *Griswold*¹⁶⁶ or even *Roe*¹⁶⁷ during the Burger Court, where the rulings ultimately set a doctrinal agenda that would carry forward for decades, contemporary race and equal protection opinions are marked by a different orientation.¹⁶⁸ Indeed, it is a point of irony that perhaps the most theoretically deep and abstract writing we have seen from the Court in recent years, in service of liberal outcomes, has been from Justice Kennedy—the Court’s swing vote in a series of decidedly incremental and modest rulings on gay rights from *Romer*¹⁶⁹ through *Obergefell*.¹⁷⁰

In contrast, the context of judicial uncertainty shapes the behavior of Republican justices differently. Given their orientation toward generality—and given their more ambitious ideological agenda—this context prompts a scaling down of principle to slightly different effect than what appears with the Democratic justices. For Republican justices, assertions of broad principle with potentially expansive reach are not uncommon in the contemporary context.¹⁷¹ However, such statements or assertions—at least the ones that reside in majority opinions—rarely challenge core doctrinal structures or threaten to undo core doctrinal principles developed in preceding decades.¹⁷² The opinions of Republican justices then are, unlike those of Democratic justices, more emphatic and ambitious in their

¹⁶¹ See Graber, *supra* note 158, at 171–74.

¹⁶² See *supra* notes 158–60 and accompanying text.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁶⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁶⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶⁸ See *infra* Part IV.

¹⁶⁹ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁷⁰ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

¹⁷¹ See *infra* Part IV (examining how the opinions of Republican justices differ from those of Democratic justices).

¹⁷² See *Id.*

deployment of constitutional principle.¹⁷³ However, similar to the opinions of Democratic justices, the effects or consequences of these opinions by Republican justices are contained and limited in their potential scope (even if they still carry quite significant consequences for the controversies and litigants in question).¹⁷⁴ If the progressive or liberal critique of the Court's liberal justices is that they lack vision or ambition, the complaint that conservatives might state about the Court's Republican justices is somewhat different: that even if they possess ideological ambition, they fail to live up to it.¹⁷⁵

IV. AN EXAMINATION OF JUDICIAL IMPARTIALITY IN THE ROBERTS COURT'S OPINIONS ON RACE AND EQUAL PROTECTION

With the preceding points in mind, let me now offer some tentative illustration of them by discussing perhaps the four most significant rulings so far on race and equal protection by the Roberts Court: its decision on voluntary school integration plans in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁷⁶ its most recent statements on higher education affirmative action admissions in *Fisher v. Texas I*¹⁷⁷ and *Fisher v. Texas II*,¹⁷⁸ and its upholding of a Michigan state constitutional amendment banning affirmative action in a wide range of state governmental actions in *Schuette v. BAMN*.¹⁷⁹

¹⁷³ *See Id.*

¹⁷⁴ In 2003, Mark Tushnet described the then-Rehnquist Court's jurisprudence as reflecting a "chasten[ing] of constitutional aspirations." MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 34–35, 69 (2003). This idea still has at least some relevance, I would argue, for the present day. Relatedly, in reviewing Cass Sunstein's normative defense of "judicial minimalism," Jeffrey Rosen said the following about the Rehnquist Court in 1999: "No other scholar has captured the temper of the current majority as neatly as Sunstein, nor has anyone else attempted to provide theoretical justification for what other observers took to be ad-hockery or improvisation." Jeffrey Rosen, *The Age of Mixed Results*, *THE NEW REPUBLIC* (June 27, 1999), <https://newrepublic.com/article/74083/the-age-mixed-results> [<https://perma.cc/96X6-WLCQ>] (reviewing CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999)).

¹⁷⁵ A notable example of this, though outside my focus on race and equal protection, has been the intense disappointment voiced by conservatives over the role of Justice Roberts in upholding the legality of Obamacare. Josh Gerstein, *Conservatives Steamed at Chief Justice Roberts' Betrayal*, *POLITICO* (June 25, 2015), <https://www.politico.com/story/2015/06/gop-conservatives-angry-supreme-court-chief-john-roberts-obamacare-119431> [<https://perma.cc/79UJ-XE7Y>].

¹⁷⁶ 551 U.S. 701 (2007).

¹⁷⁷ 133 S. Ct. 2411 (2013).

¹⁷⁸ 136 S. Ct. 2198 (2016).

¹⁷⁹ 134 S. Ct. 1623 (2014).

A. Judicial Arguments in Support of Generality

Roberts’s opinion for the Court in *Parents Involved* stayed close to Republican Party orthodoxy in endorsing a principle of color-blindness while striking down the race-conscious student assignment plans at issue there.¹⁸⁰ This principle of color-blindness (or the anti-classification principle) views both invidious and benign racial classifications in the law as deeply problematic.¹⁸¹ As such, the anti-classification principle demands that governmental actors, including judicial actors, provide equal treatment to individuals of different races—thereby speaking to a principle of generality.

Thus, in rejecting racial balancing in school composition as a compelling or even legitimate governmental purpose,¹⁸² Roberts stated:

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” Allowing racial balancing as a compelling end in itself would “effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.”¹⁸³

And then, in referencing *Brown v. Board of Education* itself, Roberts offered perhaps the most memorable lines of the *Parents Involved* opinion:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.¹⁸⁴

¹⁸⁰ *Parents Involved*, 551 U.S. at 745–46, 730 n. 17.

¹⁸¹ CHINN, *supra* note 37, at 153–54.

¹⁸² *Parents Involved*, 551 U.S. at 730, 732.

¹⁸³ *Id.* at 730 (internal citations omitted).

¹⁸⁴ *Id.* at 747–48.

The same point was made even more emphatically in Justice Thomas's concurrence in that case. Thomas acknowledged that race-conscious remedies could be appropriate in the narrow circumstances of remedying discrete, formalized acts of past racial discrimination.¹⁸⁵ Beyond this narrow context, Thomas aligned with generality principles in demanding that governmental actors generally refrain from engaging in race-conscious actions.¹⁸⁶ Indeed, Thomas's categorical endorsement of a "colorblind Constitution"—and by implication, colorblind judicial impartiality—led him to an extended commentary on the equivalence of race-conscious benign governmental action and Jim Crow segregation.¹⁸⁷

Similar reflections of Republican Party orthodoxy were aired in Thomas's concurrence in *Fisher I*, where he discussed the University of Texas's affirmative action admissions program and also repeated the comparison to Jim Crow segregation.¹⁸⁸ Taking the logic of the generality principle to its logical jurisprudential conclusion, Thomas, writing only for himself, further stated his general skepticism of diversity-based justifications for affirmative action.¹⁸⁹ He stated that he would overrule the Court's prior acceptance of race-conscious admissions in higher education in *Grutter v. Bollinger*.¹⁹⁰ In a similar vein, though he did not go so far as to equate affirmative action to Jim Crow segregation, Alito's opinion for himself, Roberts, and Thomas in *Fisher II* emphatically endorsed principles of color-blindness and generality.¹⁹¹

Finally, in *Schuetz v. BAMN*, central in that case were the "political-process" precedents of *Reitman v. Mulkey*,¹⁹² *Hunter v. Erikson*,¹⁹³ and *Washington v. Seattle School District No. 1*¹⁹⁴ which potentially supported the judiciary providing special solicitude for racial minorities facing certain adverse governmental actions. In endorsing a principle of generality, Justice Scalia—also writing for Thomas—argued for overruling *Hunter* and *Seattle*.¹⁹⁵ Scalia further stated the following, in line with the preceding points:

In the years since *Seattle*, we have repeatedly rejected "a reading of the guarantee of equal protection under which the level of scrutiny varies

¹⁸⁵ *Id.* at 756–57, 760 (Thomas, J., concurring).

¹⁸⁶ *See id.* at 759.

¹⁸⁷ *Id.* at 772–82.

¹⁸⁸ *Fisher v. U. of Tex. (Fisher I)*, 133 S.Ct. 2411, 2427–30 (2013) (Thomas, J., concurring). These comments expanded upon an idea that Thomas pressed more briefly in his dissent in *Grutter v. Bollinger*, 539 U.S. 306, 365–66 (2003) (Thomas, J., dissenting).

¹⁸⁹ *Fisher I*, 133 S.Ct. at 2423–28.

¹⁹⁰ *Id.* at 2421–223 (2013) (Thomas, J., concurring) (discussing *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

¹⁹¹ 136 S. Ct. 2198, 2220–22 (2016) (Alito, J., dissenting).

¹⁹² 387 U.S. 369, 380–381 (1967).

¹⁹³ 393 U.S. 385, 392–393 (1969).

¹⁹⁴ 458 U.S. 457, 484–487 (1982).

¹⁹⁵ *Schuetz v. BAMN*, 134 S. Ct. 1623, 1640–47 (2014) (Scalia, J., concurring).

according to the ability of different groups to defend their interests in the representative process.” Meant to obliterate rather than endorse the practice of racial classifications, the Fourteenth Amendment’s guarantees “obtai[n] with equal force regardless of ‘the race of those burdened or benefitted.’” The Equal Protection Clause “cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection it is not equal.”¹⁹⁶

Still, one would be mistaken if they concluded that the most consequential rulings in these cases were mostly constituted by the arguments found in Thomas’s concurrences in *Fisher I* and *Parents Involved*. In Roberts’s opinion for the Court in *Parents Involved*, his first extended argument centered on subjecting the enrollment plans in question to the Court’s well-established strict scrutiny analysis.¹⁹⁷ This underscores the point that on the whole, the endorsement of generality principles by these conservative-leaning justices has been moderated by a felt need—against a background of judicial uncertainty—to anchor these arguments in established precedents and doctrinal technicality. In this vein, Roberts was clear in his *Parents Involved* opinion in conceding the constitutionality of *Grutter* and the latter’s endorsement of race-conscious admissions decisions in higher education.¹⁹⁸ Similarly, in Alito’s dissent in *Fisher II* (writing also for Roberts and Thomas), his endorsement of generality was based on a largely technical doctrinal critique of the University of Texas affirmative action plan, and how it failed the narrow tailoring requirement of strict scrutiny.¹⁹⁹ And even in reaching this conclusion, Alito conceded an exception to a principle of strict color-blindness in allowing that governmental actors might pursue benign race-conscious measures if done so without the use of explicit racial classifications.²⁰⁰

Likewise, in Kennedy’s opinion for the Court in *Schuetz* (in which Roberts and Alito joined his opinion), his upholding of the Michigan state constitutional amendment at issue there was considerably more cautious than Scalia’s concurring opinion. Kennedy began by stating that there was no question in the present case about the constitutionality of voluntarily adopted race-conscious affirmative action in higher education, an issue that had already been settled in *Grutter*.²⁰¹ The Court’s focus was strictly on the Michigan state constitutional amendment prohibiting state and other governmental entities from employing race-based preferences, and thus its analysis centered on the political-process precedents in ultimately upholding the amendment, and in endorsing generality principles.²⁰²

¹⁹⁶ *Id.* at 1644 (citations omitted).

¹⁹⁷ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–35 (2007).

¹⁹⁸ *Id.* at 724–25.

¹⁹⁹ 136 S. Ct. 2198, 2226–28, 2236–38, 2242–43 (2016) (Alito, J., dissenting).

²⁰⁰ *Id.* at 2242.

²⁰¹ *Schuetz*, 134 S.Ct. 1623, 1630 (2014).

²⁰² *Id.* at 1628–29; 1631–1636.

Perhaps the best illustration of how Republican Party principles have been moderated within these cases was Justice Kennedy's concurrence in *Parents Involved*, where given his partial joining of Roberts's opinion and given the sharp split in votes between the other eight justices, portions of Kennedy's opinion could be read as the effective holding in that case.

Befitting his role as the swing-voting justice on race and equal protection cases during this period, Kennedy aligned with the conservative bloc in endorsing the established doctrinal framework that embodied the Republican Party ideal of generality, and that reflected skepticism of benign racial classifications.²⁰³ Furthermore, in endorsing the Court's well-established distinction between de jure and de facto segregation, Kennedy clearly had no appetite for unsettling the Court's long-running aversion to viewing racial balancing as a compelling or even legitimate governmental purpose, absent discrete and formalized past racial discrimination.²⁰⁴

And yet, befitting a spirit of moderation, Kennedy was also clear in finding a limited degree of partiality to be constitutional and appropriate for governmental actors and judicial actors to consider. In particular, Kennedy departed from the four votes in the conservative bloc by giving explicit recognition to the legitimacy of race-conscious governmental action that stopped short of explicit racial classifying:

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.²⁰⁵

This view, when joined with the four votes on the liberal bloc, suggests that partiality remained an appropriate element within equal protection jurisprudence and within the judicial approach to evaluating race-conscious governmental actions.

²⁰³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 796–98 (2007) (Kennedy J., concurring).

²⁰⁴ *Id.* at 793–96.

²⁰⁵ *Id.* at 787–88; *see also id.* at 788–90, 782–83.

B. Judicial Arguments in Support of Partiality

This cautious approach from Kennedy in *Parents Involved* was likewise present in his rulings for the Court in *Fisher I* and *Fisher II*. In *Fisher I*, Kennedy was careful to clarify that *Grutter*'s upholding of race-based higher education admissions was not in question.²⁰⁶ The issue in front of the Court was instead a particular question surrounding the constitutionality of the race-conscious admission plans at the University of Texas²⁰⁷ and concerned whether the narrow tailoring prong of strict scrutiny had been satisfied by one of those plans.²⁰⁸ To the latter question, Kennedy ultimately offered a fact-specific and narrow "yes."²⁰⁹ Ginsburg's dissent in *Fisher I* repeats a similar view, perhaps a little more emphatically, in which she stuck closely to precedent in defending race-consciousness in higher education admissions.²¹⁰

More expansively, in *Parents Involved*, Justice Breyer set forth a 74-page dissent—joined by Stevens, Souter, and Ginsburg—that took direct aim at Roberts's opinion for the Court.²¹¹ Unsurprisingly, Breyer reached a different conclusion in upholding the student assignment plans at issue there. But in keeping with the preceding Part, what Breyer offered was something quite a bit less than an alternative constitutional vision. Sticking closely to the Democratic Party's orientation to cautious legal pragmatism, what he offered instead was a mix of technical doctrinal argument and policy-driven pragmatism. To be sure, one might say that these are perhaps characteristics peculiar to Breyer and his jurisprudential approach. But one might just as easily say that the elevation of someone like Breyer to the Court, with such a jurisprudential approach, says something about contemporary party and judicial dynamics as well.

Central to Breyer's opinion was a reliance on precedent. In particular, he focused on the Court's rulings on desegregation soon after *Brown v. Board of Education* that were the high chief water-mark of federal judicial intervention on school desegregation. Breyer quoted Chief Justice Burger at length in the latter's opinion for the Court in *Swann*, in support of the use of race-conscious governmental actions:

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. Because of its importance, I shall repeat what this Court said about the matter in *Swann*. Chief Justice Burger, on behalf of a unanimous Court in a case of exceptional importance, wrote:

²⁰⁶ *Fisher v. Univ. of Texas*, 133 S.Ct. 2411, 2421–22 (2013).

²⁰⁷ 136 S. Ct. 2198, 2208–09 (2016).

²⁰⁸ *Fisher I*, 133 S.Ct. 2411 (2013).

²⁰⁹ 136 S. Ct. 2198, 2212–14 (2016).

²¹⁰ *Fisher I*, 133 S.Ct. 2411, 2432–34 (2013) (Ginsberg, J., dissenting).

²¹¹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–803–876 (2007) (Breyer, J., dissenting).

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.²¹²

These precedents provided support for Breyer's earlier comments in his opinion rejecting the doctrinal distinction between de jure and de facto segregation that Roberts had relied on, in part, to rule against the school districts involved in the present case.²¹³ To be sure, Breyer did, at moments, provide a more expansive statement on race consciousness that stuck closely to Democratic Party orthodoxy, in again invoking *Swann*:

That *Swann*'s legal statement should find such broad acceptance is not surprising. For *Swann* is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery.²¹⁴

Yet, also in line with Democratic Party orthodoxy, this statement was based upon and emanated from arguments rooted in the Court's prior doctrine.²¹⁵ And Breyer's conclusion here ultimately led to the relatively modest conclusion of a more relaxed doctrinal test that might generally be applied to benign race-conscious governmental actions.²¹⁶

Finally, underscoring the modesty of the judicial approach offered by Breyer, his acceptance of judicial partiality in his *Parents Involved* dissent was framed in part as both an element of judicial impartiality, and as a requisite part of judicial modesty and deference to local governmental authority:

The plurality, or at least those who follow Justice Thomas' "'color-blind'" approach may feel confident that, to end invidious discrimination, one must end all governmental use of race-conscious criteria including those with inclusive objectives. By way of contrast, I do not claim to know how

²¹² 551 U.S. at 823 (2007) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); see also *id.* at 823–29, 844–45.

²¹³ *Id.* at 820–22; see also *id.* at 856.

²¹⁴ 551 U.S. at 829 (citations omitted).

²¹⁵ *Id.* at 829–37.

²¹⁶ *Id.* at 837.

best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."²¹⁷

This was not an emphatic defense of judicial partiality as part of the judicial role then. Evident in Breyer's opinion was judicial acceptance of governmental race-conscious, though justified by supportive precedents from earlier, more liberal Courts, and aligned with a contemporary Democratic orientation to judicial modesty.

A similar orientation was also present in Breyer's concurring opinion in *Schuette*, where he found the political-process precedents to be inapplicable in that case,²¹⁸ and ultimately emphasized the importance of deference to democratic decision-making bodies in voting to uphold the Michigan state constitutional amendment:

Finally, the principle that underlies *Hunter* and *Seattle* runs up against a competing principle, discussed above. This competing principle favors decisionmaking though [sic] the democratic process. Just as this principle strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion, so must it give them the right to vote not to do so.²¹⁹

One significant exception to this trend of Democratic judicial modesty and cautiousness on partiality themes is worthy of extended comment here: Sotomayor's dissent in *Schuette*.²²⁰ There, she offered an expansive dissent from the Court's ruling upholding the Michigan state constitutional amendment. In part, her dissent touched on more technical and narrow doctrine-based arguments,²²¹ Michigan-specific arguments,²²² and policy-based arguments on diversity.²²³ But beyond these

²¹⁷ *Id.* at 862–63; *see also id.* at 848–49, 866.

²¹⁸ *Schuette v. BAMN*, 134 S.Ct. 1623, 1649–51 (2014) (Breyer J., concurring).

²¹⁹ *Id.* at 1651; *see also id.* at 1649–50

²²⁰ *Id.* at 1656–67 (Sotomayor J., dissenting).

²²¹ *Id.*

²²² *Id.* at 1677–82.

²²³ *Id.* at 1682–83.

points, she also offered extensive references to the history of racial discrimination,²²⁴ arguments in favor of departing from recent conservative precedents,²²⁵ and a more foundational argument in defense of partiality in the law and in the judicial role.²²⁶ As Sotomayor stated in direct response to Roberts's assertion in *Parents Involved*:

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.²²⁷

And yet, as much of a departure as Sotomayor's opinion may have been from other recent opinions by left-leaning Supreme Court justices on matters of race and equal protection, she spoke only for herself and Justice Ginsburg. The likelihood of a Sotomayor approach capturing a majority of votes on the Supreme Court, especially with the addition of Justice Kavanaugh, remains quite unlikely for the foreseeable future.

V. JUDICIAL IMPARTIALITY AS ENGAGEMENT

To briefly take stock of the two descriptive claims I have pressed in the preceding Parts, I first demonstrated, through an examination of the Roberts and Sotomayor confirmations, the greater Republican affinity for generality and the greater Democratic affinity for partiality in their respective notions of judicial impartiality. Their respective orientations were rooted in each party's coalitional structure and in their ideological histories. Second, I argued that these competing conceptions of judicial impartiality translate inexactly to the arena of adjudication. In the context of key Roberts Court rulings on race and equal protection, the Democratic affinity for partiality emerges as one element within a broader inclination among Democratic-appointed justices toward a cautious, progressive pragmatism. Likewise, among the Republican-appointed justices, their commitment to generality is modified by concessions to doctrinal technicalities and principles, carried over from prior Courts, that are supportive of some forms of partiality.

²²⁴ *Id.* at 1654–56.

²²⁵ *Id.* at 1672.

²²⁶ *Id.* at 1667–76.

²²⁷ *Id.* at 1676.

Thus, even if Supreme Court confirmation hearings and debates may provide relatively simple, clear-cut normative guides on what judicial impartiality demands, the picture gets muddled once one examines judicial rulings. And if one takes an even broader view that incorporates the centrality of Donald Trump in the modern Republican Party, the picture becomes even more muddled: in Trump, we see the leader of the Republican Party referencing not a principled belief in generality, but a belief in the inevitability of pure, even grotesque, partisanship driving judicial behavior.²²⁸ True to his comments during his confirmation, it fell to Chief Justice Roberts to articulate traditional Republican Party orthodoxy in response to Trump, claiming “We do not have Obama judges or Trump judges, Bush judges or Clinton judges.”²²⁹

In this Part, I will aim to put forth my third and final claim: that some normative guidance in conceptualizing judicial impartiality can be gleaned from these prior discussions. That is, notwithstanding enduring partisan differences on the topic, and the context of heightened polarization in our political life more broadly, there are small areas of commonality that might be uncovered and developed that could reach across at least some of the consequential present-day partisan divides.

Let us start from some of the observations noted earlier in Part II about areas of potential convergence between Democratic and Republican senators in the confirmation hearings and debates. First, at least as a matter of general perception, there seems to be agreement that a degree of partiality in the judicial role seems inevitable; it seems inescapable for most that as a structural matter, social facts about litigants will have some effect—perhaps greater in some instances and less in others—in how those litigants are treated by judicial actors. This may be due to a judge’s affinity with or sympathy toward certain social groups driven by common background, commonality on some other element of social status, or common deeply-held ideologies. Affinity may also be due to the repeated convergence between a judge and a particular social group on key legal and policy outcomes. As noted in Part II, Democratic senators have been more candid in acknowledging this point, though Republican senators have also acknowledged and endorsed the possibility of judicial partiality toward those social groups whose interests are (they believe) firmly grounded in legitimate constitutional principle. At the same time, however, there is certainly something normatively appealing and powerful about the aspiration toward generality and universalism, or more precisely, the hope that legal outcomes may be rooted in something more compelling than mere judicial whim or unprincipled favoritism.

I refer then to a point raised before in Part II: that at root, what Democratic and Republican senators seem to be inching toward in their competing notions of judicial impartiality is that a litigant might receive a fair chance, or fair treatment, in front of an impartial judge, no matter who that litigant might be. A tentative and normatively-

²²⁸ See *infra* notes 230–32.

²²⁹ Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks “Obama Judge,”* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/F9RE-23GW>].

attractive conception of judicial impartiality thus emerges: accepting that some degree of partiality is inevitable in the judicial role—and that judges cannot be wholly blind to certain social facts about litigants appearing before them—I would assert that judicial impartiality denotes a *consistent, good-faith engagement* with the claims and interests of those who lie outside the social groups that are aligned with a judicial actor. Impartiality demands, in other words, openness on the part of a judicial actor to consider experiences, opinions, and values that may lie beyond their own inclinations.

Judicial impartiality-as-engagement remains, admittedly, quite vague and abstract and it provides no ready analytical tools for easily determining if judicial impartiality was displayed by a given judicial actor in a given case. Consistent, good-faith engagement is a procedural element, whose presence or absence we might ascertain with varying degrees of confidence only after extended observation of a judicial actor, and close examination of their treatment of multiple cases. Even after this, and even if opinions may converge among observers on some points, opinions might still diverge on the ultimate determination of whether the judicial actor was impartial or not.

This is all to suggest that in the contemporary context, a realistic and normatively-attractive conception of judicial impartiality may amount to something more like an attitude or a spirit rather than a coherent set of discrete principles, or a commitment to any set of outcomes. Indeed, the definition I am providing suggests that two judges reaching the same legal outcome may not necessarily share the same orientation toward judicial impartiality: one judge might conceivably reach an outcome by engaging in an impartial manner, as I have defined it, while another judge might conceivably reach the same outcome by ruling in a wholly indifferent or impulsive or biased manner.

Yet, as vague as this definition might be at the micro-level, I believe it also provides more analytical value from a broader vantage point—especially if applied to something as broad as general orientations toward judicial impartiality from Democrats and Republicans. Applied to this question, judicial impartiality-as-engagement does provide some lessons for Democrats and Republicans interested in furthering this ideal, and in offering a coherent vision of their party's judicial and legal philosophy.

For Democrats, their spirit of caution in recent years superficially aligns with the notion of judicial impartiality offered here. However, one might argue that this caution and tentativeness has nevertheless failed to benefit Democrats in being viewed as staunch upholders of judicial impartiality beyond their core constituencies because, arguably, their caution has been misplaced: even if Democratic Party jurisprudential principles have been applied in a qualified way, the Party and its judicial appointees are still too closely identified with their core constituencies and key policy commitments to give them much credibility beyond their usual allies. However, there might be a different way forward for Democrats to reach across the aisle, and bolster their claims to judicial impartiality, by utilizing a different mix of principle and caution.

If impartiality-as-engagement presses judicial actors to look to interests and claims beyond those of their usual allies, the Democratic affinity toward partiality should arguably be *more*, rather than less, expansive and full-throated. That is, Democrats and Democratic-appointed judicial actors might consider the possibility of embracing partiality themes more empathically—as consistent with their core principles and as consistent with how the Party is more broadly viewed. However, with a more emphatic endorsement of partiality, Democratic-appointed judicial actors might then proceed to apply it to a broader range of social groups—beyond the Party’s usual allies—who might plausibly press forth their own claims of systemic or structural disadvantage. In this way, the Party and its judicial appointees might undertake a broader engagement beyond its usual constituents and demonstrate willingness to engage more broadly with the perspectives of others.

The one example that seems prominent, in this regard, are those disadvantaged by economic class. Accordingly, the modern-day Democratic party has retained a degree of uncertainty on how much it might incorporate class grievances within its party ideology in the preceding few decades.²³⁰ And even if more of this rhetoric has seeped into the Party since the 2016 presidential election, certainly no coherent liberal judicial philosophy focused on economic disadvantage seems guaranteed to be central to the Party’s ideology either.²³¹ Again, to further the ideal of judicial impartiality as described here, Democratic political actors and judicial appointees could bring such ideas back to central prominence.

For Republicans, their legal emphasis on generality and universalism certainly has its moments as appealing rhetoric for some in the Party, as does the Trump-inspired emphasis on rural, white, conservative grievance for others.²³² Perhaps ironically, however, what is common to both of these facets of modern-day Republican Party ideology is a kind of rigidity and dogmatism that conflicts with the notion of judicial impartiality offered here. Thus, in order for Republican judicial actors—who have been shaped by such ideals—to move closer to a norm of judicial impartiality-as-engagement, the key question would be their willingness to openly endorse and affirm a spirit of tentativeness and cautiousness on legal questions. To be dogmatic is to foreclose genuine engagement, so for Republican judicial actors to move toward the latter, adopting some of the Democratic spirit of cautious pragmatism would be ideal. This would entail more than simply toning down some of the rigid insistence on, for example, originalism, or the significance of gun rights,

²³⁰ Chinn, *Political Parties*, *supra* note 88, at 403–09.

²³¹ However, such arguments are appearing in legal literature. *See, e.g.*, Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U.L. REV. 669, 672–75 (2014) (emphasizing the “Anti-Oligarchy Constitution”—a set of constitutional arguments focused on the problems of economic class inequalities and excessive concentrations of economic power); GANESH SITARMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017) (emphasizing the threat of extreme economic inequality for the American constitutional system).

²³² George Saunders, *Who Are All These Trump Supporters?*, THE NEW YORKER (July 4, 2016), <https://www.newyorker.com/magazine/2016/07/11/george-saunders-goes-to-trump-rallies> [<https://perma.cc/T8G2-3AVR>].

or the significance of property rights. More than this, it would entail Republican judicial actors affirming a cautious, pragmatic approach *as normatively-defensible in its own right*. If such a hypothetical seems hard to imagine in the present moment, we might remember that the values of moderate Republicanism in the early to middle decades of the twentieth century would have aligned quite well such an approach. As Kabaservice notes of this philosophy:

Because [moderate Republicans] believed in disinterested consideration of the issues, they were able to work with Democrats to solve problems, and to maintain a level of balance and civility in politics that has long since vanished. But because they were not beholden to the Democrats' coalition of special-interest constituencies, they could take a broader and longer-term viewpoint and uphold values such as civil liberties and meritocracy that commanded only weak support from both Democrats and conservative Republicans.²³³

It is a testament to how transformed the Republican Party has become that there is no obvious or emphatic standard-bearer for these values among high-profile Republicans at present.

VI. CONCLUSION

In this paper, I have put forth two descriptive claims: one concerning divergent conceptions of judicial impartiality between Democratic and Republican senators in the context of Supreme Court confirmation hearings and debates, and one concerning competing conceptions of judicial impartiality by Supreme Court justices in the context of key race and equal protection rulings by the Roberts Court. In the preceding Part, I have also put forth a third claim more normative in nature: that judicial impartiality might best be understood, in the present time, as consistent, good-faith engagement by judicial actors with the claims and interests of individuals or groups who are not obviously aligned with those judicial actors, either by ideology or by other significant elements of social status.

Underlying this normative claim, and its recommendation that contemporary judicial actors approach their work and their rulings with such a spirit of open-mindedness, is my background belief that the forms and processes that constitute much of the activity of law matter. That is, there *is* a significance that attaches to how judges do their work, reach their conclusions, and conduct themselves that exists independently of the specific outcomes and policy conclusions they will reach.

²³³ GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* 398–99 (2012).

It seems that especially in a time of intense political polarization and disagreement over substantive legal and policy issues, the cultivation of basic norms such as judicial impartiality-as-engagement by judicial and non-judicial actors will be all the more crucial for the health of the American polity.