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Judging Hypocrisy

Todd E. Pettys

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JUDGING HYPOCRISY

Todd E. Pettys*

ABSTRACT

Editorialists, politicians, and others sometimes accuse U.S. Supreme Court Justices of hypocrisy, especially when they believe that divisions among the Justices are the product of partisan loyalties rather than good-faith differences in impartial legal judgment. These hypocrisy charges pose a serious threat to the Court's legitimacy. In legal circles and elsewhere, however, one finds a remarkable lack of clarity about what hypocrisy is and the moral precepts that define its boundaries. As a result, participants in public discourse about the Court can easily find themselves talking past one another. To be assured that the Justices are not hypocrites with respect to their commitment to impartiality, for example, is it sufficient to be persuaded that the Justices are not trying to deceive us when they say they do not regard themselves as mere politicians in robes, or is more required?

In this Article, I offer a conceptual framework for thinking about hypocrisy of all sorts. I argue that hypocrisy appears in three principal forms—Faking Hypocrisy, Concealing Hypocrisy, and Gerrymandering Hypocrisy—and I identify the anti-equality thread that runs through all of them. I then show how this three-part framework can deepen our thinking about the work of the Court. With respect to the Justices' pledge to be impartial, for example, I argue that there are circumstances in which the Justices can be guilty of hypocrisy only if they are schemers bent on duping the American public into believing they are unbiased. In other circumstances, however, the Justices can be guilty of hypocrisy even if they sincerely believe they are doing what the law requires.

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We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.

Chief Justice John G. Roberts, Jr.¹

I. “THE INTELLIGENT PERSON ON THE STREET”

On November 20, 2018, President Donald Trump publicly accused a federal district judge of ruling against a component of the Republican Administration’s asylum policy because he was “an Obama judge.”² In response, Chief Justice John Roberts took the unusual step of issuing the statement quoted in the epigraph above. It is not difficult to understand why. The President had condemned other federal judges before³ and his criticism on this occasion came on the heels of then-Judge Brett Kavanaugh’s extraordinarily bitter Supreme Court confirmation hearing, during which the nominee sparred angrily with Senate Democrats on national television.⁴ A few months before those headline-seizing exchanges took place, the Court concluded a Term during which, in “major cases with clear political overtones, an extremely reliable indicator of what side a justice would come down on was whether he or she was appointed by a president with an ‘R’ or a ‘D’ behind his name.”⁵ At about that same time, a Quinnipiac national poll revealed that 50% of American voters—including 57% of those between the ages of 18 and 34—believed the Supreme Court was “mainly motivated by politics” rather than “the law.”⁶ Not long before that,

¹ See Adam Liptak, *Roberts Rebukes Trump for Swipe at ‘Obama Judge’*, N.Y. TIMES, Nov. 22, 2018, at A1 (quoting the Chief Justice’s statement).

² See Brett Samuels, *Trump Rails Against Ninth Circuit Court of Appeals After Asylum Ruling*, HILL (Nov. 20, 2018, 5:00 PM), <https://thehill.com/homenews/administration/417728-trump-rails-against-ninth-circuit-court-of-appeals> (reporting on the President’s criticism of both Judge Jon Tigar—of the U.S. District Court for the Northern District of California—and the Ninth Circuit Court of Appeals).

³ See Liptak, *supra* note 1 (describing prior instances of criticism).

⁴ See Sheryl Gay Stolberg & Nicholas Fandos, *High-Stakes Deal of Tears and Fury Unfolds in Senate*, N.Y. TIMES, Sept. 28, 2018, at A1; see also Mark Sherman & Jessica Gresko, *Nominee’s Attack on Democrats Poses Risk to Supreme Court*, AP NEWS (Sept. 28, 2018), <https://apnews.com/8ef877d649a3448f9d270e975932ee81> (“Brett Kavanaugh’s angry denunciation of Senate Democrats at his confirmation hearing could reinforce views of the Supreme Court as a political institution at a time of stark partisan division . . .”).

⁵ Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES, July 6, 2018, at A11.

⁶ QUINNIPIAC UNIV. POLL, AMERICAN VOTERS SUPPORT ROE V. WADE 2-1, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; DEM CANDIDATES UP 9 POINTS IN U.S. HOUSE RACES 7 (2018) [hereinafter AMERICAN VOTERS], https://poll.qu.edu/images/polling/us/us07022018_uixs04.pdf. A May 2019 Quinnipiac poll indicates those numbers subsequently rose even higher, with 55% of the American electorate holding that view, including 71% of those between the ages of 18 and 34. QUINNIPIAC UNIV. POLL, U.S. VOTER SUPPORT FOR ABORTION IS HIGH, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; 94 PERCENT BACK UNIVERSAL GUN BACKGROUND

Senate Republicans refused to consider Democratic President Barack Obama's nomination of Merrick Garland, then-Chief Judge of the D.C. Circuit, to fill the vacancy resulting from Justice Antonin Scalia's death; Republican leaders kept the seat open, hoping (as proved true) that a member of their own party would win the 2016 presidential election and thereby obtain the nominating power.⁷ Chief Justice Roberts thus had ample reason to fear that the American public increasingly scoffs at the notion that federal judges carry out their work in a nonpartisan fashion.

The Chief Justice's concerns had been on display a year earlier during the oral argument in *Gill v. Whitford*,⁸ a case concerning partisan gerrymandering in Wisconsin. The Democratic voters challenging Wisconsin's Republican-favoring electoral maps had proposed a statistical formula for marking the point at which partisan gerrymandering becomes constitutionally impermissible, but the Chief Justice wasn't buying it. The plaintiff's formula, he said, seemed like "sociological gobbledygook."⁹ He feared ordinary citizens would react the same way and would simply attribute the Justices' rulings in partisan gerrymandering cases to partisanship among the Justices themselves:

We will have to decide in every case whether the Democrats win or the Republicans win And if you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: 'Well, why did the Democrats win?' And the answer [under the formula proposed here] is going to be because EG was greater than 7 percent And the intelligent man on the street is going to say that's a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.¹⁰

Embracing Chief Justice Roberts's suggestion that we take seriously the perceptions of the intelligent person on the street, I focus here on a morality-laden concept that frequently appears in popular discourse about the work of

CHECKS 2-3 (2019) [hereinafter U.S. VOTER SUPPORT], https://poll.qu.edu/images/polling/us/us05222019_usch361.pdf.

⁷ See Alana Abramson, *Neil Gorsuch Confirmation Sets Record for Longest Vacancy on 9-Member Supreme Court*, TIME (Apr. 7, 2017, 12:20 PM), <https://time.com/4731066/neil-gorsuch-confirmation-record-vacancy/>.

⁸ 138 S. Ct. 1916 (2018).

⁹ Transcript of Oral Argument at 40, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

¹⁰ *Id.* at 37-38; see also *id.* at 38 ("It is just not, it seems, a palatable answer to say the ruling was based on the fact that EG was greater than 7 percent. That doesn't sound like language in the Constitution.").

government officials—the concept of hypocrisy.¹¹ The Justices themselves are often accused of hypocrisy when critics believe the Justices have behaved as political partisans, voting in service to their political loyalties rather than in service to impartial justice.¹² Those accusations pose a serious threat to the Court’s legal and sociological legitimacy.¹³ Yet among scholars and others, one finds a remarkable lack of clarity about what hypocrisy is, the forms it can take, and the moral precepts that define its boundaries. As a result, participants in public discourse about the Court can easily find themselves talking past one another. To be assured that the Justices are not hypocrites with respect to their commitment to impartiality, for example, is it sufficient to be persuaded that the Justices are not trying to deceive us when they say they do not think of themselves as mere politicians in robes, or is more required?

I aim to bring us further down that road here. In Part II, I offer a conceptual framework for thinking about hypocrisy of all sorts and why we find it morally objectionable. I argue that, in legal and nonlegal settings alike, there are three principal types of hypocrisy—Faking Hypocrisy, Concealing Hypocrisy, and

¹¹ The titles of a few published pieces illustrate some of the ways in which political antagonists accuse one another of hypocrisy in American public life, including in debates about matters concerning the federal judiciary. *See, e.g.*, Al Franken, *Kavanaugh Supreme Court Hearings Showcase Republican Partisanship, Hypocrisy: Al Franken*, USA TODAY (Sept. 7, 2018, 7:36 PM), <https://www.usatoday.com/story/opinion/2018/09/07/brett-kavanaugh-supreme-court-hearings-showcase-republican-hypocrisy-column/1215578002/>; Mark Hemingway, *The Democrats’ Hypocrisy on Partisan Obstruction of Judicial Nominations*, WASH. EXAM’R (Feb. 17, 2016, 12:20 PM), <https://www.washingtonexaminer.com/weekly-standard/the-democrats-hypocrisy-on-partisan-obstruction-of-judicial-nominations>; Philip Klein, *Democrats Are Hypocrites for Attacking Brett Kavanaugh as Too Partisan*, WASH. EXAM’R (Oct. 3, 2018, 12:50 PM), <https://www.washingtonexaminer.com/opinion/democrats-are-hypocrites-for-attacking-brett-kavanaugh-as-too-partisan>; Matthew Rozsa, *Mitch McConnell Got Called Out for His Supreme Court Hypocrisy on Two Different Sunday Shows*, SALON (Oct. 8, 2018, 2:55 PM), <https://www.salon.com/2018/10/08/mitch-mcconnell-got-called-out-for-his-supreme-court-hypocrisy-on-two-different-sunday-shows/>.

¹² *See, e.g.*, KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 5 (2010) (“The political nature attributed to the judicial process often appears to be at odds with claims of judicial impartiality, naturally leading many to wonder whether judicial appeals to law are anything more than ad hoc rationalizations deployed to obscure political purposes.”); *id.* at 19 (“[A]s the indicators of political judging grow more apparent, the suspicions of judicial hypocrisy will only multiply.”); RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT xi–xii (2018) (observing that many people “resent what they perceive as the Justices’ hypocrisy in purporting to be bound either by law or by a consistent methodology”); Leah Aden, *Changing the Rules to Rig the Game: Our Supreme Court’s Hypocrisy on Civil Rights*, REWIRE NEWS (Oct. 8, 2018, 5:21 PM), <https://rewire.news/article/2018/10/08/changing-the-rules-to-rig-the-game-our-supreme-courts-hypocrisy-on-civil-rights/> (“Several recent cases expose the inconsistency—one might even say the hypocrisy—with which the Roberts Court applies its self-professed commitment to judicial modesty.”); David Leonhardt, *The Supreme Court Is Coming Apart*, N.Y. TIMES, Sept. 24, 2018, at A27 (“[T]he biggest damage from the Court’s partisanship doesn’t even come from the nasty confirmation battles. It comes from the fact that a major American institution defines itself in an evidently false way. Hypocrisy isn’t good for credibility.”).

¹³ *See infra* notes 110–22 and accompanying text.

Gerrymandering Hypocrisy¹⁴—and I identify the anti-equality thread that runs through all of them.¹⁵ In Part III, I apply that conceptual framework to the conversation about the Court and its legitimacy. Focusing primarily on the Justices’ claimed commitment to impartiality,¹⁶ I point out reasons why that commitment is a matter on which the Justices are especially vulnerable to skepticism.¹⁷ I then discuss the issues that are in play when the Justices are accused of the three principal types of hypocrisy.¹⁸ I explain, for example, that while bias-claiming charges of Faking and Concealing Hypocrisy both entail the claim that the Justices are trying to dupe the American public into believing they follow what they impartially perceive to be the law’s demands, the Justices may be guilty of Gerrymandering Hypocrisy even if (as Justice Neil Gorsuch put it during his Senate confirmation hearing) the answers they provide “are always the ones [they] believe the law requires.”¹⁹ In Part IV, using the Justices’ handling of the Court’s own precedent as an example, I briefly explain how concerns about hypocrisy can arise even when issues of impartiality are not at stake.

II. HYPOCRISY’S FUNDAMENTALS

To call someone a hypocrite is to deploy “one of the most common forms of moral censure in the contemporary world.”²⁰ When convincingly prosecuted, it can be a powerfully delegitimizing charge, because the person who commits hypocrisy has called into question his or her authority to make normative judgments worthy of others’ respect.²¹ What’s more, hypocrisy is a freestanding moral allegation, in the sense that you can accuse someone of hypocrisy even if you do not embrace the norm about which you believe the person has been

¹⁴ See *infra* Part II.A.

¹⁵ See *infra* Part II.B.

¹⁶ See *infra* Part III.A.

¹⁷ See *infra* Part III.B.

¹⁸ See *infra* Part III.C.

¹⁹ *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 66 (2017) [hereinafter *Gorsuch Confirmation Hearing*] (statement of Hon. Neil Gorsuch).

²⁰ R. Jay Wallace, *Hypocrisy, Moral Address, and the Equal Standing of Persons*, 38 PHIL. & PUB. AFFS. 307, 307 (2010); see also Daniel Statman, *Hypocrisy and Self-Deception*, 10 PHIL. PSYCH. 57, 57 (1997) (“Hypocrisy . . . is viewed with repugnance by most individuals and societies.”); Béla Szabados, *Hypocrisy*, 9 CANADIAN J. PHIL. 195, 197 (1979) (observing that *hypocrisy* is “a term of moral condemnation”).

²¹ See Jessica Isserow & Colin Klein, *Hypocrisy and Moral Authority*, 12 J. ETHICS & SOC. PHIL. 191, 191 (2017) (emphasis omitted) (arguing that “hypocrites are persons who have undermined their claim to moral authority”); Wallace, *supra* note 20, at 320 (“Hypocrites lack the standing to blame, . . . insofar as their own behavior makes it morally objectionable for them to adopt the stance of blame.”).

hypocritical.²² Due to the delegitimizing and freestanding nature of hypocrisy charges, they are an especially appealing weapon in battles between rival ideological communities.²³ After all, if you cannot change all of your opponents' minds, you might be able to lure in at least a few people from the other side—and strengthen your own community's bonds in the process—if you can make the case that your opponents' leaders are hypocrites unworthy of their followers' loyalty.

But what, precisely, is hypocrisy and why does it draw our moral condemnation? Although more complex than one might initially suppose, both questions are susceptible to serviceable answers.

A. *What Is Hypocrisy?*

1. *Preliminaries*

Explaining that the term *hypocrite* is derived from *hypokrites*—a word used in ancient Greece to refer to stage actors—one leading dictionary says that a hypocrite is a person “who pretends to be what he is not or to have principles or beliefs that he does not have.”²⁴ Pretense does indeed seem like an important part of the picture, but hypocrisy cannot be reduced to pretense alone.²⁵ An actor who plays a role in a theatrical production today pretends to be someone she is not, for example—and she may succeed to such a degree that some viewers have difficulty separating the actor's personality from that of the character she plays—but we would hardly condemn her as a hypocrite. In our own day-to-day lives, we can easily think of unobjectionable (even praiseworthy) ways in which we pretend to have beliefs or preferences that we do not actually possess. When a lonely but tiresome coworker invites you to lunch, you might express delight and agree to go, even though you can think of innumerable ways in which you

²² See Szabados, *supra* note 20, at 197 (observing that condemnation of hypocrisy entails judging a person by reference to that person's own purported standards); cf. Richard McDonough, *The Abuse of the Hypocrisy Charge in Politics*, 23 PUB. AFFS. Q. 287 (2009) (lamenting this feature of hypocrisy allegations).

²³ See JUDITH N. SHKLAR, *ORDINARY VICES* 81 (1984) (stating that, in a society marked by pervasive ideological conflict, “the contempt for hypocrisy is the only common ground that remains, and that is what renders these accusations so effective”); Isserow & Klein, *supra* note 21, at 220 (observing that, by accusing the leaders of a rival moral community of being hypocrites, one hopes to undermine their standing within that community and thereby lure some of their followers to one's own camp); Saul Smilansky, *On Practicing What We Preach*, 31 AM. PHIL. Q. 73, 73 (1994) (“To the extent that we have given up the hope of convincing our political, ideological or religious adversaries that their ways are mistaken, . . . we at least try to catch them when they do not live up to their principles.”).

²⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1115 (2002).

²⁵ See JAY NEWMAN, *FANATICS & HYPOCRITES* 85 (1986) (observing that not all pretense is hypocritical).

would rather spend that time.²⁶ When your child greets you at the end of an exhausting workday with a request to play soccer in the yard, you might feign enthusiasm and head outside, even though you would far prefer to collapse on the couch.²⁷ Even when a person uses pretense to commit a moral wrong, the hypocrisy label may seem inapt, as when a bank robber commits his crime by posing as a security guard.

Another leading dictionary draws tighter boundaries when it says that a hypocrite is “[o]ne who falsely professes to be virtuously or religiously inclined” or “who pretends to have feelings or beliefs of a higher order than his real ones.”²⁸ But if we are looking for a definition of hypocrisy that squares with the widespread judgment that hypocrisy is morally objectionable, even this one comes up short. If a schoolteacher sometimes punches those who anger him in his private life, for example, would we condemn him as a hypocrite for telling his pupils that people ought to resolve their disputes nonviolently?²⁹ Or consider a lifelong Christian who is privately distraught to find that she no longer believes the core tenets of her religion. At church on Sunday morning, she stands with the congregation and recites the creed, hoping her belief in its truth will somehow be restored. Her profession of belief during that recitation is false, but she does not seem guilty of hypocrisy. Two pews back, a middle-aged son sits with his elderly father, whom he is visiting for the holidays. The son largely rejected the faith of his childhood years ago, but the father does not know this and takes comfort in seeing his son in church. Do we condemn the son’s behavior as hypocritical?

Scholars have wrestled with such questions but have not yet agreed upon hypocrisy’s defining elements. Roger Crisp and Christopher Cowton suggest, for example, that hypocrisy comes in a variety of forms and that their shared feature is “a failure to take morality seriously.”³⁰ Eva Feder Kittay argues that

²⁶ Cf. Szabados, *supra* note 20, at 196 (arguing that the dinner guest who lies and says the meal is delicious is not a hypocrite).

²⁷ See Dan Turner, *Hypocrisy*, 21 METAPHILOSOPHY 262, 264 (1990) (arguing that the parent who is tired but nevertheless plays with his child and pretends to enjoy it is not a hypocrite).

²⁸ VII THE OXFORD ENGLISH DICTIONARY 575 (2d ed. 1989).

²⁹ See McDonough, *supra* note 22, at 290 (arguing that the schoolteacher who is addicted to gambling behaves in a morally praiseworthy manner when she tells her pupils not to gamble and—lest they be “influenced by her own failings”—opts not to tell them about her own gambling activities); see also Bernard Gert, *To Be Hypocritical or Not to Be*, N.Y. TIMES (July 15, 1974), <https://www.nytimes.com/1974/07/15/archives/to-be-hypocritical-or-not-to-be.html> (arguing that it is appropriate to condemn people for engaging in immoral conduct, but that we should not further condemn those same people when they morally condemn the same conduct).

³⁰ Roger Crisp & Christopher Cowton, *Hypocrisy and Moral Seriousness*, 31 AM. PHIL. Q. 343, 347 (1994). Crisp and Cowton identify four types of hypocrisy: hypocrisy of pretense, hypocrisy of blame, hypocrisy

“[a] hypocrite is one who pretends to be better than she is, given a norm or set of expectations within a domain in which sincerity really matters.”³¹ Béla Szabados and Eldon Soifer contend that hypocrisy consists of “pretending to be motivated by certain considerations, while really being motivated only by a desire to appear to others to be motivated by those considerations.”³² Jessica Isserow and Colin Klein argue that “hypocrites are persons who have, by mismatch between judgments and actions, undermined their . . . capacity to (1) warrant esteem and (2) bestow (dis)esteem on others” within a moral community.³³ Believing that hypocrisy has more to do with blame than an account like Isserow and Klein’s would suggest, Kyle Fritz and Daniel Miller advance a “differential blaming disposition” definition of hypocrisy.³⁴ On their view, “[t]he hypocrite is disposed to blame others for violations of [some norm] *N*, but she is not disposed to blame herself for violations of *N*, and she has no justifiable reason for this difference.”³⁵ Arguing that some hypocrites are not genuinely inclined to blame others, but perceiving that something about blame does play a role in marking the hypocrite, Benjamin Rossi offers a “commitment account” of hypocrisy.³⁶ “*R* is hypocritical with respect to norm, good, or ideal *N*,” Rossi contends, if and only if “*R* is responsible for failing to respond appropriately to *N*; *R* is, without good reason, not disposed to accept blame from others for failing to respond appropriately to *N*; and *R* is disposed to communicate commitment to *N*.”³⁷

Building on those efforts, I offer an account of hypocrisy here.³⁸ While not purporting to capture every instance of morally objectionable hypocrisy that one

of inconsistency, and hypocrisy of complacency. *See id.* at 343–45.

³¹ Eva Feder Kittay, *On Hypocrisy*, 13 *METAPHILOSOPHY* 277, 281 (1982).

³² Béla Szabados & Eldon Soifer, *Hypocrisy, Change of Mind, and Weakness of Will: How to Do Moral Philosophy with Examples*, 30 *METAPHILOSOPHY* 60, 66 (1999); cf. GILBERT RYLE, *THE CONCEPT OF MIND* 173 (1949) (“[W]e know what it is like to be hypocritical, namely to try to appear actuated by a motive other than one’s real motive.”).

³³ Isserow & Klein, *supra* note 21, at 193 (emphasis omitted); *see also id.* at 207 (emphasizing their claim that undermining one’s moral authority is constitutive of hypocrisy, rather than a mere consequence of it).

³⁴ Kyle G. Fritz & Daniel Miller, *Hypocrisy and the Standing to Blame*, 99 *PAC. PHIL. Q.* 118, 122 (2018).

³⁵ *Id.*

³⁶ Benjamin Rossi, *The Commitment Account of Hypocrisy*, 21 *ETHICAL THEORY & MORAL PRAC.* 553 (2018).

³⁷ *Id.* at 563.

³⁸ Regarding methodology, *see* JOHN RAWLS, *A THEORY OF JUSTICE* 20 (1971) (describing “reflective equilibrium” as the process of placing moral intuitions into dialogue with the principles those intuitions suggest until, through a process of recalibration on both sides of the equation, we have an account that “match[es] our considered judgments duly pruned and adjusted”); *see also* Jeff McMahan, *Moral Intuition*, in *THE BLACKWELL GUIDE TO ETHICAL THEORY* 103, 110 (Hugh LaFollette & Ingmar Persson eds., 2d ed. 2013) (stating that Rawlsian reflective equilibrium is “[t]he most commonly endorsed method of moral inquiry among contemporary moral philosophers” and that, to use this method, “we begin with a set of moral intuitions about

might possibly imagine,³⁹ I do aim to put my finger on what we have in mind most of the time when we reasonably regard someone as guilty of hypocrisy. I aim to identify, in other words, what will typically draw an accusation of hypocrisy from the intelligent person on the street. Hypocrisy can take differing forms and so a little definitional complexity is unavoidable (although, as we will see, there is one moral thread that runs through all of hypocrisy's manifestations⁴⁰). Despite the following account's descriptive breadth, I also intend it to be fairly conservative in nature, in the sense that, if its boundaries are to err in one direction or the other, it is better for my purposes here if readers find these boundaries somewhat underinclusive rather than overinclusive. After all, my aim is to provide an account of hypocrisy that falls comfortably within popular sentiments and thus lends itself well to thinking about the intelligent person on the street's perception of the Supreme Court. I have no interest in trying to persuade people to affix the hypocrisy label in a far broader range of circumstances than they already do.⁴¹

2. *Defining Hypocrisy*

With those caveats in mind, I offer the following account of hypocrisy, featuring three different types of hypocrites—the Faking Hypocrite, the Concealing Hypocrite, and the Gerrymandering Hypocrite:

particular cases, filter out those that are the obvious products of distorting influences, and then seek to unify the remaining intuitions under a set of more general principles”).

³⁹ One study of 959 undergraduates revealed considerable variety in the kinds of factors those students considered when determining whether people are guilty of hypocrisy. See Mark Alicke, Ellen Gordon & David Rose, *Hypocrisy: What Counts?*, 26 PHIL. PSYCH. 673 (2013). Although the definition I offer here is compatible with many of that study's findings, it almost certainly is not possible to frame a definition that precisely captures what each of those undergraduates had in mind when assessing all of the scenarios with which they were presented.

⁴⁰ See *infra* Part II.B.

⁴¹ Others have lamented either the frequency or the outrage with which people accuse others of hypocrisy. See, e.g., RUTH W. GRANT, *HYPOCRISY AND INTEGRITY: MACHIAVELLI, ROUSSEAU, AND THE ETHICS OF POLITICS* 16, 175–80 (1997) (stating that Machiavelli and Rousseau help us see that a certain amount of hypocrisy is necessary in politics); DAVID RUNCIMAN, *POLITICAL HYPOCRISY: THE MASK OF POWER, FROM HOBBS TO ORWELL AND BEYOND* 213 (2008) (“[S]ome personal hypocrisy will be inevitable for any democratic politician.”); SHKLAR, *supra* note 23, at 69–78 (arguing that effective participation in democratic politics likely requires insincerity and that we thus should not rank hypocrisy among the worst vices); Gert, *supra* note 29 (arguing that, because “[m]orality needs all the help it can get,” we should not condemn the hypocrisy of those who commit serious moral wrongs but then criticize others who commit the same wrongs); McDonough, *supra* note 22, at 298–99 (arguing that politicians poison the nation's political climate and engender disgust among the citizenry by eagerly accusing their opponents of hypocrisy while indulging “similar or worse behavior by their allies”). But cf. Peter A. Furia, *Democratic Citizenship and the Hypocrisy of Leaders*, 41 POLITY 113, 123 (2009) (arguing that it is not “petty” to oppose hypocrisy among politicians because “when the very leaders who advocate morally demanding principles are unable to live up to them, ordinary citizens reasonably begin to discuss the practicability of those principles”).

X commits hypocrisy when he or she explicitly or implicitly communicates a commitment to the view that violations of norm *N* are blameworthy but, for one of the following reasons, that communicated commitment is not what it facially seems:

- (1) *X* does not genuinely believe violations of *N* are blameworthy, but pretends otherwise in a morally unjustifiable effort to extract self-serving benefits from unwitting others (Faking Hypocrisy); or
- (2) *X* believes violations of *N* are blameworthy and that *X* and others should comply with *N* accordingly, but (a) *X* does not faithfully comply with *N* and (b) *X* tries to conceal those violations in a morally unjustifiable effort to extract self-serving benefits from unwitting others (Concealing Hypocrisy); or
- (3) *X* believes other people's violations of *N* are blameworthy and that they should comply with *N* accordingly, but either (a) *X* does not believe his or her own behavior violates *N*, yet believes similar behavior violates *N* when committed by others, and *X* knows or reasonably should know there is no good justification for that difference in judgment, or (b) *X* does not believe his or her own violations of *N* are blameworthy or does not believe the blameworthiness of those violations is a sufficient reason to conform his or her own behavior to *N*, and *X* knows or reasonably should know there is no good justification for regarding his or her own violations of *N* more leniently than those of others (Gerrymandering Hypocrisy).⁴²

Some elaboration is in order. To begin with, the definition proposed here embraces Rossi's suggestion that hypocrisy always entails a communicated commitment to some norm *N*.⁴³ Without the explicit or implicit communication of a values-laden judgment, there is no hypocrisy. We hear this in the frequently invoked anti-hypocrisy adage, "Practice what you preach."⁴⁴ One who preaches

⁴² For a comparable but far from identical three-part account of hypocrisy, see Macalester Bell, *The Standing to Blame: A Critique*, in *BLAME: ITS NATURE AND NORMS* 263, 275–76 (D. Justin Coates & Neal A. Tognazzini eds., 2013).

⁴³ See *supra* text accompanying notes 36–37 (recounting Rossi's suggestion).

⁴⁴ See Benoît Monin & Anna Merritt, *Moral Hypocrisy, Moral Inconsistency, and the Struggle for Moral Integrity*, in *THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL* 167, 169 (Mario Mikulincer & Phillip R. Shaver eds., 2012) ("Not practicing what one preaches has served as the working definition of moral hypocrisy in many social psychological investigations . . ."); cf. Jamie Barden, Derek D. Rucker & Richard E. Petty, "Saying One Thing and Doing Another": *Examining the Impact of Event Order on Hypocrisy Judgments of Others*, 31 *PERSONALITY & SOC. PSYCH. BULL.* 1463, 1471 (2005) (arguing that hypocrisy involves a discrepancy between what one says and what one does, and finding that people are more likely to perceive hypocrisy when the speech precedes the behavior than when the behavior precedes the speech).

is communicating a normative claim to others, telling them what they ought to believe or how they ought to think, feel, or behave. Suppose a friend comes to you and reveals that, unbeknownst to anyone else, she recently decided it is wrong to eat meat, but, in a moment of weakness last night, she ate beef. You likely would not accuse your friend of hypocrisy. For her consumption of meat to be hypocritical (rather than, say, a mere failure of willpower), your friend needs (among other things) to have conveyed her vegetarian convictions to others. Hypocrisy requires an audience on an issue of values.⁴⁵

To lay the foundation for a judgment of hypocrisy, the communication of *X*'s commitment to *N* can be either explicit or implicit. Publicly blaming others for violating *N* is certainly one way *X* can communicate a commitment to *N*, but it is not the only way. Your friend might convey the belief that it is wrong to eat meat, for example, by launching a local chapter of the Vegan Society. To accuse the pedophile priest of hypocrisy, we need not find occasions when the priest has spoken specifically on the subject of sexually abusing children; serving in the role of priest implicitly communicates a set of commitments about sexual mores and the treatment of vulnerable people.⁴⁶

Note, too, that we can accuse *X* of hypocrisy with respect to *N* even if we are not ourselves committed to *N*. Hypocrisy, as I noted earlier, is a freestanding allegation—one need not share the normative commitment on which one's allegation is based.⁴⁷ For *X*, this is both bad news and good news: people beyond *X*'s own moral community can properly accuse him or her of hypocrisy, but—

⁴⁵ See Szabados & Soifer, *supra* note 32, at 73 (“This appears to be a theme running through all clear examples of hypocrisy. It seems there must be an ‘audience’ of some sort which attributes to the individual a nobler standing than they would if they knew the facts.”). This is plainly true for the Faking Hypocrite and the Concealing Hypocrite. Is it equally true for the Gerrymandering Hypocrite? R. Jay Wallace has suggested that hypocritical blame is objectionable even when it is not expressed in any way (such that, in the language of my proposed definition, there is no communicated commitment to the view that violations of *N* are blameworthy). See Wallace, *supra* note 20, at 324. Wallace does not discuss this possibility at any length; he simply notes in passing that “[i]t matters to us whether others resent or disdain us, even when those attitudes go unexpressed.” *Id.* at 324 n.31. The issue is complex due to the differing ways in which people regard the moral significance of mental states. See, e.g., Adam B. Cohen & Paul Rozin, *Religion and the Morality of Mentality*, 81 J. PERSONALITY & SOC. PSYCH. 697, 698–701 (2001) (finding that Protestants are more likely than Jews to morally condemn “an adult [who] does not inwardly like his parents but takes good care of them”). Some might join Wallace in finding my definitional boundaries underinclusive but going further is not necessary for my purposes here.

⁴⁶ Cf. GRANT, *supra* note 41, at 1 (including “the lecherous priest” in a list of “the classic hypocritical types”). But cf. Elisabetta Povoledo, *Francis Asks Church Body for Patience with Summit*, N.Y. TIMES, Jan. 29, 2019, at A10 (“As abuse scandals have spread beyond the United States and Europe to Latin America and Asia, the [P]ope has faced pressure to prove that the church is capable of removing abusive priests and disciplining negligent bishops.”).

⁴⁷ See *supra* note 22 and accompanying text (making this observation).

by limiting the normative commitments that he or she communicates to others—*X* can limit the hypocrisy charges to which he or she reasonably can be exposed. We will consider in a moment the illustrative case of Tim Haggard, a pastor who condemned homosexuality from the pulpit but privately engaged in sex with another man.⁴⁸ Even if we reject his public views on homosexuality, we are still justified (for reasons I will explain) in charging him with hypocrisy. If he wished to have sex with other men without thereby earning condemnation as a hypocrite, he could have opted not to communicate a commitment to that particular *N* in the first place.

With respect to the three varieties of hypocrisy, there is a little more that needs to be said.

a. The Faking Hypocrite

Of the three varieties, the Faking Hypocrite is perhaps the most infamous and the most scheming. Consider Molière’s *Tartuffe*, a paradigmatic (and widely cited) hypocrite if ever there was one.⁴⁹ Before he is decisively outed, *Tartuffe* uses fraudulent professions of piety to win unwitting Orgon’s esteem, estate, and pledge of his daughter’s hand in marriage.⁵⁰ Eva Feder Kittay offers a second example: “a male employer who, although an unregenerate sexist[,] . . . hires a well-qualified woman for what is traditionally a man’s position,” hoping thereby to impress another woman with his apparent “open-mindedness.”⁵¹ By pretending to be committed to values they do not actually hold, *Tartuffe* and the employer seek esteem or other self-serving benefits from those around them that those others would be less likely to provide if they knew the truth about *Tartuffe*’s and the employer’s views on *N*.⁵²

⁴⁸ See *infra* notes 69–70 and accompanying text (discussing Tim Haggard).

⁴⁹ JEAN BAPTISTE POQUELIN DE MOLIÈRE, *TARTUFFE* (Richard Wilbur trans., Harcourt Brace & Co. 1965) (1669). *Tartuffe* ingratiates himself with Orgon through professions of piety that nearly everyone else in the household can see are fraudulent. Fooled by *Tartuffe*’s religious fakery, Orgon nearly loses his daughter and all of his worldly possessions to *Tartuffe*. Orgon finally comes to his senses only when, at the urging of his wife, he hides under a table and hears *Tartuffe* try to seduce her in decidedly impious terms. Although *Tartuffe* has now lost Orgon’s confidence, he still almost manages to walk away with Orgon’s wealth; Orgon is spared only when the king intervenes and orders *Tartuffe* imprisoned. For an excellent discussion of *Tartuffe* and hypocrisy, see SHKLAR, *supra* note 23, at 51–53. For a sample of other invocations of *Tartuffe* in discussions of hypocrisy, see Isserow & Klein, *supra* note 21, at 193, 215; Rossi, *supra* note 36, at 557.

⁵⁰ MOLIÈRE, *supra* note 49.

⁵¹ Feder Kittay, *supra* note 31, at 277.

⁵² Note that *Tartuffe* and the employer need not be successful in their bid for deception in order to be guilty of hypocrisy. Many in Orgon’s family accurately perceived that *Tartuffe* was a fraud, for example, but this does not spare him from their (or our) adverse judgment. To be a hypocrite of this variety, what matters is that one is trying to appear committed to *N* with the hope that the pretense will achieve its self-serving aims; it does not matter whether the bid succeeds or fails.

The unjustifiable, self-serving nature of *X*'s judgments or behavior is an important dimension of this and the other varieties of hypocrisy. When behaving in a hypocritical manner, people are proceeding with their own interests at heart and are doing so without adequate justification.⁵³ Consider, for example, a person like Oskar Schindler in World War II-era Germany, who falsely communicated a commitment to Nazi principles—not because he personally coveted esteem or any other self-serving benefits that Nazis might provide but because he wished to maintain the social power necessary to shield Jews from capture. How should we regard him? Richard McDonough argues that Schindler is a hypocrite but that we should spare him our moral condemnation because we applaud the ends he was trying to achieve.⁵⁴ To use the word *hypocrite* in this way, however, is more faithful to the term's morally neutral roots in ancient Greek theater than to the morally freighted meaning that its users typically aim to convey today.⁵⁵ If writing a speech honoring Schindler for the good he achieved, few of us would likely use the word *hypocrite* to describe him in our script. Nor would we likely use the word *hypocrite* to describe a person who—in a bid to save his own life or bring his time in a torture chamber to an end—falsely communicated to Nazi officials a commitment to the view that violations of some norm *N* are blameworthy. By virtue of the presence of an adequate moral justification for the falsehood, the *hypocrisy* label is inapt.

Both for the Faking Hypocrite and for the other two types of hypocrite we will encounter in a moment, the self that *X* seeks to benefit might not be manifested just in *X* himself or herself alone. As social-identity research reveals, there are attitudinally and behaviorally significant ways in which *X*'s perception of his or her self-interest may be grounded, at least in part, in his or her

⁵³ See, e.g., C. Daniel Batson, Diane Kobrynowicz, Jessica L. Dinnerstein, Hannah C. Kampf & Angela D. Wilson, *In a Very Different Voice: Unmasking Moral Hypocrisy*, 72 J. PERSONALITY & SOC. PSYCH. 1335, 1335 (1997) (defining “moral hypocrisy” as extolling morality “not with an eye to producing a good and right outcome but in order to appear moral yet still benefit oneself”); C. Daniel Batson & Elizabeth R. Thompson, *Why Don't People Act Morally? Motivational Considerations*, 10 CURRENT DIRECTIONS PSYCH. SCI. 54, 55 (2001) (summarizing studies revealing subjects' tendency “to feign morality yet still serve self-interest”); Joris Lammers, *Abstraction Increases Hypocrisy*, 48 J. EXPERIMENTAL SOC. PSYCH. 475, 476 (2012) (stating that hypocrites behave “in a self-serving manner” by attempting to appear moral “without paying the costs of being moral”); Monin & Merritt, *supra* note 44, at 171 (arguing that hypocrisy includes “any claim of morality made to satisfy ulterior (nonmoral), self-serving motives”); Szabados, *supra* note 20, at 203 (arguing that “hypocrisy is a self-interested affair: the hypocrite is out to promote his own advantage at the expense of others”); *id.* at 205 (“The idea of disinterested hypocrisy boggles the mind.”).

⁵⁴ See McDonough, *supra* note 22, at 290.

⁵⁵ See *supra* note 24 and accompanying text (noting the term's ancient Greek origins); cf. Crisp & Cowton, *supra* note 30, at 347 (“[T]here are certain cases in which we feel qualms about ascribing hypocrisy at all, let alone blaming the alleged hypocrite. Consider, for example, the person in Nazi Germany who appeared to condone Nazi morality, perhaps in order to continue working against Nazism.”).

identification with various social groups.⁵⁶ There often is little or no “psychological separation” between one’s perception of one’s own welfare and one’s perception of the welfare of groups in which a portion of one’s identity is embedded.⁵⁷ As I have explained elsewhere,

the social identifications that play prominent roles in our lives typically have at least three interrelated features: we perceive attributes that distinguish members of our group from others, thereby marking the boundary between our ‘in-group’ and the ‘out-group’; we perceive that our own individual fate is at least partly tied up with the fate of the in-group as a whole; and we feel a sense of loyalty to our fellow group members.⁵⁸

If we are avid fans of a particular sports team, for example, we might experience its victories and defeats as if they were our own, even though we play no role in producing those outcomes.⁵⁹ When we *can* affect the outcomes an in-group will achieve, we are likely to perceive that we will advance our own self-interest if we advance the interest of the group.⁶⁰ Consider, for example, the realm of electoral politics, where people’s identification with the members of one political party or another can play an especially powerful role.⁶¹ As Leonie

⁵⁶ Masaki Yuki, *Intergroup Comparison Versus Intragroup Relationships: A Cross-Cultural Examination of Social Identity Theory in North America and East Asian Cultural Contexts*, 66 *SOC. PSYCH. Q.* 166, 166 (2003).

⁵⁷ *Id.*

⁵⁸ Todd E. Pettys, *Partisanship, Social Identity, and American Government: Reality and Reflections*, 22 *LEWIS & CLARK L. REV.* 301, 316 (2018) (citing Kay Deaux, *Social Identification*, in *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* 777, 781–82, 785 (E. Tory Higgins & Arie W. Kruglanski eds., 1996); Stephen Reicher, Russell Spears & S. Alexander Haslam, *The Social Identity Approach in Social Psychology*, in *THE SAGE HANDBOOK OF IDENTITIES* 45, 48 (Margaret Wetherell & Chandra Talpade Mohanty eds., 2010); Moses Shayo, *A Model of Social Identity with an Application to Political Economy: Nation, Class, and Redistribution*, 103 *AM. POL. SCI. REV.* 147 (2009)).

⁵⁹ See Robert B. Cialdini, Richard J. Borden, Avril Thorne, Marcus Randall Walker, Stephen Freeman & Lloyd Reynolds Sloan, *Basking in Reflected Glory: Three (Football) Field Studies*, 34 *J. PERSONALITY & SOC. PSYCH.* 366, 374 (1976) (finding that “the personal images of fans are at stake when their teams take the field” and that “[t]he team’s victories and defeats are reacted to as personal successes and failures”); Edward R. Hirt, Dolf Zillmann, Grant A. Erickson & Chris Kennedy, *Costs and Benefits of Allegiance: Changes in Fans’ Self-Ascribed Competencies After Team Victory Versus Defeat*, 63 *J. PERSONALITY & SOC. PSYCH.* 724, 725 (1992) (“Team success is personal success, and team failure is personal failure.”).

⁶⁰ Researchers have found an impulse toward in-group favoritism even when subjects have been divided into groups on a wholly trivial basis, such as coin flips. See, e.g., HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY* 234 (1981) (describing the results of experiments measuring financial generosity); Yan Chen & Sherry Xin Li, *Group Identity and Social Preferences*, 99 *AM. ECON. REV.* 431, 448 (2009) (reporting the results of experiments measuring generosity and envy); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 33, 38 (William G. Austin & Stephen Worchel eds., 1979) (noting that research subjects often favor members of their own groups even when the basis for distinguishing between the relevant groups is trivial).

⁶¹ See Leonie Huddy, Lilliana Mason & Lene Aarøe, *Expressive Partisanship: Campaign Involvement*,

Huddy and her coauthors explain, a voter's "internalized sense of partisan identity means that the group's failures and victories become personal."⁶² One reason some of us might vote and make financial contributions in a given election cycle, for example—even if those actions are highly unlikely to produce policy outcomes we desire—is simply that we covet the sense of personal victory we will feel on election night if a member of our political party prevails, and we dread the sense of personal defeat we will feel if our partisan opponents are the ones celebrating instead.⁶³ When we say that *X* is behaving in a self-serving fashion, therefore, the self that *X* is seeking to benefit might be most clearly manifested in a group with which *X* identifies rather than in the individual person we call *X*.⁶⁴

Political Emotion, and Partisan Identity, 109 AM. POL. SCI. REV. 1, 1 (2015) (stating, with respect to party identification, that "[n]o other single variable comes close to accounting as well or as consistently for American political behavior"). Partisan identifications, moreover, play a powerful role in shaping people's policy preferences and political behaviors. See Pettys, *supra* note 58, at 318–26 (discussing numerous studies). Studies indicate, for example, that ordinary Americans commonly "adopt the views of the parties and groups they favor," such that "[t]he reasoned explanations they provide for their own beliefs and behavior are often just post hoc justifications of their social or partisan loyalties." CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 310 (2016).

⁶² Huddy et al., *supra* note 61, at 3.

⁶³ See DONALD GREEN, BRADLEY PALMQUIST & ERIC SCHICKLER, *PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND SOCIAL IDENTITIES OF VOTERS* 206 (2002) ("Identification with parties imbues electoral choice with special significance. . . . Although not irresistible, the desire to see one's team prevail powerfully influences the probability of casting a vote for the candidate of one's party.").

⁶⁴ See Piercarlo Valdesolo & David DeSteno, *Moral Hypocrisy: Social Groups and the Flexibility of Virtue*, 18 PSYCH. SCI. 689, 690 (2007) (concluding that, just as people hypocritically tend to treat their own moral transgressions more leniently than they treat comparable transgressions committed by others, people hypocritically perceive "transgressions committed by in-group members to be as acceptable as their own"). Suppose, for example, that *X* was among the Republicans in early 2016—when Barack Obama, a Democrat, was in the White House—who took the position (*N*) that, when a Supreme Court vacancy arises in a presidential election year, the right thing to do is to keep the seat empty until the presidential candidate who wins the ensuing election has nominated someone acceptable to fill it. See Amber Phillips, *Obama Just Chose Merrick Garland for the Supreme Court. Republicans Still Won't Confirm Him.*, WASH. POST (Mar. 16, 2016, 10:51 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/02/13/can-republicans-really-block-obamas-supreme-court-nomination-for-a-year-probably/?utm_term=.039900dce2e0. Suppose further that a Supreme Court vacancy arises early in a future presidential election year when a Republican is president and—without any good justification for taking a new stance—*X* now argues that the person who holds the presidency when a vacancy arises should be the one to choose who will fill the empty seat. Even though *X* is not gerrymandering *N* in service to his or her own personal conduct—*X* will not make the Supreme Court nomination or cast a confirmation vote in the Senate—*X* is gerrymandering *N* in service to the party in which his or her identity is partially embedded, and so we can properly accuse *X* of hypocrisy.

On September 18, 2020—as the editors of the *Emory Law Journal* were preparing this article for publication, and just six and a half weeks before the 2020 presidential election—Justice Ruth Bader Ginsburg died. See Robert Barnes & Michael A. Fletcher, *Ruth Bader Ginsburg, Supreme Court Justice and Legal Pioneer for Gender Equality, Dies at 87*, WASH. POST (Sept. 18, 2020, 8:04 PM), https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1_story.html.

Later that same day, Republican Senator Mitch McConnell put out a statement vowing that President Trump's nominee to replace her would come to a vote on the Senate floor. See Amber Phillips, *Why Mitch McConnell*

b. *The Concealing Hypocrite*

The second type of hypocrite—the person who communicates a commitment to *N*, truly believes that it is wrong to violate *N* and that one should behave accordingly, nevertheless violates *N*, and then (without adequate moral justification) conceals those violations lest others not provide the self-serving benefits that he or she hopes a convincingly communicated commitment to *N* will yield—brings us to the question of how to regard those who are weak-willed on normative matters. Others have debated whether there are morally significant differences between someone like Tartuffe, who does not believe violations of *N* are blameworthy but pretends otherwise, and someone who is merely weak-willed with respect to *N*—someone who believes that violating *N* is blameworthy but does not always possess the strength of will necessary to behave accordingly. Christine McKinnon argues, for example, that we should spare the weak-willed person the moral criticism we would level against the hypocrite, because the person who is merely weak-willed does not aim to deceive others and behaves as he or she does only after an internal struggle.⁶⁵ Rossi, on the other hand, seems uncertain whether weak-willed individuals should be morally distinguished from hypocrites. He contends that “there are weak-willed, self-blaming hypocrites” and that “the weak-willed hypocrite . . . appears to be a paradigm case that any account of hypocrisy worth its salt ought to capture,”⁶⁶ but he then concedes in a footnote that he is “sympathetic to the intuition that many cases of weak-willed hypocrisy are not morally objectionable, or at least not *as* morally objectionable as paradigm cases of exception-seeking or clear-eyed hypocrisy.”⁶⁷

On the account proposed here, what moves a weak-willed person into the realm of hypocrisy is a morally unjustifiable effort to conceal his or her violations of *N* in order to obtain the self-serving benefits that a convincingly

Intends to Confirm a New Supreme Court Justice Now, When He Wouldn't in 2016, WASH. POST (Sept. 19, 2020, 12:54 PM), <https://www.washingtonpost.com/politics/2020/09/18/why-mitch-mcconnell-intends-confirm-new-supreme-court-justice-now-when-he-wouldnt-2016/> (persuasively rejecting Senator McConnell's attempt to reconcile his position in 2016 with his position in 2020); see also Matthew S. Schwartz, 'Use My Words Against Me': Lindsey Graham's Shifting Position on Court Vacancies, NPR (Sept. 19, 2020, 12:56 PM), https://www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/19/914774433/use-my-words-against-me-lindsey-graham-s-shifting-position-on-court-vacancies?utm_campaign=politics&utm_term=nprnews&utm_source=twitter.com&utm_medium=social (reporting on Republican Senator Lindsey Graham's inconsistent positions on this issue in 2016 and 2020).

⁶⁵ Christine McKinnon, *Hypocrisy, Cheating, and Character Possession*, 39 J. VALUE INQUIRY 399, 400–01 (2005); cf. Szabados, *supra* note 20, at 199 (arguing that we must “distinguish between someone who is weak-willed merely and someone who is a hypocrite”).

⁶⁶ Rossi, *supra* note 36, at 558–59.

⁶⁷ *Id.* at 559 n.15.

communicated commitment to *N* might bring.⁶⁸ Consider Ted Haggard, a pastor who publicly denounced homosexuality—but privately engaged in homosexual sex—and falsely denied (at least initially) a male prostitute’s public allegation that the two of them had had sex together.⁶⁹ Assume that Haggard privately chastised himself for violating *N* after each of those sexual encounters, thereby establishing that he did not regard his own homosexual behavior as uniquely permissible (and that he thus was not a Gerrymandering Hypocrite, discussed next). With each step he took to conceal his homosexual activities in a self-serving effort to maintain the appearance of holding a commitment to *N*—with secrecy-seeking lies he perhaps told others when arranging those encounters; with pleas he perhaps made when asking the other man to keep quiet about their relationship; certainly when denying the other man’s public allegations—Haggard dug himself into the hypocrisy hole. If Haggard had instead accompanied his preaching on *N* with an acknowledgement that his own record on *N* had not been what he believed it should be, he would not have been guilty of hypocrisy because he would not have been concealing information that plainly bore upon whether others ought to give Haggard the esteem or other benefits they would be disposed to confer upon someone unquestionably committed to *N*.⁷⁰

⁶⁸ Cf. Szabados & Soifer, *supra* note 32, at 67–69 (distinguishing between “Henry,” a professed vegetarian whom we catch in the kitchen secretly feasting on meat at a dinner party and who tries to deny what we have witnessed, and “Victor,” a professed vegetarian who takes a bite of his mother’s legendary meatloaf while home for the holidays and then readily confesses his regret).

⁶⁹ See Rossi, *supra* note 36, at 558–59 (discussing Haggard). Haggard subsequently acknowledged that he had engaged in homosexual activities, both with the prostitute and with a fellow church member. See *Disgraced Pastor Haggard Admits Second Relationship with Man*, CNN (Jan. 30, 2009, 1:29 AM), <http://www.cnn.com/2009/US/01/29/1kl.ted.haggard/>.

⁷⁰ There are at least two ways we can make a discussion of Haggard’s hypocrisy more difficult. First, on the account I have offered here, Haggard’s concealment is key to the judgment that he behaved hypocritically. But suppose Haggard preached against homosexuality and then had one homosexual encounter that he regretted. Suppose further that Haggard never made any effort to conceal that encounter, but it was nevertheless unknown among those to whom Haggard preached. To avoid hypocrisy, would he have been morally obliged to reveal that encounter when preaching against homosexual conduct in the future? Under my account, Haggard would not have been behaving as a Concealing Hypocrite for continuing to preach against *N* in these circumstances. Cf. Bell, *supra* note 42 (“We should not have to publicly sort through all of our dirty—and clean—laundry in order for the content of our criticism to be taken seriously.”). Some readers may find this account of hypocrisy underinclusive. Before making that judgment, however, note how much rides on the premise that Haggard felt regret. If Haggard actually judges his own violation of *N* more leniently than he judges others’ violations, he will be guilty of Gerrymandering Hypocrisy.

Second, suppose Haggard tried to conceal his past violations of *N* not because he desired the self-serving benefits that a convincingly communicated commitment to *N* could bring—such as the wealth or public influence that leading a prominent evangelical community entailed—but because he believed that (1) God punishes those who engage in homosexual conduct, and (2) he (Haggard) would be less successful in helping people avoid divine punishment if he had revealed his own homosexual activities. Would we still say he was guilty of hypocrisy? We might be too quick to say yes if we reject Haggard’s theology or find his position on *N*

c. *The Gerrymandering Hypocrite*

The third variety of hypocrisy is notably different from the prior two. Here, *X* communicates a commitment to *N* and is disposed to blame others for violating it, but—without good justification—*X* either believes his or her own conduct does not violate *N* but believes similar conduct violates *N* when performed by others, or regards his or her own violations of *N* as blameless, or regards the blameworthiness of violating *N* as an insufficient reason to conform his or her own behavior to it.⁷¹ The principal focus here is on *X*'s unjustified, self-serving gerrymandering of *N*'s reach, rather than on any effort by *X* to secure self-serving benefits from unwitting others.

Suppose *X* vocally takes the position in her household that it is wrong to drink straight from the milk container in the refrigerator (she chastises members of her family when she catches them doing it) but she drinks straight from the milk container whenever she wishes. Or suppose there is a busy street in *X*'s city where two lanes merge into one, and the polite practice among most drivers is to line up in the continuing lane as soon as reasonably possible even if the resulting line is long and there is no traffic in the lane destined for closure. Although *X* often honks angrily at drivers who wait as late as possible to merge (and *X* thereby communicates a commitment to *N*), *X* sometimes does the same thing when she is feeling misanthropic. Suppose further that, in both of these scenarios, *X* knows or reasonably should know that she lacks a good justification for regarding her own conduct more leniently than she publicly regards that of others. Her position on milk-drinking, for example, is not the result of communicable diseases that her family members carry. Because *X* has unjustifiably exempted herself from *N*'s requirements while still blaming others for their violations, *X* is guilty of hypocrisy.

morally objectionable, so consider a different case involving a more readily embraceable *N*. Does the gambling-addicted parent commit hypocrisy when she tells her teenagers not to gamble and conceals her own gambling activities from them, lest they draw the inference that gambling is actually harmless and fun? Because she is not concealing her gambling in order to achieve self-serving purposes, she would not be guilty of morally objectionable hypocrisy on the account offered here. Some other writers have reached comparable conclusions, see *supra* note 29, but some readers might find my description of hypocrisy underinclusive.

⁷¹ Cf. Bell, *supra* note 42, at 276 (stating that a person is guilty of hypocrisy if “he engages in the same kind of behavior that he criticizes and sees his own behavior as morally justified”); Fritz & Miller, *supra* note 34, at 134 (“Hypocrisy involves making an exception of oneself where there is no basis for that exception.”). For a discussion of some of the psychological processes underlying the hypocrite’s leniency toward his or her own transgressions, see Piercarlo Valdesolo & David DeSteno, *The Duality of Virtue: Deconstructing the Moral Hypocrite*, 44 J. EXPERIMENTAL SOC. PSYCH. 1334, 1337 (2008) (concluding that the self-leniency is the product of rationalization, rather than an automatic intuition).

Note that, even if *X* does not know she lacks a good justification for self-servingly gerrymandering *N*'s reach in these ways, we can still accurately describe *X*'s conduct as hypocritical if she reasonably *should* know there is no such justification. If one is going to assume the Gerrymandering Hypocrite's dualistic stance, one is obliged to engage in as much self-scrutiny as the situation reasonably calls for to determine whether the self-serving gerrymandering can be justified.⁷² In the case of our milk-drinking *X*, for example, she likely cannot successfully defend herself by arguing that she has simply never thought about why she feels at liberty to do what she blames others for doing; the absence of a good justification is simply too obvious to be excusably neglected. In the legal realm, we say as a general matter that ignorance of the law is not an excuse for violating it,⁷³ but when it comes to hypocrisy—where *X* chooses the normative commitments in reference to which he or she will be judged—arguments akin to the ignorance defense should fare even less well. If *X* communicates a commitment to the view that others deserve blame for violating *N* but holds that *N* makes no meaningful claim on her own behavior, *X* is obliged to think about whether she and those others are differently situated in relevant ways.

B. Why Is Hypocrisy Morally Objectionable?

Although their defining features vary, the Faking Hypocrite, the Concealing Hypocrite, and the Gerrymandering Hypocrite all have one morally objectionable thing in common: they all violate principles of human equality.⁷⁴

⁷² Cf. Wallace, *supra* note 20, at 329 (arguing that we impose upon ourselves a “commitment to critical self-scrutiny . . . when we are subject to attitudes of resentment or indignation that we do not repudiate”). I discuss the source of this obligation in Part II.B.

⁷³ See, e.g., Cheek v. United States, 498 U.S. 192, 199 (1991) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.”); Lambert v. California, 355 U.S. 225, 228 (1957) (“The rule that ‘ignorance of the law will not excuse’ . . . is deep in our law On the other hand, due process places some limits on its exercise.” (quoting Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910))).

⁷⁴ See Fritz & Miller, *supra* note 34, at 125 (“[H]ypocrisy involves at least an implicit rejection of the equality of persons that grounds one’s right to blame.”); Wallace, *supra* note 20, at 308 (arguing that hypocrisy is morally objectionable because “it offends against the commitment to the equality of persons that is constitutive of moral relations in the first place”); cf. Alicke et al., *supra* note 39, at 689–90 (reporting that undergraduates in the authors’ empirical study were especially offended by hypocrisy when they detected that the hypocrite had an “air of superiority”). Others have offered different accounts of what makes hypocrisy morally objectionable. See, e.g., Crisp & Cowton, *supra* note 30, at 347 (arguing that hypocrites fail “to take morality seriously” and that “[i]f anything is morally blameworthy, then lack of concern for morality itself surely is”); Christine McKinnon, *Hypocrisy, with a Note on Integrity*, 28 AM. PHIL. Q. 321, 327 (1991) (arguing that hypocrisy is wrong because the hypocrite “subverts our system of morality by deliberately misrepresenting the evidence upon which we base our judgments” and “lacks . . . a commitment or the discipline to improve herself as a person, as a moral agent”).

Equality plays at least two roles in any plausible moral theory.⁷⁵ As a general matter, we should expect morality's obligations to apply equally to everyone and—when examining the particulars of those obligations—we should expect to find ways in which we are obliged to treat one another the same unless there are differences among us that justify drawing distinctions.⁷⁶ Consider Immanuel Kant's influential moral framework,⁷⁷ on which I will build here. At the heart of Kantian morality is the proposition that, as rational beings, each of us is equally entitled to the autonomous exercise of our own rational capacities.⁷⁸ From that proposition flows Kant's "practical imperative": "Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means."⁷⁹ Rather than commandeer other human beings and their rational capacities in service to our own objectives, we must honor the fact that, as our moral equals, others have a right to conduct their lives in accordance with their own judgments.⁸⁰ Kant asks us to imagine a person

⁷⁵ See Wallace, *supra* note 20, at 328 (stating that "a presumption in favor of the equal standing of persons . . . [is] fundamental to moral thought"). Although our failures to honor it have been both numerous and colossal, a political commitment to equality is prominently listed first in the United States' celebrated recitation of its founding principles: "We hold these truths to be self-evident, that all men are created equal . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). As America's uneven record on equality illustrates, equality is itself a value about which people may be hypocritical. See Dominic Abrams, Diane M. Houston, Julie Van de Vyver & Milica Vasiljevic, *Equality Hypocrisy, Inconsistency, and Prejudice: The Unequal Application of the Universal Human Right to Equality*, 21 PEACE & CONFLICT: J. PEACE PSYCH. 28, 41 (2015) ("[W]e proposed and found that respondents [in the United Kingdom] advocated equality more strongly for women, older people and disabled people, than for Blacks, Muslims and homosexual people.").

⁷⁶ See Fritz & Miller, *supra* note 34, at 125 ("Persons qua moral agents are equal with respect to the moral norms that apply to them."); *id.* at 122 ("Morality demands that persons be regarded equally if there is no morally relevant difference between them."). When describing his vision of "a well-ordered society," for example, John Rawls argues that we are all "equal moral persons," each having "a right to equal respect and consideration in determining the principles by which the basic arrangements of [our] society are to be regulated." John Rawls, *A Well-Ordered Society*, in PHILOSOPHY, POLITICS AND SOCIETY 6, 7 (Peter Laslett & James Fishkin eds., 5th ser., 1979).

⁷⁷ See generally Allen W. Wood, *What Is Kantian Ethics?*, in RETHINKING THE WESTERN TRADITION 157, 157 (David Bromwich et al. eds., 2002) ("Kant is the most influential moral theorist of modern times.").

⁷⁸ See, e.g., IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (1785), reprinted in RETHINKING THE WESTERN TRADITION 1, 54 (Allen W. Wood ed. & trans., 2002) ("Autonomy is . . . the ground of the dignity of the human and of every rational nature.") (emphasis omitted); see also ANDREWS REATH, AGENCY AND AUTONOMY IN KANT'S MORAL THEORY 121 (2006) ("Kant's general thesis [is] that autonomy of the will is the foundation of morality."); Wood, *supra* note 77, at 171 ("The most important idea in Kantian ethics is that the authority of moral deliberation is based on the autonomy of the agent's rational will. This idea rests fundamentally on . . . the equal dignity of all rational beings as ends in themselves."); *id.* at 177 ("Kantian ethics is about having a rational conception of ourselves which commits us to autonomy, human equality, and cosmopolitan community.").

⁷⁹ KANT, *supra* note 78, at 46–47 (emphasis omitted).

⁸⁰ See *id.* at 45 (stating that "the human being, and in general every rational being, exists as end in itself, not merely as means to the discretionary use of this or that will") (emphasis omitted); see also Wood, *supra* note 77, at 159 ("Kant's basic idea is that our primary commitment should be to directing our own lives according to our own best rational judgment, and he accordingly reconceived the principle of morality itself as a principle of

who would like to borrow money, for example, but knows he will be unable to repay the loan.⁸¹ Should he lie and promise to repay the debt, knowing that the creditor will not otherwise agree to hand over the money? No, Kant argues, because to do so would amount to using the creditor “merely as a means” to achieve the lying promisor’s own objectives.⁸² If we want others to give us something, their status as our moral equals demands that we not use deception to extract from them a decision to provide it.

In each of the three variants of hypocrisy, people are failing their moral obligation to treat others as their equals. Consider the Faking Hypocrite and the Concealing Hypocrite, where we find *X*—without good justification—either pretending to be committed to *N* or concealing his or her own violations of *N* in order to extract self-serving benefits that others might confer upon *X* if they find his or her communicated commitment to *N* convincing. *X*’s behavior here is morally objectionable for one of the same reasons we condemn fraud as a general matter: by deceptively distorting others’ perception of the relevant facts in service to his or her own interests, *X* is trying to prompt those others to respond in ways they might not otherwise deem appropriate.⁸³ *X* is treating others as less than his or her equals by treating them merely as a means to his or her own ends.⁸⁴ The similarity between the Faking Hypocrite and the Concealing Hypocrite, on the one hand, and Kant’s lying promisor, on the other, is striking: all feature a person *X* who desires a self-serving response from others, who perceives that those others are less likely to provide the desired response if they know certain facts about *X*, and who thus aims to hide those facts. What Charles Fried says about lies is equally apt here: “Lying is wrong because when I lie I

rational autonomy.”); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (stating that Kant emphasized the “right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends”).

⁸¹ See KANT, *supra* note 78, at 39.

⁸² *Id.* at 47; *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 171 cmt. b (AM. L. INST. 1981) (“It is ordinarily reasonable for the promisee to infer from the making of a promise that the promisor intends to perform it.”); RESTATEMENT (SECOND) OF TORTS § 530 cmt. c (AM. L. INST. 1977) (“Since a promise necessarily carries with it the implied assertion of an intention to perform, it follows that a promise made without such an intention is fraudulent and actionable in deceit . . .”).

⁸³ *Cf.* Joseph Kupfer, *The Moral Presumption Against Lying*, 36 REV. METAPHYSICS 103, 106 (1982) (arguing that lying is morally wrong as a general matter because, *inter alia*, “the deceived’s perspective on the world and his possible futures in it are distorted” and “his practical conclusions and the actions they motivate are misdirected”).

⁸⁴ *Cf.* Feder Kittay, *supra* note 31, at 286 (stating that the person who insincerely performs actions that outwardly seem virtuous is a hypocrite and is “perform[ing] those actions to gain an appearance of virtue and its accessory benefits thereby using the beneficiaries as means to that end”); Szabados, *supra* note 20, at 203 (arguing that the hypocrite’s behavior is morally condemnable because “the hypocrite is out to promote his own advantage at the expense of others”).

set up a relation which is essentially exploitative. . . . When I lie, I lay claim to your mind.”⁸⁵ Judith Shklar voices this same idea when she writes that “what is wrong with hypocrisy per se [is that] it is a form of coercion. . . . [I]t is the sheer unfairness of being forced to esteem someone more highly than he deserves that is so infuriating.”⁸⁶

What about the Gerrymandering Hypocrite, who—without good justification—either self-servingly skews his or her judgments about what violates *N* or self-servingly excuses his or her own violations of *N*? There are two equality-focused problems here. First, if violations of *N* cause harm to others, the Gerrymandering Hypocrite is guilty of regarding his or her own victims’ interests as less worthy of regard than the interests of those harmed by others’ violations of *N*.⁸⁷ Second, the Gerrymandering Hypocrite is treating others as less than his or her equals. Absent relevant differences between persons *X* and *Y*, norms that make demands on human behavior make the same demands on both of them.⁸⁸ If *X* believes that some people’s violations of *N* are blameworthy and that those people should comply with *N* accordingly, then—absent some relevant difference between *X* and those others—human equality obliges *X* to regard *N* as making the same demands on himself or herself. *X* should either regard violations of *N* as blameworthy for everyone among whom no relevant distinctions may be drawn or not regard violations of *N* as blameworthy for any of them. By insisting that others in the household not drink straight from the milk container even though she does so whenever the mood strikes,⁸⁹ for example, *X* fails to treat those others as her equals.

For a different lens on the Gerrymandering Hypocrite’s disregard of equality, consider a parallel we can draw between why we morally object to this form of hypocrisy and why, at the societal level, we value the rule of law.⁹⁰

⁸⁵ CHARLES FRIED, *RIGHT AND WRONG* 67 (1978).

⁸⁶ SHKLAR, *supra* note 23, at 50; *cf.* Jillian J. Jordan, Roseanna Sommers, Paul Bloom & David G. Rand, *Why Do We Hate Hypocrites? Evidence for a Theory of False Signaling*, 28 *PSYCH. SCI.* 356, 366–67 (2017) (summarizing the results of an empirical study that suggests people despise hypocrisy because it conveys false signals about the morality of the hypocrite’s behavior); Onora O’Neill, *Between Consenting Adults*, 14 *PHIL. & PUB. AFFS.* 252, 252 (1985) (“Few moral criticisms strike deeper than the allegation that somebody has used another; and few ideals gain more praise than that of treating others as persons.”).

⁸⁷ *See* Wallace, *supra* note 20, at 330 (making this point in the context of a discussion of standing to blame).

⁸⁸ *Cf.* Fritz & Miller, *supra* note 34, at 125 (arguing that “morality is impartial”).

⁸⁹ *See supra* text accompanying note 71 (giving this example of the Gerrymandering Hypocrite).

⁹⁰ Beyond those explained above, there are additional parallels we might draw between our condemnation of hypocrisy and our demand for the rule of law. When *X* communicates a commitment to the view that violations of *N* are blameworthy, for example, he performs a role akin to that of a lawmaker insofar as he applies social pressure on others to behave in compliance with *N*. By misrepresenting what he or she actually regards as

When we make a moral argument against the Gerrymandering Hypocrite's conduct, we are making an equality-focused plea for something akin to the rule of law in our interpersonal relations. What the rule of law demands is famously contested,⁹¹ but there is broad agreement upon a principle that is relevant here: no society fully honors the rule of law unless its legal system imposes the same benefits and burdens on everyone absent an adequate justification for drawing distinctions among them.⁹² That is the equality-seeking principle we have in mind when we say that no person should be above the law. The law is not "in charge in society" in the way that the rule of law demands⁹³ if, without justification, some are free to disregard the law's requirements when they please.⁹⁴

blameworthy, the Faking Hypocrite's behavior contrasts with what we expect of lawmakers, where the rule of law requires that the law's demands be publicly promulgated and reasonably clear so that people know what is expected of them. *See, e.g.*, LON L. FULLER, *THE MORALITY OF LAW* 49–51, 63–65 (rev. ed. 1969) (discussing these rule-of-law requirements); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."). By communicating a commitment to a norm that he actually rejects and thus feels free to apply or ignore as he sees fit, the Faking Hypocrite also wields unbounded discretion to decide when to publicly blame others for their violations of *N*. This contrasts with the rule of law's requirement that announced legal principles constrain government officials' coercive judgments so that those officials cannot wield their powers arbitrarily. *See, e.g.*, TOM BINGHAM, *THE RULE OF LAW* 57 (Penguin Books 2011) (2010) ("The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary."); PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 12 (2016) ("If the rule of law means anything, it must mean that those who control the power of the state may not use it whenever and however they want, bound only by their untrammelled whims . . ."); Martin Krygier, *The Rule of Law: An Abuser's Guide*, in *ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS* 129, 133 (András Sajó ed., 2006) (arguing that the "arbitrary exercise of power" is, "above all, . . . the evil that the rule of law is supposed to curb"). Of course, in drawing these parallels, I do not mean to suggest that the rule of law, as such, controls our ordinary human interactions.

⁹¹ *See* Brian Z. Tamanaha, *The Rule of Law for Everyone?*, 55 *CURRENT LEGAL PROBS.* 97, 101 (2002) ("[T]he rule of law is strikingly like the notion of the 'good', in the sense that everyone is for it, but there is no agreement on precisely what it is."); Krygier, *supra* note 90, at 130 ("The meaning of the concept [of the rule of law] is so contested that any definition will be stipulative. There is no shortage of stipulations.")

⁹² *See* BINGHAM, *supra* note 90, at 15 ("The core of the existing principle is . . . that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made . . ."); James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 *DEPAUL L. REV.* 593, 597 (2007) ("[T]he essential ingredient of the rule of law is *universalism*—the law should be universally heeded. If a law generates an undesirable outcome, it ought to be changed through established procedures; it should not be manipulated or ignored.")

⁹³ Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *LAW & PHIL.* 137, 157 (2002) (emphasis omitted) (arguing that nearly everyone who seriously invokes the rule of law is making claims about what it means for law to be "in charge in a society"); *see also* THOMAS PAINE, *COMMON SENSE* (1776), *reprinted in* COMMON SENSE, RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 3, 38 (2003) (arguing that "in free countries the law *ought* to be King; and there ought to be no other").

⁹⁴ Paul Gowder puts it well when describing "the principle of generality": "Neither the rules under which officials exercise coercion nor officials' use of discretion under those rules [can] make irrelevant distinctions" among the jurisdiction's people. GOWDER, *supra* note 90, at 7; *see also id.* at 40 ("The principle of generality captures the idea that subjects of law are to be treated as equals under the law."). Of course, deciding when the

When we carry the equality commitment that underlies this rule-of-law principle to the realm of ordinary human relations, we find that our Gerrymandering Hypocrite is violating it. He helps hold others accountable for violating *N* by communicating a commitment to *N* and regarding others' violations of it as blameworthy, but he regards *N* as placing lesser constraints upon his own conduct, despite the fact that he lacks a good justification for treating himself more leniently. By unjustifiably extending *N*'s reach to some but not to others, he is like the state that violates the Equal Protection Clause by drawing insufficiently justified distinctions among people.⁹⁵ Moreover, to the extent compliance with *N* yields communal benefits, *X*'s self-serving gerrymandering enables him to enjoy the benefits that flow from others' compliance without bearing his fair share of the burdens that complying with *N* imposes.⁹⁶ The Gerrymandering Hypocrite thereby violates important principles of equality just as surely as the Faking Hypocrite and the Concealing Hypocrite.

III. CONSIDERING THE CASE AGAINST THE JUSTICES

Equipped with Part II's account of hypocrisy, what can we say about the intelligent person on the street's evaluation of Supreme Court Justices, particularly with respect to claims that they are guilty of partisanship? I argue here that the Justices communicate a commitment to impartiality in a variety of important ways and their perceived fidelity to that commitment bears heavily upon the Court's legitimacy; the Justices are (for several reasons) especially vulnerable to skepticism about whether they are indeed committed to impartiality; and, in evaluations of the Justices and their work on any given occasion, all three types of hypocrisy might conceivably be brought into play.

A. *The Justices' Communicated Commitment to Impartiality*

Recall that a person is guilty of hypocrisy only if (among other things) he or she communicates a commitment to the view that violations of norm *N* are

rule of law permits distinctions among people is no easy matter. As a solution to that difficulty, Gowder argues that distinctions are permissible when they can be supported by "public reasons." *See id.* at 33 ("The idea of public reason is ready-made for this kind of problem, because it ensures that we treat our fellow subjects of law as equals by offering them reasons for the things we require of them that we can reasonably expect them to accept."). For more on public reasons and their relevance to hypocrisy analysis, see *infra* notes 216–19 and accompanying text.

⁹⁵ *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (explaining that, in most instances, the Equal Protection Clause permits a state to draw distinctions among people so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

⁹⁶ *Cf. Gowder, supra* note 90, at 41 ("Since each of us receives the benefits of [the law's] constraints, each should suffer from them on equal terms.").

blameworthy.⁹⁷ When it comes to communicated commitments, federal judges and those who lead the government's two political branches stand on very different footing. Elected officials might enjoy the support of their constituents precisely because of the partisan objectives they pledge to pursue.⁹⁸ Federal judges purport to work from a very different starting premise—the premise of impartiality that Chief Justice Roberts underscored when responding to President Trump's "Obama judge" remark in November 2018.⁹⁹ Federal judges and judicial nominees routinely insist that those in the third branch of government are obliged to do their work above the political fray, without partisan loyalties or agendas and without regard to the identities of the parties who come before them.¹⁰⁰ When then-Judge Neil Gorsuch appeared before the Senate Judiciary Committee for his Supreme Court confirmation hearing, for example, he stressed that

we sometimes hear judges cynically described as politicians in robes, seeking to enforce their own politics rather than striving to apply the law impartially. But if I thought that were true, I would hang up the robe. . . . [T]he answers we reach are always the ones we believe the law requires.¹⁰¹

Then-Solicitor General Elena Kagan put it differently during her confirmation hearing, but her central message was the same: "[I]f confirmed, . . . I will do my best to consider every case impartially, modestly, with commitment to principle and in accordance with law."¹⁰² Other nominees have communicated the same

⁹⁷ See *supra* text accompanying notes 43–48.

⁹⁸ Moreover, those constituents might expect their elected leaders to make insincere appeals to popular norms if that is what it takes to get the job done. Although many might find it distasteful, the fact of the matter is that, in politics, it often is "useful to appear to be other than what you are and to appeal to whatever moral or religious norms constitute the commonly accepted vocabulary of justification for political action." GRANT, *supra* note 41, at 175–76. Equating hypocrisy with mere insincerity—an equivalence rejected *supra* at notes 24–27 because it does not satisfactorily capture what people ordinarily have in mind when using the term *hypocrite* as a term of moral condemnation—others have shared Grant's view. See, e.g., RUNCIMAN, *supra* note 41, at 12 ("Once we acknowledge that some element of hypocrisy is inevitable in our political life, then it becomes self-defeating simply to try to guard against it. Instead, what we need to know is what *sorts* of hypocrites we want our politicians to be . . ."); SHKLAR, *supra* note 23, at 69–78 (arguing that effective participation in democratic politics likely requires insincerity and that we thus should not rank hypocrisy among the worst vices).

⁹⁹ See *supra* notes 1–2 and accompanying text.

¹⁰⁰ See Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011) (noting "the widely accepted proposition that judges commit the cardinal sin of their profession when they decide cases based upon their own biases or personal policy preferences, rather than upon democratically legitimate sources of law").

¹⁰¹ *Gorsuch Confirmation Hearing*, *supra* note 19, at 65–66.

¹⁰² *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 57 (2010) (statement of Elena Kagan, Solicitor General of the United States).

commitment in their own ways.¹⁰³ Indeed, one cannot imagine federal judges and judicial nominees saying anything to the contrary, given that our constitutional system provides federal judges with life tenure,¹⁰⁴ treats the federal judiciary's interpretations of the Constitution as "the supreme Law of the Land,"¹⁰⁵ makes constitutional amendments difficult to enact,¹⁰⁶ yet also regards the people as sovereign.¹⁰⁷

Federal judges convey a commitment to impartiality in a variety of implicit ways, as well. They wear priestly robes and preside from elevated benches, for example, not because empty custom demands it but because these are ways we mark the foundational commitment that judges make upon assuming their unique place in our governmental structure.¹⁰⁸ When Justice Gorsuch said he "would hang up the robe" if he thought judges were simply "politicians,"¹⁰⁹ he was not talking about matching his wardrobes to his moods—he was emphasizing the commitment that the robe symbolically conveys.

¹⁰³ See, e.g., *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. 59 (2009) (statement of Hon. Sonia Sotomayor) ("In the past month, many Senators have asked me about my judicial philosophy. Simple: fidelity to the law. The task of a judge is not to make law, it is to apply the law."); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2006) (statement of Hon. Samuel A. Alito, Jr.) ("A judge can't have any preferred outcome in any particular case. . . . The judge's only obligation—and it's a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires."); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of Hon. John G. Roberts, Jr.) ("Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. . . . I will remember that it's my job to call balls and strikes and not to pitch or bat.").

¹⁰⁴ See U.S. CONST. art. III, § 1 (stating that federal judges "shall hold their Offices during good Behaviour").

¹⁰⁵ *Id.* art. VI; see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has . . . been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

¹⁰⁶ See U.S. CONST. art. V.

¹⁰⁷ See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019) ("[O]ur Constitution rests on the principle that the people are sovereign[.]."). As Justice Gorsuch put it during his confirmation hearing, "[i]f judges were just secret legislators, declaring not what the law is but what they would like it to be, the very idea of a government by the people and for the people would be at risk." *Gorsuch Confirmation Hearing, supra* note 19, at 67.

¹⁰⁸ For discussions of judges' black robes and other ways in which we aim symbolically to set judges apart, see JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 254–57 (1949); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 13 (1964); HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 49 (2d ed. 1998).

¹⁰⁹ See *Gorsuch Confirmation Hearing, supra* note 19, at 65 (statement of Hon. Neil M. Gorsuch).

Whether the Justices are faithful to that commitment in practice is not all that matters in our constitutional system; the public's *perception* of the Justices' impartiality matters greatly, as well. To see why this is so, consider Richard Fallon's three-part account of legitimacy.¹¹⁰ Fallon argues that the legitimacy of Supreme Court decisions has three components: sociological (measured by the degree to which the public believes the Court's rulings deserve respect and obedience), moral (measured by whether the public *ought* to respect and obey the Court's rulings), and legal (measured by whether the Court's rulings are methodologically and substantively consistent with legal norms).¹¹¹ Although distinguishable from one another in important ways, these three components are also interrelated. At least in part, for example, sociological and legal legitimacy depend upon one another for their strength.¹¹² If the Court violates legal norms in publicly perceptible ways, the Court's standing in the eyes of the public will presumably suffer; conversely, if the public ceases to accept the Court as a source of decisions that deserve respect and obedience, this will undermine the Court's legal legitimacy. The Constitution's own legal legitimacy illustrates the latter point. The Constitution's legal status today ultimately flows not from whether it was adopted in compliance with the legal norms that prevailed at the time of ratification (there are famous challenges on that front¹¹³), but rather from whether the Constitution is accepted as law today by the American people.¹¹⁴ What is true about the legal legitimacy of the Constitution can be true about any number of features of our governmental system,¹¹⁵ including decisions handed down by the Supreme Court.

¹¹⁰ See FALLON, *supra* note 12.

¹¹¹ See *id.* at 21 (introducing his three-faceted conception of legitimacy); *id.* at 22–23 (“I shall associate sociological legitimacy with beliefs that the law and formal legal authorities within a particular regime deserve respect or obedience and with a further disposition to obey the law for reasons besides self-interest.”); *id.* at 24 (“A morally legitimate regime is one with the power to alter normative obligations . . .”); *id.* at 35 (“When we talk about Supreme Court decisions as being [legally] legitimate or illegitimate, we are concerned with whether the Justices’ decisions accord with or are permissible under constitutional and legal norms.”).

¹¹² Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (plurality opinion) (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”). As Tara Leigh Grove points out, the sociological and legal legitimacy of the Court’s rulings may also sometimes be in tension, insofar as the Justices might perceive either that they need to sacrifice fidelity to legal norms in order to produce a ruling that preserves the Court’s public support or that they need to sacrifice their sociological legitimacy in order to produce a ruling that adheres to legal norms. See Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2250–72 (2019) (reviewing FALLON, *supra* note 12).

¹¹³ See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 15–23, 34–68 (1998) (discussing issues concerning the ratification of the Constitution and the Thirteenth and Fourteenth Amendments); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 285–312, 351–401 (2005) (discussing the same).

¹¹⁴ See FALLON, *supra* note 12, at 86.

¹¹⁵ See *id.* at 87 (stating that public acceptance might confer legal legitimacy even on norms “that supplement, or qualify, or even partially displace the written Constitution”).

By focusing on the perceptions of the intelligent person on the street, my primary focus in this Article is on what Fallon describes as the Court's sociological legitimacy—on whether the public believes the Court “deserves to be respected or obeyed for reasons that go beyond fear of adverse consequences.”¹¹⁶ It goes virtually without saying that the Court's sociological legitimacy suffers if a large percentage of the American public believes the Court is staffed by Justices who hypocritically try to further their own partisan ends by using the power that comes with a professed commitment to impartiality.¹¹⁷ No matter what the setting, to regard someone as a hypocrite is to cast doubt upon that person's ability or authority to make normative judgments that merit others' respect.¹¹⁸ For judges, that is a problem not to be ignored. Keith Bybee writes:

Judicial legitimacy has long been understood to derive from what judges do *and* from how they look doing it. Public confidence in the judiciary ultimately depends not only on the substance of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle. Public suspicion of the courts is thus worth paying attention to because it threatens judicial capacities. Litigants may not respect court orders when they suspect that a judge is advancing a political agenda. Indeed, citizens may be led to doubt the authority of government as a whole when they suspect a powerful institution is misrepresenting its manner of operation.¹¹⁹

As those observations suggest, damage to the Court's sociological legitimacy may have significant ramifications for the Court's legal legitimacy. The American people's acquiescence to the Court's claim of judicial supremacy,¹²⁰ for example, is key to that doctrine's legal status. After all, the Constitution's text does not unambiguously require all state and federal officials to regard federal courts' constitutional interpretations as the nation's supreme law, and it would be circular to suppose that the Court's own declaration of that

¹¹⁶ *Id.* at 22.

¹¹⁷ Sociological legitimacy might *not* be harmed, however, by the realization that the Justices are influenced by their personal values, so long as one still perceives the Justices as proceeding in a sincere, principled, non-scheming fashion. Based on empirical analysis, James Gibson and Gregory Caldeira write: “The most knowledgeable respondents recognize [judicial] discretion and accept that judges rely on their political values in decisionmaking, even while seeing judges as different from ordinary politicians, especially in not being insincere and strategic. It appears that this conception of principled but discretionary judicial policymaking renders realistic views compatible with judicial legitimacy.” James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 213 (2011).

¹¹⁸ See *supra* notes 20–21 and accompanying text.

¹¹⁹ BYBEE, *supra* note 12, at 5.

¹²⁰ See *supra* note 105 and accompanying text.

requirement legally obliges other government officials to accept it. At the end of the day, the legal legitimacy of the Court's claim to judicial supremacy depends upon the public's acquiescence. The American people have by and large acquiesced up to this point, and their support of the Supreme Court as an institution has proven to be exceptionally resilient.¹²¹ But the day may come when they begin to entertain serious second thoughts.¹²²

B. The Justices' Vulnerability to Skepticism

Building on the insight that, in all instances of morally objectionable hypocrisy, a person's communicated commitment to the view that violations of norm *N* are blameworthy is not what it facially seems,¹²³ it bears emphasizing that the Justices' commitment to the norm of impartiality is a matter on which they are especially vulnerable to skepticism. There are numerous reasons for this vulnerability,¹²⁴ and I briefly describe four of them here: (1) in cases prominently pitting the political interests of Democrats and Republicans against one another, the Justices sometimes each appear to align themselves with the interests of the political party that successfully championed their rise to power; (2) the law's indeterminacy often gives the Justices significant decision-making latitude, thereby providing opportunities for their personal loyalties to wield an influence; (3) the Justices' fidelity to the norm of impartiality concerns the mental inner workings of decision-making processes to which the public does not have direct access; and (4) an equality-themed story of judicial bias presses itself strongly upon those who are dissatisfied with the Justices' rulings.

¹²¹ See Gibson & Caldeira, *supra* note 117, at 199 (“[F]ew courts in the world have accumulated more institutional support than the Supreme Court. That support is resistant to change.”).

¹²² Among some Democratic leaders, that day might already be dawning. Although not (yet) attacking judicial supremacy itself, some prominent Democrats are calling for significant Court reforms, such as term limits or the addition of a large number of seats on the Court. See Amelia Thomson-DeVeaux, *Can the Supreme Court Stay Above the Partisan Fray?*, FIVETHIRTYEIGHT (Aug. 12, 2019, 7:00 AM), <https://fivethirtyeight.com/features/can-the-supreme-court-stay-above-the-partisan-fray/> (noting proposals made by Democratic presidential candidates Pete Buttigieg and Beto O'Rourke, among others). In an August 2019 amicus brief filed in a gun rights case, five Democratic U.S. Senators told the Justices that the Court might have to be restructured if it does not change its jurisprudence in ways these Senators believe are necessary to preserve the Court's legitimacy. See Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin & Kirsten Gillibrand as *Amici Curiae* in Support of Respondents at 17–18, *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280).

¹²³ See *supra* note 42 and accompanying text.

¹²⁴ Beyond what I say above, for example, the forces of motivated reasoning spur those unhappy with the Court's rulings to accuse the majority's members of violating their commitment to impartiality. See Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 28–29 (2011). For more on motivated reasoning, see *infra* notes 232–36 and accompanying text.

As Chief Justice Roberts acknowledged during an interview more than a decade ago, deep fractures among the Justices can pose problems in cases of all sorts, because (in the interviewer’s paraphrasing) “closely divided, 5-4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.”¹²⁵ The risk of appearing partisan becomes especially acute when litigation pits Democrats’ and Republicans’ interests against one another and the Justices divide in a manner that makes the partisan origins of their respective appointments difficult to ignore. Picking up where the Chief Justice left off during the oral argument in *Gill v. Whitford*,¹²⁶ it seems safe to assume that, when Republican-aligned litigants prevail 5-4 in a given case because the Court’s five Republican appointees vote in their favor, the intelligent person on the street might be powerfully tempted to say that those litigants won because the Republican appointees preferred the Republicans over the Democrats. And, of course, the intelligent person on the street might perceive partisan bias in the other direction if the Court’s four Democratic appointees had a fifth vote and handed down victories for Democrats.

Consider, for example, the impression collectively made by four cases from recent Terms:

- In June 2019’s *Rucho v. Common Cause*, the Justices were asked to adopt a standard for determining when partisan gerrymandering is so extreme that it violates the Constitution.¹²⁷ The Court had ruled that the plaintiffs in *Gill* had not yet demonstrated they possessed standing,¹²⁸ so the issue remained unresolved. Gerrymandering can benefit any party that controls a state’s map-drawing machinery—*Rucho* itself involved partisan gerrymandering by Democrats in Maryland and by Republicans in North Carolina—but Republicans today are the ones nationally reaping most of its benefits.¹²⁹ All five Republican appointees concluded that

¹²⁵ Jeffrey Rosen, *Roberts’s Rules*, ATL. MONTHLY, Jan./Feb. 2007, at 104, 105; cf. James R. Zink, James F. Springs II & John T. Scott, *Courting the Public: The Influence of Decision Attributes on Individuals’ Views of Court Opinions*, 71 J. POL. 909, 923 (2009) (concluding that a large majority coalition in a given Court ruling increases the likelihood that people will accept the outcome even if they are ideologically disposed to dislike it).

¹²⁶ 138 S. Ct. 1916 (2018); see *supra* notes 8–10 and accompanying text (discussing *Gill*).

¹²⁷ 139 S. Ct. 2484 (2019).

¹²⁸ See *Gill*, 138 S. Ct. at 1934.

¹²⁹ See, e.g., David A. Lieb, *Analysis Indicates Partisan Gerrymandering Has Benefited GOP*, AP NEWS (June 25, 2017), <https://www.apnews.com/fa6478e10cda4e9cbd75380e705bd380> (reporting on a statistical analysis of thousands of state and federal races during the 2016 elections); LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUST., *EXTREME MAPS 1* (2017), <https://www.brennancenter.org/publication/extreme-maps> (summarizing the authors’ analysis of multiple jurisdictions and concluding, for example, that “[i]n the 26 states that account for 85 percent of congressional districts, Republicans derive a net benefit of at least 16-17

partisan gerrymandering claims present nonjusticiable political questions, such that federal courts can provide no redress.¹³⁰ All four Democratic appointees disagreed.¹³¹

- In June 2019's *Department of Commerce v. New York*, the Court was asked whether the Trump Administration's Secretary of Commerce violated the Administrative Procedure Act when deciding to place a question about American citizenship on the 2020 census.¹³² Amidst evidence that the question would drive down response rates in ways likely to harm Democrats both electorally and financially,¹³³ the Secretary claimed he was including the question at the request of the Department of Justice. All five Republican appointees believed the Secretary's decision was reasonable in light of the evidence that was before him; all four Democratic appointees disagreed.¹³⁴ On the question of whether the Secretary had impermissibly provided a pretextual justification for his decision, all four Democratic appointees concluded he had, and Chief Justice Roberts was the lone Republican appointee to join them.¹³⁵ All four of the other Republican appointees would have allowed the Secretary's decision to stand.¹³⁶
- In June 2018's *Husted v. A. Philip Randolph Institute*,¹³⁷ Ohio's Secretary of State, a Republican, asked the Justices to uphold a procedure that Ohio uses to remove people from its list of registered voters¹³⁸—a procedure that has an especially

congressional seats in the current Congress from partisan bias”).

¹³⁰ See *Rucho*, 139 S. Ct. at 2498–505.

¹³¹ See *id.* at 2509 (Kagan, J., dissenting).

¹³² 139 S. Ct. 2551 (2019).

¹³³ See *id.* at 2587–92 (Breyer, J., concurring in part and dissenting in part) (describing some of the evidence in the record).

¹³⁴ See *id.* at 2569–71 (majority opinion); *id.* at 2592–93 (Breyer, J., concurring in part and dissenting in part).

¹³⁵ See *id.* at 2573–76 (majority opinion).

¹³⁶ See *id.* at 2576–77 (Thomas, J., concurring in part and dissenting in part); *id.* at 2596–97 (Alito, J., concurring in part and dissenting in part). After initially signaling that it would continue to fight on the matter, the Trump Administration abandoned its effort to place the question on the census. See Katie Rogers, Adam Liptak, Michael Crowley & Michael Wines, *President Seeks Citizenship Data by Other Means*, N.Y. TIMES, July 11, 2019, at A1.

¹³⁷ 138 S. Ct. 1833 (2018).

¹³⁸ Ohio identifies registered voters who failed to vote or engage in any other voter activity (such as signing a petition) over a two-year period. See *id.* at 1840–41. The state sends those individuals a notice alerting them that their voter registration will be canceled unless they either (1) return a card confirming they continue to reside in the district where they are registered or (2) vote in at least one election during the following four years. See *id.* The question was whether this arrangement violates provisions of the National Voter Registration Act of 1993. See 52 U.S.C. § 20507(a)(4) (directing each state to “conduct a general program that makes a reasonable

negative impact on racial minorities.¹³⁹ In what was widely seen as a win for Republicans in Ohio and for Republicans nationally who want to follow the same path,¹⁴⁰ all five Republican appointees found Ohio's procedure permissible.¹⁴¹ All four Democratic appointees said the procedure violates federal legislation.¹⁴²

- In June 2018's *Abbott v. Perez*,¹⁴³ the Justices reviewed a three-judge district court's finding that Texas's Republican-controlled legislature racially gerrymandered Texas's districting maps in violation of the Equal Protection Clause, and that, in four districts, the legislature reduced racial minorities' electoral opportunities in violation of Section 2 of the Voting Rights Act of 1965.¹⁴⁴ Before reaching those issues, the Justices had to determine whether they had jurisdiction under the statute that authorizes them to review three-judge district courts' grants and denials of injunctive relief.¹⁴⁵ The district court here had not yet formally granted injunctive relief when state officials appealed.¹⁴⁶ All five Republican appointees concluded the Court had jurisdiction; all four Democratic appointees disagreed.¹⁴⁷ All five Republican appointees concluded the plaintiffs had failed to establish a violation of the Equal Protection Clause; all four

effort to remove the names of ineligible voters from the official lists of eligible voters"); § 20507(b)(2) (declaring that a state may not remove a person from its voting rolls "by reason of the person's failure to vote").

¹³⁹ See Brief of *Amici Curiae* National Association for the Advancement of Colored People and the Ohio State Conference of the NAACP in Support of Respondents at 4, *Husted*, 138 S. Ct. 1833 (No. 16-980) (arguing that "the Ohio Secretary of State's misapplication of the [National Voter Registration Act] continues [Ohio's] pattern of denying the right to vote to communities of color"); *Husted*, 138 S. Ct. at 1864 (Sotomayor, J., dissenting) (stating that Ohio's procedure "has disproportionately affected minority, low-income, disabled, and veteran voters").

¹⁴⁰ See, e.g., Philip Bump, *The Supreme Court's Decision on Purging Voters in Ohio Is a Boon to the GOP*, WASH. POST (June 11, 2018, 1:24 PM), https://www.washingtonpost.com/news/politics/wp/2018/06/11/the-supreme-courts-decision-on-purging-voters-in-ohio-is-a-boon-to-the-gop/?utm_term=.eed655fc5e71 (reporting that Ohio's law "has more of an impact on Democrats than Republicans"); Adam Liptak, *Supreme Court Upholds Purge of Ohio Voters*, N.Y. TIMES, June 12, 2018, at A1 ("The Supreme Court on Monday upheld Ohio's aggressive efforts to purge its voting rolls, siding with Republicans in the latest partisan battle over how far states can go in imposing restrictions on voting.")

¹⁴¹ See *Husted*, 138 S. Ct. at 1848.

¹⁴² See *id.* at 1850 (Breyer, J., dissenting).

¹⁴³ 138 S. Ct. 2305 (2018).

¹⁴⁴ See *id.* at 2315; see also U.S. CONST. amend. XIV, § 2; 52 U.S.C. § 10301. There was a high correlation between race and political party preference. See *Abbott*, 138 S. Ct. at 2314, 2314 n.3.

¹⁴⁵ See *Abbott*, 138 S. Ct. at 2319; 28 U.S.C. § 1253.

¹⁴⁶ Instead, the court had scheduled hearings to discuss possible remedies for the violations it had found. See *Abbott*, 138 S. Ct. at 2318–19.

¹⁴⁷ See *id.* at 2319–21; *id.* at 2336–45 (Sotomayor, J., dissenting).

Democratic appointees disagreed.¹⁴⁸ All five Republican appointees concluded that three of the four districts challenged on Section 2 grounds were permissible; all four Democratic appointees disagreed.¹⁴⁹

With the lone exception of Chief Justice Roberts's vote on the issue of pretext in *Department of Commerce v. New York*, what sense might the intelligent person on the street make of those voting alignments? Will most observers feel confident that each of the Court's nine Justices—Democratic appointees and Republican appointees alike—would have reached all of those same conclusions in those four cases if the partisan stakes had been flipped, such that Democrats were the ones predominantly benefiting from partisan gerrymandering, Republicans were the ones mostly harmed by a Democratic Administration's decision to place a question on the census, Democrats were the ones appealing in the absence of formally issued injunctive relief, and so forth?¹⁵⁰ Even sophisticated Court watchers can find such confidence beyond their reach.¹⁵¹ Of course, through the opinions they write or join, the Justices offer legal justifications for their conflicting conclusions. When thinking about why the Justices *actually* aligned as they did, however, it seems inevitable that many are going to believe partisanship influenced at least some of the Justices' votes. Many are likely to believe, in other words, that at least some of the Justices

¹⁴⁸ See *id.* at 2324–30 (majority opinion); *id.* at 2346–54 (Sotomayor, J., dissenting).

¹⁴⁹ See *id.* at 2330–35 (majority opinion); *id.* at 2354–60 (Sotomayor, J., dissenting). The Justices did unanimously agree, however, that Texas House District 90 was an impermissible racial gerrymander. See *id.* at 2335 (majority opinion); *id.* at 2348 (Sotomayor, J., dissenting).

¹⁵⁰ We could, of course, ask the same question about earlier rulings, such as *Shelby County v. Holder*, 570 U.S. 529 (2013), in which—over the dissent of four Democratic appointees—five Republican appointees struck down the federal statutory formula by which jurisdictions with a history of voting discrimination were required to obtain the federal government's approval before making changes to their election laws and procedures. *Id.* at 556–57.

¹⁵¹ Cf., e.g., Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 157 (2019) (stating that the new and underexplained willingness among the Court's five Republican appointees to entertain the current Solicitor General's applications for stays whenever there is "a colorable argument against a district court injunction" is "risk[ing] the perception that the rule is not one for the federal government *in general*, but for the federal government at particular moments in time—perhaps depending upon the identity (or political affiliation) of the sitting President"). Among political scientists, of course, there is a large body of literature suggesting that judges' ideologies and partisan affiliations influence judicial decision-making. See Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 244–46 (2019) (providing a concise overview of the literature). But see Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, "Ideology" or "Situation Sense"? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354 (2016) (stating that the authors' empirical study "furnished evidence strongly at odds with the conclusion that judges are influenced by their political predispositions when they engage in legal reasoning").

were not “doing their level best to do equal right to those appearing before them.”¹⁵²

Observers are especially likely to suspect partisanship when their own preferred political party comes out on the losing side and the loss comes entirely at the hands of Justices whose appointments came from the opposing partisan team.¹⁵³ With the political provenance of the Justices’ appointments now accounting more reliably than ever for the ideological direction of their votes,¹⁵⁴ and with the Court today controlled by Republican appointees, we would expect Democrats to view the Court today far more skeptically than Republicans. And they do. Throughout most of the 1980s and 1990s, Republicans’ and Democrats’ appraisals of the Court ran largely in tandem with one another.¹⁵⁵ But following the Justices’ ruling in *Bush v. Gore*¹⁵⁶—a ruling in which the Court voted 5-4 to halt Florida’s recount of ballots in the 2000 presidential election, thereby ensuring Republican George W. Bush’s victory over Democrat Al Gore¹⁵⁷—an eighteen-point gap emerged between the percentages of Republicans and Democrats who expressed confidence in the Court.¹⁵⁸ That gap is even larger today. A September 2019 Gallup poll revealed, for example, that 73% of Republicans—but only 38% of Democrats—approved of the Court’s job performance.¹⁵⁹

¹⁵² See Liptak, *supra* note 1 (quoting Chief Justice Roberts).

¹⁵³ See Kahan et al., *supra* note 151, at 355–56 (stating that, under the sway of “identity-protective reasoning,” those unhappy with Supreme Court rulings are often inclined to accuse the Justices in the majority of partisanship).

¹⁵⁴ See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 4 (2019) (“Since 2010, when Democratic nominee Elena Kagan replaced liberal Republican John Paul Stevens, all of the Supreme Court’s Republican-nominated Justices have been to the right of Democratic-nominated Justices. Before 2010, the Court never had clear ideological lines that coincide with party lines.”). For those authors’ article-length treatment of the subject, see Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301.

¹⁵⁵ See Megan Brenan, *Confidence in Supreme Court Modest, but Steady*, GALLUP (July 2, 2018), <https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx> (describing historical trends).

¹⁵⁶ 531 U.S. 98 (2000).

¹⁵⁷ *Id.* at 110–11. The five Justices forming the majority on that issue were Republican appointees. Two other Republican appointees—Justices John Paul Stevens and David Souter—were among the dissenters. See *id.* at 126–27 (Stevens, J., dissenting); *id.* at 134–35 (Souter, J., dissenting).

¹⁵⁸ See Brenan, *supra* note 155 (providing data for the period from 1982 to 2018).

¹⁵⁹ Lydia Saad, *Supreme Court Enjoys Majority Approval at Start of New Term*, GALLUP (Oct. 2, 2019), <https://news.gallup.com/poll/267158/supreme-court-enjoys-majority-approval-start-new-term.aspx>. A July 2018 poll produced similar results. See Megan Brenan, *Supreme Court Approval Highest Since 2009*, GALLUP (July 18, 2018), <https://news.gallup.com/poll/237269/supreme-court-approval-highest-2009.aspx> (finding that 72% of Republicans but only 38% of Democrats approved of the Court’s performance). So did a September 2018 poll. See Justin McCarthy, *Women’s Approval of SCOTUS Matches 13-Year Low Point*, GALLUP (Sept. 28, 2018), <https://news.gallup.com/poll/243266/women-approval-scotus-matches-year-low-point.aspx?version=print>

Beyond the Justices' own voting patterns, a second overarching reason why the Justices are so exposed to suspicions of partiality concerns the law's indeterminacy. To see how this is so, we can quickly draw an analogy to the realm of morality. Georg Hegel perceived (as Judith Shklar explains) that, whereas people in earlier, "naïve" eras had recognized objective standards for judging right and wrong, Hegel's contemporaries had shed reliance upon objective moral guides and were simply adjusting their moral standards to suit any behavior they found appealing.¹⁶⁰ As Shklar puts it, Hegel feared "that the new subjectivity had given rise to a hideous reign of hypocrisy of a peculiarly assertive kind."¹⁶¹ After all, if one is left free to determine the rules of the game, one can always find ways to win. Even if the moral principles we claim to honor today are not ones we self-servingly manufacture out of whole cloth, people often will not have difficulty persuading themselves that those principles permit their own self-interested behavior. When we confront moral dilemmas and invoke abstract principles to resolve them, for example, the abstract framing of those principles frequently gives us the "cognitive flexibility" we need if we wish to construe our own behavior more leniently than we would construe the same behavior when committed by others.¹⁶²

In the legal realm where the Justices do their work, we have largely abandoned the naïve assumptions that the law always dictates objectively correct

(finding that 67% of Republicans but only 36% of Democrats approved of the Court's job performance). So did an August 2019 poll. See Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, PEW RSCH. CTR. (Aug. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> ("Today, three-quarters of Republicans and Republican-leaning independents have a favorable opinion of the Supreme Court, compared with only about half (49%) of Democrats and Democratic leaners . . .").

¹⁶⁰ Judith Shklar, *Let Us Not Be Hypocritical*, 108 DAEDALUS 1, 7 (1979); see also SHKLAR, *supra* note 23, at 61 ("Although Hegel expected the anarchy of the sincere to bring about a general indifference to hypocrisy, he was, in fact, the herald of a veritable army of ferocious antihypocrites."); cf. RONALD C. NASO, *HYPOCRISY UNMASKED: DISSOCIATION, SHAME, AND THE ETHICS OF INAUTHENTICITY* 174 (2010) ("The hypocrite lives out a fantasy of transcendence rather than orienting himself toward enduring ideals or concerns broader than his immediate self-interests. . . . He mimics conviction, refusing to be bound by obligations that he experiences as everchanging and contingent or defined by his deeds, whose ultimate justification rests on the shifting sands of relativism."). See generally G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 140 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (discussing morality, subjectivism, and hypocrisy).

¹⁶¹ Shklar, *supra* note 160, at 7.

¹⁶² Lammers, *supra* note 53, at 475–76; see also *id.* at 479 ("This is disturbing because it suggests that those people who routinely base [their decisions] on an abstract set of rules, such as judges, police officers, or priests (who are those people that we expect to behave in a moral manner), are themselves the most susceptible to hypocrisy."). Moreover, the more power we possess in society, the greater the likelihood we feel "a sense of entitlement" that encourages us both to do what serves our self-interests and to find ways to justify it even when simultaneously condemning similar behavior by others. See Joris Lammers, Diederik A. Stapel & Adam D. Galinsky, *Power Increases Hypocrisy: Moralizing in Reasoning, Immorality in Behavior*, 21 PSYCH. SCI. 737, 738–42 (2010).

answers to legal controversies and that good judges simply deduce those answers from the appropriate legal rules.¹⁶³ Having learned some of legal realism's lessons,¹⁶⁴ we now foreground the degree to which legal principles (especially those of an abstract variety, such as those one frequently finds in constitutional law) leave room for reasonable disagreement about how particular controversies ought to be resolved.¹⁶⁵ If a Justice *did* wish to favor one litigant over another, we thus know it often would not be difficult to identify a plausible legal rationale for reaching the desired result.¹⁶⁶ Even when the Court's own prior rulings would seem to foreclose certain analytic options, those rulings can always be called into doubt.¹⁶⁷ That would not be true if the Justices were strongly committed to the principle of *stare decisis* even when it stands as an obstacle to conclusions they find compelling. But they aren't. As Frederick Schauer recently pointed out,

At least within the array of currently-sitting Justices, there do not appear to be any who have demonstrated the ability to combine their accusations of ignoring *stare decisis* with a willingness to adhere to *stare decisis* when its effect is to reinforce or perpetuate decisions they believe mistaken, or to support their sometimes vehemently professed

¹⁶³ See Gibson & Caldeira, *supra* note 117, at 207 (“In general, belief in the theory of mechanical jurisprudence . . . is not particularly widespread.”); *id.* at 196 (“[N]o serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges. In this sense, legal realism has carried the day.”). *But cf.* Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996) (“My vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions.”). For a brief discussion of the historic assumptions of formalism, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (stating that “[t]he heart of [classical orthodoxy] was the view that law is a science” and that “through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts”). One might try to reduce the frequency with which judges decide cases in the absence of clear, discretion-restraining legal rules, but some measure of judicial discretion is inevitable. *Cf.* Scalia, *supra* note 90, at 1186–87 (“I have not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them.”).

¹⁶⁴ For brief discussions of the intellectual revolution brought about by legal realism, see THEODORE L. BECKER, *POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE: A WORKING THEORY AND STUDY IN JUDICIAL DECISION-MAKING* 42–43 (1964); Harris & Sen, *supra* note 151, at 243–44. For a lengthier discussion of legal realism—one that softens the edges in the traditional tale of the history of our shift from formalism to realism—see Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009).

¹⁶⁵ See Girardeau A. Spann, *Constitutional Hypocrisy*, 27 CONST. COMMENT. 557, 559 (2011) (“Legal realism has taught us that legal doctrine—including the doctrine embedded in the Constitution—is alone too indeterminate to resolve disputes. . . . As a result, constitutional meaning is inevitably vulnerable to the normative values and political preferences of those doing the interpreting . . .”).

¹⁶⁶ *Cf.* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 8 (2013) (“[M]any cases that reach the Supreme Court tend both to be highly charged politically and to be indeterminate from a legalist standpoint, forcing the Justices back on their priors—which often have an ideological component—to resolve the case.”).

¹⁶⁷ See *infra* Part IV (discussing *stare decisis* and its relationship to hypocrisy analysis).

adherence to stare decisis with a willingness to relinquish their own proclivity to persistent dissent.¹⁶⁸

When Democratic and Republican appointees split from one another in cases prominently featuring Democrats' and Republicans' competing political interests, therefore, the law itself often gives observers ample room to believe the Justices' partisan loyalties may have played a role in determining the results.

Of course, judges of all stripes assure us that they strive mightily to honor the norm of impartiality.¹⁶⁹ Because those are the same assurances that partisan judges would make if self-servingly trying to maintain their grip on power, we are eager for opportunities to confirm the assurances' accuracy. But because the law's indeterminacy leaves so much to judicial choice, fidelity to the norm of impartiality often has far less to do with judges' objectively verifiable compliance with externally imposed requirements than it does with judges' management of the inner workings of their decision-making processes. Of course, we lack direct access to those inner mental workings, and so we lack direct access to the information we need if we want to be certain the Justices are deciding cases as impartially as their communicated commitments would have us believe. As a result, a great deal inescapably rides on our assessment of the Justices' sincerity.

The position in which the Justices thus find themselves is as precarious as it is unavoidable. As Eva Feder Kittay observes, we often react most strongly to perceived hypocrisy in arenas where we care deeply about states of mind and accordingly place a premium on people's sincerity when they claim to describe the inner realities underlying their outward behavior.¹⁷⁰ One of the reasons why Tartuffe's fraudulent piety is so timelessly reviled, for example, is that his hypocritical behavior concerns religion, a domain in which the states of mind animating a person's actions often matter a great deal.¹⁷¹ When it comes to the Justices, we care very much about whether we can take them at their word when

¹⁶⁸ Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 140; see also Eric Segall, *The Emperor's Stare Decisis*, DORF ON LAW (Dec. 17, 2018, 7:00 AM), <http://www.dorfonlaw.org/2018/12/the-emperors-stare-decisis.html> (arguing through multiple examples that the doctrine of stare decisis does not "exist at all apart from stylistic rhetoric that pops up from time to time in Supreme Court opinions" and that "[w]here the Justices really care, on the most pressing, most important questions, stare decisis has played little or no substantive role").

¹⁶⁹ See, e.g., *supra* note 1 and accompanying text (quoting Chief Justice Roberts); *supra* notes 101–03 and accompanying text (quoting several judicial nominees).

¹⁷⁰ See Feder Kittay, *supra* note 31, at 280; cf. SHKLAR, *supra* note 23, at 58 (stating that sincerity came to be regarded as a chief virtue once people shed reliance on external moral guides).

¹⁷¹ See Feder Kittay, *supra* note 31, at 280 (citing religion as a domain in which we take hypocrisy especially seriously); *supra* note 49 and accompanying text (discussing Tartuffe).

they say they make their decisions based on their best efforts to impartially determine the law's requirements. Are the premises and conclusions the Justices articulate in their written opinions indeed the same premises and conclusions they would have embraced if the parties' identities or the cases' partisan stakes had been different? On one answer, the Justices are to be celebrated as constitutional heroes; on the other, their own communicated commitments suggest they are to be run out of town.

A final reason why the Justices are so vulnerable to skepticism about their commitment to impartiality is that—especially in cases of the sort on which we are focusing here, pitting the political interests of Democrats and Republicans against one another—salient concerns about equality press themselves upon observers in multiple, mutually reinforcing ways. In these legal disputes, claims of unequal treatment are usually explicitly or implicitly in play. We saw this, for example, in recent Terms' cases regarding partisan gerrymandering, the proposed census question about citizenship, and election-related policies and practices that disadvantage racial minorities: in all of those instances, plaintiffs claimed Republicans were unfairly tilting the playing field against their political opponents.¹⁷² Equality is also the value we find violated in all instances of morally objectionable hypocrisy¹⁷³ and is the value that chiefly underlies our insistence that judges commit themselves to adjudicating cases impartially¹⁷⁴ and our overarching rule-of-law commitment to ensuring that the government treat people the same unless there are sufficient reasons to treat them differently.¹⁷⁵ When the Justices divide along familiar lines in Democrat-versus-Republican disputes, therefore, there are multiple ways in which concerns about equality may be brought forcefully to the observer's mind. If we do perceive inequality on any of those fronts and have a negative emotional reaction to it, that emotional reaction will make equality values even more salient in our appraisal of the situation; we then will pay greater attention to issues of equality; and we then will be more likely to perceive other ways in which equality values may have been compromised.¹⁷⁶ A single-themed story in which at least some

¹⁷² See *supra* notes 127–49 and accompanying text.

¹⁷³ See *supra* Part II.B.

¹⁷⁴ See *supra* notes 99–108 and accompanying text.

¹⁷⁵ See *supra* notes 90–94 and accompanying text.

¹⁷⁶ See RONALD DE SOUSA, *THE RATIONALITY OF EMOTIONS* xv (1987) (“[E]motions are among the mechanisms that control the crucial factor of *salience* among what would otherwise be an unimaginable plethora of objects of attention, interpretations, and strategies of inference and conduct.”); Yaniv Hanoch, “*Neither an Angel nor an Ant*”: *Emotion as an Aid to Bounded Rationality*, 23 J. ECON. PSYCH. 1, 8 (2002) (“Focusing and directing our attention is one of the fundamental roles played by our emotions.”); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 677 (1989) (“Emotions direct our attention to certain aspects of a situation, suggest certain approaches.”).

of the Justices feature as equality-violating hypocrites is not one that the intelligent person on the street is likely to find elusive.

C. Evaluating the Case for Faking, Concealing, or Gerrymandering Hypocrisy

Recall that there are three principal types of hypocrisy, all of which draw moral condemnation because they violate principles of human equality: Faking Hypocrisy (*X*'s communicated commitment to norm *N* is merely a pretense calculated to extract self-serving benefits from unwitting others), Concealing Hypocrisy (*X* believes violations of *N* are blameworthy but nevertheless violates *N* and then conceals those violations in a bid to obtain from unwitting others the self-serving benefits that a convincingly communicated commitment to *N* might elicit), and Gerrymandering Hypocrisy (*X* believes others ought to comply with *N* and are to be blamed if they do not, but—without good justification—*X* self-servingly gerrymanders *N*'s reach to avoid at least some of its constraints).¹⁷⁷ With respect to the Justices' communicated commitment to the *N* of impartiality, what can we make of hypocrisy allegations against the Justices, perhaps especially when cases involve Democrats' and Republicans' competing political fates and the Democratic and Republican appointees each side with the party of the President who had successfully sought their placement on the Court?

1. Faking and Concealing Hypocrisy

Conversations regarding judicial hypocrisy often proceed on the assumption that the chief question under discussion is whether the Justices are frauds who actually hold no commitment to impartiality but use outward displays of professional piety—akin to the displays of Molière's *Tartuffe*¹⁷⁸—as a façade to keep the power necessary to serve their own interests. In the vocabulary we have used to describe Faking Hypocrisy, we would say the Justices are charged with feigning a commitment to impartiality because they hope an unwitting public will accept that commitment as genuine and thus allow them to keep the judicial power that enables them to pursue their own personal objectives or the objectives of groups (partisan or otherwise) in which the Justices' identities are partially embedded.¹⁷⁹ One author writes, for example, that polls indicate many Americans suspect that judges are “affecting a reliance on legal principle that

¹⁷⁷ See *supra* Part II.A (describing the three types of hypocrisy); Part II.B (explaining why all three types of hypocrisy are morally objectionable on equality grounds).

¹⁷⁸ See *supra* note 49 and accompanying text (discussing *Tartuffe*).

¹⁷⁹ See *supra* Part II.A.2.i (discussing Faking Hypocrisy and the role of social identities).

they do not actually have” and that judges use this “air of impartiality in order to disguise the pursuit of political goals.”¹⁸⁰ Many political scientists embrace or at least edge toward this same view when they contend—based on “the culmination of [more than] fifty years of behavioral research on the role of attitudinal forces in legal decision making”—that “judges do not use legal authority to reason through cases,” and, instead, use legal argument “as a post hoc justification for choices consistent with their political policy preferences.”¹⁸¹

The image of the Tartuffian judge clearly loomed large in Justice Gorsuch’s mind during his Senate confirmation hearing. He insisted that judges are not “politicians in robes”—or, he could have said in the same spirit, wolves in sheep’s clothing—“seeking to enforce their own politics rather than striving to apply the law impartially.”¹⁸² For him, the key to vindicating judges’ claim to impartiality lay in persuading his listeners that “the answers we reach are always the ones we believe the law requires.”¹⁸³ Tartuffe did not care a whit about what was divinely required, but he pretended otherwise because he desired benefits that unwitting Orgon might thereby be inspired to give him.¹⁸⁴ Justice Gorsuch sought to rebut the notion that judges similarly pretend to be impartial readers of the law’s requirements because they believe a gullible public will respond by allowing them to retain the power that enables them to pursue their personal aims.

Justice Gorsuch’s comments are equally apt if we shift our focus slightly and consider the claim that the Justices are guilty of Concealing Hypocrisy. The primary difference between Concealing Hypocrisy and Faking Hypocrisy is that those guilty of the former believe they ought to comply with *N* notwithstanding the fact that they sometimes violate it, whereas the Tartuffes of the world reject the normative value of *N* altogether. But Concealing Hypocrites and Faking Hypocrites are both engaged in a campaign to conceal relevant facts from

¹⁸⁰ BYBEE, *supra* note 12, at 19–20; *see also id.* at 20–21 (discussing polling data).

¹⁸¹ EILEEN BRAMAN, LAW, POLITICS & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 16–17 (2009) (describing but not endorsing this view); *see also* FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 10–11 (2000) (echoing those observations). Political scientists have often stopped short of taking a firm position on whether judges intentionally manipulate the law or instead are influenced by their preferences on a subconscious level. Political scientists have often focused their energies instead on demonstrating that, no matter what the mechanics, judges’ personal preferences do influence their decisions. *See* BRAMAN, *supra*, at 17–18, 20. For a skeptical discussion of those efforts, *see* Kahan et al., *supra* note 151, at 357–63 (2016) (arguing that many of those studies suffer from serious flaws).

¹⁸² *Gorsuch Confirmation Hearing*, *supra* note 19, at 65.

¹⁸³ *Id.* at 66; *cf.* FALLON, *supra* note 12, at 11 (contending that, to make a legal argument in “good faith,” judges must “sincerely believe what they say when engaging in constitutional argument”).

¹⁸⁴ *See* MOLIÈRE, *supra* note 49.

onlookers because they desire self-serving benefits those onlookers might provide if successfully deceived. To say that the Justices are Concealing Hypocrites with respect to the norm of impartiality is to say that they genuinely believe they should be impartial but, to their regret, sometimes do let their personal biases get the better of them and then—in a bid to extract the same sorts of self-serving benefits that a Faking Hypocrite on the bench would seek—try to conceal those violations by dressing their opinions in the garb of legal argumentation, denying charges of bias, and so forth. Contrary to the ideal that Justice Gorsuch described, neither the concealing judge nor the faking judge sincerely believes that the answers he or she gives are assuredly the same ones he or she would give if the judge's personal biases were not in play.

For the half or more of the American electorate that believes the Supreme Court is “mainly motivated by politics,”¹⁸⁵ the portrait that Justice Gorsuch was disclaiming—whether of the faking or the concealing variety—is presumably what they have in mind. What would it take to convince those observers that they should embrace assurances like those Justice Gorsuch offered even when, from the outside, it appears the Justices might be schemers bent on serving their partisan loyalties? There is no way to prove *conclusively* that the Justices are innocent of these forms of hypocrisy, because the central fact at issue concerns the inner workings of the Justices' minds: do they truly believe they are doing what the law requires, or are they trying to deceive us? Orgon came at the mind reading problem from the other direction—convinced of Tartuffe's piety, he abandoned that belief only after hiding under a table and hearing Tartuffe mock Orgon's credulousness and try to seduce Orgon's wife.¹⁸⁶ There are no tables under which the American public can hide, hoping that unsuspecting Justices will reveal their true natures. Moreover, if the Justices *do* sincerely believe that the answers they give “are always the ones [they] believe the law requires,”¹⁸⁷ then they have no Faking or Concealing Hypocrisy to confess while we lurk nearby. In the end, therefore, the intelligent person on the street is left to make uncertain judgments about the Justices' sincerity.

There nevertheless are good reasons to doubt that the Justices are hypocrites of the faking or concealing types, even when—in cases concerning the competing political interests of Democrats and Republicans—the Justices split in the problematic way of special concern to us here. As Eileen Braman points

¹⁸⁵ See AMERICAN VOTERS, *supra* note 6 (describing a 2018 poll that indicated that 50% of the American electorate held this view); U.S. VOTER SUPPORT, *supra* note 6 (describing a 2019 poll that indicated that 55% of the American electorate held this view).

¹⁸⁶ See MOLIÈRE, *supra* note 49, at 282–89.

¹⁸⁷ Gorsuch Confirmation Hearing, *supra* note 19, at 66.

out, there are many signs “that judges *believe* they are reaching decisions through the objective application of legal doctrine” and “believe that to the extent they stray from accepted sources of legal decision making, they exceed their authority in our democratic system.”¹⁸⁸ Studies indicate, for example, that when working their way through cases’ merits, judges speak to one another in pervasively legal terms, and judges genuinely take it “as a personal affront” when accused of using their positions to vindicate their personal preferences.¹⁸⁹ When giving public talks and interviews, the Justices frequently express respect for one another and praise the collegiality with which they collectively do their work—hardly the sort of remarks one typically hears today when partisan adversaries talk about one another in public.¹⁹⁰ If all of this is part of a judiciary-wide conspiracy to deceive the American public in Tartuffian fashion, it is a bipartisan conspiracy of extraordinary breadth and longevity.

Of course, because the Justices hope to build coalitions with one another in future cases and because an angered public cannot use elections to sweep unpopular federal judges out of office, the Justices have strong incentives to praise one another’s qualities in public, even if they believe some of their colleagues are charlatans. For at least some of us, however, seeing the Justices as pervasively engaged in strategic fakery to that degree is a bridge too far. Surely there are positive inferences to be drawn, for example, from the fact that Justices with sharply contrasting ideological leanings often seem to regard one another with genuine respect and affection—consider, for example, the close friendship that Justice Ruth Bader Ginsburg and Justice Antonin Scalia famously enjoyed.¹⁹¹ If the Justices believe their ideological opponents on the Court are illegitimate con artists, they hide those beliefs well.

¹⁸⁸ BRAMAN, *supra* note 181, at 23–24.

¹⁸⁹ *Id.* at 24 (citing studies).

¹⁹⁰ See, e.g., Mark Sherman, *In a Divided Court, Many Small Signs of Agreement, Respect*, CHRISTIAN SCI. MONITOR (June 6, 2019), <https://www.csmonitor.com/USA/Justice/2019/0606/In-a-divided-Court-many-small-signs-of-agreement-respect> (“The justices themselves never tire of telling the public that their disagreements are not personal, even when their pointed opinions call out a colleague by name.”); Robert Barnes, *Ginsburg Gently Pushes Back on Criticism of the Supreme Court and Her Fellow Justices*, WASH. POST (July 25, 2019, 11:09 PM), https://www.washingtonpost.com/politics/courts_law/ginsburg-gently-pushes-back-on-criticism-of-the-supreme-court-and-her-fellow-justices/2019/07/25/e3c22846-ae7-11e9-bc5c-e73b603e7f38_story.html?utm_term=.e4c89b74a666 (quoting Justice Ginsburg as saying that the Court “remains the most collegial place I have ever worked” and “my two newest colleagues [Justices Gorsuch and Kavanaugh] are very decent and very smart individuals”); Christine Wang, *Supreme Court Must Stay Out of Partisan Politics to Preserve Its Legitimacy, Kagan and Sotomayor Say*, CNBC (Oct. 6, 2018, 2:39PM), <https://www.cnbc.com/2018/10/06/supreme-courts-elena-kagan-sonia-sotomayor-avoid-partisan-politics.html> (“Despite the justices’ [differing] judicial philosophies, Kagan and Sotomayor described a culture of respect among members of Supreme Court, explaining that it is crucial to their work.”).

¹⁹¹ See Irin Carmon, *What Made the Friendship Between Scalia and Ginsburg Work*, WASH. POST (Feb.

Well, *usually* they do. The place where the Justices come closest to accusing one another of Faking or Concealing Hypocrisy is in some of their dissents. In *King v. Burwell*,¹⁹² for example, Justice Scalia wrote that Chief Justice Roberts's majority opinions in *King* and *National Federation of Independent Business v. Sebelius*¹⁹³—cases concerning the Patient Protection and Affordable Care Act—demonstrated “the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.”¹⁹⁴ In *Lawrence v. Texas*¹⁹⁵—the case concerning Texas's ban on same-sex sodomy—Justice Scalia accused Justice Anthony Kennedy's majority of producing an opinion that was “the product of a Court . . . that has largely signed on to the so-called homosexual agenda.”¹⁹⁶ In *Obergefell v. Hodges*¹⁹⁷—the case concerning state bans on same-sex marriage—Justice Scalia said that Justice Kennedy's majority opinion “lack[ed] even a thin veneer of law,”¹⁹⁸ was “couched in a style that is as pretentious as its content is egotistic,” was filled with “showy profundities [that] are often profoundly incoherent,”¹⁹⁹ and was a product of judicial “[h]ubris.”²⁰⁰ In *Trump v. Hawaii*²⁰¹—the case in which the Court upheld President Trump's so-called travel ban—Justice Sonia Sotomayor wrote that Chief Justice Roberts and the Court's other Republican appointees were able to reach their conclusion only by “ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.”²⁰² In *Rucho v. Common Cause*²⁰³—a case concerning partisan gerrymandering—Justice Elena Kagan marveled at her Republican-appointed colleagues' unwillingness to do anything about what she said were especially obvious and damaging constitutional violations:

13, 2016, 11:55 PM), <https://www.washingtonpost.com/posteverything/wp/2016/02/13/what-made-scalia-and-ginsburgs-friendship-work/>; Sasha Zients, *Justice Scalia's Son: Washington Can Learn from Dad's 'Rich Friendship' with RBG*, CNN (Aug. 23, 2018, 8:34 PM), <https://www.cnn.com/2018/08/23/politics/scalia-son-rbg-podcast-cnn-tv/index.html>.

¹⁹² 576 U.S. 473 (2015).

¹⁹³ 567 U.S. 519 (2012).

¹⁹⁴ *King*, 576 U.S. at 518 (Scalia, J., dissenting).

¹⁹⁵ 539 U.S. 558 (2003).

¹⁹⁶ *Id.* at 602 (Scalia, J., dissenting).

¹⁹⁷ 576 U.S. 644 (2015).

¹⁹⁸ *Id.* at 716 (Scalia, J., dissenting).

¹⁹⁹ *Id.* at 719.

²⁰⁰ *Id.* at 718.

²⁰¹ 138 S. Ct. 2392 (2018).

²⁰² *Id.* at 2433 (Sotomayor, J., dissenting).

²⁰³ 139 S. Ct. 2484 (2019).

In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.²⁰⁴

At the same moments when dissenters draft and file such opinions, could they sincerely assure the public that they believe their opposing colleagues are “doing their level best to do equal right to those appearing before them”?²⁰⁵ It is one thing to praise the collegiality and good faith of one's fellow Justices when giving public speeches; it is quite another to offer such praise when passionately rejecting an opposing majority's conclusions. The Justices have left it to the intelligent person on the street to square the Justices' happy public remarks with their damning written critiques—and that is not always an easy task. As one writer points out, the Justices' practice of “denounc[ing] one another in acid dissents . . . corroborate[s] the popular indictment of the Court as a partisan body.”²⁰⁶ No matter what assurances the Justices offer when talking about the Court in the abstract, therefore, they should not be surprised if many observers conclude that, at least sometimes, the Court's members prioritize partisan aims over impartiality and are being hypocritically deceptive when they claim to the contrary.

2. *Gerrymandering Hypocrisy*

When we turn to Gerrymandering Hypocrisy, the conversation changes in two important ways. First, even if we posit that the Justices are not life-tenured Tartuffes determined to dupe the American public into believing they are impartial, this does not mean that all hypocrisy charges are off the table. As we have seen, Gerrymandering Hypocrisy does not centrally concern bids to fool others; rather, it concerns bids to gerrymander the reach of normative commitments that one has communicated to others.²⁰⁷ Second, because Gerrymandering Hypocrisy includes instances in which a person draws self-serving distinctions and should know—but doesn't—that he or she lacks a good justification for doing so, the Justices can be guilty of hypocrisy even if the

²⁰⁴ *Id.* at 2515 (Kagan, J., dissenting).

²⁰⁵ Liptak, *supra* note 1 (quoting Chief Justice Roberts).

²⁰⁶ Kahan, *supra* note 124, at 4.

²⁰⁷ *See supra* Part II.A.2.iii (describing Gerrymandering Hypocrisy).

answers they provide “are always the ones [they] believe the law requires.”²⁰⁸ Gerrymandering Hypocrisy concerns a realm, in other words, where what a Justice believes about the lawfulness of his or her rulings is not always dispositive on the question of hypocrisy.

Let’s begin with an easy case. Suppose that, when deciding how to resolve a given legal dispute, a Justice relies at least in part upon rationale *R* and believes it is permissible to do so; suppose the Justice would nevertheless regard it as a breach of the judicial commitment to impartiality if an antagonist on the Court were to rely upon *R*; and suppose the Justice knows he or she lacks a good justification for regarding *R* as available to him or her but not to the antagonist. This plainly amounts to Gerrymandering Hypocrisy. The Justice’s communicated commitment to impartiality is not what it facially seems because, by self-servingly gerrymandering the boundaries of the obligation to be impartial—and doing so while knowing he or she cannot satisfactorily justify it—the Justice is treating others unequally in morally objectionable ways.²⁰⁹

As an example, consider Jack Balkin’s charge against the five conservative Justices who halted Florida’s recount of presidential ballots in 2000’s *Bush v. Gore*.²¹⁰ Balkin contends those Justices were “motivated by a particular kind of partisanship”²¹¹—namely, the desire to secure George W. Bush’s victory because he was the candidate most likely to appoint Justices who shared the *Bush* majority’s “ideological positions like colorblindness, respect for state autonomy from federal interference, and protection of state governmental processes from federal supervision.”²¹² Suppose Balkin is right.²¹³ Suppose, too, that the Justices in the majority believed they were behaving in a permissible manner but would have seen it as a breach of the commitment to impartiality if the Court’s liberal members relied upon a comparable rationale in service to their own preferred presidential candidate, and suppose the Justices in the majority knew they lacked a good justification for granting themselves license to do what they would condemn their liberal counterparts for doing. We then would say those Justices were guilty of Gerrymandering Hypocrisy.

²⁰⁸ See *Gorsuch Confirmation Hearing*, *supra* note 19, at 65–66.

²⁰⁹ See *supra* notes 87–96 and accompanying text (explaining why Gerrymandering Hypocrisy is morally objectionable).

²¹⁰ Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *YALE L.J.* 1407 (2001).

²¹¹ *Id.* at 1408.

²¹² *Id.* at 1409.

²¹³ Of course, Balkin’s assessment is not universally shared. See, e.g., Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 *TEX. L. REV.* 485, 515 (2016) (stating that Balkin’s claims are “unfair, accusatory, and wrong”).

I take it as clear that the *Bush* majority's Justices would indeed lack a good justification for relying upon a rationale they would find objectionable if deployed by colleagues aligned as antagonists. One way to understand this is to recognize the crucial role that "public reasons" play in societies committed to equality and the rule of law.²¹⁴ Joshua Cohen writes that, in a morally and ideologically pluralistic society that recognizes the equality of its political participants, policy arguments must be backed by justifications "that others have reason to accept" even if their own policy preferences are different.²¹⁵ Building on that idea, Paul Gowder argues that a government violates its equality-based commitment to the rule of law when it treats some less desirably than it treats others, unless the government can provide a justification "that we can reasonably expect [those who are disadvantaged by the distinction] to accept."²¹⁶ "If all subjects of law know that distinctions between them are justified by public reasons," Gowder writes, "those who get the short end of the stick in some distinction are at least spared the insult of being disregarded or treated as inferiors."²¹⁷ With respect to Balkin's claim regarding the Court's ruling in *Bush*, we could not reasonably expect the dissenting Justices or Democratic candidate Al Gore to accept the rationale that giving them the short end of the stick was justified because the majority wanted to help their favored presidential candidate win and thereby enhance the security of their conservative jurisprudence.

Many other instances of possible hypocrisy require both us and the Justices to think harder about how Justices make their decisions and what they should realize—even if they don't—when making them. As we will see in the following paragraphs, exploring the possibility of Gerrymandering Hypocrisy will often require us to posit facts about the internal workings of the Justices' minds—facts that we can never conclusively establish and that thus call for uncertain judgments, both by us and (sometimes) by the Justices themselves. It would be

²¹⁴ GOWDER, *supra* note 90, at 33. For more on the parallels between hypocrisy and the rule of law, see *supra* notes 90–94 and accompanying text.

²¹⁵ JOSHUA COHEN, *Procedure and Substance in Deliberative Democracy*, in PHILOSOPHY, POLITICS, DEMOCRACY: SELECTED ESSAYS 154, 161 (2009). Cohen emphasizes that this means we must "offer considerations that others (whose conduct will be governed by the decisions) can accept, not simply that we count their interests in deciding what to do, while keeping our fingers crossed that those interests are outweighed." *Id.* at 163. Those in pluralistic societies will not always agree on which justifications we can reasonably expect others to accept. "But even if there is disagreement," Cohen says, "and the decision is made by majority rule, participants may appeal to considerations that are quite generally recognized as having considerable weight, and as a suitable basis for collective choice, even among people who disagree about the right result." *Id.* at 162.

²¹⁶ GOWDER, *supra* note 90, at 33.

²¹⁷ *Id.*

unrealistic, therefore, to suppose that unassailable answers to allegations of hypocrisy always lie within our reach. My aim here is simply to provide a conceptual framework that enables the Justices, their defenders, and their critics to see with greater clarity the issues on which they could profitably focus when contemplating the likelihood of hypocrisy in specific instances.

Suppose there is a feature *F* that could appear in a Justice's decision-making process—and set aside for a moment the important questions of what *F* is and whether *F* is desirable. Imagine a Justice believes it would be a breach of the judicial commitment to impartiality if colleagues who are antagonists in a given case allowed *F* to play a role in their decision-making processes. A case comes along in which our Justice reasons his or her way to a conclusion. Now, posit that either of two things is true:

- (1) The Justice believes *F* has not played a role in his or her decision-making process, even though he or she would say *F* played a role in antagonists' decisions if the antagonists relied upon similar decision-making processes. Moreover, the Justice should know—but perhaps doesn't—that there is no good justification for evaluating his or her own decision-making process differently than he or she would evaluate the decision-making processes of the antagonists. Or,
- (2) The Justice recognizes that *F* has played a role in his or her decision-making process, but the Justice regards this as acceptable even though he or she would find it unacceptable if antagonists allowed *F* to play a similar role in their own decision-making processes. Moreover, the Justice should know—but perhaps doesn't—that there is no good justification for regarding his or her own use of *F* more leniently than he or she would regard antagonists' use of *F*.

Both of these scenarios depict instances of Gerrymandering Hypocrisy. In both, the Justice is self-servingly gerrymandering the reach of the judicial commitment to impartiality, either by concluding that he or she has held *F* at bay under circumstances in which he or she would accuse antagonists of allowing *F* to exert an influence, or by unreasonably claiming special license to allow *F* to play a role when making his or her own decisions.

So, what could *F* be? The possibilities are numerous. Looking again to Balkin's allegation regarding the majority's motivation in *Bush v. Gore*,²¹⁸ for example, *F* might be an impartiality-compromising objective that a Justice

²¹⁸ See *supra* notes 210–13 and accompanying text (discussing Balkin's allegation).

negligently believes is an appropriate basis for deciding a particular case in a particular way. Suppose once again that Balkin's charge is accurate, that the Justices in the majority believed they were acting permissibly, and that they would have charged their liberal counterparts with unacceptable bias if they had relied upon a similar motivation in a bid to secure victory for a Democratic presidential candidate. But now imagine that the *Bush* majority believed they had special license to prefer one presidential candidate over the other because legal principles more important than a judicial commitment to impartiality were at stake. So long as those Justices should have known that a judge must never compromise impartiality in service to other ends, we could charge them with Gerrymandering Hypocrisy even if they believed they were doing what the law required.

Many candidates for *F* involve forces that can bias the Justices' decision-making in ways that might elude their initial attention, but that (1) we suspect are exerting an influence, (2) we believe the Justices could self-diagnose if they gave the matter adequate attention, and (3) the Justices themselves believe they can detect in the reasoning of their antagonists. These forces stand as threats to impartiality—a serious problem, of course, in its own right—but, depending on the circumstances, they can also give rise to Gerrymandering Hypocrisy. Consider, for example, Neal Devins and Lawrence Baum's argument that the Justices' decisions are sometimes influenced by a desire to maintain the esteem of political or ideological elites with whom a Justice enjoys personal relationships or with whom a Justice's social identity is at least partially embedded.²¹⁹ As Devins and Baum point out, those taking seats on the Supreme Court today commonly bring with them politically or ideologically significant relationships that they maintain while in office (conservative Justices appear frequently in Federalist Society circles, for example, while liberal Justices tend toward the American Constitution Society).²²⁰ Devins and Baum contend that the Justices' desire to maintain good reputations among their preferred elites may subconsciously influence their decisions:

[M]ost if not all of [today's Justices] have affective ties to political groups such as the parties, to ideological groups, to groups with a position on particular issues, or to some combination of those categories. In an era of political polarization, when those affective ties

²¹⁹ See DEVINS & BAUM, *supra* note 154, at 147. See generally *supra* notes 57–64 and accompanying text (discussing social identities and their relevance to hypocrisy).

²²⁰ See DEVINS & BAUM, *supra* note 154, at 147 (summarizing their book's central claim); *id.* at 43–44, 133–36, 138–39, 150–51 (discussing the Justices' relationships with the Federalist Society and the American Constitution Society).

have tended to strengthen among people who are interested in politics and policy, undoubtedly that is true of Supreme Court Justices as well.²²¹

Those affective ties, in turn, may lead the Justices “to seek approval and respect from individuals and groups that are important to them. As a result, which sets of people are part of a Justice’s identity makes a good deal of difference for that Justice’s work as a decision maker.”²²²

If that argument has merit, the problem of bias in judicial decision-making is obvious. How might it also give rise to problems of hypocrisy? It could do so in ways that the Justices’ critics could never conclusively establish (due to the inner mental workings involved), but that critics might nevertheless reasonably suspect and that a Justice committed to impartiality should find worthy of serious attention. Suppose a Justice’s desire to maintain the esteem of certain elites does indeed play a role in how he or she decides to vote in a given case, but the Justice fails to recognize that fact even though he or she could have detected it with reasonable self-inspection and even though the Justice would condemn antagonists for allowing the desire for esteem to influence their own decisions. Or suppose the Justice recognizes that a desire for those elites’ esteem has shaped his or her vote in a given case, but the Justice finds this acceptable on a theory that he or she would reject if offered by antagonists. Unless the Justice has good justifications for drawing those distinctions, we would say in both instances that the Justice had hypocritically gerrymandered the boundaries of the judicial commitment to impartiality.

For another example of an impartiality-compromising influence that could constitute *F* for purposes of Gerrymandering Hypocrisy, consider what Cass Sunstein and a group of coauthors from the Affective Brain Lab at University College London recently described as “epistemic spillovers.”²²³ Prior research

²²¹ *Id.* at 43; *see also id.* at 45 (“To the extent that Justices act in ways that might draw favorable reactions from relevant elites, they are likely to do so unconsciously.”); *id.* at 131 (stating that “affective polarization has reached the Court”). Devins and Baum point out that elites’ influence does not always give rise to undesirable bias. One group of elites whose esteem the Justices presumably desire, for example, are the legal elites who value the Court’s impartiality. *See id.* at 53–54.

²²² *Id.* at 147. A 2016 study by Dan Kahan and several coauthors provides some evidence that, by virtue of their professional training, judges are not as susceptible as others to identity-protecting forms of motivated reasoning. *See Kahan et al., supra* note 151, at 354–55. As Devins—one of Kahan’s coauthors on that 2016 study—points out, however, judges’ professional training and judges’ desire to maintain the esteem of elites who value impartiality introduce important “countervailing force[s]” (such that we often find the Justices voting contrary to their presumed personal preferences) but do “not prevent the Justices from acting largely on the basis of their policy preferences.” DEVINS & BAUM, *supra* note 154, at 57.

²²³ *See Joseph Marks, Eloise Copland, Eleanor Loh, Cass R. Sunstein & Tali Sharot, Epistemic Spillovers: Learning Others’ Political Views Reduces the Ability to Assess and Use Their Expertise in Nonpolitical*

had indicated that people tend to believe that those who share their views about a given topic are more likely than others to be experts in that same field.²²⁴ Through a pair of laboratory experiments, Sunstein and his coauthors found evidence that people are prone to regard those who share their political views as more credible than others not just on political issues, but even on issues having nothing to do with politics and even when one has clear evidence that others possess greater expertise.²²⁵ In other words, even when our political allies are demonstrably less reliable than others on an issue unrelated to politics, we may tend to seek them out for guidance on that issue rather than rely upon those whose political views we reject but whose guidance is more likely to be accurate.²²⁶

When adjudicating a case, the Justices frequently hear from numerous groups and individuals (parties, amici, clerks, and others) on a wide range of matters, ranging from history, to economics, to statistics, to climatological science, and more. Even when these opinion-holders are not officially allied with a political party, their political leanings often are not difficult to discern.²²⁷ When seeking guidance on matters relevant to their decisions, therefore, the Justices might find it difficult to resist the tide of epistemic spillovers when hearing views advanced by politically likeminded others.²²⁸ Consider, for example, the statistical formula that Democratic voters pitched in *Gill v. Whitford* for marking the point at which partisan gerrymandering becomes constitutionally

Domains, 188 COGNITION 74, 83 (2019).

²²⁴ See *id.* at 74 (citing Eric D. Boorman, John P. O'Doherty, Ralph Adolphs & Antonio Rangel, *The Behavioral and Neural Mechanisms Underlying the Tracking of Expertise*, 80 NEURON 1558 (2013); Ali Farajirad, Luk Warlop & Bendik M. Samuelsen, *When the Message "Feels Right": When and How Does Source Similarity Enhance Message Persuasiveness?*, 40 ADVANCES CONSUMER RSCH. 682 (2012); Leonhard Schilbach, S. B. Eickhoff, T. Schultze, A. Mojzisch & K. Voegeley, *To You I Am Listening: Perceived Competence of Advisors Influences Judgment and Decision-Making via Recruitment of the Amygdala*, 8 SOC. NEUROSCIENCE 189 (2013)).

²²⁵ See *id.* at 83.

²²⁶ See *id.* at 75 (summarizing their findings); see also *id.* at 83 ("The most striking finding is that people consult and are influenced by the judgments of those with shared political convictions even when they had observed evidence suggesting that those with different convictions are far more likely to offer the right answer.").

²²⁷ See DEVINS & BAUM, *supra* note 154, at 47 ("[A]micus briefs convey a picture of where conservatives and liberals stand on the specific issues that arise in a particular case That information is especially helpful when it is not obvious which sides liberals and conservatives could be expected to take.").

²²⁸ Cf. Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC. REV. 917, 936 (2015) (finding that "ideological congruence between an amicus brief and the majority opinion writer" increases the likelihood that the author of the opinion will use language from the amicus brief in his or her opinion). For a brief overview of the literature examining possible relationships between ideology and the influence of amici on Justices' decisions (literature that yields mixed results), see Paul M. Collins, Jr., *The Use of Amicus Briefs*, 14 ANN. REV. L. & SOC. SCI. 219, 226–28 (2018).

impermissible.²²⁹ Chief Justice Roberts (a Republican appointee) said he thought the formula was “sociological gobbledygook,”²³⁰ while Justice Breyer (a Democratic appointee) said the formula sounded to him like “pretty good gobbledygook.”²³¹ Might those differing impressions have had something to do with the political affiliations of those championing or criticizing the formula’s merits? Regardless, we can hypothesize as a general matter that the possibility of bias-injecting epistemic spillovers in judicial decision-making sets hypocrisy traps for unwary Justices. If members of the Court believe they have held epistemic spillovers at bay when evaluating a case but would accuse antagonists of letting those spillovers wield an influence if their decision-making processes were similar, or if Justices believe their reliance upon epistemic spillovers is permissible but would be blameworthy in the hands of their antagonists, then those Justices are guilty of hypocrisy with respect to their communicated commitment to impartiality.

These examples concerning esteem-seeking and epistemic spillovers point us toward the broader realms of heuristics and motivated reasoning, where we find that our decision-making processes may suffer from biasing influences in ways that elude our conscious attention unless we reflect upon those processes with unusual perspicacity.²³² In her groundbreaking article on motivated reasoning, for example, Ziva Kunda explains that, when decision-makers have “directional goals” that cause them to regard some conclusions as more desirable than others, those goals may bias their reasoning in ways that increase the likelihood that the desired conclusions are the ones they will indeed reach—and this may happen beneath the decision-makers’ radar, such that they genuinely regard their decisions as laudably objective.²³³ Dan Kahan encapsulates this

²²⁹ 138 S. Ct. 1916 (2018); see *supra* notes 8–10 and accompanying text (discussing *Gill*).

²³⁰ Transcript of Oral Argument at 40, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

²³¹ *Id.* at 41.

²³² I focus on motivated reasoning above. With respect to heuristics, see Marks et al., *supra* note 223 (explaining that a heuristic is a “mental shortcut, which often works well, but which can lead to severe and systematic errors,” and suggesting that their findings regarding epistemic spillovers may provide an example). A widely deployed heuristic entails relying upon the policy positions taken by the leaders of one’s political party when identifying one’s own positions. See Posner & Sunstein, *supra* note 213, at 509; see also John G. Bulloch, *Elite Influence on Public Opinion in an Informed Electorate*, 105 AM. POL. SCI. REV. 496, 496–97 (2011) (concluding that the positions taken by party elites influence “even those who are exposed to a wealth of policy information” but that, among those who are indeed exposed to a great deal of policy information, “the effects of such position-taking [by party elites] are generally smaller than the effects of policy information”).

²³³ See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 481–83 (1990). For a famous example involving Dartmouth and Princeton football fans’ differing perceptions of referees’ decisions during a rough game, see Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCH. 129 (1954). For a discussion of neurological specifics, see Drew Westen, Pavel S. Blagov, Keith Harenski, Clint Kilts & Stephen Hamann, *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional*

well, emphasizing that although we can be slow to identify motivated reasoning in ourselves, we can be quick to spot it in others:

Motivated reasoning refers to the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand. When subject to it, individuals can be unwittingly disabled from making dispassionate, open-minded, and fair judgments. Moreover, although people are poor at detecting motivated reasoning in themselves, they can readily discern its effect in others, in whom it is taken to manifest bias or bad faith.²³⁴

When we try to make sense of the frequent congruence between the Justices' votes in divisive cases and the Justices' presumed policy predispositions, Eileen Braman contends that the influence of motivated reasoning offers a far better explanatory theory than the notion that judges consciously regard themselves as politicians in robes and are lying when they claim to the contrary.²³⁵ If motivated reasoning *is* influencing the Justices, they might very well sincerely believe that their decisions are impartial.²³⁶ This plainly presents great challenges for the Justices, not only with respect to remaining impartial but also with respect to avoiding hypocrisy. If we reasonably believe that motivated reasoning has wielded an impartiality-compromising influence in a Justice's decision and has done so in ways that the Justice reasonably could have detected and would blame antagonists for failing to detect in decisions of their own, then we may reasonably accuse the Justice of Gerrymandering Hypocrisy.

IV. IT'S NOT ALL ABOUT IMPARTIALITY

Although I have focused my discussion of judicial hypocrisy on the Justices' commitment to impartiality, impartiality is not the only normative matter on which the Justices communicate commitments. There are many others, any of which might provide the starting point for hypocrisy allegations.²³⁷ *Stare decisis*

Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election, 18 J. COGNITIVE NEUROSCIENCE 1947 (2006).

²³⁴ Kahan, *supra* note 124, at 7.

²³⁵ BRAMAN, *supra* note 181, at 6–7, 22–30. Braman argues, for example, that motivated reasoning likely helps explain how different Justices can disagree about the legal meaning of the Court's prior rulings and can disagree about whether the Court has the jurisdiction necessary to address a given case's merits. *See id.* at 161–63. For an empirical study casting doubt on the frequency with which at least one form of motivated reasoning influences judges' decision making, see Kahan et al., *supra* note 151.

²³⁶ *See* BRAMAN, *supra* note 181, at 21–22.

²³⁷ *See supra* notes 43–46 and accompanying text (discussing the role of communicated commitments when defining and detecting hypocrisy).

is a fine example. To varying degrees and in varying settings, individual Justices have stressed that, unless specified circumstances apply, members of the Court deserve blame if they fail to work within the constraints imposed by prior rulings.²³⁸ I noted earlier, however, that the Justices' invocations of *stare decisis* frequently seem more rhetorical than substantive: members of the Court who are unhappy with a majority's ruling might accuse their colleagues of unjustifiably abandoning precedent, but those same Justices might then vote to overturn prior decisions for comparable reasons when those decisions stand as obstacles in their path.²³⁹

When the Justices are inconsistent in their handling of precedent, the possibility of hypocrisy is clearly in play. A Justice who has communicated a strong commitment to *stare decisis* would be guilty of Faking Hypocrisy if, for example, he or she voiced that commitment merely to win the Senate's confirmation but, once in office, felt at liberty to disregard prior rulings whenever they stood in the Justice's way.²⁴⁰ The Justice would be guilty of Concealing Hypocrisy if he or she were committed to *stare decisis*, violated it under circumstances he or she found blameworthy, and then tried to hide the violation (through pretextual verbal gymnastics of one sort or another) in a self-serving effort to retain the approval of unwitting observers.²⁴¹ The Justice would be guilty of Gerrymandering Hypocrisy if the Justice believed he or she was behaving appropriately when deciding whether to honor or reject prior rulings but—without good justification for the difference in judgment—would accuse antagonists on the Court of behaving in a blameworthy fashion if they treated precedent in a similar way.²⁴²

Justice Scalia appeared to charge Justice Kennedy with hypocrisy of one or more of those three types in *Lawrence v. Texas*.²⁴³ In that 2003 decision striking

²³⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[W]e recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”) (citation omitted). *But cf.* *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (“When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of *stare decisis* follows directly from the Constitution’s supremacy over other sources of law—including our own precedents.”).

²³⁹ See *supra* note 168 and accompanying text.

²⁴⁰ See *supra* Part II.A.2.i (discussing Faking Hypocrisy).

²⁴¹ See *supra* Part II.A.2.ii (discussing Concealing Hypocrisy).

²⁴² See *supra* Part II.A.2.iii (discussing Gerrymandering Hypocrisy); *cf.* FALLON, *supra* note 12, at 130 (“In appealing to a methodological premise in one case, a Justice . . . implicitly affirms his or her commitment to abide by that same premise in future cases, whatever conclusion it might yield, unless the future cases are legally and morally distinguishable.”).

²⁴³ 539 U.S. 558 (2003).

down Texas's ban on same-sex sodomy, Justice Kennedy's majority overturned the Court's 1986 ruling in *Bowers v. Hardwick*²⁴⁴ for reasons that—in Justice Scalia's view—violated the stare decisis principles that Justice Kennedy and others had espoused when refusing in *Planned Parenthood v. Casey*²⁴⁵ to overturn *Roe v. Wade*.²⁴⁶ Justice Scalia believed the *Lawrence* majority's treatment of *Bowers* “exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.”²⁴⁷

Regardless of the merits of that accusation, Justice Scalia's argument illustrates the ease with which notions of hypocrisy may enter the picture when examining the consistency with which the Justices hold true to their communicated commitments. Inconsistency on any front may, of course, be a sign that a Justice is behaving hypocritically with respect to his or her ostensible commitment to impartiality—perhaps a Justice in a given case is disregarding his or her own past statements about stare decisis, for example, because precedent does not favor the litigant whom the Justice wants to prevail. But inconsistency may also be a sign that a Justice is behaving hypocritically with respect to other communicated commitments that deserve attention in their own right, even when issues of bias are not at stake.

To avoid hypocrisy of any kind, the Justices are obliged to think honestly and deeply about the norms to which they have communicated commitments, the forces that lie beneath what they initially judge to be their own unbiased assessments of the law's requirements, and the criteria they deploy when evaluating decisions rendered by colleagues with whom they disagree. Even if the legal answers toward which they initially gravitate are “the ones [they] believe the law requires,”²⁴⁸ the Justices may still be guilty of hypocrisy unless they explore those matters with at least as much sincerity and vigor as they would expect from their antagonists, and then respond appropriately to what they find.

²⁴⁴ 478 U.S. 186 (1986) (holding that the Constitution does not confer a strongly protected right to engage in same-sex sodomy); see *Lawrence*, 539 U.S. at 578 (overruling *Bowers*).

²⁴⁵ 505 U.S. 833, 854–69 (1992).

²⁴⁶ 410 U.S. 113 (1973) (holding that the Constitution confers a strongly protected right to abortion); see *Lawrence*, 539 U.S. at 586–92 (Scalia, J., dissenting).

²⁴⁷ *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting).

²⁴⁸ *Gorsuch Confirmation Hearing*, *supra* note 19.

CONCLUSION

No matter whether it takes the faking, concealing, or gerrymandering form, hypocrisy rightly draws our moral condemnation because it violates principles of equality.²⁴⁹ The hypocrisy stakes are especially high when it comes to the Supreme Court, where matters of institutional legitimacy loom large. The Court's members assure us they are "doing their level best to do equal right to those appearing before them,"²⁵⁰ which is precisely what one would hope and expect to hear in a nation that is committed to equality and the rule of law and that acquiesces to judges' claims of judicial supremacy. When the Justices behave in a manner that suggests impartiality may have given way to favoritism, however, their claim to evenhandedness can rightly trigger angry accusations of morally objectionable hypocrisy.²⁵¹

The possibility of hypocrisy becomes especially difficult to ignore when—in cases prominently featuring the Democrats' and Republicans' competing political interests—the Justices each side with the party that successfully sought their placement on the Court.²⁵² Such voting alignments sharply prod observers to wonder whether the Justices' party-line divisions are truly the product of good-faith differences in impartial legal judgment or are, instead, the product of partisan loyalties. The intelligent person on the street, whose perspective Chief Justice Roberts has urged us to bear in mind when assessing the work of the Court,²⁵³ is often likely to find the latter theory more compelling than the former. The Chief Justice has acknowledged that "[i]t can be tempting for judges to confuse [their] own preferences with the requirements of the law,"²⁵⁴ and the partisan attachments and antagonisms that all of us know so well do nothing to make that temptation less powerful. When members of the public perceive that some or all of the Justices have indeed let their partisan sentiments get the better of them, charges of hypocrisy are sure to follow. If those charges become widely embraced, the Court faces grave problems.²⁵⁵ As one editorialist understatedly put it, "[h]ypocrisy isn't good for credibility."²⁵⁶

²⁴⁹ See *supra* Part II.

²⁵⁰ See Liptak, *supra* note 1 (quoting Chief Justice Roberts); see also *supra* notes 100–03 and accompanying text (noting comparable assurances).

²⁵¹ See *supra* Part III.

²⁵² See *supra* notes 127–49 and accompanying text (providing recent examples).

²⁵³ See *supra* note 10 and accompanying text (noting Chief Justice Roberts's treatment of "the intelligent man on the street" as an important point of reference for gauging likely public reactions to Court rulings).

²⁵⁴ *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

²⁵⁵ See *supra* notes 110–22 and accompanying text (discussing the Court's sociological, moral, and legal legitimacy).

²⁵⁶ Leonhardt, *supra* note 12.

A closing word of caution is in order for all of us who count ourselves among the intelligent people on the street. Judges are certainly not the only ones whose judgments can be distorted by personal preferences and prejudices. Even if the Justices in a given case have divided based entirely on good-faith differences in laudably impartial legal analysis, they may find themselves accused of hypocrisy by observers who suffer from the same kinds of biases that the Justices themselves are charged with exhibiting. As Dan Kahan and his coauthors explain, the powers of motivated reasoning are such that

diverse members of the public can be expected to form highly polarized perceptions of facts and highly polarized judgments about the dictates of the law in cases that resonate with contested cultural sensibilities. . . . [T]hey (or a substantial proportion of them) will predictably understand the outcome of such cases to be rooted in partisan biases²⁵⁷

What we often find among intelligent people on the street, in other words, are partisan judgments about judicial partisanship. Those partisan judgments, moreover, can easily lead the Court's observers into hypocrisy of their own. Those who communicate normative commitments when condemning a Supreme Court ruling today, for example, might hypocritically gerrymander those commitments tomorrow if doing so serves their self-interests.²⁵⁸ Given the institutional gravity of the matters at stake, we would do well to try to assess the Justices' decisions with the same kind of evenhandedness that we rightly expect to find in the Justices' assessments of even the most politically charged legal disputes.

²⁵⁷ Kahan et al., *supra* note 151, at 355–56; *see also supra* notes 232–36 and accompanying text (discussing motivated reasoning).

²⁵⁸ *See supra* Part II.A.2.iii (discussing Gerrymandering Hypocrisy).