

UNDERSTANDING “JUDICIAL LOCKJAW”: THE DEBATE OVER EXTRAJUDICIAL ACTIVITY

LESLIE B. DUBECK*

Federal judges are expected to conduct themselves differently than their counterparts in the political branches. This Note considers the policy and historical reasons used to justify this different standard of conduct and concludes that these justifications are largely unsupported or overstated. These erroneous justifications obfuscate the debate over extrajudicial conduct and may result in a suboptimal level of extrajudicial activity.

INTRODUCTION

In 2006, news coverage of the State of the Union address included an analysis of the behavior of the four Supreme Court Justices in attendance. The *Washington Post* reported: “When Bush said ‘We love our freedom, and we will fight to keep it,’ Thomas looked at Roberts, who looked at Breyer, who gave an approving shrug; all four gentlemen stood and gave unanimous applause.”¹ This brief episode illustrates three important points: First, there is a deep-seated understanding that federal judges are held to a different standard of behavior than their counterparts in the legislative and executive branches. Although audience members on both sides of the aisle were applauding, the Justices hesitated to do so. Second, it is difficult to identify exactly what is expected of judges. The Justices had to confer to determine whether applause would be appropriate. Third, the public is aware of the special behavior expected of judges. The *Washington Post* found it relevant enough to warrant a story the following morning.

Sixty years before this incident, Justice Felix Frankfurter noted that he suffered from “judicial lockjaw”²—a phenomenon of self-censorship that prevents judges from speaking about the judicial process and from pursuing extrajudicial activities. Although constitu-

* Copyright © 2007 by Leslie B. Dubeck. B.A., 2003, University of Pennsylvania; J.D. Candidate, 2007, New York University School of Law. Thanks to Rachel E. Barkow, Erin F. Delaney, Niki Fang, Barry Friedman, Lisa B. Ross, Matthew B. Tilove, and the Furman Fellows and Scholars at the New York University School of Law.

¹ Dana Milbank, Commentary, *New Justice’s First Challenge: Clap On or Clap Off?*, WASH. POST, Feb. 1, 2006, at A2.

² Felix Frankfurter, *Personal Ambitions of Judges: Should a Judge “Think Beyond the Judicial”?*, 34 A.B.A. J. 656, 658 (1948).

tional and statutory law do not mandate such censorship,³ factors such as peer pressure and judicial culture,⁴ fear of negative public reaction,⁵ and the judge's conception of his or her responsibility in a constitutional democracy⁶ contribute to judicial lockjaw. In large part, the public becomes the arbiter of whether extrajudicial conduct is acceptable, as the boundary between appropriate and inappropriate conduct is established by the public's response⁷ to specific episodes as well as the general public discourse over extrajudicial conduct. Because of the public's significant effect on extrajudicial conduct, it is important that such public discourse about extrajudicial conduct be grounded on sound arguments.

³ Prior to 1980, no statute addressed federal judicial behavior. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended in scattered sections of 28 U.S.C.). To this day, no statute addresses the conduct of Supreme Court Justices. *Cf.* Judicial Improvements Act of 2002, 28 U.S.C. § 351(d)(1) (Supp. III 2003) (defining judge subject to discipline as "a circuit judge, district judge, bankruptcy judge, or magistrate judge"). Nor does the Code of Conduct for federal judges, adopted by the Judicial Conference, apply to Justices of the Supreme Court. CODE OF CONDUCT FOR U.S. JUDGES intro. (Judicial Conference of the U.S. 1999). The Judicial Conference of the United States was established by Congress in 1922 as the "principal policy making body concerned with the administration of the United States Courts." Admin. Office of the U.S. Courts, Judicial Conference of the United States, <http://www.uscourts.gov/judconf.html> (last visited Mar. 3, 2007).

⁴ For a discussion of the judiciary's mechanism for self-regulation, see John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 964, 997-1001 (2002). It has been noted that judicial culture was particularly able to impose discipline "when the federal judiciary was a small and homogeneous group." REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, 152 F.R.D. 265, 277 (1993). *But cf.* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 285-89 (2000) (suggesting that judiciary has more recently been able to educate and acculturate membership through official policy commitments of the Judicial Conference, and that "over the years, the federal judiciary has developed an etiquette of quieting dissent").

⁵ Judge Reinhardt of the Ninth Circuit explains: "We prefer to hold ourselves above censure, and the only way to do so is to provide the people with no basis for criticizing us." Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 810 (1995).

⁶ Nancy Gertner, *To Speak or Not To Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1147 (2004) (describing practice of judicial lockjaw as making sense due to need for respect and legitimacy and because unelected judges are not "directly accountable to the public" and therefore without same pressure as elected officials to delineate their views to public). Michael Hawkins paraphrased Judge Calabresi of the Second Circuit as having said that "silence and restraint are a fair bargain for life tenure." Michael Daly Hawkins, *Dining with the Dogs: Reflections on the Criticism of Judges*, 57 OHIO ST. L.J. 1353, 1362 (1996).

⁷ This Note relies on statements by public figures, newspaper articles, editorials, and scholarship to describe the public discourse on extrajudicial activity and the public reaction to specific instances of extrajudicial activity.

Public condemnation of extrajudicial conduct is pervasive. One newspaper editorial highlighted the supposedly unprecedented nature of recent speeches by Justices Sandra Day O’Connor, Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg.⁸ Many groups called for Justice Scalia to recuse himself from *Hamdan v. Rumsfeld*⁹ after a speech he gave in Switzerland,¹⁰ and he was also chided for missing the swearing-in of Chief Justice John Roberts in September 2005 because he was “on the tennis court at one of the country’s top resorts,” where he was lecturing and socializing at a Federalist Society seminar.¹¹ Yet Justice Stephen Breyer, who appeared on multiple news shows speaking about the content of his newest book,¹² did not garner any criticism, despite the public and substantive nature of these appearances. The public’s response is thus an imprecise guide for extrajudicial conduct, as the public’s varied and unpredictable responses create uncertainty that encourages self-censorship by judges.¹³

Uncertainty also exists because there is no clear definition of extrajudicial conduct. The Oxford English Dictionary defines “extrajudicial” as “[l]ying outside the proceedings in court.”¹⁴ Extrajudicial

⁸ Jonathan Turley, Editorial, *Our Loquacious Justices*, L.A. TIMES, Mar. 28, 2006, at B13. (“[T]he justices have been entering the public debate recently in a way that would have been viewed as scandalous just a couple of decades ago.”).

⁹ 126 S. Ct. 2749 (2006).

¹⁰ Michael Isikoff, *Detainees’ Rights—Scalia Speaks His Mind*, NEWSWEEK, Apr. 3, 2006, at 6, 6 (discussing call for recusal by Center for Constitutional Rights but noting that “[o]ther experts said it was a closer call”); Charles Lane, *Scalia’s Recusal Sought in Key Detainee Case*, WASH. POST, Mar. 28, 2006, at A6 (reporting calls for recusal from group of retired U.S. generals and admirals, Center for Constitutional Rights, and Rep. John D. Conyers).

¹¹ Brian Ross, *Supreme Ethics Problem?*, ABC NEWS, Jan. 23, 2006, <http://abcnews.go.com/Nightline/Investigation/story?id=1534260>. The Federalist Society paid for Scalia’s trip. *Id.* For a discussion of the ethical issues raised by such judicial trips, see generally Douglas T. Kendall & Jason C. Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 GEO. J. LEGAL ETHICS 65 (2004).

¹² See, e.g., *NewsHour with Jim Lehrer* (PBS television broadcast Oct. 19, 2005) (interview with Justice Stephen Breyer); *This Week with George Stephanopoulos* (ABC television broadcast Oct. 3, 2005) (same).

¹³ In First Amendment doctrine, this self-censorship resulting from uncertainty is a recognized phenomenon. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 122 (2d ed. 2003) (noting that First Amendment jurisprudence has found fault with vague and therefore uncertain laws in part because citizens will steer too wide of proscribed conduct when they are unsure of exactly what is forbidden, and that this may have “significant chilling effect”). This Note focuses on the policy and historical justifications offered for judicial lockjaw; the question of whether Supreme Court Justices have a First Amendment right to engage in extrajudicial activity is thus beyond its scope. Other authors have addressed that question. See, e.g., Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 2 (2004) (discussing First Amendment problems presented by judicial lockjaw).

¹⁴ OXFORD ENGLISH DICTIONARY 613 (2d ed. 1989).

conduct thus literally includes all conduct outside of court proceedings. This Note defines extrajudicial conduct to include partisan activities (i.e., lobbying, campaigning, and running for office), ex officio activities, academic activities, and public speeches. Even though this list encompasses scholarship and other conduct that is generally accepted as benign,¹⁵ judicial scholarship still implicates the same policy considerations as other types of extrajudicial activity and thus should be considered in evaluating the arguments against extrajudicial conduct.

There is a simple resolution to uncertainty about public reaction: A judge could abstain from all extrajudicial conduct and thus avoid criticism for his extrajudicial activity. This approach, however, denies the public important benefits and unnecessarily constrains the judge. Judges, like all citizens, can contribute to the public discourse,¹⁶ and by virtue of their institutional knowledge and expertise, they are in a unique position¹⁷ to be “leader[s] in our democracy.”¹⁸ Even those who would proscribe extrajudicial conduct recognize this by admitting that judges can participate in legal scholarship.¹⁹ The persistence of a legal scholarship exception admits that there are benefits to extrajudicial conduct in some circumstances. While there is no assurance that judges’ extrajudicial activities will contribute to society, “[t]o say that we have no assurance . . . is to miss the point entirely. We would not think of requiring such assurances before sanctioning the political activities of any non-judge.”²⁰ Because of the strong possibility that extrajudicial conduct will make uniquely valuable contributions to the public discourse, the problem of judicial lockjaw is troubling.

This Note focuses specifically on the activity of, and expectations imposed on, U.S. Supreme Court Justices. The policy rationales for

¹⁵ This definition is not entirely unbounded. This Note limits extrajudicial activities to activities where it is relevant that the actor is a Justice.

¹⁶ Reinhardt, *supra* note 5, at 805 (“[Judges] cannot stand above the public dialogue that is so essential to the proper functioning of a true democracy.”).

¹⁷ *Id.* (noting that judges are obliged to help educate public on matters with which judges have “particular knowledge or experience”); *see also* *Mistretta v. United States*, 488 U.S. 361, 404 (1989) (noting that judges serving on Sentencing Commission are “uniquely qualified on the subject of sentencing”); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1748 (1998) (emphasizing benefits of greater “advicegiving” by judges to other branches of government).

¹⁸ John J. Parker, *The Judicial Office in the United States*, 23 N.Y.U. L.Q. REV. 225, 237 (1948).

¹⁹ CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(6) (Judicial Conference of the U.S. 1999) (explaining that proscription against public commentary for federal judges specifically does not apply to “a scholarly presentation made for purposes of legal education”).

²⁰ Russell R. Wheeler, *Judging What Justices Do Off the Bench*, 1990 J. SUP. CT. HIST. 59, 62.

and against judicial lockjaw are most acute when considered in this context. The Supreme Court wields significant power and is the public face of the judicial branch; therefore, ill-advised extrajudicial conduct by a Supreme Court Justice has the greatest potential to yield bad effects. Conversely, Supreme Court Justices, because of their prominence and their knowledge of, and influence on, nationally divisive issues, may have the greatest ability to contribute to public debate. Furthermore, unregulated by formal standards, the activities of the Justices are only monitored by the public, whose role as arbiter becomes inflated. Because of this magnified role, it is essential to critically evaluate the arguments informing the public discourse. This Note argues that the current public discourse over the propriety of extrajudicial conduct is mired in misleading and inaccurate claims.

This Note outlines and evaluates various policy and historical justifications that scholars, judges, and politicians present for prohibiting extrajudicial conduct. Part I describes and evaluates the policy arguments proffered against extrajudicial conduct. These arguments, while persuasive in some instances, are not determinative and can frequently be used to support either side of the debate. The policy arguments are further undermined by the fact that Justices are not criticized for extrajudicial scholarship, despite the fact that scholarship implicates many of the same arguments as other forms of extrajudicial conduct. A critical evaluation of these policy arguments suggests that they may mask a debate about the substantive content of the judge's extrajudicial speech rather than address the propriety of extrajudicial conduct itself. Part II presents the historical justifications that are frequently referenced in the debate over extrajudicial conduct and demonstrates that the historical accounts are inaccurate. This Note concludes that these often spurious arguments should be discounted in any debate over extrajudicial conduct and should not be used to condemn a practice that frequently provides real benefits to democratic deliberation.

I

POLICY JUSTIFICATIONS IN THE DEBATE OVER EXTRAJUDICIAL CONDUCT

Myriad policy rationales are cited in the debate over extrajudicial conduct. Judicial lockjaw has been justified as critical to protecting the separation of powers, encouraging the public's allegiance to the judiciary and acceptance of judicial decisions, ensuring that judges devote adequate time and energy to judging, and promoting impar-

ality.²¹ These are all desirable ends, but judicial lockjaw does not serve these ends in all circumstances. While these policy arguments may seem persuasive, they do not, in fact, necessarily favor judicial lockjaw. Separation of powers arguments can be made either in support of, or in opposition to, extrajudicial conduct. Similarly, advocates of both extrajudicial conduct and judicial lockjaw can claim to serve the causes of judicial allegiance and impartiality. Furthermore, many of these conflicting arguments rely on mere intuitions about the impact of extrajudicial conduct on public opinion rather than on solid empirical evidence. Finally, when judicial scholarship that is usually thought of as benign is carefully considered, this category of extrajudicial conduct in fact raises similar policy concerns and therefore demonstrates the limits of each of the policy rationales.

The policy arguments are inconclusive and cannot dictate a specific standard for whether extrajudicial conduct is acceptable. This indeterminacy indicates that something else is motivating the debate. The public discourse is ostensibly about the proper standard for extrajudicial conduct, but the abstract policy arguments may mask the true motivation for the criticism: Critics disagree with the substantive *content* of extrajudicial conduct.²² Rather than engaging with the substance of the extrajudicial activity, critics may find it easier to attack the propriety of such activity.

A. Policy Justifications Proffered by Both Sides

1. Protecting the Separation of Powers

Some argue that extrajudicial conduct may threaten the separation of powers by either precipitously weakening the judicial branch

²¹ See BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* 6 (1982) (arguing that judicial lockjaw promotes separation of powers, impartiality, and “public acceptance of Court decisions”); Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 *LAW & CONTEMP. PROBS.* 9, 12 (1970) (pinpointing three “dangers of over-involvement” by judges as consumption of time and energy, creation of bias, and impairment of judicial/court dignity); Wheeler, *supra* note 20, at 59 (providing overview of various arguments and concrete examples against extrajudicial conduct); Peter Alan Bell, Note, *Extrajudicial Activity of Supreme Court Justices*, 22 *STAN. L. REV.* 587, 589–98 (1970) (explaining harm of judges’ political activities, such as consultations, administrative assignments, and electoral politics).

²² Barry Friedman has made a similar observation with regard to the arguments made for and against judicial review. See Barry Friedman, *The Cycles of Constitutional Theory*, 67 *LAW & CONTEMP. PROBS.* 149, 149 (2004) [hereinafter Friedman, *Cycles*] (“When the ideological valence of Supreme Court decisions shifts, constitutional theorizing about judicial review tends to shift as well.”); Barry Friedman, “*Things Forgotten*” in *the Debate over Judicial Independence*, 14 *GA. ST. U. L. REV.* 737, 755–58 (1998) [hereinafter Friedman, “*Things Forgotten*”] (noting that “the basis for sustained challenges to judicial independence inevitably arise out of substantive disagreement with the content of judicial decisions”).

or by making it too strong, while others claim that extrajudicial conduct is necessary to maintain the proper balance. This Section explains the arguments on both sides of the debate and concludes that extrajudicial activity is neither categorically threatening nor categorically beneficial to the separation of powers. Rather, its effect will vary depending on the type of activity and the surrounding circumstances. Any arguments relying on the separation of powers must therefore recognize that this aspect of the debate is inconclusive.

a. Does Extrajudicial Conduct Weaken the Judicial Branch?

Advocates for and against judicial lockjaw can each claim that their position preserves the judiciary's power. Proponents of judicial lockjaw argue that extrajudicial conduct tarnishes the prestige of the judicial branch and thus undermines the judiciary's ability to serve as a check on the other branches.²³ Critics of judicial lockjaw make a similar argument: Silence in the face of criticism reduces the prestige of the judiciary and thereby threatens judicial independence.²⁴

The persuasiveness of either argument will depend on the circumstances of the extrajudicial conduct. Members of the legislative and executive branches gain political points by attacking the substance of decisions made by individual federal judges and by threatening the judiciary.²⁵ This situation may make extrajudicial responses appropriate in order to defend the independence of the judicial branch, since failing to respond may give the appearance that the judiciary is under the thumb of a political branch. For example, when Judge Baer was attacked by President Clinton and presidential candidate Robert Dole for his ruling on an evidentiary question,²⁶ four judges on the Court of Appeals for the Second Circuit issued this statement: "The

²³ Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 131 (explaining that Chief Justice John Jay opposed extrajudicial activities because they threatened judges' ability to be impartial).

²⁴ Tony Mauro, *Is the Supreme Court Ready to Rumble?*, LEGAL INTELLIGENCER (Phila.), May 8, 2006, at 4 (arguing that by speaking their minds, judges reinforce judicial independence and "show the world that the judiciary is not as fragile a flower as the justices themselves sometimes make it out to be").

²⁵ The members of the judiciary are used as "scapegoats and poster targets" and are "being taken undue advantage of on a variety of hot-button issues." Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381, 2383 (1997); see also Robert M. O'Neil, *Assaults on the Judiciary*, TRIAL, Sept. 1998, at 54, 55 ("Attacking judges, once seen as the perverse province of extremists, has become an eminently reputable activity for the political and legal establishment.").

²⁶ Judge Baer excluded eighty pounds of cocaine and heroin from evidence after deciding that the police lacked a reasonable suspicion to conduct the search, but he later reversed this decision in the face of massive criticism and calls for impeachment. Hawkins, *supra* note 6, at 1353-54; Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1.

recent attacks on a trial judge of our Circuit have gone too far. . . . These attacks do a grave disservice to the principle of an independent judiciary.”²⁷

Some believe that bar associations and other surrogates can serve this function and act as protectors of the judiciary.²⁸ Bar associations and other legal groups frequently defend the judiciary’s independence.²⁹ For instance, “threats of retaliation” against federal judges in 2005 prompted the deans of more than two-thirds of the nation’s law schools to write a letter to members of Congress in defense of the judiciary’s independence.³⁰ Because “[j]udges are expected to comport themselves in a reserved and dispassionate manner at all times,”³¹ the deans took it upon themselves to stand up for the judiciary. Still, these groups may not be sufficient to protect judicial independence, because they are not as effective at grabbing the public’s attention and do not perfectly share the judiciary’s concerns.³² These

²⁷ Carl E. Stewart, *Contemporary Challenges to Judicial Independence*, 43 LOY. L. REV. 293, 299 (1997) (alteration in original) (quoting *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y.L.J., Mar. 29, 1996, at 4); see also William H. Rehnquist, *2004 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 2005, at 1, 2–4 (criticizing sitting congressmen who threatened federal judges with impeachment and arguing that “Congress’ authority to impeach and remove judges should not extend to decisions from the bench”).

²⁸ AM. BAR ASS’N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 50, 64 (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html> (recommending that bar associations be responsible for evaluating and responding to criticism of judges); John Q. Barrett, *Introduction: The Voices and Groups That Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHN’S J. LEGAL COMMENT. 1, 4 (1996) (describing five groups with power to define, and protect, judicial independence as judges, politicians, media, judiciary, and legal profession); Thomas L. Cooper, *Attacks on Judicial Independence: The PBA Response*, 72 PA. B. ASS’N Q. 60, 64–65 (2001) (describing bar associations’ role in defending judiciary); John M. Walker, Jr., *Current Threats to Judicial Independence and Appropriate Responses*, 12 ST. JOHN’S J. LEGAL COMMENT. 45, 52 (1996) (describing judiciary’s reliance on surrogates); Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 647 (1962) (same).

²⁹ See, e.g., Stephen J. Fortunato, Jr., *On a Judge’s Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679, 705 & n.103 (1999) (describing efforts of New Jersey State Bar Association and California Judges’ Association to respond to “baseless” criticism of judiciary on behalf of judges).

³⁰ Letter from Richard Revesz, Dean, N.Y. Univ. Sch. of Law, to William H. Frist, Senate Majority Leader, U.S. Senate et al. (May 4, 2005), http://www.law.nyu.edu/news/calendars/2004_2005/pressrelease/lettertocongress.html.

³¹ *Id.*

³² Fortunato, *supra* note 29, at 706 (explaining that judges are most qualified to respond to criticisms, because “[i]t is the judge, after all, and not a committee, who is most familiar with the background circumstances of the controversy, not to mention his or her own tenure on the bench”); Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 722 (1997) (“The plain truth is that bar leaders and bar associations today *cannot* respond in equivalent fashion. Their

problems make surrogate groups much less effective at protecting judicial independence than judges themselves.

This policy justification—preserving the strength of the judiciary—does not create a clear standard for judging extrajudicial conduct. The arguments on both sides rely on intuitions about what conduct or lack of conduct will most tarnish the judiciary’s image. Without any proof that their intuition is sound, advocates for either side can claim to be serving judicial independence.³³

b. Does Extrajudicial Conduct Give the Judicial Branch Too Much Power?

Critics and advocates of extrajudicial conduct both claim that their position ensures that the judiciary’s power is not expanded beyond its rightful scope. Critics believe that extrajudicial conduct “encroach[es] on functions constitutionally delegated” to the other branches,³⁴ while advocates argue that extrajudicial conduct prevents the creation of an overly powerful, unitary judiciary.

Critics of extrajudicial conduct claim that judicial lockjaw restrains individual judges to their appropriate spheres of influence. This type of argument was made in *Mistretta v. United States*,³⁵ where a litigant claimed that extrajudicial conduct in the form of serving on the Sentencing Commission violated the separation of powers by giving a judge rulemaking authority.³⁶ The Supreme Court dismissed this argument, noting that a judge who served on the Sentencing Commission served in his individual capacity and not in his capacity as a federal judge and wielded administrative rather than judicial power.³⁷ This decision recognized that individual conduct is often considered less troublesome to the separation of powers than judicial branch conduct; the distinction has been described as the difference between the “separation of institutions” and the “separation of personnel.”³⁸ This distinction has been made since the Founding, when

responses just do not get the same billing.”); Mauro, *supra* note 24 (“[I]t’s safe to say that a feisty speech by a Supreme Court justice is much more newsworthy than the same speech given by the president of the local bar association.”).

³³ See *infra* note 51 and accompanying text.

³⁴ MURPHY, *supra* note 21, at 6.

³⁵ 488 U.S. 361 (1989).

³⁶ *Id.* at 383–84.

³⁷ *Id.* at 404.

³⁸ Solomon Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers*, 49 CONN. B.J. 391, 395–96 (1975). Slonim explains that the “separation of institutions” refers to “each branch of government [being] limited to its own proper sphere of operation” while the “separation of personnel” is a separation that “bar[s] an individual from belonging to, and exercising the powers of, more than one branch of government.” *Id.*

Justices refused to issue official advisory opinions on behalf of the judicial branch but were willing to personally advise the President.³⁹

Those who argue that extrajudicial conduct is beneficial claim that a strong culture of judicial lockjaw could, in fact, give the judiciary too much power. Self-censoring of extrajudicial conduct among individual judges creates a single judicial voice that may increase the influence of the judiciary.⁴⁰ A unified judicial voice expounding a single political view is stronger, vis-à-vis the other branches, than individual voices expressing individual views.⁴¹ The Judicial Conference⁴² has allowed the federal judiciary to promote specific policy objectives⁴³ while discouraging dissent from the conference's position.⁴⁴ The increasing influence of the Judicial Conference has been criticized as a threat to the separation of powers.⁴⁵ A strong culture of judicial lockjaw that discourages individual extrajudicial activity gives further strength to the institutional voices that do speak.

Just as advocates on both sides of the debate can claim to be preserving the strength of the judiciary, so too can advocates on both sides claim to be ensuring that the judiciary does not become too powerful.

³⁹ Katyal, *supra* note 17, at 1742–44.

⁴⁰ Judith Resnik notes:

What [have] developed . . . are restrictions on judicial action in individual cases coupled with few boundaries for the Judicial Conference in general policy making. . . . [T]he more the judiciary becomes generative of policies, the less it will be able to be free from partisanship. . . . When judicial advice moves beyond idiosyncratic efforts by individual judges to regular corporate commentary, the judiciary loses more of its unique character. The lines between judicial and legislative decisionmaking become increasingly blurred.

Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 306 (2003) [hereinafter Resnik, *Constricting Remedies*]; see also Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1021 (2000) [hereinafter Resnik, *Trial as Error*] (“[I]nternal mechanisms by which the judiciary ‘speaks’ are structures of authority not representative of the judges within.”).

⁴¹ Resnik, *Constricting Remedies*, *supra* note 40, at 306–07.

⁴² See *supra* note 3.

⁴³ Until the creation of the Judicial Conference in 1922, the federal judiciary did not have any mechanism for self-governance. “Only in the twentieth century did federal judges gain the capacity to function as a cohort and thus have to decide when and how to use a collective voice.” Resnik, *Constricting Remedies*, *supra* note 40, at 273.

⁴⁴ See Resnik, *Trial as Error*, *supra* note 40, at 1021 (“Relatively few judges testify before Congress to offer views contrary to the judiciary’s official policy; controversy within judicial circles erupts when they do.”). Resnik also notes the judiciary’s “etiquette of quieting dissent.” Resnik, *supra* note 4, at 286.

⁴⁵ See, e.g., Resnik, *Constricting Remedies*, *supra* note 40, at 306 (discussing separation of powers concerns created by increasing influence of Judicial Conference).

2. *Encouraging Judicial Allegiance and Public Acceptance*

The most persistent justification offered against extrajudicial activity is that such activity will undermine judicial allegiance and public acceptance of judicial decisions. In 1906, Roscoe Pound argued that the political involvement of judges diminishes public respect for the judiciary,⁴⁶ and modern news coverage of the Court has repeatedly reflected this belief.⁴⁷ Public confidence in the Court is seen as a prerequisite to respect for the judiciary's judgment.⁴⁸

Once again, advocates for and against extrajudicial conduct both claim to serve the goal of fostering judicial allegiance. Those opposed to extrajudicial conduct suggest that the behavior of individual judges will threaten judicial authority and undermine public confidence.⁴⁹ Meanwhile, those in support of extrajudicial conduct argue that such activity may increase judicial allegiance and public acceptance by contributing to the public discourse and ensuring a connection to the people subject to the jurisdiction of the Court.⁵⁰ At a minimum, both

⁴⁶ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906) ("Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.").

⁴⁷ See, e.g., David O'Brien & Ronald Collins, Op-Ed, *The Wisdom of Judicial Lockjaw*, N.Y. TIMES, Sept. 29, 1988, at A27 ("[T]he danger remains that the Court's institutional power and prestige will suffer when Justices plead their cases to the public."); Stuart Taylor, Jr., *Supreme Court: Administration Trolling for Constitutional Debate*, N.Y. TIMES, Oct. 28, 1985, at A12 ("Because much of the Court's authority rests on its appearance of Olympian detachment and impartiality, Justices have traditionally been wary of debate on politically charged issues.").

⁴⁸ Walker, *supra* note 28, at 51–52 ("Without public confidence in the judiciary . . . the respect accorded its judgments will erode."); see also Bell, *supra* note 21, at 588–89, 594–95 (observing that Court's power is rooted in its prestige). Alexander Hamilton's familiar observation is that the judicial department has "neither FORCE nor WILL, but merely judgment." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The "immense" power of the Supreme Court "rests upon public opinion." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 176 (Gerald Bevan trans., Penguin Books 2003) (1835).

⁴⁹ See Bell, *supra* note 21, at 594–96 ("[T]he political activities of Justices can undermine the Court's effectiveness by tarnishing its public image."). This concern has been articulated for a long time. See 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 583 (1926) (describing newspapers as warning that people would be "less willing to accept the doctrines laid down by the Court" as result of judiciary's role in elections of 1876); Editorial, *The Supreme Court and the Presidency*, CHI. DAILY TRIB., Mar. 28, 1876, at 4 (criticizing political activity by Justices because "[t]he Supreme Court, once convicted of being partisan, sinks into public contempt"). A similar concern was articulated when the Administrative Office of the United States Courts was established. See Resnik, *Constricting Remedies*, *supra* note 40, at 291–92 (describing fear that positions of Administrative Office would be imputed to judiciary and "[i]f unpopular or ill-advised, those decisions could tarnish judicial authority").

⁵⁰ See Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DEN. U. L. REV. 549, 578 (1988) (describing how judges can contribute to

positions make plausible claims, and without rigorous empirical studies, it is impossible to determine which is more powerful.⁵¹

3. Promoting Impartiality

The promise of an impartial judiciary is fundamental to our understanding of liberty and to the role of an adjudicatory body.⁵² Many scholars have argued that extrajudicial activity may threaten impartiality.⁵³ There are three reasons why this may be so. First, judges may in fact be partial if they have made a public statement on a subject. Second, extrajudicial activity creates the opportunity for pursuing a public office or other prize, and judges may sacrifice their impartiality in pursuit of that prize. And third, the public may perceive a judge as partial by virtue of his involvement with particular

education of public and arguing that “in the long run, demonstrations of actual openness and fairness will only increase public respect for the judiciary”); Westin, *supra* note 28, at 637 (arguing that commentary may increase public understanding); Mauro, *supra* note 24 (“By mixing it up with the public in ways that make the justices more human and accessible, and less like oracles, they fill in the many blanks of the public’s perception of the judiciary.”). Other authors have explained that extrajudicial activity might improve the judicial system and increase public understanding of the system. See, e.g., Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 652 (1987) (“[T]he system of justice, as well as our democratic institutions may be better served by a more open attitude.”); McKay, *supra* note 21, at 12 (“To judge in the real world a judge must live, breathe, think and partake of opinions in that world.”); Marna S. Tucker, *The Judge’s Role in Educating the Public About the Law*, 31 CATH. U. L. REV. 201, 208 (1982) (arguing that judges should be involved in directly educating public, both to increase public understanding of judicial process and so that judges will have “a heightened appreciation . . . of the ways in which the law does not serve the public well”); Editorial, *The Supreme Court and Politics*, WASH. POST, June 16, 1916, at 6 (“If [the Court] were to wrap itself in abstractions and close its eyes to everyday life, politics included, it would not be fit or able to administer justice.”). Justice Douglas observed: “A man or woman who becomes a Justice should try to stay alive; a lifetime diet of the law alone turns most judges into dull, dry husks.” WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 469 (1974).

⁵¹ There is little to no empirical data on public opinion regarding extrajudicial conduct. Steven Lubet, *Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment*, 2 GEO. J. LEGAL ETHICS 665, 668 (1989).

⁵² THE FEDERALIST NO. 78, *supra* note 48, at 466; see also Editorial, *An Alert from the Chief Justice*, N.Y. TIMES, Apr. 11, 1996, at A24 (calling independent judiciary “one of the crown jewels of our system of government”).

⁵³ MURPHY, *supra* note 21, at 6–7 (explaining that judges are asked to abstain from activities that “compromise or appear to compromise the public’s belief in the integrity and political independence of the judiciary”); Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 622 (1994) (discussing danger to impartiality resulting from Court’s involvement in politics); Kaye, *supra* note 32, at 711 (describing need to “stay out of the fray” in order “to secure an impartial forum”); Bell, *supra* note 21, at 589 (“Activities that give a Justice a stake in what persons outside the judiciary do or tie him to interests which become involved in litigation before the Court threaten the Court’s independence.”).

causes or political parties or because of extrajudicial speech setting forth his views on controversial issues.

It is impossible to know whether a judge's public statement on an issue sacrifices his or her actual impartiality. Judges are educated individuals who usually arrive at the bench after a distinguished career in the law. Justice William Rehnquist observed that: "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."⁵⁴ If we accept that judges will necessarily have some opinions on questions that will come before them, then a judge's public statements are troubling only if we assume that publicly articulating a position will influence a judge more than his past, nonpublic consideration. It is possible that the public articulation of a position threatens impartiality more than privately considering an issue.⁵⁵ Justice Rehnquist, however, dismissed this concern: "The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance."⁵⁶ Whether or not the public statement of a Justice will ossify his view, the inherent partiality of an educated jurist means that maintaining actual impartiality is, at best, an imperfect goal. Some commentators suggest that given inherent biases, it is better to have the biases made public, rather than to pretend they do not exist.⁵⁷

The second concern is that the availability of extrajudicial positions may motivate Justices to decide cases in pursuit of a political office, and this concern has a long historical pedigree. Initially expressed in response to Chief Justice Jay's serving as Ambassador to England,⁵⁸ the concern was echoed in criticisms of the political ambi-

⁵⁴ *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

⁵⁵ *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 136, 142 (1969) [hereinafter *Senate Hearings*] (statement of Alexander M. Bickel, Chancellor Kent Professor of Law and Legal History, Yale University) ("[I]n some measure every man who goes on record . . . does in fact close his mind."); see also Harlan F. Stone, *Fifty Years' Work of the United States Supreme Court*, 14 A.B.A. J. 428, 428 (1928) (lamenting "unhappy fate" of Stone's past statements being used by counsel to attempt to influence his ruling on cases).

⁵⁶ *Laird*, 409 U.S. at 836.

⁵⁷ Reinhardt, *supra* note 5, at 809 ("The public should know what approach we as individuals take from the bench; it should be aware that we are not carbon copies of each other; and it should be aware that some decisions are indeed influenced by the philosophies and values that judges bring to the bench."); Dahlia Lithwick, *Fighting Words*, SLATE, Mar. 9, 2004, <http://www.slate.com/id/2096883> (noting that "[t]he alternative to these speeches isn't neutral judges").

⁵⁸ See Russell R. Wheeler, *Of Standards for Extra-Judicial Behavior*, 81 MICH. L. REV. 931, 943 n.46 (1983) (reviewing MURPHY, *supra* note 21).

tions of Justices Salmon Chase and William Douglas.⁵⁹ Those concerned about this possibility focus on the availability of positions that require public favor, such as elected office and ex officio service on commissions that could be seen as “perks,” rather than on actual service in those positions.⁶⁰ In *Mistretta*, the Supreme Court rejected an argument that the opportunity to serve in an ex officio capacity would threaten judicial independence, noting that: “Were the impartiality of the Judicial Branch so easily subverted, our constitutional system of tripartite Government would have failed long ago.”⁶¹ Furthermore, this concern applies with equal force to promotion within the judiciary—judges may decide a case in pursuit of a judicial promotion—and this concern is present even though no extrajudicial conduct is involved.

The final argument is that extrajudicial conduct threatens the appearance of impartiality, a concern closely related to the belief that extrajudicial conduct will diminish judicial allegiance.⁶² The appearance of impartiality is critical both for individual judges, so that litigants believe the decisionmaker is unbiased, and for the institution of the judiciary, to the extent that rampant individual partiality would taint the institutional image. But although we place a premium on the appearance of impartiality, we do not demand it in all circumstances. A judge who has already dissented from a case with a similar set of facts is considered impartial in a later case. Given the choice, a litigant might prefer a judge who has spoken publicly on a topic to a judge who has made his position clear in a previous opinion. The system necessarily allows for something less than the appearance of

⁵⁹ Chief Justice Morrison Waite criticized the political ambitions of his predecessor, Justice Salmon Chase: “Whether true or not, it was said that [Chase] permitted his ambitions . . . to influence his judicial opinions.” Westin, *supra* note 28, at 650–51 (quoting BRUCE R. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST 141–42 (1938)). And Justice Frankfurter feared that Justice Douglas’s decisions were based on “whether they might help or hurt his chances for the presidency.” MURPHY, *supra* note 21, at 267.

⁶⁰ Often, critics who make this argument concede that there has not been such impropriety and instead focus on the possibility of future impropriety. For example, those criticizing Justice Roberts’s service on the Pearl Harbor commission “are not so much concerned about this particular job for which Mr. Roberts has been detached as they are about the precedent it will establish.” Frank R. Kent, Op-Ed, *The Great Game of Politics*, WALL ST. J., Dec. 19, 1941, at 4.

⁶¹ *Mistretta v. United States*, 488 U.S. 361, 409–10 (1989).

⁶² See *supra* Part I.A.2. But extrajudicial speech may not change the public’s view of a judge’s impartiality. See Reinhardt, *supra* note 5, at 809 (noting that disclosure of views will provide “reason to admire our honesty”). Extrajudicial speech may even promote the appearance of impartiality in some circumstances. See Mauro, *supra* note 24 (noting that some judicial speech might demonstrate that “[j]udges set aside their personal views when deciding cases”).

complete impartiality, because it is not feasible to restrict judges from deciding cases with similar fact patterns. Proponents of judicial lockjaw cannot win a debate simply by raising the specter of partiality; rather, they must demonstrate that the burden of judicial lockjaw is worth the marginal increase in the appearance of impartiality.

These three concerns about impartiality are less persuasive than they may first appear. Given that we do not demand perfect impartiality, in fact or in appearance, these concerns are not sufficient to demonstrate that extrajudicial conduct impairs impartiality. Furthermore, some types of extrajudicial conduct will not threaten impartiality at all.

B. Flaws in the Debate

Many of the policy justifications are further undermined by the example of judicial scholarship and by the lax nature of public monitoring. Judicial scholarship provides a means to test the strength of the policy arguments, because it is not criticized even though it implicates many of the same policy concerns. Many of the policy justifications turn on untested hypotheses about the public's perception of extrajudicial behavior.

Public acceptance of judicial scholarship is further evidence that some policy justifications may ultimately be bankrupt. Legal scholarship is generally considered to be benign,⁶³ but it implicates many of the same policy concerns outlined above. For instance, if an argument against extrajudicial conduct is that judges will be less impartial if they make a public statement of their position on an issue, this concern applies with equal force whether the judge is serving *ex officio* or publishing an article in a law journal.

Justices have continued, unabated, to engage in the academic community by giving lectures, writing commentaries, and articulating legal theories outside of decisions, all without triggering criticism. For example, in 1881, Justice Samuel Miller published *Lectures on the Constitution of the United States*⁶⁴ with commentary on the Fourteenth Amendment. In 1891, Justice David Brewer gave a speech entitled "Protection to Private Property from Public Attack."⁶⁵ Justice

⁶³ See, e.g., CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(6) (Judicial Conference of the U.S. 1999) (allowing for "scholarly presentation made for purposes of legal education"); Turley, *supra* note 8 (noting that "mundane graduation address" was considered acceptable when other public speeches were not).

⁶⁴ SAMUEL FREEMAN MILLER, *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* (New York, Banks & Brothers 1881).

⁶⁵ Justice Brewer, Protection to Private Property from Public Attack, Address at the Yale Law School (June 23, 1841), *in* 10 RAILWAY & CORP. L.J. 281 (1891).

Brewer also gave a “confident defense[] of the Court,” the themes of which were “echoed” in later speeches by Justices Horace Lurton and Stanley Matthews.⁶⁶

In the last seventy years, Justices have been especially busy writing commentaries on the law.⁶⁷ Justices Hugo Black, William Douglas, Robert Jackson, and Felix Frankfurter all published commentaries on the Constitution or the Court generally.⁶⁸ In 1965, Justice William Brennan wrote an article⁶⁹ that “dealt so extensively” with the decision in *New York Times v. Sullivan*,⁷⁰ that many believe the article “provides the controlling interpretation of the case.”⁷¹ Justice Thurgood Marshall publicly challenged the majority opinion in cases regarding the “rights of prisoners and protection of journalists in libel suits.”⁷² Chief Justice Warren Burger and Justices Harry Blackmun, John Paul Stevens, and Lewis Powell engaged in a public debate, through a series of speeches, about the Court’s decision in *Gannett Co. v. DePasquale*.⁷³ Justice William Rehnquist spoke on privacy law,⁷⁴ and Justice Sandra Day O’Connor expressed her displeasure with federal district judges who nullified the decision of a state

⁶⁶ Westin, *supra* note 28, at 652–53. For the text of Justice Brewer’s speech, see David J. Brewer, The Nation’s Anchor, Address at the Marquette Club of Chicago, in 57 ALB. L.J. 166 (1898).

⁶⁷ Although this Note focuses on the extrajudicial conduct of Supreme Court Justices, other federal judges have also been active. Judge J. Clifford Wallace of the Ninth Circuit wrote an article proposing legislative alternatives to, and rebutting arguments made in favor of, the Nunn Bill, which was proposed to increase control over judicial conduct. J. Clifford Wallace, *Must We Have the Nunn Bill? The Alternative of Judicial Councils of the Circuits*, 51 IND. L.J. 297 (1975). District Court Judge Frank Battisti authored an article advocating for the repeal of 28 U.S.C. § 332(d); he feared that § 332(d) would be used to remove federal judges, providing an alternative to impeachment. Frank J. Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711 (1975). And most recently, Judge Harold DeMoss, Jr. of the Fifth Circuit published an editorial that was critical of the Court’s privacy jurisprudence. Harold R. DeMoss, Jr., Op-Ed, *Unacceptable Argument: Figment of Imagination*, HOUS. CHRON., Jan. 15, 2006, at 1.

⁶⁸ HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* (1968); WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* (1958); ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955); Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957).

⁶⁹ William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

⁷⁰ 376 U.S. 254 (1964).

⁷¹ Bell, *supra* note 21, at 601–02 (citations omitted).

⁷² D’Alemberte, *supra* note 50, at 623–24.

⁷³ Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 20, 25 n.97 (1980) (“The *Gannett* case provoked screams of outrage from the press and much debate among judges, lawyers, and legal scholars.”). In *Gannett Co. v. DePasquale*, the Court held that the public has no right of access to a criminal trial. 443 U.S. 368, 379–80 (1979) (“Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.”).

⁷⁴ D’Alemberte, *supra* note 50, at 624.

judge⁷⁵ and also spoke "pointedly" against the death penalty.⁷⁶ And Justice Antonin Scalia published a book articulating his theory of constitutional interpretation,⁷⁷ while Justice Stephen Breyer provided his own interpretation of constitutional values.⁷⁸ Yet this massive amount of judicial scholarship, a form of extrajudicial conduct, has generated little public criticism.

In addition to carving out an exception for judicial scholarship, many of the policy justifications discussed above turn on the public's perception of the judiciary. These assertions all make claims about the public's reaction to extrajudicial conduct: (1) extrajudicial conduct weakens the judiciary by tarnishing its public image; (2) extrajudicial conduct prevents a weakening of the judiciary by protecting its public image; (3) extrajudicial conduct threatens judicial allegiance; (4) extrajudicial conduct promotes judicial allegiance; and (5) extrajudicial conduct creates the appearance of partiality. Advocates and critics of judicial lockjaw both rely on public perception, but they are merely speculating about the public's response.⁷⁹ It is clear, however, that extrajudicial activity by a majority⁸⁰ of Justices has not eroded all public confidence in the judicial branch.⁸¹

Op-Ed articles frequently express dissatisfaction with extrajudicial activity,⁸² yet the public continues to accept the decisions of the Court. Modern critics who claim that today's behavior threatens judi-

⁷⁵ *Id.*

⁷⁶ Editorial, *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16; Ralph J. Temple, Letter to the Editor, *Judges' Political Stripes*, N.Y. TIMES, July 11, 2001, at A16.

⁷⁷ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

⁷⁸ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006). Some writers saw Breyer's book as a response to Scalia. See, e.g., Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2388 (2006) (book review) (stating that Justice Breyer "offers [his] approach as a counterpoint to the conservatives' textualism-originalism"). But see Michael A. Livermore & D. Theodore Rave, Book Note, *Conversation, Representation, and Allocation: Justice Breyer's Active Liberty*, 81 N.Y.U. L. REV. 1505, 1506 (2006) (explaining that, although Justice Breyer devotes section to criticizing textualism, "the primary purpose of the book is not to defend a theory of constitutional interpretation" but to explain particular constitutional value Justice Breyer felt had been underemphasized). Justice Breyer also went on a press tour to promote his book. See *supra* note 12 and accompanying text.

⁷⁹ See Lubet, *supra* note 51, at 668 (noting that there is no empirical data on public responses to extrajudicial activity).

⁸⁰ As of 1982, two-thirds of 102 Justices had "engaged in some form of extrajudicial political behavior." MURPHY, *supra* note 21, at 7.

⁸¹ One recent survey found that fifty percent of respondents have "strong confidence" in the Supreme Court, while only fifteen percent had "slight or no confidence in it." *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1309 (1999).

⁸² See, e.g., sources cited *supra* note 47.

cial independence like never before echo the hollow warnings of their predecessors.⁸³ Based on historical experience, the current demands that Justices curtail their extrajudicial activity will never move beyond the Op-Ed pages; in the past, pointed criticism has remained merely criticism. Uncertainty about the public's response to extrajudicial activity does not dismiss the various policy arguments described above; however, it does suggest that something else may be motivating the debate.⁸⁴

Advocates for both more and less extrajudicial activity rely on the same policy arguments. The policy concerns—judicial independence, judicial allegiance, and impartiality—are significant interests, but they do not dictate a specific standard for judging extrajudicial activity. Because the policy arguments lead to such inconclusive results and can be used on both sides of the argument, they cannot be motivating the debate over extrajudicial activity. A simpler and more basic explanation is plausible—critics of extrajudicial activity may disagree with what Justices say when they speak extrajudicially,⁸⁵ and they might be using arguments about the propriety of extrajudicial conduct itself to mask their criticism.

In addition to the policy considerations discussed above, most critics of extrajudicial conduct rely heavily on historical claims to bol-

⁸³ See *id.*; sources cited *infra* notes 86, 88. In addition to the cycle of commentators claiming that extrajudicial activity poses an unprecedented threat to judicial independence, a parallel cycle of commentators is claiming that the judiciary faces unprecedented threats from the political branches. *E.g.*, William H. Pryor, Jr., Op-Ed, 'Neither Force Nor Will, but Merely Judgment,' WALL ST. J., Oct. 4, 2006, at A14 ("Recently some leaders of the bench and bar . . . have decried what they describe as unprecedented threats to the independence of the judiciary."). Such attacks on judicial independence are not unprecedented. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2610–11 (2003) ("Actors in the political branches have challenged, and will continue to challenge, judicial authority or independence when it serves their interests."); Friedman, "Things Forgotten," *supra* note 22, at 739–53 (summarizing periods where political branches have threatened judicial independence). Noting this historical precedent, Judge Pryor disagrees with the conclusion that the judiciary is uniquely "under siege" today. Pryor, *supra*.

⁸⁴ Attempting to discern a principle behind the Justices' own attitudes about extrajudicial conduct, David Eisenberg concluded that "[w]hat emerges . . . is a dizzying patchwork of ad-hoc justifications." David Eisenberg, *A Consideration of Extra-Judicial Activities in the Pre-Marshall Era*, in SUPREME COURT HISTORICAL SOC'Y, YEARBOOK 1985, at 117, 117 (1985).

⁸⁵ Barry Friedman describes a similar phenomenon in constitutional law scholarship, where genuinely scholarly constitutional arguments are in fact motivated by the outcome of cases. Because the work is very theoretical, "ideology is less obviously the impetus for the scholar's work. . . . [But] grand theory can be understood both as a reaction to trends in constitutional events and as influenced by the ideological commitments of its author." Friedman, *Cycles*, *supra* note 22, at 151–53. Similarly, the theoretical arguments about the possible effects of extrajudicial activity may be masking an ideological disagreement with the *content* of the extrajudicial speech.

ster their position. The next Part evaluates the strength of these historical claims and demonstrates that they are weak and inaccurate.

II

EVALUATING THE HISTORICAL JUSTIFICATIONS

The consistent practice of engaging in extrajudicial conduct and the public response to that practice challenges the historical accounts given to explain and justify judicial lockjaw. There are three discrete and conflicting historical accounts of how judicial lockjaw developed. This Part outlines those historical accounts and explains how each account relies, at least in part, on incomplete historical understandings. As was the case with the policy justifications, untenable historical justifications obfuscate the debate over extrajudicial activity.

Editorialists and politicians rely on historical claims to criticize extrajudicial activity, disparaging the conduct as unprecedented. Over the past two decades, critics have periodically used this device, decrying modern extrajudicial conduct as unheard of or more frequent than ever before. In 1988, the *New York Times* noted that Justices were granting interviews, publicly speaking about controversial issues, and criticizing the President, and concluded that these are "all practices that were almost unheard of as recently as the 1970's."⁸⁶ And in 2006, the *New York Times* observed that "[s]peeches by Supreme Court justices are usually sleepy civics lessons studded with references to the Federalist Papers and the majesty of the law. That seems to be changing."⁸⁷

Historical claims inform the debate over the permissible boundaries of extrajudicial conduct, but the most frequent historical claims, such as those made by recent newspaper articles, are inaccurate. The claim that we are facing roving, extrajudicially active judges for the first time is untenable. Judges have always engaged in extrajudicial behavior of some form, and this behavior was frequently criticized.

⁸⁶ Stuart Taylor, Jr., *The Supreme Court: Lifting of Secrecy Reveals Earthy Side of Justices*, N.Y. TIMES, Feb. 22, 1988, at A16. Three years earlier, the *New York Times* made a similar point: "Justices have traditionally been wary of debate on politically charged issues. This tradition is eroding." Taylor, *supra* note 47; see also Turley, *supra* note 8 ("[T]he justices have been entering the public debate recently in a way that would have been viewed as scandalous just a couple of decades ago.").

⁸⁷ Adam Liptak, *Public Comments by Justices Veer Toward the Political*, N.Y. TIMES, Mar. 19, 2006, § 1, at 22.

A. *Extrajudicial Conduct at the Founding*

Modern criticism that derides extrajudicial conduct as “eroding” a “tradition”⁸⁸ is an example of the popular understanding that judges have always refrained from extrajudicial conduct. By this account, “silence is the price of life tenure.”⁸⁹ But this historical account is refuted by the activities of federal judges at the Founding.

The first federal judges had to rely on their own judgment to define their role and that of the new judiciary. The Constitution devotes relatively little text to the judicial department.⁹⁰ The judiciary was to be an independent branch of government, vested with “judicial [p]ower,” and comprised of judges who served during “good [b]ehaviour.”⁹¹ The separation of powers doctrine was a “novel” arrangement, and there was no precedent for judges to follow.⁹²

At the Constitutional Convention, there was “very little fear of extrajudicial activity.”⁹³ In England and colonial America, judges frequently engaged in extrajudicial activity and even served in other branches of government.⁹⁴ There were proposals to circumscribe

⁸⁸ Taylor, *supra* note 47; *see also* Turley, *supra* note 8 (criticizing Justices for “[a]bandoning a long-held tradition of avoiding public speeches”). There is even a tradition of hearkening back to this supposed long-held practice. Over 130 years ago, the Supreme Court referred to “the universal assumption by the people that the man who is appointed to the Supreme Bench takes the place for life, and that thenceforth he is utterly withdrawn from politics, and his future public life is to be devoted exclusively to the exalted duties of a high Judge.” *The Supreme Court and the Presidency*, *supra* note 49; *see also* Kent, *supra* note 60 (“By those who most deeply cherish the traditions of the bench, it is insisted that members of the court should remain aloof from all administrative activities not directly connected with the bench.”); Editorial, *Out of Place*, N.Y. TIMES, July 18, 1916, at 8 (noting “custom, faithfully honored by observance” of “withdraw[ing] from many activities of a political or social nature”); Editorial, *The Presidency and the Supreme Court*, N.Y. TIMES, Aug. 20, 1915, at 10 (noting tradition that “Supreme Court should not be a training ground of candidates for President”).

⁸⁹ Hawkins, *supra* note 6, at 1354 (paraphrasing Judge Calabresi).

⁹⁰ Article III, which discusses the judiciary, is only 51 lines long, while Article II (executive) and Article I (legislature) are 127 and 303 lines long, respectively. ERNEST SUTHERLAND BATES, *THE STORY OF THE SUPREME COURT* 30 (1936).

⁹¹ U.S. CONST. art. III.

⁹² Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789–1800*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 31, 52 (Robert A. Katzmann ed., 1988); *see also* Wheeler, *supra* note 23, at 124 (“The American Constitution created a unique judicial office, and it fell to the Jay Court to explain its character.”).

⁹³ Wheeler, *supra* note 23, at 126.

⁹⁴ *See* Resnik, *Constricting Remedies*, *supra* note 40, at 272–73, 273 n.271 (noting that many judges even drafted legislation); *see also* STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 12–22* (1997) (describing extrajudicial activities of English judges); Wheeler, *supra* note 23, at 126–27 (noting that “extrajudicial activity . . . was common both in England and the American colonies” and discussing reasons for occasional “[o]bjections to plural officeholding”).

extrajudicial activity at the Constitutional Convention, but these proposals did not even make it to a vote.⁹⁵

As soon as the Constitution was adopted and the first Justices were appointed, Congress and the President put the Justices to work in extrajudicial roles. The political branches assumed, based on their experience with the English Constitution, that "judges were obligated to serve the nation extrajudicially in various ex officio capacities."⁹⁶

The first federal judges engaged in all types of extrajudicial behavior, much of which was explicitly or implicitly endorsed by Congress, the President, or both. For instance, Congress assigned Chief Justice John Jay two ex officio responsibilities: serving on the Sinking Fund Commission to cope with the Revolutionary War debt, and inspecting the Mint.⁹⁷ Also, the President appointed, and the Senate confirmed, sitting Chief Justice Jay and Justice Oliver Ellsworth as ambassadors to Great Britain and France, respectively.⁹⁸ Chief Justice Jay also provided informal advice to President Washington.⁹⁹

The range of extrajudicial conduct was broad and included academic lectures and legislative lobbying. From the beginning, Justices lectured and commented on the law; as early as 1790 Justice James Wilson gave a series of lectures on the nature of law, government, and the Constitution.¹⁰⁰ The early Justices were also active lobbyists, particularly against circuit riding.¹⁰¹ In 1792, Justice James Iredell lobbied the President to urge Congress to change certain policies

⁹⁵ Wheeler, *supra* note 23, at 127.

⁹⁶ *Id.* at 123–24.

⁹⁷ See Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186 (the Sinking Fund Commission); Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250 (the Mint); Wheeler, *supra* note 23, at 140–41.

⁹⁸ Simon H. Rifkind, *A Judge's Nonjudicial Behavior*, 38 N.Y. St. B.J. 22, 26 (1966); Bell, *supra* note 21, at 591.

⁹⁹ Bell, *supra* note 21, at 590 & n.14 (citing *Nominations of Abe Fortas and Homer Thornberry: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 164 (1968) (statement of Abe Fortas, Associate J. of the U.S. Supreme Court)). Although President Washington and Chief Justice Jay had a personal relationship, Chief Justice Jay was more likely motivated by a sense of obligation than by the "spirit of friendship," and "Washington obviously understood that the Chief Justice in his official capacity was to work with the executive officers." Wheeler, *supra* note 23, at 145–46.

¹⁰⁰ JAMES WILSON, *THE WORKS OF JAMES WILSON* (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896). Justice Wilson intended to publish a book, but never finished the project. Bird Wilson, *Preface to Original Edition of JAMES WILSON, THE WORKS OF JAMES WILSON*, at xvii–xxiv (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896).

¹⁰¹ Wheeler, *supra* note 58, at 943 n.44 (citing Letter from the Justices of the U.S. Supreme Court to the Congress of the United States (Nov. 7, 1792), in 1 AMERICAN STATE PAPERS, DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 52, 52 (Walter Lowrie & Walter S. Franklin eds., D.C., Gales & Seaton 1834).

regarding circuit courts.¹⁰² When Congress was considering amendments to the Judiciary Act in 1800, Justices Bushrod Washington and William Paterson drafted a proposed new bill and submitted it to the House Judiciary Committee.¹⁰³

In addition to the activity described above, many of the Justices engaged in campaigning and electioneering. Chief Justice Jay made an unsuccessful bid for Governor of New York in 1792; he was eventually elected in absentia and resigned from the Court in 1795 to accept the position.¹⁰⁴ Justice William Cushing was a Massachusetts gubernatorial candidate in 1794.¹⁰⁵ During the revolutionary¹⁰⁶ presidential election of 1800, Justice Washington actively campaigned for Charles Pinckney¹⁰⁷ while Justice Samuel Chase traveled around making stump speeches on behalf of John Adams.¹⁰⁸

This evidence demonstrates that in just the first decade under the Constitution, federal judges engaged in a wide range of extrajudicial activities. Modern critics who deride Justices for departing from tradition are relying on an imagined tradition that does not describe practice inherited from the Founding generation.¹⁰⁹

B. *Extrajudicial Conduct after the Chase Impeachment*

The second historical account argues that the impeachment proceedings brought against Supreme Court Justice Samuel Chase in 1805, for issuing a grand jury charge criticizing Congress, represent a critical moment that redefined the “constitutional nature of the judicial office.”¹¹⁰ Scholars who view the Chase impeachment as a “watershed” event¹¹¹ explain that, notwithstanding his acquittal, the Chase impeachment changed the “expectations of what constituted

¹⁰² Letter from James Iredell, Justice of the U.S. Supreme Court, to George Washington, President of the United States (Feb. 23, 1792), in 11 *THE PAPERS OF ALEXANDER HAMILTON* 46, 46 (Harold C. Syrett ed., 1966); see also Katyal, *supra* note 17, at 1743 n.163 (summarizing Iredell’s letter).

¹⁰³ Katyal, *supra* note 17, at 1741 (citing Marcus & Van Tassel, *supra* note 92, at 43).

¹⁰⁴ 1 *WARREN*, *supra* note 49, at 76, 124; D’Alemberte, *supra* note 50, at 620–21.

¹⁰⁵ 1 *WARREN*, *supra* note 49, at 275; Westin, *supra* note 28, at 637.

¹⁰⁶ See, e.g., *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC*, at xiii–xiv (James Horn et al. eds., 2002) (describing election of 1800 as “revolution”).

¹⁰⁷ 1 *WARREN*, *supra* note 49, at 275; Westin, *supra* note 28, at 637–38.

¹⁰⁸ FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES* 44–45 (Phila., Carey & Hart 1849); Westin, *supra* note 28, at 637.

¹⁰⁹ For an example of such criticism, see *supra* note 88.

¹¹⁰ Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 *STUD. AM. POL. DEV.* 55, 112 (1995).

¹¹¹ Blue, *supra* note 13, at 37–42 (questioning whether Chase impeachment was “quite the watershed event Professor Friedman suggests that it was”).

proper judicial behavior, thereby excluding overt partisan political activity."¹¹²

In the late eighteenth and early nineteenth centuries, judges frequently issued grand jury charges,¹¹³ which they used to give impassioned speeches on the law.¹¹⁴ For example, in 1799, Justice Oliver Ellsworth issued a charge that explained that "[c]onduct . . . clearly destructive of a government, or its powers, which the people have ordained to exist, must be criminal."¹¹⁵ Issuing such passionate and partisan charges invited criticism. The newly-elected Republicans felt that the Federalist Justices were "converting the holy seat of law, reason and equity, into a rostrum, from which they could harangue the populace, under the artful pretence of instructing a grand jury."¹¹⁶

In 1803, Justice Chase issued a charge to a grand jury in Baltimore in which he criticized federal legislation abolishing circuit judgeships, asserting that "[t]he independence of the *national* judiciary is . . . shaken to its foundation."¹¹⁷ This charge led President Jefferson to prompt his friends in Congress to impeach Justice

¹¹² Whittington, *supra* note 110, at 112. Scholars have varied views on the impact of the Chase impeachment; some view the impeachment as the end of partisan activity by judges, while others view the impeachment as indicative of new societal expectations about appropriate judicial behavior. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 116 (1973) (explaining that "openly political role [of judges] was reduced" after impeachment and that Justice Chase's acquittal represented "a kind of social compromise" where "[t]here would be no more impeachments, but also no more Chases"); Richard Ellis, *The Impeachment of Samuel Chase*, in *AMERICAN POLITICAL TRIALS*, at 57, 71 (Michal R. Belknap ed., 1994) (explaining that after this incident, federal judges were no longer impeached "for political purposes," but they also were not regarded as "spokesmen for particular political parties," although they were still "thought of as having ideological philosophies"); Richard B. Lillich, *The Chase Impeachment*, 4 *AM. J. LEGAL HIST.* 49, 71-72 (1960) ("[F]ederal judges subsequently refrained from active participation in politics.").

¹¹³ The practice became less influential and "attract[ed] less attention" after 1836, when Chief Justice Taney decided not to issue a grand jury charge. Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 *CARDOZO L. REV.* 1753, 1803 & n.369 (2003) (citing Taney's declination to issue a charge in *Charge to Grand Jury*, 30 *F. Cas.* 998 (C.C.D. Md. 1836) (No. 18,257)).

¹¹⁴ See generally Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 *SUP. CT. REV.* 127, 129-55 (discussing grand jury instructions given by Supreme Court Justices).

¹¹⁵ *The Charge*, *MASS. SPY, OR WORCESTER GAZETTE*, June 26, 1799, at 1 (reprinting Ellsworth's jury charge); see also 1 *WARREN*, *supra* note 49, at 162-63 (describing the charge).

¹¹⁶ Letter to the Editor, *Extract of a Letter, Dated London, May 1, 1802*, *INDEP. CHRON.* (Boston), June 14, 1802, at 2.

¹¹⁷ *Judge Chase's Charge*, *REPUBLICAN* (Baltimore), July 1, 1803, at 2 (reprinting Justice Chase's jury charge); see also 1 *WARREN*, *supra* note 49, at 276 (describing Justice Chase's jury charge); *Judge Chase's Charge*, *AM. CITIZEN* (New York), May 24, 1803, at 2 (summarizing Justice Chase's jury charge).

Chase.¹¹⁸ In 1804, feeling that “the seditious and official attack”¹¹⁹ should not go unpunished, the Republicans’ position was “that impeachment must be considered a means of keeping the Courts in reasonable harmony with the will of the Nation . . . and that a judicial decision declaring an Act of Congress unconstitutional would support an impeachment and the removal of a Judge.”¹²⁰

Although Justice Chase was acquitted,¹²¹ many scholars hypothesize that Chase’s impeachment served as a warning to other partisan judges.¹²² However, the historical evidence demonstrates that the Chase impeachment did not result in a depoliticized judicial department. In the period immediately following the Chase impeachment, Justices continued to engage in extrajudicial conduct, taking stances on the issues of the day, responding to criticism of their decisions, publishing lengthy commentaries on the law, and even campaigning for candidates and lobbying the political branches.

Justices publicly addressed issues of the era, such as slavery and nullification—provocative issues that threatened the unity of the country and would eventually lead to the Civil War. At a town meeting in Massachusetts, Justice Joseph Story spoke in favor of “resolutions calling on Congress to outlaw slavery in the federal territories and to reject new slave-holding territories for statehood unless they

¹¹⁸ President Jefferson wrote to Representative Nicholson (R-MD), “You must have heard of the extraordinary charge of Chace [sic] to the Grand Jury at Baltimore. Ought this seditious and official attack on the principles or our Constitution, and on the proceedings of a State, to go unpunished?” 4 DUMAS MALONE, *JEFFERSON AND HIS TIME* 467 (1970). The vote to investigate Justice Chase was “an out-and-out party measure”; the House voted to impeach Justice Chase by an “overwhelming” majority. *Id.* at 468.

¹¹⁹ *Id.* at 467.

¹²⁰ 1 WARREN, *supra* note 49, at 293–94. The impeachment trial in the Senate focused on defining a standard of impeachable behavior. 4 MALONE, *supra* note 118, at 478. The prosecution presented multiple standards. *See, e.g.*, 14 ANNALS OF CONG. 357 (1804) (statement of Hopkinson) (discussing whether impeachable offense must also be indictable); 14 ANNALS OF CONG. 432–37 (1805) (statement of Martin) (saying that high crimes and misdemeanors are not all impeachable but those that relate to office or reflect very poorly on office holder are impeachable); *see also* 3 ASHER C. HINDS, *PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* 738–60 (1907) (transcribing discussion of nature of impeachment during Chase impeachment proceedings); William H. Rehnquist, *Political Battles for Judicial Independence*, 50 WASH. L. REV. 835, 840–41 (1975) (discussing Republican theory of impeachment).

¹²¹ The defense maintained that only indictable activity could support an impeachment. 3 HINDS, *supra* note 120, at 762; Westin, *supra* note 28, at 643–44. Ultimately, Justice Chase was acquitted on all counts, although the Republicans held a sufficient majority in the Senate. A two-thirds vote would only require twenty-three votes to convict; there were twenty-five Republicans and nine Federalists in the Senate. The closest margin was nineteen guilty votes to fifteen not guilty votes on one of the articles of impeachment. 14 ANNALS OF CONG. 669 (1805); 4 MALONE, *supra* note 118, at 479–80.

¹²² *See* Ellis, *supra* note 112, at 71; Katyal, *supra* note 17, at 1748; Whittington, *supra* note 110, at 112.

adopted abolition.”¹²³ Justice John McLean published a letter on Congress’s power to legislate on slavery and publicly stated that he was opposed to slavery.¹²⁴ Justice William Johnson published arguments in reply to the Nullification movement and in support of broad federal treaty power.¹²⁵

Criticism of judicial decisions was as heated then as it is today, and both Justice Johnson and Chief Justice John Marshall found it necessary to publish articles in their own defense. In 1808, Justice Johnson published letters in South Carolina newspapers defending his decision to issue a writ of mandamus in *Gilchrist v. Collector of Charleston*¹²⁶ after the Attorney General issued an opinion stating that the circuit court should not have the power to issue mandamus.¹²⁷ Chief Justice Marshall responded to criticism of *McCulloch v. Maryland*¹²⁸ by anonymously publishing a defense of the decision.¹²⁹

Several important commentaries on the law also emerged during the period after the Chase impeachment. Justice Joseph Story’s *Commentaries on the Constitution* was first published in 1833.¹³⁰ Four years later, Justice Henry Baldwin published a commentary opposing Justice Story’s view of the Constitution, articulating the compact

¹²³ Westin, *supra* note 28, at 638, 645. But note that Westin referred to judicial “party participation” as “unusual in the years after 1800,” and explained that this was the only time Justice Story was involved in public extrajudicial political conduct. Justice Story made an exception to his usual policy of avoiding political conduct because he felt that with regard to slavery, “his duty to himself, his country, and the world, required him to overstep the limits he had set for himself on ordinary occasions, and throw the whole weight of his influence and opinions upon the side of liberty and law.” *Id.* at 638 (internal quotation marks omitted) (quoting 1 LIFE AND LETTERS OF JOSEPH STORY 359–60, 363 (William W. Story ed., Boston, Charles C. Little & James Brown 1851)).

¹²⁴ FRANCIS P. WEISENBURGER, *THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT* 140–41 (1937); Westin, *supra* note 28, at 639. For quotes from the letters, see Westin, *supra* note 28, at 648.

¹²⁵ See McKay, *supra* note 21, at 28 (citing DONALD G. MORGAN, *JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER* 260 (1954)) (“[Justice Johnson] wrote the ‘Philonimus Papers,’ denouncing those opposed to the broad sweep of the federal treaty power. . . . [and] issued written replies to the proponents of the Nullification Movement.”).

¹²⁶ 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420) (ordering writ of mandamus in embargo case).

¹²⁷ 1 WARREN, *supra* note 49, at 334 (“Judge Johnson took the unusual course of issuing to the public an elaborate and somewhat pugnacious defense of his decision and further explanation of the legal grounds on which it was based”); Westin, *supra* note 28, at 647. The published decision includes the text of the Attorney General’s letter as well as Justice Johnson’s response. *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 357–66 (C.C.D.S.C. 1808) (No. 5420).

¹²⁸ 17 U.S. (4 Wheat.) 316 (1819).

¹²⁹ 1 WARREN, *supra* note 49, at 515 n.1 (citing 4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 318, 322 (1919)).

¹³⁰ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Boston, Hilliard, Gray & Co. 1833).

theory of the Constitution and explaining votes on four specific cases.¹³¹ The dueling commentaries “provide[d] serious and extended discussions of disputes within the Court for the general public to consider, in addition to what was said in the opinions.”¹³²

Justices also continued to campaign and advise the political branches.¹³³ Justice John McLean was a “perennial candidate for [the] presidential nomination,”¹³⁴ and he “aspired to the presidency at every four-year interval from 1832 until 1860.”¹³⁵ Justice John Catron did not seek office for himself, but he actively campaigned on behalf of James Buchanan in 1856.¹³⁶ Justice William Johnson remained politically active in local South Carolina affairs and advised President Monroe on federal-state relations.¹³⁷ And Justice Robert Grier disclosed inside information about the Court’s pending decision in *Dred Scott* to President-elect Buchanan.¹³⁸

As the detailed examples above indicate, the Chase impeachment did not mark the end of extrajudicial behavior. There were some changes in the judiciary following the impeachment, as Justice Chase retired from most partisan activities and all of the Justices became more conservative in their jury charges.¹³⁹ However, although the Justices may have stopped using the bench to pursue partisan ends, there is no evidence that the Justices withdrew from public life or politics completely.

The long history since Chase’s impeachment reaffirms that Justices have continued to be involved in extrajudicial conduct; it is

¹³¹ HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES (Phila., John C. Clark 1837).

¹³² Westin, *supra* note 28, at 650.

¹³³ Justice Story helped Daniel Webster prepare for the debate on the National Bank and drafted federal legislation. McKay, *supra* note 21, at 29. See 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 123, at 155–58, for the text of a letter from Justice Story to Webster with Justice Story’s thoughts on the Bank. Chief Justice Roger Taney helped President Jackson with his farewell address, McKay, *supra* note 21, at 29, and advised President Van Buren about the government’s financial policies. CARL BRENT SWISHER, ROGER B. TANEY 332–33, 339–42 (1935); Katyal, *supra* note 17, at 1750.

¹³⁴ Westin, *supra* note 28, at 639; see generally WEISENBURGER, *supra* note 124 (chronicling political life and ambitions of John McLean).

¹³⁵ Bell, *supra* note 21, at 593 n.41.

¹³⁶ McKay, *supra* note 21, at 30.

¹³⁷ MORGAN, *supra* note 125, at 106–08, 273 n.64; McKay, *supra* note 21, at 28; Bell, *supra* note 21, at 593.

¹³⁸ 2 WARREN, *supra* note 49, at 295–97; McKay, *supra* note 21, at 30.

¹³⁹ See FRIEDMAN, *supra* note 112, at 116 (concluding that after impeachment, judges stopped pursuing partisan ends from bench by issuing partisan jury charges); Ellis, *supra* note 112, at 71 (arguing that since Chase trial, Justices are acknowledged to have ideological philosophies but are not seen as spokespersons for political parties); Rehnquist, *supra* note 27, at 125 (noting that after impeachment, “Supreme Court justices sitting on circuit stopped including political harangues in their charges to grand juries”).

clearly incorrect to suggest that the Chase impeachment ushered in an era of judicial lockjaw. Long after Justice Chase and the Founding generation had passed into history, Justices have continued to lobby,¹⁴⁰ to serve ex officio,¹⁴¹ to advise the President,¹⁴² to lecture,¹⁴³ and to teach.¹⁴⁴

¹⁴⁰ Justice Salmon Chase contributed to early drafts of the Fourteenth Amendment. Katyal, *supra* note 17, at 1750. As Chief Justice, Taft lobbied for the Judges' Bill and against the Caraway Bill, and he advocated for American participation in the International Court of Justice. On the Judges Bill, see Resnik, *Constricting Remedies*, *supra* note 40, at 273 n.273; on the Caraway Bill, see Katyal, *supra* note 17, at 1751 n.207; on the International Court of Justice, see McKay, *supra* note 21, at 33. Chief Justice Burger spoke in favor of and lobbied for a new bankruptcy bill. MURPHY, *supra* note 21, at 5. Now, Justices continue to give recommendations to Congress on matters related to the justice system and policy matters on which they have "special expertise." Katyal, *supra* note 17, at 1719.

¹⁴¹ In 1963, President Johnson created a commission to investigate the assassination of John F. Kennedy and appointed Chief Justice Earl Warren as the head. Bell, *supra* note 21, at 592. Justices continue to serve in many ex officio roles. For a list of examples of such roles, see *Mistretta v. United States*, 488 U.S. 361, 400 n.24 (1989).

¹⁴² After the Civil War, several Justices were involved in advising President Lincoln. See Katyal, *supra* note 17, at 1750 (describing how Chief Justice Chase tried to persuade Lincoln to end martial law and how "Justices Swayne and Davis . . . tried and failed to persuade President Lincoln to soften the administration's policy of arbitrary arrest and confinement of civilians by military authorities"); Bell, *supra* note 21, at 590 n.14 ("Justice David Davis advised President Lincoln on legal matters that were later the subject of Davis' important opinion on martial law."). There are many other examples of Justices advising other Presidents. See, e.g., ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 518–27 (1946) (examining role that Brandeis played in advising President Wilson during World War I); ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 138–56 (1965) (discussing Chief Justice Taft's relationship with Presidents Harding, Coolidge, and Hoover); MURPHY, *supra* note 21, at 17 (noting "close advisory relationship between a Supreme Court Justice (William Moody) and a President (Theodore Roosevelt)," but explaining that this was "first time in over forty years" that such a relationship had existed); *id.* at 313–38 (discussing Justice Frankfurter's relationship with President Franklin Delano Roosevelt and other Presidents and his attempts to influence judicial appointments); McKay, *supra* note 21, at 32–35 (citing numerous examples of Justices advising Presidents); Bell, *supra* note 21, at 590–95 (same).

¹⁴³ Recently, Justices have been active giving speeches. See Charles Lane, *Commentary, Kennedy's Assault on Editorial Writers*, WASH. POST, Apr. 3, 2006, at A17 (describing Justice Kennedy "publicly lashing out at editorialists who, he says, write as if they have not even read the court's opinions" during speech before American Society of International Law); Mauro, *supra* note 24 (noting that Justices O'Connor and Ginsburg made speeches in which they "firmly push[ed] back against Republican criticisms of the judiciary" and that Justice Stevens gave lecture in which he commented on controversial eminent domain opinion); Turley, *supra* note 8 (describing speaking engagements of Justices Scalia, Thomas, and Ginsburg). For a wide range of examples of extrajudicial commentary, see *AN AUTOBIOGRAPHY OF THE SUPREME COURT: OFF-THE-BENCH COMMENTARY BY THE JUSTICES* (Alan F. Westin, ed.) (1963); Emily Bazelon, *Sounding Off: Judges Should Have the Right Not to Remain Silent*, LEGAL AFFAIRS, Nov./Dec. 2002, at 30, available at http://www.legalaffairs.org/issues/November-December-2002/review_bazelon_novdec2002.msp.

¹⁴⁴ Many of the current Supreme Court Justices maintain full speaking schedules and some hold teaching appointments at law schools. See *Financial Portrait of the Justices Shows at Least Six Millionaires*, N.Y. TIMES, June 11, 2005, at A11 (noting that three

C. *The Modern Public Has Higher Expectations*

The third historical claim, that the modern public has new expectations for extrajudicial decorum, is misleading.¹⁴⁵ This third account acknowledges that judges have participated in extrajudicial conduct in the past but claims that “changing societal expectations . . . rendered accepted standards of judicial conduct contestable.”¹⁴⁶ The new societal expectations are described as symptoms of a “general erosion of public confidence in the competency of its government and in its judiciary.”¹⁴⁷ However, the claim that society has higher standards now, and the implication that modern society would not tolerate the extrajudicial behavior of past Justices, is based on the false assumption that extrajudicial conduct was tolerated in the past. Extrajudicial conduct has always been criticized. Although federal judges have engaged in extrajudicial conduct of some sort since the Founding and continuing long after the Chase impeachment, the persistence of this behavior does not indicate that the public condoned the behavior.

A strong form of this historical claim rests on an incorrect perception that the public endorsed the extrajudicial activities of the first Justices. The public did acquiesce to the ex officio obligations of Chief Justice John Jay,¹⁴⁸ in part because these appointments mirrored colonial and English experience.¹⁴⁹ However, Chief Justice Jay’s extrajudicial diplomatic position was broadly criticized.¹⁵⁰ Further-

Justices had teaching engagements); Linda Greenhouse, *What Justices Do off the Bench: Many Find Travel Is Broadening*, N.Y. TIMES, May 21, 1993, at B9 (observing that Justices O’Connor, Scalia, and Kennedy traveled almost every month for speaking engagements).

¹⁴⁵ This claim—that modern times require something different—also has a historical pedigree. In 1940, the *New York Times* criticized the possibility that Justice Douglas would be on the Democratic ticket, noting: “In modern times, after the established power of the Supreme Court made its total detachment from politics seem indispensable to respect for and belief in its justice, only one member left the bench to enter or re-enter the political field.” Arthur Krock, *Tradition Plays Role at Chicago Conclave*, N.Y. TIMES, July 7, 1940, at E3.

¹⁴⁶ REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, 152 F.R.D. 265, 278 (1993) (referring to circumstances leading to 1973 adoption of Code of Conduct for United States Judges); see also *supra* text accompanying notes 86–88.

¹⁴⁷ Abraham G. Gerges, *Should the Rules Be Changed to Allow Judges to Respond to Criticism?*, N.Y. ST. B.J., Mar.–Apr. 1997, at 38, 38 (arguing that changed circumstances may call for increased extrajudicial conduct in form of allowing judges to respond to criticism).

¹⁴⁸ Wheeler, *supra* note 23, at 142. See note 97 and accompanying text, *supra*, for a summary of Chief Justice Jay’s ex officio obligations.

¹⁴⁹ See Wheeler, *supra* note 23, at 126 (noting that extrajudicial activity was common in England and colonial America).

¹⁵⁰ See, e.g., N.Y. DAILY GAZETTE, May 15, 1794, at 2 (describing meeting of Democratic Society of Pennsylvania that adopted resolution referring to Chief Justice Jay’s appointment as “contrary to the spirit and meaning of the constitution”); Editorial, *From a Correspondent*, GEN. ADVERTISER (Phila.), June 4, 1794, at 2 (criticizing Chief Justice Jay’s

more, the Republicans condemned the practice of issuing partisan jury charges,¹⁵¹ and they were also highly critical of campaigning activities by Justices. Republican newspapers reprinted letters criticizing Justices for their electioneering activities.¹⁵² One letter, written under the signature "A Republican," asked:

What think you, my friends, of our supreme judges electioneering at towns and county meetings, those grave solemn characters, who ought to be retired from the public eye, who ought never to be seen in numerous assemblies or mingle in their passions and prejudices, and who, with respect to all political questions, and characters, ought ever to be deaf and blind to every thing except what they hear in evidence from the bench.¹⁵³

The press also criticized Justices Joseph Story and John McLean for their activities protesting slavery.¹⁵⁴ A Boston newspaper declared that Justice Story should be "hurled from the Bench,"¹⁵⁵ while a Philadelphia newspaper complained that Justice McLean's conduct did not conform with the behavior of other Justices who "respect the high responsibilities of their position and the notorious feelings of the people, by keeping themselves aloof from the altercations and animosities, the differences and the difficulties of party strife."¹⁵⁶

Long after the Founding period, the criticism of extrajudicial conduct continued. Although many Justices ran for President,¹⁵⁷ contemporary newspapers and other Justices did not approve.¹⁵⁸ The

appointment as violating separation of powers); *see also* Wheeler, *supra* note 23, at 142 (noting controversy over Chief Justice Jay's extrajudicial diplomatic mission).

¹⁵¹ *See supra* text accompanying note 116.

¹⁵² *See, e.g.*, Editorial, *On the Election of a President of the United States*, CITY-GAZETTE & DAILY ADVERTISER (Charleston), Sept. 13, 1800, at 2 (criticizing judges for electioneering); Letter to the Editor, *To the "South Carolina Federalist"*, CAROLINA GAZETTE (Charleston), Sept. 18, 1800, at 2 (Supplement) (same); *see also* 1 WARREN, *supra* note 49, at 274 (describing reaction to Justices' electioneering).

¹⁵³ *On the Election of a President of the United States*, *supra* note 152.

¹⁵⁴ *See supra* notes 123–24 and accompanying text.

¹⁵⁵ Westin, *supra* note 28, at 645.

¹⁵⁶ 2 WARREN, *supra* note 49, at 271; *see also id.* at 269–72 (describing contemporary attacks on Justice McLean's conduct); WEISENBURGER, *supra* note 124, at 140–41, 166 (same); Westin, *supra* note 28, at 639 (same). Justice McLean was criticized as "a 'judicial politician' who was 'dragging the ermine in the mire of politics' and displaying 'party violence on the bench.'" Westin, *supra* note 28, at 639 (citing 2 WARREN, *supra* note 49, at 270 & n.2).

¹⁵⁷ *See, e.g., supra* notes 134–35 and accompanying text (discussing McLean's multiple candidacies); *see also* JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 273–75 (1958) ("[F]or at least one hundred and twenty-five years [before 1958], there has been no ten-year period in which a Supreme Court Justice has not been seriously and soberly considered for the presidential office.").

¹⁵⁸ For criticism of Davis, *see* ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 135–36 (1965). Bickel suggested that this period of low prestige for Court may have been partially due to the fact that "this period embraced the tenures of four justices

Chicago Daily Tribune criticized Justice David Davis's candidacy, stating that: "Our objection, and it is one universal among the American people, is not personal to Judge Davis . . . Judges as candidates for Presidential honors, are held by the people, and will be treated by the people, as among the revolting abominations of corrupt and degenerate politics."¹⁵⁹ In the fallout of the 1876 elections,¹⁶⁰ newspapers argued that "public confidence in the Judges had been weakened,"¹⁶¹ and in 1884, the *Washington Post* called for a constitutional amendment "[d]eclaring that any citizen accepting an appointment to the Supreme bench shall thereafter be ineligible to any elective office."¹⁶² Justices were also criticized for their willingness to serve on presidential commissions, such as the Venezuela Boundary Commission.¹⁶³

The press continued to criticize extrajudicial conduct at the beginning of the twentieth century. The *Wall Street Journal* quoted Justice David Brewer's statement supporting a constitutional amendment "forbidding" Justices from pursuing a political career.¹⁶⁴ The 1912 and 1916 elections sparked a debate over whether Justices could, or should, pursue the Presidency. In both elections, Justice Charles Hughes was praised for refusing to consider a presidential run.¹⁶⁵ He

who entertained open presidential aspirations and engaged in vigorous political activity." For criticism of Justice Field's proposed candidacy, see J.N. Burritt, Letter to the Editor, *Justice Field and the Presidency*, N.Y. TIMES, Dec. 29, 1879, at 3. The *Chicago Daily Tribune* similarly criticized Chief Justice Fuller's proposed candidacy for the Presidency. Op-Ed, *The Fuller Presidential Boom*, CHI. DAILY TRIB., July 22, 1891, at 4.

¹⁵⁹ *The Supreme Court and the Presidency*, *supra* note 49.

¹⁶⁰ Congress established the Electoral Commission of 1876 to resolve disputed election returns from four states; the Commission was composed of fifteen members, including five Supreme Court Justices. Katyal, *supra* note 17, at 1750 n.202.

¹⁶¹ 2 WARREN, *supra* note 49, at 583.

¹⁶² Editorial, *Let Us Amend the Constitution*, WASH. POST, Feb. 17, 1884, at 4.

¹⁶³ *Are to Draw the Line*, CHI. DAILY TRIB., Dec. 31, 1895, at 4 (quoting former Solicitor General Aldrich as saying, "I deprecate the Justices of the Supreme Court assuming such duties"). There was concern that Justice Harlan's service on the Bering Sea Commission was unconstitutional, but Justice Harlan consulted with other Justices and was assured that it was constitutional. *The Offices Do Not Conflict*, CHI. DAILY TRIB., Aug. 17, 1892, at 9.

¹⁶⁴ Editorial, *The Judicial Office*, WALL ST. J., Aug. 12, 1904, at 1. But Justice Brewer apparently had no problem speaking on policy issues of the day. See A.H. Ulm, *Behind Scenes of the Supreme Court*, N.Y. TIMES, Jan. 18, 1925, at SM5 (noting that Justice Brewer "spoke out freely and frequently as an individual," but Court "did not look kindly on the practice"); Op-Ed, *Justice Brewer on the Race of the Navies*, N.Y. TIMES, June 20, 1909, at SM5 (discussing speech about disarmament that Justice Brewer made to New Jersey Bar Association and noting that speech was "a remarkable pronouncement, especially as coming from a Justice of the Supreme Court"). And Justices Harlan and Fuller "lamented [Justice Brewer's] outspoken manner." Westin, *supra* note 28, at 660.

¹⁶⁵ See *Justice Hughes's Refusal*, 72 INDEPENDENT 1435 (1912) (praising Justice Hughes's decision not to run and hoping that it would establish precedent, so that "hereafter no

ultimately resigned from the Court in order to run against Woodrow Wilson in the 1916 election. The *Washington Post* dismissed concerns that this was a problem and accused the *New York Times* of “weeping crocodile tears over the threatened corruption of the Supreme Court by politics.”¹⁶⁶ Fifteen years later, when Justice Hughes was nominated for Chief Justice, some senators opposed the nomination partly on the grounds that he had campaigned for the Presidency.¹⁶⁷ And during President Roosevelt’s “court-packing” plan, a proposed constitutional amendment would have rendered former Justices ineligible to hold any political offices.¹⁶⁸

The press and Congress criticized the political activity of judges during and after World War II.¹⁶⁹ Newspapers also expressed concern with the precedent set by Justice Owen Roberts’s service on the commission investigating Pearl Harbor,¹⁷⁰ and Congress eventually inves-

party will dare to tempt a member of that [C]ourt”); *The Presidency and the Supreme Court*, *supra* note 88, at 10 (noting tradition that “Supreme Court should not be a training ground of candidates for President”). But it was also argued that Justice Hughes could choose to participate in politics, citing the historical evidence of past Justices who had aspired to the Presidency. *See, e.g.*, Sterling E. Edmunds, Letter to the Editor, *Aspiring from the Bench*, N.Y. TIMES, June 20, 1916, at 10 (noting presidential ambitions of many past Justices).

¹⁶⁶ *The Supreme Court and Politics*, *supra* note 50 (arguing that there was no threat to Court, since “Hughes did not participate in politics while on the bench”).

¹⁶⁷ *Fight to Bar Hughes from Bench Opened by Senator Norris*, N.Y. TIMES, Feb. 11, 1930, at 1 (noting Senators Norris’s and Blease’s objections to Justice Hughes’s appointment and reproducing Norris’s comments).

¹⁶⁸ *Connally Offers Court Amendment*, N.Y. TIMES, Aug. 21, 1937, at 6. Conversely, Senator Borah suggested that the amendment should additionally “provide that holders of political office shall hereafter be ineligible to sit on the Supreme bench.” *Id.* Justice Black was criticized for his long experience, before his appointment, in politics. *Justice Black Assenting*, WASH. POST, Mar. 30, 1938, at X6 (“[T]he appointment to the Supreme Court of men long active in political life is undesirable, regardless of the appointee’s personal ability or the sincerity of his desire to discharge conscientiously the duties of his high office.”).

¹⁶⁹ *See Judges in Politics*, CHI. DAILY TRIB., July 6, 1949, at 18 (criticizing Justice Douglas’s political speeches, including speaking at rally at Madison Square Garden and addressing CIO); *Out of Place*, *supra* note 88 (criticizing Justice Brandeis’s extrajudicial comments on controversial issues). In 1940, the media criticized President Roosevelt for considering Justice Douglas as a running mate. *See, e.g.*, Arthur Krock, *supra* note 145 (calling Justice Douglas’s consideration “backward” and “perilous”); *see also* Roscoe Drummond, Editorial, *Intimate Message: Washington*, CHRISTIAN SCI. MONITOR, June 26, 1941, at 11 (identifying distressing trend of lean staffing that required Justice Byrnes to act as Majority Leader of Senate after appointment to Court but before beginning to serve). But criticism was not universal. Some defended the extrajudicial statements, and derided critics, claiming that they were “moved in this matter by partisan motive.” John D. Bradley, Letter to the Editor, *Judges in Politics*, WASH. POST, Sept. 6, 1941, at 8.

¹⁷⁰ *See, e.g.*, Kent, *supra* note 60 (questioning effect of detaching Justice Roberts “from his judicial duties for [Pearl Harbor commission] or any other purpose”).

tigated Justice Roberts's service.¹⁷¹ The press similarly disapproved of Justice Robert Jackson leaving the Court temporarily to prosecute the Nuremberg Trials.¹⁷² The *Washington Post* criticized the suggestion that Justice Fred Vinson serve as an emissary to the Soviet Union, noting that the Court was becoming a "House of Lords with its members available at any time for special assignments of a delicate and supposedly nonpolitical nature."¹⁷³ In 1946, jockeying over the Chief Justice position and a public rift between Justices Hugo Black and Robert Jackson led one newspaper to observe that many did not believe "that 'guarantees against breaches of duty' have been wholly 'adequate.'"¹⁷⁴

In 1955, although Chief Justice Earl Warren was not a presidential candidate, it was reported that if President Eisenhower had decided not to run for reelection, Chief Justice Warren was the person most favored for the Republican nomination.¹⁷⁵ The *Washington Post* disapproved: "If any Chief Justice should permit himself to be nominated for a political office, he would inflict incredible harm upon the Supreme Court as an institution."¹⁷⁶ And Senator Eugene McCarthy complained that Chief Justice Warren's appointment to the commission investigating the Kennedy assassination¹⁷⁷ "could in no way be squared with the intention of the framers of the Constitution."¹⁷⁸ In 1968, the Senate refused to confirm Justice Abe Fortas's nomination

¹⁷¹ Bell, *supra* note 21, at 591–92 (citing *Pearl Harbor Attack: Hearings Before the J. Comm. on the Investigation of the Pearl Harbor Attack*, 79th Cong. 3261–303 (1946)). In 1948, after he had left the bench, Justice Roberts advocated for a constitutional amendment barring federal judges from engaging in nonjudicial activities. Op-Ed, *To Keep Judges in Court*, HARTFORD COURANT, Dec. 16, 1948, at 14.

¹⁷² *To Keep Judges in Court*, *supra* note 171 (arguing that Justice Jackson ended up in "embarrassing position . . . over the appeals of the Japanese war lords, stemm[ing] from his service as prosecutor of the Nazi gangsters"). Justice Stone also objected to Justice Jackson's service at the Nuremberg Trials. Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193, 209–15 (1953).

¹⁷³ Marquis Childs, Editorial, *Washington Calling*, WASH. POST, Oct. 13, 1948, at 8. It was rumored that President Truman was grooming Justice Vinson to be nominated for President in 1952, *To Keep Judges in Court*, *supra* note 171, but Justice Vinson refused to be considered for the nomination, Philip L. Graham, *Vinson Would Reject Nomination for Presidency, Even if Drafted*, WASH. POST, Feb. 21, 1952, at 1.

¹⁷⁴ Arthur Krock, *The Question of a Judge's "Good Behavior"*, N.Y. TIMES, June 14, 1946, at 20 (quoting speech given by Justice Charles Evans Hughes in 1927).

¹⁷⁵ *Voters Eye the Chief Justice*, WASH. POST & TIMES HERALD, Apr. 14, 1955, at 16.

¹⁷⁶ *Id.* Chief Justice Warren responded quickly to reject the suggestion that he would run for President. William S. White, *Warren Rules out '56 Race and Any Return to Politics*, N.Y. TIMES, Apr. 16, 1955, at 1.

¹⁷⁷ Bell, *supra* note 21, at 592 (noting Chief Justice Warren's appointment to commission).

¹⁷⁸ EUGENE J. MCCARTHY, *FIRST THINGS FIRST: NEW PRIORITIES FOR AMERICA* 41 (1968); see also Wheeler, *supra* note 23, at 125–31 (disagreeing with Senator McCarthy and providing contrary analysis of framers' intent).

for Chief Justice after accusations of cronyism and the revelation of past conflicts of interest and certain extrajudicial behavior.¹⁷⁹

Criticism of extrajudicial conduct is not new; it has been levied for hundreds of years. Since the Founding, the public has begrudgingly tolerated extrajudicial behavior in a variety of forms. Each criticism of extrajudicial conduct echoes the criticism that preceded it, and even the claim that modern times require higher standards is a recurring device used by critics of extrajudicial conduct.¹⁸⁰ This latest invocation is no more persuasive than the claims of prior critics. The recurring nature of the criticism, pointing to the same policy arguments over two centuries, further undermines the strength of the policy arguments and supports the hypothesis that these arguments may be rhetoric, employed to discredit the judge and the substance of his or her speech.

CONCLUSION

A pattern has emerged in the public discourse over extrajudicial conduct. Critics and advocates alike rely on familiar policy rationales to justify their position and turn to history for support. While both sides fight over possession of the policy arguments, the indeterminacy of those arguments indicates that something else may be motivating the debate. Meanwhile, the historical evidence does not support squarely either side of the debate. Historical arguments about custom and tradition have the potential to be persuasive and rhetorically useful, but the claims made by critics of extrajudicial conduct are inaccurate.¹⁸¹

Extrajudicial conduct has the potential to impart real benefits to society—both because of the special expertise of judges, and in the same way that robust participation by any citizen creates a benefit. In the debate about standards for extrajudicial conduct, therefore, it is important to identify correctly what is at stake and to discount the unjustified arguments that have previously dominated the debate.

¹⁷⁹ Katyal, *supra* note 17, at 1752 & nn.210–11 (citing BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 238–67 (1988) and Alexander M. Bickel, *Voting the Court Up or Down: Fortas, Johnson and the Senate*, *NEW REPUBLIC*, Sept. 28, 1968, at 21, 22). When the Senate learned of the extent of Justice Fortas's advisory relationship with President Johnson, it instituted an investigation into the constitutionality of his actions. Katyal, *supra* note 17, at 1752 n.211 (citing *Senate Hearings*, *supra* note 55).

¹⁸⁰ See *supra* note 145.

¹⁸¹ This Note does not mean to suggest that the historical evidence supports increased extrajudicial activity, but rather that such evidence cannot be used to impeach extrajudicial conduct.