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The Limits of Debate or What We Talk About When We Talk About Gender Imbalance on the Bench

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THE LIMITS OF DEBATE
OR
WHAT WE TALK ABOUT WHEN WE TALK ABOUT
GENDER IMBALANCE ON THE BENCH

*Keith J. Bybee**

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INTRODUCTION

What do we talk about when we talk about gender imbalance on the bench? The first thing we do is count. Scholars,¹ pundits,² the press,³ and organizations⁴ all keep track of the number of female judges. In this Sympos-

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1. See Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262, 263 (2011).

2. See RUSSELL WHEELER, JUDICIAL NOMINATIONS AND CONFIRMATIONS AFTER THREE YEARS—WHERE DO THINGS STAND? 1 (2012), available at http://www.brookings.edu/~media/research/files/papers/2012/1/13%20nominations%20wheeler/0113_nominations_wheeler.

3. See *Obama Picks More Females, Minorities for Judges*, THEGRIO (Sept. 13, 2011, 9:35 AM), <http://thegrio.com/2011/09/13/obama-picks-more-females-minorities-for-judges>.

4. See NAT'L WOMEN'S LAW CTR., WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO 1-2 (2012), available at <http://www.nwlc.org/sites/default/files/pdfs/judgescourtswomeninfedjudfactsheetaugust6.pdf>.

sium, Linda Greenhouse provides a comprehensive accounting of women serving on the state and federal bench.⁵ Such enumerations are an essential starting point. Without a careful census of current judges, we cannot know how great the imbalance between men and women is.

Once the data has been gathered and figures have been tabulated, we then argue about what the disparity between men and women in the judiciary means. These arguments about meaning are not freestanding. On the contrary, I claim in this Article that debates over the value of gender equity occur within the context of a broader public debate over the nature of judicial decision making.⁶ My aim is to identify the influence of the broader public debate and to suggest how arguments over the meaning of gender imbalance on the bench should be altered as a consequence.

My argument proceeds in four Parts. In the first Part, I explain how the framework of a debate may limit the range of claims and proposals discussed.⁷ In the second Part, I turn to the public debate over judicial decision making and detail how it is organized around dueling conceptions of the judge as impartial arbiter and as politically motivated policymaker.⁸

In the third Part, I indicate how the two prevailing conceptions of judicial decision making may constrain arguments about gender imbalance on the bench.⁹ Calls for gender equity do not fit easily with the conventional conception of impartial adjudication; as a result, arguments about the importance of increasing the number of female judges are often assimilated into the conventional conception of preference-driven policymaking.¹⁰ Given this structure of debate, discussions about the meaning of gender imbalance tend to devolve into bickering about politicized courts.¹¹

In the fourth and final Part, I briefly consider how arguments about gender imbalance might be productively re-cast by directing gender equity concerns away from the broader public debate over judicial decision making and toward the fairness of the judicial selection process.¹² I argue that this strategy of re-direction will keep discussion squarely focused on gender disparities and will advance the cause of placing more women on the bench.

5. Linda Greenhouse, Keynote Speech at the Spring 2012 Pipeline to Power Symposium (Apr. 12, 2012), in 2012 MICH. ST. L. REV. 1433, 1434-36.

6. See *infra* Part III.

7. See *infra* Part I.

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part III.

11. See *infra* Part III.

12. See *infra* Part IV.

I. THE SIGNIFICANCE OF STRUCTURE

The notion that the overall structure of a debate may help determine the content and orientation of arguments is an old one. The work of Karl Marx provides an instructive example.

In 1843, Marx identified and critiqued the constraints imposed on political discussion in liberal democracies, including the United States.¹³ As Marx noted, Americans express their freedom by referencing the individual rights that protect people from the government.¹⁴ Thus Americans understand themselves as free to exercise religion and to possess property in the specific sense that the state is prohibited from dictating their choices about faith and ownership.¹⁵ This kind of rights-based freedom is an important form of “political emancipation” and represents significant progression away from strictures enforced under European feudalism.¹⁶ As more rights are extended to more people, the scope of political freedom will only continue to expand.¹⁷

According to Marx, the problem is that defining freedom in terms of individual rights makes it difficult to see that other forms of human emancipation are also possible.¹⁸ In the United States, “[t]he state abolishes, after its fashion, the distinctions established by *birth, social rank, education, occupation*, when it decrees that birth, social rank, education, occupation are *non-political* distinctions.”¹⁹ Yet all of these distinctions retain their force within civil society outside the sphere of political freedom.²⁰ The idea of a communal emancipation capable of altogether transcending social divisions remains beyond the boundaries of public discussion, for the proliferation of individual rights “leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty.”²¹ Individuals are freed from the state and then left to relate with another only in terms of “natural necessity, need and private interest, the preservation of their property and their egoistic persons.”²² The liberation achieved by embracing rights is therefore both genuine and genuinely narrow: “[M]an was not liberated from religion; he received religious liberty. He was not liberated from property; he received the liberty to own property. He was not liberated from the egoism of busi-

13. Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 26-34 (Robert C. Tucker ed., 2d ed. 1978).

14. *Id.* at 40-41.

15. *Id.* at 32-33.

16. *Id.* at 35 (emphasis omitted).

17. *Id.*

18. *Id.* at 35-46.

19. *Id.* at 33.

20. *Id.* at 35.

21. *Id.* at 42.

22. *Id.* at 43.

ness; he received the liberty to engage in business.”²³ The only way to expand the debate over the meaning of freedom is to change its basic terms.²⁴

Marx embedded his critique of individual rights in a complex constellation of arguments about history and human consciousness.²⁵ It is not necessary to adopt his general theories in order to accept his specific insights, and Marx’s basic lesson about the restrictions imposed by the terms of discussion clearly has applications independent of his larger project. Indeed, almost a century and a half after Marx wrote, and without relying on Marx’s broader suite of arguments, social scientists demonstrated the constraining power of rhetorical frameworks in a book-length study illustrating how the American vocabulary of individualism sharply circumscribes popular perceptions of community.²⁶ Whatever one thinks about Marx’s theories of history, his work remains an important touchstone for understanding how a debate’s contents are formed and confined.

As we take our analytical cue from Marx, it is worth noting that his example shows that the constraints of debate are not absolute. After all, Marx himself was living in an age of individual rights and yet he was able to identify the limits of rights talk and to articulate alternative views of emancipation.²⁷ Marx shows how the framework of a debate can affect arguments and establish a center of gravity for thought and action.²⁸ Following his lead, we can say that the influence of a debate’s structure is a matter of tendency and degree, not of precise direction and rigid categories.

II. IMPARTIAL ARBITERS AND POLITICAL ACTORS

With Marx’s example in mind, we can begin to explore how the basic terms of the debate over judicial decision making shape arguments about gender imbalance on the bench. The first step is to identify the structure of the judicial decision making debate.

As I suggested at the outset, the public discussion of judging is dominated by two concepts: the judge as impartial arbiter and the judge as politically motivated policymaker.

Judges themselves are the most vocal proponents of the concept of impartial decision making.²⁹ Judicial opinions speak entirely in terms of

23. *Id.* at 45.

24. *Id.* at 46.

25. See, for example, Marx’s discussion of “species-life” and “species-being.” *Id.* at 33-46.

26. See generally ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (2d ed. 1996).

27. See Marx, *supra* note 13, at 26-46.

28. See *id.*

29. Keith J. Bybee, *Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making*, 8 ANN. REV. L. & SOC. SCI. 69, 72 (2012).

neutral legal reasoning, and judges write as if they are relying on legal rules to plan and guide their actions. Judges portray themselves as moving within law, appealing to principle and impartial reason as standards for their decisions and as grounds for criticizing those with whom they disagree.³⁰ Judges rely on their specific idiom of principle and impartiality to define and describe the kind of institution that a court is.³¹ For example, members of the United States Supreme Court discuss their institutional home in synchronous terms.³² They do not present the early periods of the Court as being any different from later periods or from the current day.³³ According to the Justices, the Court's entire existence is, as Jack Miles noted in a different context, "simultaneous to itself."³⁴ The Court cannot be reduced to any particular time, place, party, or set of personalities.³⁵ Every judicial decision, regardless of when it was rendered, is available to the current members of the high bench, and any opinion within the canon of the Court's rulings may be used to comment on any other.³⁶ Majority opinions remain eternally relevant as do concurrences and dissents; and the same perspective applies even to those decisions that have been explicitly repudiated.³⁷ *Dred Scott v. Sandford*,³⁸ *Plessy v. Ferguson*,³⁹ and *Lochner v. New York*⁴⁰ all retain significant power as negative examples—cautionary tales that the sitting Justices regularly invoke as they relate the essential characteristics of the Court. In this same vein, the Justices insist that issues are justiciable only where "judicially discoverable and manageable standards" exist,⁴¹ a requirement members of the Court have taken to mean that "law pronounced by the courts must be principled, rational, and based on reasoned distinctions."⁴² The Court proceeds as a court only where identifiable legal principles can be found—principles that may be used to decide the case at hand and to create a framework for rationally deciding future cases.⁴³ Without being limited to and guided by impartial principle, the Court enters a trackless thicket where

30. KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 91 (2010).

31. Bybee, *supra* note 29.

32. *Id.*

33. *Id.*

34. JACK MILES, GOD: A BIOGRAPHY 12 (1995).

35. Bybee, *supra* note 29.

36. *Id.* (citing Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1348-67 (2010)).

37. *Id.*

38. 60 U.S. 393 (1857).

39. 163 U.S. 537 (1896).

40. 198 U.S. 45 (1905).

41. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

42. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

43. Bybee, *supra* note 29, at 73.

there is no clear line between proper judicial decision making and arbitrary judgments about policy.⁴⁴

Of course, this is not to say that Supreme Court Justices (or any other set of judges) always agree with one another. Yet the Justices do not typically present their differences as anything other than expressions of principled disagreement.⁴⁵ The high frequency of splintered decisions does not mean the Court is, from the Justices' perspective, a fractious political body squabbling over policy.⁴⁶ Arguments over law can be contentious and still be legal arguments: conflicting political commitments pervade constitutional discourse, "[a]nd yet no constitutional interpreter in the American system ever asserts that her answer to a constitutional question is a political as opposed to a legal one."⁴⁷ In spite of the sharply divided opinions and blistering dissents, the Justices continue to portray the Court as an impartial arbiter resolving disputes by interpreting fixed principles of law.⁴⁸

Judges are hardly alone in their depiction of judicial decision making as a neutral and reasoned enterprise. Large segments of the public see the courts as impartial.⁴⁹ For example, thirteen separate surveys of public opinion about state courts (conducted from 1989 to 2009) show a significant majority of Americans agreeing that state judges are fair and trustworthy.⁵⁰ Belief in the judiciary's impartiality is found at the federal level as well.⁵¹ Polls indicate that large majorities of Americans expect federal judges to apply the law impartially and distrust federal judges who advance narrow ideological interests.⁵² Particular groups appear to have an especially strong belief in the federal courts' capacity to meet popular expectations. Many attorneys, for example, consider courts to be institutions of principle—80% of lawyers admitted to practice in either the U.S. Supreme Court or a U.S.

44. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 740 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992)).

45. Bybee, *supra* note 29, at 73.

46. *Id.*

47. H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 68 (2008).

48. Bybee, *supra* note 29, at 73.

49. BYBEE, *supra* note 30, at 1-33.

50. Bybee, *supra* note 29, at 77 (citing Deborah R. Hensler, *Do We Need an Empirical Research Agenda on Judicial Independence?*, 72 S. CAL. L. REV. 707 (1998); DAVID B. ROTTMAN, PUBLIC PERCEPTIONS OF THE STATE COURTS: A PRIMER (2000), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=24>).

51. *Id.*

52. See generally James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 AM. J. POL. SCI. 139 (2009); John Russonello, *Speak to Values: How to Promote the Courts and Blunt Attacks on Judiciary*, CT. REV., Summer 2004, at 10; 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 (2001).

court of appeals agreed that “[m]ost of the time the Supreme Court [J]ustices closely follow the Constitution, the law, and the precedents in deciding cases.”⁵³ More broadly, studies have shown that the Supreme Court has received a good deal of public goodwill because it is generally thought to be an even-handed guarantor of basic democratic values for all.⁵⁴ Sixty-four percent of those surveyed in 2006, for example, trusted the Supreme Court to operate in the best interests of the American people either “a great deal or a fair amount” of the time.⁵⁵ When asked whether federal judges should be subject to greater political control by elected officials, more than two-thirds of those surveyed said no.⁵⁶

This commonly held view of judges as impartial arbiters co-exists with an understanding of judges as politically motivated policymakers. The political conception of judges has long been endorsed by scholars, beginning at least as far back as the legal realists.⁵⁷ Legal realism was a loose school of thought that developed during the early decades of the twentieth century.⁵⁸ Most realists doubted that court rulings were strictly derived from legal principles, and they insisted instead that the actual origins of judicial decisions were to be found in the judges’ circumstances and motivations.⁵⁹ “We know, in a general way,” Felix Cohen wrote in his description of the realists’ common knowledge, “that dominant economic forces play a part in judicial decision, that judges usually reflect the attitudes of their own income class on social questions, [and] that their views on law are molded to a

53. Kevin T. McGuire, *The Judicial Branch: Judging America’s Judges*, in A REPUBLIC DIVIDED: THE ANNENBERG DEMOCRACY PROJECT 194, 202 (2007).

54. See generally James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003); James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507 (2007); Gibson & Caldeira, *supra* note 52.

55. KATHLEEN HALL JAMIESON, ANNENBERG PUB. POLICY CTR., PUBLIC UNDERSTANDING, MEDIA, AND EDUCATION 2 (2006), available at http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_Courts20060928/Courts_Summary_20060928.pdf (emphasis omitted).

56. *Poll: Americans Don’t Want Politicians Constraining Judges*, CNN.COM (Oct. 28, 2006, 9:01 PM), <http://www.cnn.com/2006/POLITICS/10/27/activist.judges>.

57. BYBEE, *supra* note 30, at 1-4.

58. See generally EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973); LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960* (1986); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995); STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* (2000).

59. Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, in WHAT’S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT’S AT STAKE 306, 314 (Charles Gardner Geyh ed., 2011).

certain extent by their past legal experience as counsel for special interests.”⁶⁰ Behind judicial pronouncements about what the law is, most realists saw a tangled set of social pressures and political preferences at work.

A good deal of scholarly work today is carried on in the spirit of legal realism.⁶¹ As I have noted, judges frequently portray judicial decision making as a matter of legal principle and impartial reason.⁶² By contrast, many academics describe judicial decision making as a matter of preference and politics, an activity largely driven by the personal beliefs and policy commitments that judges bring to the bench.⁶³ That is, while judges tell us that everything relevant to a court’s ruling is to be found in the judge’s own words, scholars often suspect that the important reasons for a court’s ruling have been left unsaid. Judicial attitudes,⁶⁴ judicial strategies,⁶⁵ and the priorities of the governing regime⁶⁶ are just a few of the factors scholars have examined when searching for the true sources of judicial action.

Although there is no reason to believe that the public at-large is deeply familiar with academic research, a substantial majority of Americans nonetheless agree with the scholarly portrait of judges as political actors.⁶⁷ The same thirteen surveys of public opinion showing significant majorities of Americans agreeing that state judges are fair also show large majorities of Americans agreeing that politics influences state judges.⁶⁸ Public belief in political motivations is evident at the federal level as well.⁶⁹ A large portion of the public believes that the Supreme Court operates with too little regard for legal principle: national surveys regularly find a near majority of respondents agreeing that the Court is too mixed up in politics.⁷⁰ With the

60. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 845 (1935).

61. See *supra* note 13 and accompanying text.

62. Bybee, *supra* note 29, at 70.

63. BYBEE, *supra* note 29, at 25-32.

64. See generally JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

65. See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

66. See generally Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002); KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* (2011).

67. Bybee, *supra* note 29, at 77; see also Hensler, *supra* note 50, at 710-13; ROTTMAN, *supra* note 50, at 1-7.

68. Bybee, *supra* note 29, at 77; see also Hensler, *supra* note 50, at 713; ROTTMAN, *supra* note 50, at 1.

69. Bybee, *supra* note 29, at 77.

70. Scheb & Lyons, *supra* note 52, at 181-90; Gibson, Caldeira & Spence, *supra* note 54, at 356; Gibson, *supra* note 54, at 512; Gibson & Caldeira, *supra* note 52, at 139-40; see also James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People*

Court widely viewed as a political institution, the public often rates the high bench in ideological terms,⁷¹ and large majorities believe that the Court favors some groups more than others.⁷² In fact, only a little more than 7% of Americans think that the partisan background of judges has no influence at all on court decisions.⁷³

In view of such beliefs, it is perhaps unsurprising to find that many Americans express skepticism about the reasons judges give for their rulings and about assertions of judicial impartiality.⁷⁴ In 2005, the Maxwell Poll asked a representative sample of Americans whether they agreed or disagreed with the following statement: "Judges always say that their decisions are based on the law and the Constitution, but in many cases judges are really basing their decisions on their own personal beliefs."⁷⁵ A solid majority of respondents agreed.⁷⁶ Moreover, this view was shared by majorities in a wide range of different groups: Democrats (60%) and Republicans (59%); those who generally trust public officials to do the right thing (55%) and those who generally distrust public officials (59%); those who always vote (58%) and those who never vote (60%); and those who approve of the president (60%) as well as those who disapprove of the president (58%).⁷⁷ All these groups agreed that even though judges may consistently invoke high legal principle, judicial decisions are often derived from more mundane preferences. This same question about the influence of personal beliefs in judging was included in panel surveys in 2005 and 2006,⁷⁸ and again in a national survey in 2011.⁷⁹ In every instance, a significant majority of respondents agreed that judicial decisions are influenced by personal politics,

Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment, 58 POL. RES. Q. 187, 187 (2005).

71. James L. Gibson, *Public Reverence for the United States Supreme Court: Is the Court Invincible?* 9-10 (Wash. Univ. in St. Louis, Working Paper, 2012), available at <http://ssrn.com/abstract=1898485>.

72. McGuire, *supra* note 53, at 202.

73. Keith J. Bybee, *U.S. Public Perception of the Judiciary: Mixed Law and Politics*, JURIST (Apr. 10, 2011), <http://jurist.org/forum/2011/04/us-public-perception-of-the-judiciary-mixed-law-and-politics.php>. These results have been broadly confirmed at the level of the Supreme Court. See Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1.

74. Keith J. Bybee, *The Two Faces of Judicial Power*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 1, 3 (Keith J. Bybee ed., 2007); see also BYBEE, *supra* note 30, at 21.

75. BYBEE, *supra* note 30, at 20-21.

76. *Id.* at 21.

77. *Id.*

78. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 204, 215-16 (2011).

79. Bybee, *supra* note 29, at 76.

indicating widespread doubt about the description that judges offer of their own decision making.⁸⁰

III. THE LIMITS OF THE DEBATE

Just as the framing of freedom in terms of individual rights focuses attention on governmental tyranny (while leaving issues of social hierarchy largely untouched), the concepts of impartial judgment and politically motivated policymaking exert a powerful influence on the discussion of judicial decision making.

Claims about impartial judgment are advanced in praise of judges. Indeed, the American Bar Association considers impartial judgment to be an enduring ideal:

Judges occupy the role of umpires in an adversarial system of justice; their credibility turns on their neutrality. To preserve their neutrality, they must neither pre-judge matters that come before them, nor harbor bias for or against parties in those matters. They must, in short, be impartial, if we are to be governed by the rule of law rather than judicial whim.⁸¹

Charges of politically motivated policymaking are directed at judges for failing to transcend preconceptions in the way that the ideal of impartiality requires.⁸² The basic criticism is that the judicial activist arrives in the courtroom with a series of objectives to be achieved.⁸³ Litigants do not receive a hearing so much as they receive a pretense of being heard; the policymaking judge deploys law, facts, and arguments simply as ad hoc justifications for predetermined results—fig leaves of principle used to cover an exercise of partisan preference.⁸⁴

The opposition between ideals of impartiality and accusations of politically motivated policymaking essentially defines the public discussion of judicial decision making. And many commentators worry that this dominant opposition is corrosive.⁸⁵ The perception of politically informed decision making transforms judges from neutral oracles of law into biased partisans,

80. BYBEE, *supra* note 30, at 20-21.

81. ABA COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 11 (2003), available at <http://www.soros.org/sites/default/files/justiceinjeopardy.pdf>. The idea here is not that judges must approach controversies without any preexisting beliefs about what the law requires. *Id.* The ideal of judicial impartiality does not ask judges to abandon their legal preconceptions so much as it calls upon them to not let preconceptions “harden into prejudgments,” preventing them from giving fair weight to the facts, law, and arguments that will be presented in the disputes before the courts. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 211 (2004).

82. BYBEE, *supra* note 30, at 7.

83. *See id.*

84. Bybee, *supra* note 29, at 76.

85. *See id.*

“placing the bench on par with other policymakers” and breeding cynicism about the possibility of fair adjudication.⁸⁶ A sign of such spreading cynicism is that assertions of impartial decision making are often treated as mere ploys engineered to insulate policymaking judges from attack.⁸⁷

Examples of the dueling relationship between impartiality and policymaking (as well as suggestions of this relationship’s corrosive power) can be found in the most recent round of Supreme Court confirmation hearings.⁸⁸ In her opening statement to the Senate Judiciary Committee, Elena Kagan clearly identified herself with the image of the judge as an impartial arbiter.⁸⁹ She began by explaining “how her experience in various settings taught her a set of lessons about the neutrality, principle, reason, and restraint of the Court.”⁹⁰ Kagan promised “[to] listen hard, to every party before the Court and to each of my colleagues . . . [to] work hard . . . [and to] do my best to consider every case impartially, modestly, with commitment to principle, and in accordance to law.”⁹¹ The Democrats on the Senate Committee repeatedly reinforced Kagan’s pledge to exercise impartial and principled judgment.⁹² For example, Senator Patrick Leahy argued that Kagan “will do her best to consider every case impartially, modestly, and with commitment to principle and in accordance with law.”⁹³

Republican senators roundly rejected these assurances and characterized Kagan as a political operative with a clear policy agenda for the high bench.⁹⁴ Announcing his opposition to Kagan, Senator Orrin Hatch called her “a skilled political lawyer” and criticized her for supporting jurists that Hatch considered to be activists.⁹⁵ “The law must control the judge; the judge must not control the law,” Hatch argued.⁹⁶ Senator Jeff Sessions reached the same conclusion:

86. *Id.*

87. *See supra* notes 61-73 and accompanying text.

88. Keith J. Bybee, *Will the Real Elena Kagan Please Stand Up? Conflicting Public Images in the Supreme Court Confirmation Process*, 1 WAKE FOREST J.L. & POL’Y 137, 147-52 (2011).

89. *Id.* at 147-48.

90. *Id.* at 148.

91. *Elena Kagan’s Opening Statement to the Senate Judiciary Committee*, L.A. TIMES, June 28, 2010, <http://latimesblogs.latimes.com/washington/2010/06/elna-kagan-judiciary-statement-supreme-court.html>.

92. Bybee, *supra* note 88, at 150.

93. James Oliphant, *Senate Begins Debate over Supreme Court Nominee Kagan*, L.A. TIMES, Aug. 3, 2010, <http://articles.latimes.com/2010/aug/03/nation/la-na-kagan-nomination-20100804>.

94. Bybee, *supra* note 88, at 149-50.

95. Bernie Becker, *Hatch Opposes Kagan*, N.Y. TIMES, July 2, 2010, <http://thecaucus.blogs.nytimes.com/2010/07/02/hatch-opposes-kagan>.

96. *Id.*

I believe she does not have the gifts and the qualities of mind or temperament that one must have to be a justice [Kagan would be] an activist, liberal progressive, politically minded judge who will not be happy simply to decide cases but will seek to advance her causes under the guise of judging.⁹⁷

In turn, Democratic senators deflected the Republicans' criticism of political judging onto the conservative Justices sitting on the Supreme Court.⁹⁸ "The rightward shift of the Court under Chief Justice Roberts is palpable," Senator Chuck Schumer argued.⁹⁹ "In decision after decision, special interests are winning out over ordinary citizens. In decision after decision, this court bends the law to suit an ideology."¹⁰⁰

The fact that Republicans and Democrats consistently disagreed about the identity of the "true" judicial activists suggested that each camp considered impartial judicial decision making to be less a matter of neutral judgment than a matter of praising preferred policy objectives. The senators did not seem to be doing very much in the way of genuine deliberation; instead, they seemed to be trying to score political points and to placate key partisan constituencies. As the *Los Angeles Times* observed in its coverage of the confirmation hearings, "both sides prevailed upon Kagan to be the very thing that both sides say they decry: a nominee with preformed views about the law."¹⁰¹

The heated political competition at hearings diminished Kagan, pushing her to the periphery instead of keeping the process focused on the nominee.¹⁰² The political jockeying also raised questions about Kagan's own protestations of principle and impartiality.¹⁰³ Just as the senators appeared to exploit the hearings in order to promote political goals, Kagan also appeared to use the process to advance her own interest in getting confirmed.¹⁰⁴ She was repeatedly portrayed in the press as carefully following a "script" that dictated her every gesture and response.¹⁰⁵ Her participation in the hearings ultimately came off as a kind of act, "a show designed to secure her eleva-

97. David M. Herszenhorn, *In Senate, Vote Nears on Kagan Nomination*, N.Y. TIMES, Aug. 4, 2010, at A14.

98. *Id.*

99. Alec MacGillis & Amy Goldstein, *Kagan Says She Would Take a 'Modest' Approach on Supreme Court*, WASH. POST, June 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062801859.html>.

100. *Id.*

101. James Oliphant, *Kagan Slips on Fruits and Vegetables in Senate Panel Questioning*, L.A. TIMES, July 1, 2010, <http://articles.latimes.com/2010/jul/01/nation/la-na-kagan-hearings-20100701/2>.

102. Bybee, *supra* note 88, at 151.

103. *Id.*

104. *Id.* at 151-52.

105. *Id.* at 152.

tion to the high bench without revealing anything about the person on stage.”¹⁰⁶

What implications does this sort of debate have for arguments about gender imbalance on the bench? Questions of gender equity may not surface at all in the discussion of judicial decision making (indeed, there was little sustained discussion of gender during Kagan’s confirmation hearings, even though her selection would bring the number of women serving on the Supreme Court to a historic high¹⁰⁷). But when questions of gender equity do arise, they tend to get caught up in the centrifugal forces generated by the clashing concepts of impartial judgment and politically motivated policy-making.

Since “impartiality” is the central term of praise, arguments about impartiality provide an obvious way to advance the case for more female judges. One might argue, for instance, that female judges are more likely to achieve impartiality because their experience in a male-dominated profession has made them more sensitive to the ways in which gender might influence decisions—an influence that male judges detect less easily by virtue of their majority status. This is a plausible argument that could be developed into a broader case for judicial diversity embracing a wide range of underrepresented identities. Yet the effort to connect gender (or any other identity) with the more effective pursuit of impartial decision making will be readily countered by claims that the call for more female judges is an attempt to import a political agenda into the courts. This is so because the debate is structured such that the sole alternative to impartial judgment is politically motivated policymaking. Thus, the more supporters call positive attention to an individual’s gender, the more easily opponents may turn that attention in a negative direction by arguing that gender pre-commits the individual to particular results—and consequently renders her unable to make impartial decisions.

The assimilation of gender equity arguments into the larger opposition between impartiality and policymaking was on clear display during Sonia Sotomayor’s confirmation hearings.¹⁰⁸ The occasion for debating gender

106. *Id.*

107. *See id.* The lack of attention to gender reflected broader public opinion. *See Supreme Court/Judiciary: Gallop Poll*, POLLINGREPORT.COM (May 6, 2010), <http://pollingreport.com/court.htm>. During the period of the Kagan nomination, the Gallup Poll showed that nearly three-quarters of Americans thought that it did not matter whether or not the next Supreme Court justice was a woman, and only 4% thought having a female justice was essential. *Id.*

108. In this context, and unlike the context of the Kagan nomination, a substantial proportion of the public favored the selection of a female justice. *See Supreme Court/Judiciary: CBS News Poll*, POLLINGREPORT.COM (July 9, 2009), <http://pollingreport.com/court.htm>. A CBS News poll conducted in the days immediately

was created by a comment that Sotomayor had made in several different speeches prior to her confirmation: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”¹⁰⁹ As I have suggested, such a comment could be read as an argument about the necessity of attending to difference in order to arrive at impartial decisions. In order to treat conflicting parties fairly, do we begin by ignoring gender differences? Or are we better served by first exploring the significance of these differences in law, society, and the life of the judge? Sotomayor attempted (at least initially) to take the latter approach in the hearings. In an early exchange with Republican Senator Jeff Sessions, Sotomayor explained that knowledge of identity and difference is the key to impartial judicial decision making: “I think the system is strengthened when judges don’t assume they’re impartial but when judges test themselves to identify when their emotions are driving a result or their experiences are driving a result and the law is not.”¹¹⁰ Similar connections between diversity and improved judicial decision making were also drawn by Democratic Senators speaking in support of Sotomayor’s nomination.¹¹¹

Such arguments were met with a line of criticism linking gender to political bias. Senator Sessions, for example, plainly rejected Sotomayor’s effort to connect gender and impartiality.¹¹² After reciting Sotomayor’s “wise Latina” remark and entering the text of her speeches into the hearing record,¹¹³ Senator Sessions stated that Sotomayor’s nomination presented a clear choice between two kinds of judges: “Do I want a judge that allows his or her social, political, or religious views to change the outcome? Or do

before the Sotomayor confirmation hearings found that over one-third of Americans thought it was “very important” to have another woman on the Court. *Id.*

109. Charlie Savage, *A Judge’s View of Judging Is on the Record*, N.Y. TIMES, May 15, 2009, at A21, available at <http://www.nytimes.com/2009/05/15/us/15judge.html>. The “wise Latina” comment was the subject of substantive engagement throughout the confirmation hearings. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009).

110. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor*, *supra* note 109, at 71.

111. For instance, Senator Edward Kaufman stated:

Though the Supreme Court is not a representative body, we should hold as an ideal that it broadly reflect the citizens it serves. Diversity shares many goals. Outside the courtroom, it better equips our institutions to understand more of the viewpoints and backgrounds that comprise our pluralistic society. Moreover, a growing body of social research suggests that groups with diverse experience and backgrounds come to the right outcome more often than do non-diverse groups which may be just as talented. I believe a diverse court will function better as well.

Id. at 47-48.

112. *Id.* at 7-8.

113. *Id.* at 7.

I want a judge that impartially applies the law to the facts and fairly rules on the merits, without bias or prejudice?”¹¹⁴ Sessions made it clear that he thought Sotomayor belonged in the first camp. In an extended period of close questioning, he pushed Sotomayor to explain how her celebration of gender and ethnic identity could be consistent with the notion that when judges “put on that robe, that is a symbol that they are to put aside their personal biases and prejudices.”¹¹⁵ Sessions brushed aside Sotomayor’s claim that awareness of difference was the essential first step to making impartial decisions, and he insisted that it was impossible to square the ideal of fair judicial treatment with Sotomayor’s “statement that you willingly accept that your sympathies, opinions, and prejudices may influence your decision making.”¹¹⁶ Republican Senators Charles Grassley,¹¹⁷ Jon Kyl,¹¹⁸ and Lindsey Graham¹¹⁹ all pressed Sotomayor on the same point. They all argued that Sotomayor could not call attention to gender in the way she had without embracing the kind of personal beliefs and preferences that judges must ignore.¹²⁰

Sotomayor ultimately responded by backing away from her own words. In praising the decision making capacities of a wise Latina, Sotomayor said she had used a “rhetorical flourish that fell flat.”¹²¹ Her words were not to be taken literally.¹²² Rather than making a claim about how the law should be interpreted and judgments rendered, Sotomayor insisted that her primary goal had been to motivate.¹²³ She gave versions of her speech “most often to groups of women lawyers or to groups most particularly of young Latino lawyers and students.”¹²⁴ Her principal aim was to energize her audience, “to inspire them to believe that their life experiences would enrich the legal system, because different life experiences and backgrounds always do. . . . [and] to inspire them to believe that they could become anything they wanted to become, just as I had.”¹²⁵ An awareness of gender and identity difference was not a prerequisite to impartial decision making. Instead, a rich variety of experiences on the bench was “good for America because we are the land of opportunity, and to the extent that we are pursuing and showing that all groups can be lawyers and judges, that’s just re-

114. *Id.* at 8 (quoting Senator Jeff Sessions).

115. *Id.* at 69.

116. *Id.* at 71.

117. *Id.* at 16-18.

118. *Id.* at 21-24.

119. *Id.* at 26-29.

120. *Id.* at 18, 21-24, 27.

121. *Id.* at 73.

122. *Id.* at 327.

123. *Id.* at 66.

124. *Id.*

125. *Id.*

flecting the values of our society.”¹²⁶ In Sotomayor’s telling, her “wise Latina” comment became nothing more than an anodyne restatement of the American Dream.

Why did Sotomayor retreat? She was involved in a debate not only where assertions of judicial impartiality are countered by accusations of judicial policymaking, but also where assertions of impartiality are often interpreted as mere pretenses by the public. This is not a context in which novel or expansive claims about the meaning of impartiality will be easy to advance. If Sotomayor was not to defend her prior speeches as a new kind of argument about impartiality, then there was only one way to counter her opponents’ continued accusations of political bias: she must argue that gender was altogether irrelevant to the debate. When Senator Graham gave Sotomayor a chance to apologize for the “wise Latina” comment, she took it.¹²⁷

IV. A WAY FORWARD

It is regrettable that Sotomayor did not maintain and elaborate her initial argument about the importance of gender. More broadly, it is unfortunate that confirmation hearings as a whole hew to the established lines of debate, predictably consumed by oaths of impartiality and charges of bias, and largely without any fresh discussion about the determinants of good judicial decision making.¹²⁸

These lamentable limits of the debate are, as I have argued, the product of the basic terms in which the debate is organized. Of course, such limits are not completely insurmountable: some arguments about gender equity on the bench were articulated during the Sotomayor hearings and the nominee was confirmed. Yet, if the limits of debate are not insuperable obstacles, they nonetheless remain important and durable. Singling out the gender of a judge or judicial nominee tends to provoke criticism that the person in question is a judicial activist with a policy agenda favoring select groups. The criticism is countered by vociferous protestations about impartiality—protestations that are in turn interpreted by critics as mere smokescreens designed to obscure the reality of bias. As gender becomes a liability, supporters of the judge or judicial nominee (or, in the case of Sotomayor, the nominee herself) increasingly deflect attention away from any direct talk about the importance of having a woman on the bench.

126. *Id.* at 124.

127. “I regret that I have offended some people. I believe that my life demonstrates that that was not my intent to leave the impression that some have taken from my words.” *Id.* at 428.

128. Ronald Dworkin, *The Temptation of Elena Kagan*, N.Y. REV. BOOKS (Aug. 19, 2010), <http://www.nybooks.com/articles/archives/2010/aug/19/temptation-elena-kagan>.

The end result is that the framework of current debate discourages robust advocacy of gender equity. Expressions of regret about this state of affairs will not make a difference so long as judicial decision making continues to be discussed only as a matter of impartial judgment or of politically motivated policymaking. For lasting change to occur (as the example of Marx indicates¹²⁹), the basic terms of debate must be altered.

By way of a conclusion, let me briefly suggest one strategy for ushering in change, at least in the context of judicial selection. In my view, the critical step is to detach the call for greater gender diversity from any specific candidate for judicial office. Instead, efforts should be focused on the population of nominees.¹³⁰

To raise the profile of a particular judicial nominee's gender is to put that person in the position of having to explain how she will overcome her gender. By contrast, to train attention on the gender balance of an entire group of nominees is to put the selection process's gatekeeper (whether that role is played by a merit system board, a party nominating committee, or the President of the United States) in the position of having to explain why there are not more women in the pool. The targeted criticism of gatekeepers will not break open the debate over judicial decision making, and public discussion of judges will still be dominated by concepts of impartiality and politically motivated policymaking. But the focused criticism of gatekeepers will raise a threshold question that precedes the usual dickering over individual candidates: In a world where nearly one-half of all law students are women,¹³¹ why are so few women put forward for judicial positions?

Compared to the kind of changes Marx thought would be necessary to move understandings of freedom beyond the limits of individual rights, the strategy I am recommending can hardly be called radical. An emphasis on the proportion of female nominees may still be helpful because it shifts attention to a debate with a more favorable structure. A number of public figures are clearly willing to spin gender as a disqualifying bias for any given judge, yet virtually no one is willing to argue that women are incapable of serving on the bench. Claims that are easy to make when the reigning opposition in the debate is between impartiality and policymaking become much more difficult to advance when the opposition is between modern views of female intellectual capacities and archaic conceptions of a woman's place. As a consequence, decisionmakers responsible for selecting judicial nominees lack a strong defense if they fail to name a proportionate number of females. Indeed, such decisionmakers not only lack a strong defense, but

129. See *supra* Part I.

130. For a similar effort to change the terms of debate in the context of affirmative action, see RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* (Stephen L. Wasby ed., 1992).

131. NAT'L WOMEN'S LAW CTR., *supra* note 4, at 1.

also already possess the institutional power necessary to change the gender mix of the nominee pool. Once we change what we talk about when we talk about gender imbalance on the bench, the source of the problem and the means of solution are both in reach.