

2018

**Learning to Live with Judicial Partisanship: A Response to
Cassandra Burke Robertson**

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recommends and supports President Trump's judicial nominees,⁶ while liberal interests groups oppose many of them.⁷ In the voting booth, the public understands that it matters who appoints judges.

On the other hand, the Chief Justice was right insofar as his point was that federal judges are not beholden to the president who appointed them; they are not expected consciously to favor the parties and legal positions identified with that president or with that president's party.⁸ For example, in deciding a legal challenge to an executive order, a federal judge should bring the same philosophical and interpretive predispositions to bear regardless of whether the president who issued the order was a Republican or Democrat. While political ideology plays a role in judicial decision-making, it does not directly determine the outcome of cases.⁹ Judges look to precedent and employ various interpretive techniques and accepted forms of legal reasoning.

In her article, *Judicial Impartiality in a Partisan Era*,¹⁰ Professor Cassandra Burke Robertson stakes out a middle ground between these two conceptions.¹¹ She suggests that even if judges make a conscious effort not to decide cases based on partisan political identification, they may unconsciously bring their partisan views to bear.¹² Doing so may be unavoidable.¹³ Social scientists tell us, for example, that when sports fans view disputed plays, they perceive them more favorably to the team for which they are rooting—and neuroscientists tell us that there is a neural basis for their different perceptions.¹⁴ While judges are professionals, and

6. See Sophie McBain, *Who are the Federalist Society? Inside the right-wing group picking Trump's Supreme Court judges*, NEW STATESMAN (Sept. 7, 2018), <https://www.newstatesman.com/world/north-america/2018/09/who-are-federalist-society-inside-right-wing-group-picking-trump-s> [<https://perma.cc/KSQ3-8AGF>].

7. See, e.g., *Judicial Nominees*, ALL. FOR JUST., <https://www.afj.org/our-work/issues/judicial-nominees> [<https://perma.cc/N242-NHBC>].

8. Guthrie et al., *supra* note 5, at 3–4 (explaining how hunches and intuitive responses do not alone determine judicial decisions). Regardless of expectations, some contend that, at the highest levels, judges do in fact tend to decide cases on political party lines, regardless of whether the decision conforms to the judge's general judicial philosophy. E.g., Sheldon Whitehouse, *Sen. Whitehouse: There's a 'Crisis of Credibility' at the U.S. Supreme Court*, NAT'L L.J. (Feb. 15, 2019), <https://www.law.com/nationallawjournal/2019/02/15/sen-whitehouse-theres-a-crisis-of-credibility-at-the-u-s-supreme-court/> [<https://perma.cc/F9WL-HAD9>] (charging that the decisions of Republican appointees on the U.S. Supreme Court demonstrate an “undeniable pattern of political allegiance. Under [Chief Justice] Roberts, justices appointed by Republican presidents have, with remarkable consistency, delivered rulings that advantage big corporate and special interests that are, in turn, the political lifeblood of the Republican party.”).

9. Guthrie et al., *supra* note 5, at 2–3.

10. Robertson, *supra* note 4.

11. See *id.* at 739.

12. See *id.* at 767.

13. *Id.*

14. See TIMOTHY J. ANDREWS ET AL., NEURAL CORRELATES OF GROUP BIAS DURING NATURAL VIEWING 1 (2018).

may make a stronger effort than sports fans to be impartial, unconscious preferences likely influence their perceptions, too. For example, if the roles were reversed in *Bush v. Gore*,¹⁵ and Al Gore had won the initial count in Florida, are we confident that five Republican-appointed Justices would have voted to end George W. Bush's legal challenge?¹⁶

Professor Robertson sees it as a problem worth redressing that judges may be influenced—or appear to be influenced—by “political bias” in ways unseen by observers and unperceived by judges themselves.¹⁷ The problem involves the nature of judging and the legitimacy of courts in a highly partisan age. Professor Robertson is aware that this is not a new problem but argues that the increasingly polarized partisan climate calls for a new response.¹⁸ She acknowledges that the problem cannot effectively be solved by disqualifying partisan judges because all judges have partisan affiliations and political and ideological sympathies.¹⁹ Moreover, it would be impossible to untangle political sympathies from judicial philosophies and policy preferences; the latter are not only unavoidable but desirable in a judge.²⁰ Professor Robertson proposes various other procedural responses instead.²¹

The most significant response, one that Professor Robertson does not advance, would be to change how judges are selected. In most U.S. jurisdictions, judges are either appointed by an elected official, as in the case of Article III federal judges, or are themselves elected. There are other ways to choose judges, however, that avoid or reduce partisan political influence.²² For example, federal magistrate judges, who are

15. 531 U.S. 98 (2000).

16. Compare Nelson Lund, “*Equal Protection My Ass!*”? *Bush v. Gore and Laurence Tribe's Hall of Mirrors*, 19 CONST. COMM. 543, 545, 556 (2002) (defending the Court's decision), Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1219 (2002) (defending the Court's decision), and Ronald D. Rotunda, *Yet Another Article on Bush v. Gore*, 64 OHIO ST. L.J. 283, 287 (2003) (defending the Court's decision), with Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) (“That the conservative Justices acted as they did suggested that their partisanship was so thorough and pervasive that it blinded them to their own biases.”), and Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1424 (2016) (“[T]he partisanship of the many judges and political actors in the 2000 postelection process uncannily predicted their decision-making for and against Bush and Gore.”).

17. See Robertson, *supra* note 4, at 756–64.

18. See *id.* at 756–57.

19. See *id.* at 767–69.

20. See Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education Be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 965–67 (2002) (quoting and citing authority).

21. See Robertson, *supra* note 4, at 769–75.

22. For a small sample of the literature comparing different methods of judicial selection in the United States, see, e.g., Hon. Diane M. Johnsen, *Building A Bench: A Close Look At State Appellate Courts Constructed By The Respective Methods Of Judicial Selection*, 53 SAN DIEGO

selected by the federal judiciary, are less likely than Article III judges to be perceived as politically partisan.²³ An even more nonpartisan selection process is employed in countries where judging is a profession separate from the practice of law.²⁴ In legal systems where law graduates immediately join, and then remain in, a judicial bureaucracy, judges are unlikely to be identified with, or beholden to, a particular political party throughout their judicial careers.²⁵

We are not persuaded that such a radical change or Professor Robertson's more minor suggestions are needed, however. While we agree that judges, as humans, are subject to all kinds of unconscious thought processes, which likely include partisan identification, we are less disposed than Professor Robertson to see this as a problem worth redressing. We acknowledge social science teachings about unconscious biases, including pernicious ones such as unconscious racial biases. But we tend to think that judges' humanity, including their unconscious irrationalities and other human frailties, should simply be accepted, and that we ought to focus on whether judges' conscious decision-making processes, including their express thought processes, adhere to professional expectations. If so, we need not worry too much about what

L. REV. 829, 832–33 (2016) (reviewing five methods of selecting state appellate judges—partisan election, nonpartisan election, legislative selection, merit selection, and “merit-confirmation”); Phyllis Williams Kotey, *Public Financing for Non-partisan Judicial Campaigns*, 38 AKRON L. REV. 597, 598–99 (2005) (arguing that public funding of nonpartisan judicial elections will better promote judicial independence and nonpartisanship than partisan judicial elections or judicial appointments); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2000*, 37 U. MICH. J.L. REFORM 791, 791 (2004) (concluding that elected judges are more beholden to interest groups than appointed judges).

23. See Christopher E. Smith, *Merit Selection Committees and the Politics of Appointing United States Magistrates*, 12 JUST. SYS. J. 210, 229–30 (1987).

24. See John O. Haley, *Judicial Reform: Conflicting Aims and Imperfect Models*, 5 WASH. U. GLOBAL STUD. L. REV. 81, 93 (2006) (discussing civil law systems where “judges are members of an elite corps of civil servants in one or more specialized ‘judicial service’ bureaucracies”). In common law countries (other than the United States) where judges are generally selected to the bench by other judges and serve for substantial periods of time without expectation of promotion, there is also less partisanship than in the United States. See *id.* at 91 (“[A]s judicial selection in the United States occurs either through the electoral process or by political appointment, political accountability is assured but partisan politics necessarily permeates the selection and above all retention processes.”).

25. This is not to say, however, that judicial bureaucracies better promote judicial independence. On the contrary, where judges' impartiality is secured through bureaucratic, rather than democratic, accountability, judges may be more susceptible to inappropriate executive and bureaucratic influence. See generally Neil Chisholm, *The Faces of Judicial Independence: Democratic versus Bureaucratic Accountability in Judicial Selection, Training, and Promotion in South Korea and Taiwan*, 62 AM. J. COMP. L. 893 (2014) (analyzing the two different approaches to judicial independence). It is simply to say that judges who come up the ranks of judicial bureaucracies are likely to be less susceptible to political-party influence and to be less likely to identify, or appear to identify, with a political party.

lies below the surface.²⁶

We have previously written in praise (within limits) of judges' reliance on emotion—another unconscious, or at least non-rational, thought process.²⁷ Trial judges in particular are often personally affected by the participants and the drama in their courtrooms. Appellate judges, commentators, and scholars have, at times, chastised them for emotional outbursts, suggesting that these displays are inconsistent with the role of the judge. In contrast, we argue that emotional entanglement is not only consistent with good judging, but it can also help judges manage their courtrooms, empathize with litigants, and reach appropriate decisions. Unlike emotional responses, unconscious partisan bias is not a useful judicial trait. But it is no less a product of who we are as human beings.

Judicial decision-making is complicated. The fact that judges have implicit biases, including biases correlating to partisan preferences and political identification, does not mean that their implicit biases necessarily have a significant role in judicial decision-making. When evaluating self-interests and biases that might undermine a judge's professional judgment, one should acknowledge countervailing incentives and influences. Judges may be motivated by professional values such as fairness, consistency, and impartiality that largely offset their unconscious biases. Ideally, judges' commitment to norms of impartial decision-making is reinforced insofar as their judicial peers, the legal profession, or the public at large review their work and measure it against these values. Particularly at the appellate level, judges have a burden of justification—they must write opinions that satisfy norms of judicial reasoning—and their justifications are scrutinized. If professional pride does not influence judges to seek to avoid partisan bias, then their self-interest in their professional reputation may do so.

Although unconscious political partisanship probably cannot be offset entirely, it should not necessarily be identified as a particular cause of concern. Judges, as humans, are subject to the potential influence of a host of implicit biases, of which political partisanship is but one.²⁸ The

26. Our conclusions accord with those of empirical legal scholars who conclude that it is not necessarily bad for judges to rely on intuition, even though intuition can include an uncomfortable mix of bias and well-trained instinctual or common-sense responses. The key is to empower judges to reject their worst instincts when possible. *See* Guthrie et al., *supra* note 5, at 33–41.

27. *See* Bruce Green & Rebecca Roiphe, *Judicial Activism in Trial Courts*, NYU ANN. SURV. AM. L. (forthcoming 2018); Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 NYU ANN. SURV. AM. L. 497, 498–99 (2008).

28. *See Understanding Implicit Bias*, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, OHIO ST. U., <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> [<https://perma.cc/8P6H-8BGD>] (providing examples of implicit bias such as race, ethnicity, age and appearance)

ideal of some pure judicial core motivated only by reason is a myth not worth pursuing.

Professor Robertson is clearly aware of the complexity of human thought and judicial decision-making, rejecting caricatures of judges as completely impartial or entirely motivated by partisan bias.²⁹ On the one hand, there is President Trump's view of judges as political actors dressing up partisan ideology in judicial language.³⁰ On the other, Chief Justice Roberts has portrayed judges as rational and the law as readily discernible.³¹ Well before he rebuked President Trump's twitter attack on "Obama judges," Chief Justice Roberts avowed at his confirmation hearings that his job as a judge was "to call balls and strikes and not to pitch or bat."³² Professor Robertson acknowledges that judging inevitably falls somewhere in between these two extremes.

Professor Robertson prudently embraces Professor Charles Geyh's goal of "impartial enough" judging, reminiscent of the 1950s popular slogan of the "good enough mother."³³ Professor Geyh acknowledges that because society now accepts the premises of legal realism and the inevitable role of personal and political interests in judging, it is illogical to argue that judges are entirely impartial.³⁴ Bias is inevitable and acceptable as long as it does not push the judge out of the range of what we all recognize as legitimate judicial reasoning. Having dispensed with the mythical extremes of judging encompassed by the pronouncements of both Chief Justice Roberts and President Trump, what remains is a different concept of what it means to be a judge and a different sense of when that person's impartiality ought to be reasonably questioned. A political view, partisan attachments, even a personal relationship with a powerful political actor, should not necessarily be regarded as disqualifying considerations.

Professor Robertson revisits this issue at an important time. She argues persuasively that the increasingly polarized nature of political life makes her subject more pressing.³⁵ Citing social science data, she

29. See Robertson, *supra* note 4, at 762.

30. See Reilly, *supra* note 1.

31. See *id.*

32. Roberts: 'My job is to call balls and strikes and not to pitch or bat', CNN (Sept. 12, 2005), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/> [https://perma.cc/6XTN-PM6K].

33. The term was coined by British Psychologist D.W. Winnicott to refer to mothers who gradually withdraw from their children and do not attend to their every need. See D.W. WINNICOTT, *PLAYING AND REALITY* 10 (1971). The idea is that the imperfection is what makes for a good mother.

34. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 504-05 (2013).

35. See Robertson, *supra* note 4, at 751-52.

explains that the public believes that judges can remain impartial but that, in politically sensitive cases, people equate impartiality with outcomes that correspond with their own political views.³⁶ Meanwhile, the public is more polarized, less likely to agree with those from other parties, and more insulated in and assured of its own ideology.³⁷ Political groups like the Heritage Foundation have consciously recruited young lawyers to their cause and prepared future judicial clerks in a judicial philosophy that leads to consistently conservative rulings.³⁸

All of this may make it harder to persuade the public that President Trump is wrong about judges. Without faith in the judiciary, the legitimacy of the courts is placed in jeopardy and the rule of law itself is put at risk. But Professor Robertson's own data provides some comfort. The public does trust the courts. Of course, those on both sides of the aisle rail in indignation when a decision does not go their way. But, as she argues, they accept the ruling and abide by it, albeit reluctantly. Even if judges are doing politics by other means, the way they do it matters. They use certain forms of reasoning, abide by certain rules, and adhere to formal and informal traditions. While the public may be skeptical about whether this process prevails over a completely outcome-oriented partisan determination in any given case, the public is more or less accepting of this fact as a general matter.

If Professor Robertson is right that the legitimacy of the judiciary is at greater risk than it has been in the past, a premise we are not sure we share, her proposed changes may not be an adequate solution. She proposes using the jury and the appellate system as a check on impermissible bias at the trial level, but the kind of political bias that she discusses tends to have a greater effect at the appellate level, especially in the Supreme Court, where her proposed solutions would not apply.³⁹

Professor Robertson has two suggestions relating to recusal. She argues that each litigant should have one peremptory challenge to eliminate a judge, a solution that eighteen states have implemented.⁴⁰ First, like the jury and appellate system, this system of judicial challenges tends to apply in trial court settings where the problem of partisan bias is least severe. The other problem with this proposal is that it risks

36. *Id.* at 764.

37. *But see* Tim Wu, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html> [<https://perma.cc/C4GW-B2ZX>] (arguing that the defining problem of our time is not polarization and, in fact, the vast majority of the public tends to agree about many important issues).

38. *See* Adam Liptak, *Conservative Heritage Foundation Revives Training Academy for Future Clerks*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/heritage-foundation-clerks-training-academy.html> [<https://perma.cc/EUG2-SNUX>].

39. *See* Whitehouse, *supra* note 8.

40. Robertson, *supra* note 4, at 771.

importing a host of problems of peremptory challenges in the jury context into judicial selection.⁴¹ Peremptory challenges have been regulated in such a way that their use can reinforce rather than eliminate bias in the system.⁴² Courts that adopt a peremptory challenge for judges would risk introducing these problems without necessarily solving the problem of perceived or actual partisan bias, especially since some jurisdictions will have a high concentration of judges of a particular political bent. Finally, Professor Robertson suggests more explicit rules for recusal.⁴³ The standards, she argues, are so nebulous that judges rarely recuse and often feel personally insulted if asked to do so.⁴⁴ Specific guidelines could be useful, but it is hard to imagine which rules would effectively address partisan bias. Would dinner with a political candidate suffice for recusal, or a close personal relationship with a politician? In our view, partisan bias is so deeply entangled with valuable life experience, intuition, and judgment that it would be hard to find rules that eliminated partisan bias effectively.

Further, judicial institutions can endeavor to reduce the negative influence of judges' implicit partisan bias by educating judges about, and making them aware of, their biases, while at the same time teaching techniques to promote impartial judicial decision-making.⁴⁵ Intuitions, infused as they are with partisan and other biases, may not be a bad place to start as long as judges are trained to check their instincts by deliberately employing these accepted processes. To compete with efforts of entities such as the Heritage Foundation to influence judges and their law

41. See Nancy J. King, *Batson for the Bench: Regulating the Peremptory Challenge of Judges*, 73 CHI-KENT L. REV. 509, 509–10 (1998). For criticisms based on efficiency and other concerns see Stephen B. Burbank, *Unwarranted Distrust of Federal Judges*, 81 J. AM. JUDICATURE SOC. 7, 41 (1997).

42. For criticism of the Supreme Court's approach to eliminating bias in peremptory challenges, see, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and The Review of Jury Verdicts* 56 U. CHI. L. REV. 153, 156–57 (1989); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 44–46 (2001); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 524 (1994); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 214 (2003).

43. Robertson, *supra* note 4, at 770.

44. See *id.* at 760.

45. In other contexts, the profession has strived for a more equal, and less biased, profession. E.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 485 (2019) (explaining that it violates the code of judicial conduct for judges who perform marriages to refuse to perform marriages for same sex couples); MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N, Discussion Draft 1983) (establishing that it is professional misconduct to engage in conduct "that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law").

clerks,⁴⁶ the federal Judicial Conference and its state counterparts could institute training for judges that focuses on professionalism.⁴⁷ They would not, of course, teach judges that political views and ideology ought to play no role, but they might be able to highlight the judicial processes and traditions that tend to minimize the role that bias may play in influencing the outcome of cases.⁴⁸ Understanding the social science and legal philosophy of the past century that explains the inevitability of bias in decision-making might help judges to acknowledge and minimize its influence. The myth perpetuated by Chief Justice Roberts and others of a pure judicial philosophy may ironically allow judges to draw more heavily on their partisan tendencies while masking their decisions in neutral language.

Of course, both informal and formal efforts at professional socialization have their limits. Future judges are not necessarily trained to value and exercise impartiality, since most are members of the practicing bar where the dominant ethos is one of partisanship. As noted, lawyers may be appointed or elected to serve as judges precisely because of their partisan identification. Once they join the bench, many judges (especially federal judges) perform their work relatively autonomously, fairly independent of the judicial bureaucracy—indeed, judicial independence is highly valued. They may be somewhat inured to judicial socialization.⁴⁹ And the public may not necessarily value and praise exercises in impartiality. The very same outside organizations that

46. The federal Judicial Conference's Committee on Codes of Conduct recently published an opinion identifying considerations relevant to whether, under applicable codes of conduct, judges, law clerks, and future law clerks may properly attend privately-sponsored educational programs. See U.S. COURTS, COMMITTEE ON CODES OF CONDUCT ADVISORY OPINION NO. 116 (2019), available at <https://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf>. For an argument that the existing judicial regulatory rules do not adequately address privatized judicial education, see Green, *supra* note 20, at 1000–05 (arguing that privatized judicial education “pose[s] a risk not only to public confidence in the integrity of individual judges, which judicial ethics regulation addresses reasonably well, but also a risk to public confidence in the judiciary as an institution. Judicial regulation fails to take account of the latter problem, created by the aggregation of potentially small influences on individual judges.”).

47. The Judicial Conference was created in 1922 with the goal of rationalizing and improving the administration of justice. William W. Shwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1131 (1995). In the 1950s, the Judicial Conference undertook new research and training projects, including implementing an orientation program for new judges. *Id.* at 1132. In 1966, the Judicial Conference proposed legislation that passed the following year, creating a Judicial Center, which would focus on education and training of court personnel. See *id.* at 1132–33.

48. Others have suggested related mechanisms for helping judges check their instincts and reduce improper bias. See Guthrie et al., *supra* note 5, at 33–43 (suggesting, among other things, more time to deliberate, more requirements about written opinions, and checklists).

49. Cf. Haley, *supra* note 24, at 90 (“[C]ommon experience and the elite nature of the English-styled judiciary in turn strengthen the effectiveness of peer pressures (social disapproval) as a mechanism to control individual judicial behavior.”).

promote partisanship in the judicial selection process may give positive reinforcement to judges who make decisions that accord with the particular organizations' partisan preferences. Not only that, but certain accepted judicial philosophies, such as originalism, have come to be virtually synonymous with a particular ideological agenda. This makes disentangling inappropriate partisan impulses from acceptable judicial behavior even harder.⁵⁰ Part of the appeal of originalism is that it purports to remove subjectivity from judicial decision-making, but like all judicial reasoning it inevitably fails to do so.⁵¹

Finally, the bar, the media, and educational institutions need to do a better job of educating the public about judges and their role in upholding the rule of law. It is widely accepted in the academy, and among lawyers themselves, that ideology inevitably plays a role in judicial decision-making. It is less clear how well the public understands this. Warped expectations and understanding of judges may contribute to the public reaction Professor Robertson describes. President Trump's and Chief Justice Roberts's overly-simplified characterizations of judicial decision-making dominate public discourse, leaving little room for a more nuanced understanding of the judiciary. Perhaps the outrage and crisis in legitimacy that Professor Robertson describes would be mitigated if the public were to have a more sophisticated understanding of what judges actually do.⁵² One silver lining of the current political climate is that the public commentary about courts and justice provides just such a civics lesson. While the exchange between the President and Chief Justice was reductive, it nonetheless focused the public attention on a largely ignored question—how do and should judges make decisions? If the public is primed to listen and judges are better trained in how to act and how to educate litigants, juries, and spectators, the fear of politics co-opting the judicial branch could be allayed if not eliminated.

50. See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626, 630 (2008); Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610, 617 (2008).

51. See Tushnet, *supra* note 50, at 617.

52. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PENN. L. REV. 971, 977–80 (2000) (arguing that the crisis in the legitimacy of the courts or the level of concern for the countermajoritarian power of courts can be affected by changing expectations about the function of the judiciary and the role of judicial review).