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Partiality and Disclosure in Supreme Court Opinions

Robert F. Nagel*

ABSTRACT

This Essay begins by identifying the various kinds of partiality the Justices of the Supreme Court can have in the cases they decide. Although there is widespread recognition of the influence these biases might have, for the most part the Justices continue to write opinions as if they (and other judges) were entirely disinterested. This practice is often thought to be justified as a source of judicial legitimacy, but there are a number of reasons to doubt that a pretense of impersonality is actually important for maintaining respect for the Court. Consequently, the possibility has to be considered that the Justices should routinely acknowledge their interests. This Essay, however, assesses some exceptional categories of cases where the Justices have addressed the issue of partiality and concludes that judicial self-interest prevents candid or realistic appraisals of possible bias.

INTRODUCTION

In this Essay, I address the question of whether the Justices of the Supreme Court (and perhaps, by extension, other judges) should routinely acknowledge and evaluate their interests in the cases they are deciding. This kind of attention to possible bias would certainly constitute a fundamental change, as the established style, with few exceptions, is a firmly impersonal focus on the legal merits of the dispute. Though it may seem odd in an age where the tenets of legal realism are widely accepted, most observers take this general pattern for granted and seem satisfied with it. Appreciation for the various forms that partiality can take has grown considerably in modern times, but the judicial practice of maintaining silence on this issue has largely remained unchanged. In a world where the Justices cannot be idealized as impersonal expositors of the law, the traditional reason for this silence is no longer persuasive. Nevertheless, as I intend to show, the very fact that judges have human frailties counsels against extensive self-examination in judicial opinions.

I. SILENCE ABOUT PARTIALITY AS A SOURCE OF RESPECT FOR THE JUDICIARY

A useful place to start thinking about partiality on the Supreme Court is the case that today is commonly credited with establishing the Court's preeminent role as legal arbiter. Despite *Marbury v. Madison*'s¹ canonical status, it is often observed that Chief

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¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

Justice John Marshall was not exactly impartial when he authored that decision.² Indeed, *Marbury* provides a kind of road map of the various aspects of judicial bias.³ Marshall was partial in the backward-looking sense that his own behavior helped give rise to the case. He was partial in the forward-looking sense that he would be affected by the outcome of the case. And he was biased both personally and, as a member of the judiciary, institutionally.

Marshall's behavior had directly created the circumstances that led to the lawsuit. Recall that while Secretary of State in the Adams Administration, Marshall himself sealed the commission that became the subject of *Marbury's* lawsuit, and Marshall's brother was the person who failed to deliver the sealed document.⁴ These facts may help to explain another frequently noted feature of *Marbury*: Despite the ultimate holding that the Court was without jurisdiction to decide the case, the Court's opinion declares the appointment to have been complete upon sealing.⁵ Marshall, that is, went out of his way to find his own behavior and that of his brother to have been legally harmless. In the decision that today is taken to be the fountainhead of the Supreme Court's central role in enforcing our fundamental law no mention is made of the Chief Justice's part in the transactions that gave rise to the case.

Partiality of a different kind might also help to explain why Marshall's famous opinion purports to decide that the Secretary of State would have been subject to a judicial order mandating delivery of the commission (if only the Court had had jurisdiction).⁶ Needless to say, this determination had large implications for the power of federal courts, dominated by members of Marshall's political party, to control executive officers who were members of the rival party. In short, the dictum concerning sovereign immunity increased Marshall's power and that of his political allies in potentially concrete and important ways. *Marbury* is silent about this rather delicate matter,⁷ as if the fact that the outcome of a case would benefit the Justices both personally and as members of the judicial branch was too crass even to occur to them or too unworthy to merit comment.

Along with black robes, elevated seating, and arcane language, this kind of silence is one of the "ritual[s] of solemn detachment" that we take for granted.⁸ Indeed, it is normal for judges not to mention their very real interests in the cases they decide. These interests are noticed by journalists, political scientists, and other observers, but for the most part they are ignored in judicial opinions.

Silence is the rule even when a litigant raises the issue of partiality in a recusal petition. Such petitions are referred to the Justice whose fairness is being questioned, so the Court never issues decisions, let alone explanations, on such matters. The practice,

² See LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008* 47 (2009).

³ For a useful discussion of the nature of impartiality, see Andreas Schedler, *Arguing and Observing: Internal and External Critiques of Judicial Impartiality*, 12 J. POL. PHIL. 245 (2004); see also William Lucy, *The Possibility of Impartiality*, 25 OXFORD J. LEGAL STUD. 3 (2005).

⁴ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 144 (2004).

⁵ *Marbury*, 5 U.S. at 151.

⁶ *Id.*

⁷ *Id.*

⁸ Schedler, *supra* note 3, at 257.

with two notable exceptions⁹ has been for the Justice to decide without any opinion whether recusal is appropriate.¹⁰

When the possibility of bias is institutional as well as individualized, the practice of silence is just as firmly entrenched. An egregious illustration is *Stump v. Sparkman*,¹¹ a 1978 decision in which the Court held that state judges are immune from monetary liability even for intentional or malicious violations of constitutional rights.¹² In an opinion sharply at odds with trends in the case law concerning executive and legislative immunity, the Court mentioned partiality only as a justification for absolute judicial immunity. Twice the Justices asserted that it is “a general principle of the highest importance to the proper administration of Justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.”¹³ It is to be expected, of course, that the Justices would have special concern and respect for the functions performed by other jurists. Moreover, the logic of *Stump*, if applied to federal judges, would shield the Justices and their colleagues on the federal bench from financial liability in civil rights cases. This, however, was not the kind of “personal consequence” that the Justices thought worth discussing.¹⁴

Perhaps the Justices believe that the mystique of impersonality would be threatened if they were to acknowledge the issue of judicial bias even in the limited number of cases where, as in *Stump*, the interest of judges in the outcome is fairly direct, tangible, and obvious. However this may be, it must be admitted that, if routinely extended to cases where a Justice’s interest is more remote, candid acknowledgement of his stake might plausibly be thought to undermine the judicial role. It is not unreasonable to be concerned, as jurists and lawyers undoubtedly are, at the prospect of the Justices constantly writing about themselves and their possible biases.

As understandable as this concern is, it leads to the perverse conclusion that silence about partiality is more important as a source of institutional strength to the extent that the Justices are in fact often interested in case outcomes. And, whether the Justices’ interests reside in the background of the case or in its outcome, the existence of those interests will be very common indeed. The Justices of the Supreme Court often are a part of the background of cases for the simple reason that they are powerful people both before and after their elevation to the Court. For instance, while a senator, Hugo Black helped to draft the Fair Labor Standards Act, the constitutionality of which he later voted

⁹ See *infra* text accompanying notes 113–127.

¹⁰ Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 575–76 (2005).

¹¹ *Stump v. Sparkman*, 435 U.S. 349 (1978). One Justice did later acknowledge the appearance of self-dealing. See *Butz v. Economou*, 438 U.S. 478, 528 n.* (1978) (Rehnquist, J., concurring in part and dissenting in part) (noting that special immunity rules for judges and others operating as a part of the judicial machinery may be seen as an example of judges treating nonjudicial officials as “lesser breeds without the law”).

¹² Unless the judge acts “in the ‘clear absence of all jurisdiction.’” *Sparkman*, 435 U.S. at 357 (quoting *Bradley v. Fisher*, 80 U.S. 335, 351 (1871)).

¹³ *Id.* at 355, 363 (quoting *Bradley*, 80 U.S. at 347, 351–52).

¹⁴ *Id.* at 355. *But see Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., memorandum opinion) (denying motion to recuse himself).

on while a Justice.¹⁵ While a member of the Justice Department, William Rehnquist testified before Congress on a case that he later helped the Court to decide.¹⁶

More broadly, as members of the Court, the Justices help to shape many of the social norms and practices that are later the subject of adjudication. During the so-called federalism revival, for instance, the Court issued many opinions seeking to strengthen state sovereignty, conceived of as dignitary status, when the Court itself had for decades been undermining that dignitary status.¹⁷ Arguably, at least, the Justices had helped to create the need for the federalism revival that they eventually initiated. In *Washington v. Glucksberg*, the Court emphasized the wisdom of allowing the political branches to cope, at least for a while, with the volatile issue of assisted suicide.¹⁸ It did so against the background of having decided *Roe v. Wade* in a way that cut off political debate and reform; thus, as was surely known by the Justices who decided *Glucksberg*, severely aggravating social tensions and possibly reducing access to abortion.¹⁹ The Justices' handling of the abortion issue helped to create the social context against which the Court decided to allow continued political responsibility for the assisted suicide issue.

If institutional interests are taken into account, the web of causality—and partiality—is much wider. In *Brown v. Board of Education*,²⁰ the Court began a prolonged and difficult attack on a system of racial segregation that predecessor Justices in *Plessy v. Ferguson*²¹ had helped to legitimize. Was the judiciary's institutional responsibility for Jim Crow one reason for the Warren Court's idealistic campaign? The same kind of question arises from the Court's treatment of the commerce power. Was the post-1937 approval of vast expansions of federal regulatory power influenced, not simply by a change in membership, but by a sense of institutional responsibility for the earlier Court's risky and much-criticized effort to stem the New Deal? And was the Rehnquist Court's eventual effort to define limits to the commerce power in part a reaction to the widespread belief, which the post-1937 Court had done much to create, that there are no limits to the commerce power?

The Justices are also often a part of the cases they decide in the sense that the outcomes will affect them personally. This is so because they live in the society that their decisions do so much to shape. They may have children or grandchildren who attend public schools that, because of Establishment Clause decisions, are bare of religious observances. A relative or a friend may be a homosexual whose life has been changed by the privacy decisions. Some of the Justices may hope that at some point assisted suicide might be an option for themselves or a relative.

Of course, as realists never tire of pointing out, the consequences of case outcomes involve more subtle or remote interests as well. A decision may advantage the political party responsible for the Justice's elevation to the Court or a cause that has long

¹⁵ *Laird*, 409 U.S. at 831.

¹⁶ Frost, *supra* note 10, at 545–46.

¹⁷ See Robert F. Nagel, William Rehnquist and the American Concept of Sovereignty (unpublished manuscript) (on file with the author).

¹⁸ 521 U.S. 702, 735 (1997).

¹⁹ See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

²⁰ 347 U.S. 483 (1954).

²¹ 163 U.S. 537 (1896).

interested the Justice. It may implement some moral precept favored by the Justice's religion. Patterns of decision making may lead to fame or obloquy or obscurity.

When, as in *Marbury*, the judicial interest in the case is both retroactive (in the sense that a Justice or the Court as a whole helped to shape the transaction giving rise to the case) and prospective (in the sense that the Justices or their colleagues will be affected by the outcome), the Court can effectively become the real party in interest. Those who praise *Marbury* as an act of judicial statesmanship do not have in mind the plaintiff, who did not get his commission, nor the defendant, who did not have to deliver it. They have in mind that the Court greatly enhanced the power of federal courts under circumstances unlikely to arouse political opposition. This may well have been profoundly good for the country, but this possibility does not diminish the fact that it was also profoundly good for the members of the Court. The Court—its institutional role, its prestige and power—is what *Marbury* is about.

A similar substitution of the Court for the nominal party in interest can be seen in the school desegregation cases. Consider the many cases from across the country in which federal courts held school districts to be in violation of the Constitution because they had not achieved adequate levels of racial balance. As much attention as this record of struggle has received, not everyone fully recognizes that the district court orders, which were based on standards set by the Supreme Court, were a central aspect of the transactions being adjudicated. The reasonableness and feasibility of these orders and standards were what was at issue.²² Moreover, the institutional prestige of the Justices and their colleagues, not to mention their place in history, would be diminished if the outcome of the lawsuit were to appear to reward resistance to the judiciary's part in the dispute. It is not too much to say that in deciding whether the actions of the defendants violated the Equal Protection Clause the Justices paid as much attention to state officials' attitudes towards federal judicial authority as to the educational interests of the plaintiff class.²³

As large a stake in a case as the Justices may have, a thorough recognition of the kinds of interests that they have leads more often to passivity or resignation than to disapproval.²⁴ This is because, while the ideal of impartiality is unachievable, the task of judging must go on. It is an understandable response to this dilemma to turn from the task of assuring impartiality to the task of maintaining the ideal—or myth or mystique—of impartiality. If judging is necessary and if some partiality in judging is unavoidable, then what seems to matter is convincing the members of the polity that the Justices are impartial or at least sufficiently impartial. This is done through the various rituals of impartiality, including (as we have seen) publishing opinions that treat the issue of partiality as if it does not exist or, at least, is not worth discussion.

However, given all the ways that the Justices are a part of the cases they decide, the rituals of impartiality—especially the aloof posture struck by the Justices in their opinions—seem rather insubstantial. In fact, it may be that poses like elevated seating and silence about partiality serve mainly to reassure the Justices themselves and some others who are acculturated into the world of lawyering. Large segments of the public

²² See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 12–13 (1958).

²³ Indeed, in *Cooper*, the Justices as much as acknowledged that their insistence on immediate compliance with the lower court order would harm students' education. *Id.* at 15.

²⁴ See generally, POWE, *supra* note 2, at 350.

may take the hard-nosed view that the Justices are naturally interested in the cases they decide just as large segments believe the Justices are influenced by political considerations.²⁵ Although the public seems to approve of legalistic values in judicial decision making, the evidence that legalistic opinion writing legitimates the judiciary is surprisingly scant.²⁶ If fidelity to precedent, for instance, does not especially affect attitudes towards judges, how much less effect would a fictive pose of stolid impartiality have?

Even if the ritual of silence is not especially effective in establishing the legitimacy of the Court's decisions, it does not necessarily follow that the Justices, or other judges, are viewed as unfair or lawless. Belief in judicial impartiality, like respect for courts in general, may come from elsewhere. One obvious source is generalized beliefs about the importance to the political system of law and the judicial function.²⁷ An alternative source lies in judicial procedures, in the traditions and rules that assure some approximation of equal opportunity for argument.²⁸ The opportunity for oral argument and briefing, for instance, provides a commonsensical reason to believe that judicial partiality is being contained. True, arguments can be undervalued or ignored, but it is surely plausible to think that the right to present arguments at least makes fair consideration possible.

Another plausible protection arises from assurances (frequently given during confirmation hearings and in other public settings) that the Justices will earnestly try to resist the influence of personal considerations. These assurances are, obviously, self-serving and for a number of reasons not entirely dependable. But everyone has experience with analogous efforts at self-control. The events of everyday life, like umpiring a Little League game or settling a neighborhood dispute, provide some basis to believe that good-faith efforts at impartiality are possible and have some effect.²⁹

If factors like fair procedures and personal self-control are the real bases for public satisfaction about judicial impartiality, the ritual of silence might be expendable. There is little reason to pretend that the Justices do not have interests in the cases they decide if most people already realize that they do and believe that there are workable methods for keeping their partiality within acceptable limits. Indeed, in cases where the possibility of bias is strong and evident, like *Stump*, acknowledgement might be more re-assuring than silence.³⁰ Acknowledgement would at least indicate a degree of self-awareness. Even if the ritual of silence were broken in more routine instances of possible partiality, the frequency with which the issue would have to be addressed might not be a problem. References to possible bias could, perhaps, become an ordinary part of judicial decisions and be largely taken for granted.

²⁵ John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 190 (2001).

²⁶ See, e.g., James R. Zink, James F. Spriggs II, & John T. Scott, *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. POL. 909 (2009).

²⁷ See, e.g., Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658 (1992).

²⁸ Frost, *supra* note 10, at 559–60; VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 13 (2003).

²⁹ For an argument that ordinary thought provides a rich understanding of impartiality, see generally Lucy, *supra* note 3.

³⁰ Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 696–97 (2005).

In short, in this age of realism the ritual of silence may no longer be credible or necessary. However, the consequences of breaking with the general pattern of silence about partiality would depend on the manner in which the Justices chose to discuss their own interests in the cases they decide. Fortunately this need not be entirely a matter of conjecture, since there are specific categories of cases where the ritual of silence has not been observed. One of these categories involves cases where a judge is charged with being so biased as to deny due process of law, and a second involves cases where the exercise of freedom of speech is alleged to have intimidated a judge. As demonstrated in the next Part, in these two types of cases the Justices portray judges as strong and impersonal. The third category of cases, which I discuss in Part III, involves the question of whether judges have made a legal error in a prior case. In these cases the Justices paint judges in highly personal, even heroic, tones. There have been only two decisions in which a Justice explained his recusal decision, but these confirm the conclusions that emerge from the other three categories of cases and will be discussed in the final section.

II. IMPERSONALITY AS A SIGN OF THE JUSTICES' CONFIDENCE

In this Part, I shall examine, first, cases in which the Justices determine whether a judge's possible bias towards a litigant violates due process and, second, cases in which the Justices decide whether speech has so intimidated a judge as to be unprotected by free speech principles. These two areas of the law are, of course, quite different, but in both the Justices depict judges (and by inference the Justices themselves) as being capable of enormous self-discipline. Descriptions of judges as strong and impersonal occur even when the Justices are attempting a psychologically realistic assessment. They occur despite the fact that, as the free speech cases show, the Justices are certainly able to provide perceptive descriptions of the weaknesses and vulnerabilities of individuals who are not jurists.

A. The Possibility of Judicial Bias Against a Litigant

In *Caperton v. A.T. Massey Coal Co.*, the Court expanded the rather narrow range of cases where the partiality of a judge violates the Due Process Clause.³¹ The lower court noted that the Constitution required recusal when a judge has a "direct, personal, substantial, pecuniary interest" in a case.³² The Supreme Court in *Caperton* held that:

[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.³³

Caperton widens the constitutional standard for identifying partiality in that a political contribution benefits the campaigning judge indirectly and impersonally (by aiding in his re-election to a public office, as opposed to providing funds for his personal use). This

³¹ 129 S. Ct. 2252 (2009).

³² *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 295 (W. Va. 2008).

³³ *Id.* at 2263–64.

move from the “direct, personal, substantial” standard appears to support the possibility that the Justices can discuss both judicial psychology and public perception in realistic terms.³⁴ Certainly there can be “a serious risk of actual bias” in many circumstances other than ones involving a “direct, personal, . . . pecuniary interest.”³⁵

It might be doubted that *Caperton* demonstrates any willingness or capacity to discuss the Justices’ own partiality in realistic terms, since neither they nor their colleagues on the federal bench are elected to office. However, the Court’s discussion of judicial bias bears on the Justices themselves because of the professional and institutional identification to be expected among jurists. In this sense, whenever the Court discusses bias in judging, it is discussing its own role as well. Moreover, the approach taken in *Caperton* has some potential for application to federal judges. Confirmation hearings, after all, have many of the trappings of a campaign. If a political advisor, who had helped to “direct” a judicial nominee by devising a strategy for responding to senators’ questions, were a party before that individual after confirmation, the logic of *Caperton* might raise a question of partiality. So might a lawsuit involving an interest group that had taken out advertisements intended to influence public attitudes and senatorial votes.

The analogy between electoral campaigns and confirmation hearings is supported by Chief Justice Roberts’ dissent, which emphasizes the potential expansion of the concept of bias inherent in the majority opinion.³⁶ The long list of questions, that he asserts are opened up by the majority opinion, includes some that could apply to the federal nomination and confirmation process. He asks, for example, “Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias?”³⁷

In any event, *Caperton* can usefully be examined for indications about how the Justices might discuss their own partiality. Although on the one hand, *Caperton* represents an effort to move consideration of judicial bias to a more realistic level, on the other, it rests firmly on an idealized view of the judge and the judge’s capacities. The majority opinion quotes this passage from *Tumey v. Ohio*:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.³⁸

The Court refers to this sentence no less than four times.³⁹ This repeated reliance is incongruous in an opinion that aims at some degree of realism. Notice that the *Tumey* standard begins by referring to “[e]very procedure which would offer a possible

³⁴ See *id.* at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (referencing the “realistic appraisal of psychological tendencies and human weakness”).

³⁵ See generally *Wood v. Georgia*, 370 U.S. 375 (1962) (noting that lower court judges issued citation for and found defendant guilty of contempt for statements made about a political matter involving the judges).

³⁶ *Caperton*, 129 S. Ct. at 2267 (Roberts, J., dissenting).

³⁷ *Id.* at 2270. But, for the most part, even where the questions could have relevance outside the electoral context, Roberts has in mind candidates and elected judges. *Id.* at 2269–72.

³⁸ *Id.* at 2260 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

³⁹ *Id.* at 2260, 2261, 2264, 2265.

temptation.”⁴⁰ And the procedure need only offer a temptation to “the average man as a judge.”⁴¹ A temptation to do what? “[N]ot to hold the balance nice, clear, and true.”⁴² In other words, the existence of any temptation that might possibly cause an average judge to depart even slightly from a precise legal balance violates due process of law. Because the existence of almost any personal incentive might meet this test and thus violate the Due Process Clause, the paradoxical effect of the passage is to idealize judges and judging. The standard for unconstitutional partiality can be phrased in such exacting terms only because of the hidden assumption that the average judge will seldom be tempted to depart from holding the balance “nice, clear and true.” Otherwise, virtually any judicial decision might be subject to challenge for partiality.

The Court’s assumption that judges are usually impervious to the temptations of partiality emerges clearly when the opinion cites to *In re Murchison*,⁴³ a decision finding unconstitutional partiality when a judge served as a “one-man grand jury” and then tried the same defendant he had indicted. *Murchison* is quoted for the brave proposition that “no man can be a judge in his own case.”⁴⁴ Further, “no man is permitted to try cases where he has an interest in the outcome,” and “a judge . . . [must be] . . . wholly disinterested in the conviction or acquittal of those accused.”⁴⁵ Judges, presumably average judges, are capable of being—and are expected to be—wholly disinterested in the outcome of the cases they try.

The conceit that judges can be wholly disinterested is repeated in *Mayberry v. Pennsylvania*,⁴⁶ another case relied on by the *Caperton* Court. *Mayberry*, like *Caperton*, attempted to inject a note of realism into evaluations of judicial partiality. The trial judge in *Mayberry* had been subjected to a series of colorful insults from a pro se criminal defendant.⁴⁷ To emphasize the intense psychological strain necessary to compromise the standard of complete disinterestedness, the Supreme Court quoted these insults at length before quickly concluding that due process required that subsequent criminal contempt proceedings be conducted by a different judge.⁴⁸ The Justices conceded that a trial judge “vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy.”⁴⁹ Teetering here on the edge of realism, the Court quickly pulled back by concluding that the insulted judge was unlikely to “maintain that calm detachment necessary for fair adjudication.”⁵⁰ To say that the judge failed to meet a standard of calm detachment is kind but understated. To think that the judge was anything less than furious is inconsistent with human nature, as well as with the fact that, in the contempt hearing, he had imposed on the defendant a prison term of eleven to

⁴⁰ *Tumey*, 273 U.S. at 532.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 349 U.S. 133 (1955).

⁴⁴ *Id.* at 136.

⁴⁵ *Id.* at 136–37.

⁴⁶ 400 U.S. 455 (1971).

⁴⁷ *Id.* at 466. The defendant, representing himself at trial, called the judge a “dirty sonofabitch,” “fool,” and “dirty tyrannical old dog.” *Id.* He also accused the judge of “running a Spanish Inquisition,” and told him to “keep your mouth shut” and “go to hell.” *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 465.

⁵⁰ *Id.*

twenty-two years for his insults.⁵¹ Moreover, despite acknowledging that the defendant's conduct would come "as a shock to those raised in the Western tradition that considers a courtroom a hallowed place . . .,"⁵² the Court ended its opinion with the happy thought that a different judge sitting in a contempt hearing would have "the impersonal authority of the law . . ."⁵³ By any realistic assessment, the norms of calm detachment and complete disinterestedness might, of course, be compromised in a contempt proceeding presided over by a professional associate of the vilified trial judge. Indeed, these norms might be compromised every day in normal courtrooms as judges, including the Justices themselves, find attorneys offensive, unresponsive, unprepared, irritating, or infuriating.

Thus even in a case like *Caperton* where the Court slightly expanded the standard for a finding of unconstitutional partiality, it repeatedly asserted an unrealistic and self-serving description of the capacities of ordinary judges. Paradoxically, this idealistic depiction is an explicit formulation of the same claim that is made implicitly by the ritual of silence. In different ways, both say: Judges are normally capable of an extremely high degree of impartiality. It may not be surprising that the Justices, even when they choose to acknowledge the possibility of partiality, insist on an idealized depiction of judges, but it is a fact worth keeping in mind when evaluating the possibility of routine discussion of the Justices' interests in cases before them.

B. The Possibility of Bias Arising from Intimidating Speech Directed at a Judge

On occasion the Court also breaks the ritual of silence when the issue it confronts is the effect on a jurist of threatening speech. Here again the Justices portray judges as strong and self-disciplined. Before describing the most colorful of these cases, however, it is necessary to dispel the understandable objection that free speech decisions generally place a heavy burden on the audience, even when the audience consists of ordinary citizens rather than judges.

It is true that modern free speech decisions often require ordinary people to put up with dangerous or offensive speech. To take a famous example, after painting a picture of the American framers as heroically brave and tolerant, Justice Brandeis argued: "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced . . . [And] that the danger apprehended is imminent."⁵⁴ Under this rule, people must tolerate risks if the threatened harm is uncertain or less than serious. And if the threatened harm is both likely and serious, its occurrence must be imminent. Many cases deny that the protection of citizens' sensibilities is adequate to justify restrictions on speech even when the harm is certain and immediate.⁵⁵ Nevertheless, despite Brandeis's encomium to the courage of the founders, by and large the Court's free speech decisions do not rest on unrealistic assumptions about the human capacity to tolerate risk, unpleasantness, and disagreement. Indeed, the modern Court's vigorous campaign to protect speech rests on pessimistic assumptions about these aspects of human nature.⁵⁶ The underlying idea is certainly not

⁵¹ *Id.* at 455.

⁵² *Id.* at 456.

⁵³ *Id.* at 465 (quoting *Offutt v. United States*, 348 U.S. 11, 17 (1954)).

⁵⁴ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

⁵⁵ *E.g.*, *Cohen v. California*, 403 U.S. 15, 21 (1971).

⁵⁶ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 9–10 (1970).

that people are too strong to be hurt by unfettered speech. Even when forbidding a state from punishing the display of a shocking profanity in a public place, the Justices knew—and indeed recommended—that passersby would seek to protect themselves by averting their eyes.⁵⁷

When Justice Brandeis's austere standard for protecting potentially harmful speech was adopted as authoritative in *Brandenburg v. Ohio*, the Court used it to set aside the conviction of a leader of a Ku Klux Klan group for burning a cross at a rally where there were guns and talk of "some revenge [sic] [being] taken."⁵⁸ These actions had been alleged to violate a prohibition against "advocat[ing] the duty, necessity, or propriety of crime, . . . violence, or unlawful methods of terrorism as a means of accomplishing . . . political reform."⁵⁹ It might be thought that the Court's insistence that this statute be restricted to prohibitions against incitement of imminent lawless action rather cruelly required African-Americans in the vicinity of the rally to abide an oppressive and threatening atmosphere. It is now fairly clear that this supposition about the psychological effects of the Court's holding is accurate. Even if a Ku Klux Klan leader in the circumstances of *Brandenburg* were to be tried under a statute prohibiting cross burning with intent to intimidate, his actions would be protected speech.⁶⁰ African-Americans must live with the anxiety that comes from knowing that the Ku Klux Klan meets to burn crosses in the night.⁶¹

This, however, does not mean that the Court is insensitive to the psychological harm created by cross burning. The practice, says the Court in *Virginia v. Black*, may be declared to be a species of "true threat" and outlawed, at least when the cross burning is done with the intent to intimidate a person or specific group of persons.⁶² It is not necessary that the speaker intend to make good on the threat because "a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur."⁶³ The Court's position may or may not show sufficient appreciation for the harm done by cross burning,⁶⁴ but the majority opinion at least acknowledges that threats are harmful because they engender fear and fear affects behavior.

Indeed, the Justices are capable of realistic, even sympathetic, accounts of the psychological damage that unregulated speech can cause. In *Hill v. Colorado*, for example, the Court described in these terms the state's purposes in imposing an eight-foot buffer zone between those entering a health care facility on public sidewalks and those who would engage "in oral protest, education, and counseling":

[T]he statute's restriction seeks to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach . . . by a person wishing to argue

⁵⁷ *Cohen*, 403 U.S. at 21.

⁵⁸ 395 U.S. 444, 446–48 (1969).

⁵⁹ *Id.* at 444–45.

⁶⁰ *Virginia v. Black*, 538 U.S. 343, 343 (2003).

⁶¹ *Id.* at 366.

⁶² *Id.* at 359–60.

⁶³ *Id.* at 344 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

⁶⁴ *See id.* at 388–400 (Thomas, J., dissenting).

vociferously face-to-face and perhaps thrust an undesired handbill upon her.⁶⁵

Four concurring Justices added that the protected individuals are “already tense or distressed in anticipation of medical attention.”⁶⁶ It should be noted that, according to the majority, “the implied threat of physical touching” was one of the considerations important enough to justify the government’s restraints on speech.⁶⁷

The same degree of empathetic realism cannot be found when the intimidation is directed at a judge. In *Bridges v. California*, the Court set aside contempt citations issued for the asserted purpose of providing fair trials “free from coercion or intimidation” or, as the Court also phrased it, “to preserve judicial impartiality.”⁶⁸ One citation had been directed at a newspaper for publishing an editorial urging a trial judge to sentence two defendants to prison rather than probation on charges of assault during a labor dispute.⁶⁹ The editorial cryptically asserted, “Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes” (whom the editorial had previously described as “gorillas”).⁷⁰ The Court declared that these words had no “inherent tendency” or “reasonable tendency” to compromise the judge’s impartiality because “it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from [the newspaper] in the event probation were granted.”⁷¹ Even giving the editorial “the most intimidating construction it will bear,” to think that it might influence the judge’s sentencing decision “would be to impute to judges a lack of firmness, wisdom, or honor”⁷²

It was left to three dissenters to specify the most intimidating construction that the editorial could bear. “A powerful newspaper,” wrote Justice Frankfurter, “admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be ‘a serious mistake.’”⁷³ Thus the majority’s position was that the threat of heated opposition from the *Los Angeles Times* during a retention campaign would not have an inherent tendency to influence a sentencing decision. Even *Caperton*, as unrealistic as that opinion was in the end, recognized that major factors in a political campaign can in some circumstances be reasonably thought to threaten judicial impartiality.⁷⁴

The second contempt citation set aside in *Bridges* involved a threat by an officer of the C.I.O. union to respond to an attempt to enforce a judge’s order in a labor dispute by using strikes to shut down ports in “the entire Pacific Coast.”⁷⁵ The Court again reasoned that the judge involved would have known that a strike was possible even without the explicit threat. The majority therefore concluded, “[W]e find exaggeration in the

⁶⁵ *Hill v. Colorado*, 530 U.S. 703, 724 (2000).

⁶⁶ *Id.* at 737 (Souter, J., concurring).

⁶⁷ *Id.* at 724.

⁶⁸ 314 U.S. 252, 259, 271 (1941).

⁶⁹ *Id.* at 271–72.

⁷⁰ *Id.* at 272.

⁷¹ *Id.* at 273.

⁷² *Id.*

⁷³ *Id.* at 299 (Frankfurter, J., dissenting).

⁷⁴ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

⁷⁵ 314 U.S. at 276.

conclusion that the utterance even ‘tended’ to interfere with Justice.”⁷⁶ Passing the obvious difference between knowing a strike is possible and knowing that one has been threatened, the Court’s position presumes that a judge “of reasonable fortitude” (to use the Court’s words) would not even tend to be influenced by the possibility that his actions might lead to the closing of traffic in and out of West Coast ports.⁷⁷

An African-American put in fear for his life by the burning of a cross is, as the Court has emphasized, reacting to a single act made significant by a long and painful history. One would think that a judge might—in assessing a strike threat by a union official—take into account the tumultuous history of labor unrest. A woman, the Justices have said, can be put in serious distress because of the threat of physical touching implied by the approach of a protestor. But a judge of reasonable fortitude, according to the Court, would feel no anxiety at the prospect of precipitating an economic crisis. It is true that ordinary human beings do not have the official duties that judges have. Nor are their feelings disciplined by professional expectations and ideals. Nevertheless, the psychological realism found in many free speech cases is starkly absent when it is a judge who is the object of intimidating messages. The judge as imagined by the Court in *Bridges* is hardly a person at all.

III. EMOTIONALITY AS AN EXPRESSION OF THE JUSTICES’ SENSE OF HEROISM

When the Court is asked to overrule a prior decision, the underlying issue, of course, is whether its legal analysis in an earlier case was deeply enough mistaken that it should be abandoned. This is to say that the Court’s own past behavior is the subject matter of the case. Thus a challenge to stare decisis can implicate the professional skill and wisdom of the Justices personally if they participated in the case being challenged. It implicates them in a more remote sense when close colleagues, with whom they work on the high court, participated in the earlier case. And in any event in such cases the Justices always have a strong interest in the consequences of their decision because the Court’s prestige and authority will be affected by admitting serious error.

Therefore, powerful incentives exist for the Justices to deny or minimize prior error. And even in constitutional cases, where uncorrected mistakes in interpretation subordinate the fundamental law to the common law norm of following precedent, the Justices are reluctant to overrule prior decisions. When mistakes are corrected, various devices are often used to protect the prestige and authority of the Court. When *Brown v. Board of Education* effectively overruled *Plessy v. Ferguson*, the Court famously emphasized changes in social conditions and in psychological understandings during the intervening years.⁷⁸ The severe criticisms of the reasoning in *Plessy* that were readily available are omitted, as is any recognition of the unfortunate social consequences of that decision.⁷⁹ *Brown* also illustrates the common technique of emphasizing intervening cases where the Court has ruled in ways that undermine the original, offending decision. At the extreme, the mistaken decision can be made to look like a slight aberration from a

⁷⁶ *Id.* at 278 (quoting *Toledo Newspaper Co. v. U.S.*, 247 U.S. 402, 425 (1918)).

⁷⁷ *Id.*

⁷⁸ *Brown v. Board of Education*, 347 U.S. 483, 493–96 (1954).

⁷⁹ *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

massive and generally correct judicial record.⁸⁰ Even in cases where prior error is bluntly and fully acknowledged, face-saving techniques can be found. In *Garcia v. San Antonio Metropolitan Transit Authority*,⁸¹ for instance, Justice Blackmun wrote a full-bore repudiation of state sovereignty that had been developed in *National League of Cities v. Usery*,⁸² a decision in which he had concurred. Toward the end of this demolition, Blackmun, quoting from his opinion in *National League of Cities*, noted that “the fifth vote” in that case “was ‘not untroubled by certain possible implications of the decision.’”⁸³

No case better illustrates how intense and personal the Justices’ interests can be in *stare decisis* cases than *Planned Parenthood v. Casey*.⁸⁴ The United States Justice Department made *Casey* the occasion for asking the Court to overrule one of the two most controversial, divisive, and significant decisions of the twentieth century. Sitting on the Court at the time were three members who had participated in deciding *Roe v. Wade*.⁸⁵ Over the ensuing years the other six members had, of course, helped to decide various cases that tested the meaning and limits of *Roe*.⁸⁶ When considering the Justices’ personal stake in *Casey*—whether in favor of reaffirming or overruling *Roe*—it is necessary to recall some well-known facts. *Roe* had invalidated abortions laws in forty-six states. In each year following that decision well over a million abortions have been performed.⁸⁷ The Justice Department’s call to overrule *Roe v. Wade* followed decades of political resistance to that decision, resistance that took the form of demonstrations and occasional violence, federal statutes limiting funding for abortions, and dozens of state statutes that directly or indirectly challenged *Roe*. Several presidential nominations to the Court were almost certainly aimed at inducing a reversal of *Roe*, and one—that of Robert Bork—resulted in the most vitriolic and dramatic hearings in modern times. In addition to creating an angry, energetic political movement with wide political impact, *Roe* had precipitated intellectual critiques remarkable for their severity and seriousness.⁸⁸ In short, the Justices’ positions in *Casey* would affect their personal and professional relationships, their reputations, the status of the Court on which they served, the political and cultural climate of the nation in which they lived, and (it is not too much to say) their places in history.

The tone and content of the *Casey* opinion are, to say the least, unusual. The Justices’ words are weighty and expressive. I cannot think of a case where the Court makes a more extensive, even impassioned, effort to confront the personal and institutional implications of a decision. Even while voting to reaffirm the basic holding of *Roe*, some of the Justices acknowledge the existence of good-faith doubts about the

⁸⁰ See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379, 392–98 (1937).

⁸¹ 469 U.S. 528, 545–47 (1985).

⁸² 426 U.S. 833 (1976).

⁸³ *Garcia*, 469 U.S. at 556; see also *Garcia*, at 562 (Powell, J., dissenting) (noting that Blackmun wrote the majority opinion in *National League of Cities*).

⁸⁴ 505 U.S. 833 (1992).

⁸⁵ 410 U.S. 113 (1973). Those three participants were Justices Blackmun, White, and Rehnquist.

⁸⁶ Justices O’Connor, Scalia, Kennedy, Stevens, Souter, and Thomas.

⁸⁷ HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 30, 67–68 (2002).

⁸⁸ E.g., *Roe*, 410 U.S. at 171–76 (Rehnquist, J., dissenting); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); *The End of Democracy? The Judicial Usurpation of Politics*, *FIRST THINGS*, Nov. 1996, at 18–42, available at <http://www.firstthings.com/article/2007/11/001-the-end-of-democracy-the-judicial-usurpation-of-politics-30>.

morality of abortion,⁸⁹ as well as their own doubts about its constitutionally protected status.⁹⁰ They discuss their reactions to the political turmoil that followed *Roe*. They speak openly and proudly of some of the sweeping changes induced in U.S. society by the Court's decision.⁹¹ And they write at length about the Court's central role in the U.S. political system and how that role would be undermined by a decision to overrule *Roe v. Wade*.⁹²

If *Casey* is in many ways a stunning exception to the ritual of silence, it is also a disturbing reminder of the temptations the Justices face when they drop the mantle of impersonality. The temptation to minimize or deny past error is pervasive in the majority opinion. The substantive section of *Casey* begins with a reformulation of *Roe*'s account of why abortion is a protected liberty under the Due Process Clause. Given the depth of the criticisms that had been leveled at *Roe*, the reformulation is remarkably brief, assertive, self-important, and complacent.⁹³ This defense of the central holding in *Roe* is followed by a separate and much longer, more systematic discussion of stare decisis.⁹⁴ Since it is axiomatic that a prior case should not be overruled if it is correct as a matter of law, the section on stare decisis would not have been necessary if the Justices had been convinced by their own claims about why *Roe* had been rightly decided.⁹⁵ So, the manifest purpose of the Court's lengthy and impassioned section on stare decisis was to provide practical reasons for reaffirming *Roe* and thereby to diminish the importance of the question of prior error.

Indeed, the section on stare decisis begins by largely eliminating the question whether *Roe* was so wrong that it should be reversed. While recognizing in the abstract that a prior judicial ruling could come to be seen "clearly as error," the opinion moves quickly to assert that "when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations"⁹⁶ These considerations—the effects of reversal on the rule of law and the relative costs of reaffirming and overruling—occupy almost all of the remainder of the long discussion of stare decisis.

This is not to say that the possibility of error is completely ignored. The Justices acknowledge it in a few places—but usually dismissively. Thus, the Court describes a reversal based on a change in the Court's conception of constitutional principles⁹⁷ as "a present doctrinal disposition to come out differently from the Court of 1973."⁹⁸ What is needed is "some special reason over and above the belief that a prior case was wrongly decided."⁹⁹ Thus, the Court treats most principled objections to *Roe* as momentary opinions or mere beliefs. At one point the opinion does acknowledge the possibility of a reversal based on "principles worthy of profound respect" but asserts that such a reversal,

⁸⁹ *Casey*, 505 U.S. at 850.

⁹⁰ *Id.* at 853.

⁹¹ *Id.* at 860.

⁹² *Id.* at 854–55, 867.

⁹³ *Id.* at 844–46.

⁹⁴ *Id.* at 854–69 (devoting sixteen pages to a discussion of stare decisis).

⁹⁵ And some had reservations about this. *See id.* at 853.

⁹⁶ *Id.* at 854.

⁹⁷ As opposed to a change in an understanding of facts. *Id.* at 860, 863.

⁹⁸ *Id.* at 864.

⁹⁹ *Id.*

like a reversal based on more superficial ideas, would create an impression in the public that the Court was surrendering “to political pressure.”¹⁰⁰ In contrast, attention to social facts and pragmatic issues would somehow reinforce the Court’s status as a legal arbiter. Thus is the possibility of legal error—“if error there was”—pushed to margins of the case.¹⁰¹

Closely connected to the understandable desire to minimize the possibility that *Roe* was based on legal error is the desire to deny that *Roe* had involved judges in issues that cannot be resolved by normal judicial methods. The Court dismisses this criticism in one short paragraph that begins with the bald assertion that *Roe* “has in no sense proven ‘unworkable.’”¹⁰² A few lines later the Justices conclude that the determinations required by *Roe* “fall within judicial competence.”¹⁰³ As an assessment of their own decision making abilities, this sentence, offered without examples or elaboration, can only be described as an astonishing expression of self-confidence.

To gauge the scale of this self-confidence, put aside (as, perhaps, too picky) the fact that in *Casey* itself the Court abandons as unworkable *Roe*’s famous trimester scheme. Consider instead the fact that just a few pages before asserting that the issues raised by *Roe* are all within judicial competence, the Court had characterized the inquiry into the content of the liberties protected by the Due Process Clause in this way: “choices central to personal dignity and autonomy . . . are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁰⁴ It is difficult to find words to describe the self-confidence of jurists who believe it to be self-evident that they are competent to decide which liberties are necessary for individuals to define their own concept of existence and the universe.

But the self-confidence of the Justices does not end there. Prior to *Casey* and then in *Casey* itself, the Justices made determinations about the importance of a state’s interest in assuring that parents be notified of a daughter’s impending abortion or that husbands be notified of their wives’ impending abortions.¹⁰⁵ In *Roe* and then again in *Casey* the Justices announced their determination that the state’s interest in protecting the potential life of the fetus becomes significant at the point at which the fetus can live outside the womb with or without artificial aids. In short, in 1973 the Court plunged into a morass of the most difficult moral and philosophical issues imaginable. That the Justices could emerge some twenty years later to announce blandly that these issues are all within their competence as judges is, to put it mildly, not a sign of any capacity for healthy self-assessment.

In other ways, as well, the *Casey* opinion merges traditional judicial self-confidence with hubris. Against the backdrop of the multiple and complex causes of the radical alterations in sexual mores, employment practices, and family life seen during the modern era, the Court attributes to *Roe* the way people have “organized intimate relationships and made choices that define their views of themselves and their places in

¹⁰⁰ *Id.* at 867.

¹⁰¹ *Id.* at 869.

¹⁰² *Id.* at 855.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 851.

¹⁰⁵ *Id.* at 895 (citing cases upholding parental notification).

society.”¹⁰⁶ If a single assertion, this claim might be ignored or explained away. But a bit later the Justices repeat the thought: “An entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society”¹⁰⁷

And hubris merges with grandiosity. In defending *Roe v. Wade*—possibly the most incoherent, unmoored decision ever handed down¹⁰⁸—the Justices solemnly declare:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.¹⁰⁹

Indeed. And what principle was expressed in *Roe*? The *Casey* majority explains that *Roe* was one of those cases where the Court “calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”¹¹⁰ But even this unembarrassed conception of the Court’s role is not enough. In words often quoted but not fully appreciated, the Justices go on to claim that the desire of the American people to live according to the rule of law “is not readily separable from their understanding of the Court vested with the authority . . . to speak before all others for their constitutional ideals.”¹¹¹

These ideas—that it is the Court’s role to end national division on deep moral disputes and to enable Americans to see themselves through constitutional ideals, as well as the associated idea that overruling *Roe v. Wade* would undermine the Court’s legitimacy and thus its capacity to perform these functions—would be less disturbing if less a reflection of the Justices’ own beliefs and fears. There are, of course, many empirical studies of the effectiveness of constitutional rulings and the sources of the Court’s legitimacy.¹¹² But these are not mentioned, perhaps because they tend to show how murky the social science data is. The entire force of the argument depends on the Justices’ urgent declarations, and these declarations reveal how completely the Supreme Court is involved in the case.

Nevertheless, as we have seen in other cases, the Justices claim the mantle of detachment and selflessness. In at least two places unidentified Justices express personal reluctance at reaffirming *Roe* and present themselves as being driven to do so by fine legal calculations.¹¹³ Overruling *Roe* would also amount to a breach of faith with those who had accepted that ruling and had suffered as a result. “To all those . . . , the Court

¹⁰⁶ *Id.* at 856.

¹⁰⁷ *Id.* at 860.

¹⁰⁸ *See, e.g.*, Ely, *supra* note 88.

¹⁰⁹ *Casey*, 505 U.S. at 865–66.

¹¹⁰ *Id.* at 867.

¹¹¹ *Id.* at 868.

¹¹² Some of the studies, available when *Casey* was decided, can be found in Jeffery J. Mondak, *Institutional Legitimacy, Policy Legitimacy, and the Supreme Court*, 20 AM. POL. Q. 457, 475–77 (1992).

¹¹³ *Casey*, 505 U.S. at 853 (admitting doubts but concluding that “the stronger argument is for affirming *Roe*’s central holding”); *id.* at 869 (acknowledging again the possibility of error in *Roe*); *id.* at 901 (accepting “our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents”).

implicitly undertakes to remain steadfast”¹¹⁴ A willing breach of this “promise of constancy” would be “nothing less than a breach of faith.”¹¹⁵ While some might detect in this rather inflated phrasing the suggestion of personal considerations like gratitude and personal loyalty, the Justices insist their concern is about the Court’s legitimacy, and legitimacy “is not for the sake of the Court but for the sake of the Nation to which it is responsible.”¹¹⁶

In *Casey* the Justices unburden themselves of a self-serving, even grandiose self-image as well as deep fears and resentments. They nevertheless attempt to present themselves as impartial arbiters of the law. The members of the majority are so involved in the case that their writing is close to being unhinged both rhetorically and substantively.¹¹⁷ *Casey* may well be the most personal and revealing Supreme Court decision ever issued. Its excesses, unusual as they may be, must give pause to anyone proposing that the Justices more openly consider their own frailties and biases.

IV. THE INESCAPABLE SELF-INTEREST OF THE JUSTICES AS A LIMIT ON SELF-EXAMINATION

Chief Justice Rehnquist once broke the ritual of silence to explain why he should not recuse himself from a case involving an issue that, as a Justice Department attorney, he had once testified about to Congress.¹¹⁸ His memorandum is a model of lawyerly analysis—careful, methodical, precise, and respectful. Towards the end of the memorandum, Rehnquist reaches the question whether, as a discretionary matter, he should recuse himself because of his previous public statements. He concedes that the question is “fairly debatable” because the statements indicate a propensity for him to decide the pending case in a certain way.¹¹⁹ He would not be “start[ing] off from dead center in . . . willingness or ability to reconcile the opposing arguments . . . with the . . . law.”¹²⁰ Although Rehnquist does point out that it is to be expected that judges will have opinions about issues in cases, he says nothing about why the particular opinions he expressed did not unduly prejudice him. Instead he turns to the institutional damage to the Court that would be done if the Justices did not feel “a duty to sit.”¹²¹ Taken as a whole, this rather admirable opinion makes its argument by performance; that is, Rehnquist in effect argues that he can be impartial by demonstrating his intellectual discipline even while evaluating a charge of bias against him. In holding the balance in the recusal memorandum (to use the language quoted in *Caperton*) “nice, clear, and true,” Rehnquist is not reflecting on his own partiality. Even while addressing the issue of bias, he is doing what the ritual of silence is intended to do. He is showcasing legalistic virtues to make personal reflection about the extent of his bias unnecessary.

¹¹⁴ *Id.* at 868.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ To take an egregious example, while the major theme of the stare decisis discussion is that calamity is threatened if the Court’s legal determinations are affected by “political fire,” the political fire directed at *Roe* is given as the deeper reason for reaffirming the decision.

¹¹⁸ *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., memorandum opinion) (denying motion to recuse himself).

¹¹⁹ *Id.* at 837.

¹²⁰ *Id.* at 839.

¹²¹ *Id.* at 837.

Justice Scalia also broke the ritual of silence in a recusal memorandum that explained why he should not recuse himself after going duck hunting with a party (Vice President Cheney) to a case before the Court.¹²² In contrast to Rehnquist's memorandum, Scalia's is highly personal and emotional, in places even bitter. Rehnquist's discussion is self-assured in its calm reliance on the capacity to weigh the relevant legal considerations with precision. Scalia's is self-assured in its open expression of anger and moral urgency.

Unlike Rehnquist, Scalia gives a specific, rather full account of the events allegedly giving rise to bias.¹²³ He does not remember, for instance, being alone with the Vice President.¹²⁴ He did not save "a cent" by flying to the event on Air Force Two.¹²⁵ And so on. In response to the argument that disapproving editorials were sufficient to demonstrate the appearance of bias, Scalia characterizes the publicity as "a blast of largely inaccurate and uninformed opinion."¹²⁶ He gives no quarter to the legal claims made for recusal. One argument "would be utterly disabling,"¹²⁷ another asks "judges to do precisely what they should not do,"¹²⁸ and a third has "implications . . . [that are] staggering."¹²⁹ And in the end Justice Scalia casts himself as heroic. He has been the object of "embarrassing criticism" and cruel observations.¹³⁰ He "would have been pleased . . . to silence the criticism, by getting off the case."¹³¹ But the Justice could not take that easy route because he is bound by law, according to which "there is no basis for recusal."¹³²

By now it should be clear that it is no coincidence that these two efforts to evaluate and explain a Justice's own impartiality should be characterized either by sterile and unrealistic appeals to judicial imperviousness or by fulsome and aggressive images of judicial heroism. These are the same basic strategies that we have seen employed in other cases where the issue of judicial impartiality is addressed. The bedrock fact is that judges have an interest in how they speak about whether they are interested. Whether idealized as a rigorous legal thinker or as a besieged hero, self-interest demands that a Justice present himself or herself as a person fit to be judge. In our system that leaves two models from which to draw, the first, more formalistic model requires steely impersonality and precision. The second, more realistic model requires vigorous self-confidence. In the rare instances where, for one reason or another, Justices feel the need to address the issue of judicial partiality, they choose one model or the other.

The great mass of cases, where the Justices treat the issue of partiality as if it did not exist, are also a response to the two available jurisprudential traditions. The appeal to realistic considerations to decide the merits of the case threatens to lay bare the Justice's political, institutional, and personal interests, while the simultaneous appeal to traditional

¹²² *Cheney v. U.S. Dist. Court for the Dist. of Colum.*, 541 U.S. 913 (2004) (Scalia, J., memorandum opinion) (denying motion to recuse himself).

¹²³ For a highly critical account, see Frost, *supra* note 10, at 572–81.

¹²⁴ *Cheney*, 541 U.S. at 915.

¹²⁵ *Id.* at 921.

¹²⁶ *Id.* at 924.

¹²⁷ *Id.* at 916.

¹²⁸ *Id.* at 920.

¹²⁹ *Id.* at 923.

¹³⁰ *Id.* at 929.

¹³¹ *Id.*

¹³² *Id.*

legal norms requires that these interests not be present. The ritual of silence submerges the issue of partiality and allows the Justices, who are openly dealing with moral and political matters, to speak as if they were dealing impersonally and admirably only with legal issues.

It must be said that the exceptional instances of self-examination discussed in this Essay are discouraging. The two available strategies are dismaying because they reveal the opposite of what self-examination is meant to reveal. They reveal that the Justices cannot escape their self-interest by examining it. Better, it might be thought, to leave the subject of partiality alone unless it simply cannot be avoided.

The ritual of silence, however, is dismaying in its own way. It provides no assurance to the public that the Justices are even aware of their many interests in the cases before them. It might be that some passing acknowledgement of the more important of these interests, if such acknowledgement became an unexceptional part of judicial practice, could usefully address this problem.¹³³ However, to expect perceptive and realistic self-assessments would be, it appears, asking too much.

¹³³ For a different, more elaborate, but also moderate proposal, see Frost, *supra* note 10, at 582–92.