

ARTICLES

LOYALTY, GRATITUDE, AND THE FEDERAL JUDICIARY*

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INTRODUCTION

Ordinary rules of social interaction impose obligations of gratitude and loyalty on those who receive a significant benefit. Moral philosophers and sociologists generally agree that gratitude and loyalty are essential components of organized society. What happens, however, when the benefit conferred is a federal judgeship? For the recipient of this prized position, the duty of impartiality is a job requirement. Yet the demands of civil behavior may also require the judge to express some degree of gratitude and loyalty toward her benefactor, the government entity or individual responsible for placing the judge in her position.¹ This benefactor likely holds strong feelings about some cases coming before the judge. The jurist may experience a serious struggle as the duty of impartiality clashes with the obligations of loyalty and gratitude.

Contrary to popular perception, this struggle is not necessarily the result of base political motivation or human frailty. Instead, the struggle most likely reflects the judge's honest, well-meaning attempt to accommodate all that organized society expects of her. On its most fundamental level, this Article explores that struggle.

As always, the story is not as simple as it first appears. To begin, a judge may never encounter a case that puts to the test any debt of gratitude or loyalty she may bear. Moreover, some judges, because of

1. Under our constitutional scheme, federal judges are nominated by the President and confirmed by the Senate. See U.S. CONST. art. II, § 2, *quoted infra* text accompanying note 147. For lower court judges, individual Senators and other individuals from the judge's home state may be intimately involved in the nomination and confirmation process. See *infra* notes 167-77 and accompanying text (expanding on political role in confirmation process). For that reason, the identity of the judge's "benefactor" is not entirely clear.

This Article is confined to the problem of federal judges, and therefore does not deal with loyalties and tensions that may result from the process of electing judges.

the motivations underlying their appointment, may be less susceptible to the conflict posed by gratitude and loyalty. In this Article, I identify some of these permutations that may buffer a federal judge from the clash of expectations.

On the other hand, I also show that, under many circumstances, a judge must confront the conflict of impartiality with loyalty and gratitude. Although our legal tradition attempts to resolve this conflict, the clash is likely to continue, creating dissonance for the judge and influencing the decisionmaking process. I study the conflict below and highlight those instances where dissonance is most likely to occur.

Part I below reviews the philosophical and sociological literature on gratitude, loyalty, and social exchange. Analyzing the federal judiciary in light of this material, Part II describes the duty of impartiality and its potential conflict with gratitude, loyalty, and exchange obligations. In Part III, I review the judicial selection process and canvass the criteria historically employed for choosing members of the federal judiciary. Part IV identifies the types of appointees most at risk of suffering a conflict among expectations. Finally, I explore in Part V whether gratitude and loyalty have any legitimate role in a judge's work, and probe how these enduring personal expectations may affect decisionmaking.

I. LOYALTY AND GRATITUDE: VIEWS OF PHILOSOPHERS AND SOCIOLOGISTS

Describing a flurry of recent philosophical essays on gratitude and loyalty, a recent review declares that "[t]he virtues are fighting back."² Although scholarly interest in these principles may have waned for a time, their importance in our society has been enduring. Since ancient Greece, analysis of gratitude and loyalty has permeated many disciplines, including philosophical compositions,³ literature,⁴ law,⁵

2. Mary Midgely, *Virtuous Circles*, THE TIMES (London), June 18, 1993, (Literary Supp.) at

3. This review also included a work on "responsibility" in its survey of "virtues."

3. Aristotle, for example, had much to say about social exchange and loyalty within the context of friendship. See ARISTOTLE, THE NICHOMECHAN ETHICS, Book VIII, pts. vi-vii, at 451, 475-79 (H. Rackham trans., Harvard University Press 1990) (describing commitment and exchange in friendships of equals and friendships of unequals). Other philosophers have also discussed gratitude and loyalty. See, e.g., W.D. ROSS, THE RIGHT AND THE GOOD 21 (1967) (discussing duty of gratitude as one of seven important duties); see also *infra* notes 7-35 and accompanying text (discussing philosophical analysis of gratitude and loyalty).

4. Shakespeare's Viola provides an excellent example:

I hate ingratitude more in a man
Than lying, vainness, babbling, drunkenness,
Or any taint of vice whose strong corruption

and the social sciences.⁶

For the purpose of studying the federal judiciary, the writings of moral philosophers and sociologists prove particularly instructive. This Part looks to moral philosophy and sociology to lay the groundwork for understanding why a judge who heeds the call of gratitude and loyalty is not necessarily reprehensible, but is instead showing fidelity to integral components of our moral and social structure.

A. *The Works of Moral Philosophy*

1. *Gratitude*

Most moral philosophers believe that gratitude has significant moral components. Although a few philosophers suggest that gratitude is merely a matter of etiquette,⁷ none disputes that gratitude includes recognition of a benefit or kindness conferred on a beneficiary.⁸

Inhabits our frail blood.

WILLIAM SHAKESPEARE, *TWELFTH NIGHT* act 3, sc. 4.

5. Law-related works have focused primarily on loyalty. See, e.g., GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 78-100 (1993) (discussing role of loyalty in law governing testimonial privileges, surrogate motherhood, gift giving, inheritance, and freedom of religion); JOSEPH RAZ, *THE AUTHORITY OF LAW* 250-61 (1979) (exploring analogy between respect for law and loyalties of friendship); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1065 (1976) (discussing loyalty in lawyer-client relationship).

6. Psychologists, sociologists, anthropologists, and political scientists have all devoted considerable energy to the study of loyalty and gratitude. See generally GRAHAM A. ALLAN, *FRIENDSHIP* (1989) (examining role of friendship and loyalty in our social structure); HERBERT A. BLOCH, *THE CONCEPT OF OUR CHANGING LOYALTIES* (1934) (using social psychology of loyalty to develop theory of social individual); VALERIAN J. DERLEGA & BARBARA A. WINSTEAD, *FRIENDSHIP AND SOCIAL INTERACTION* (1986) (describing studies on social psychology of friendships); MELANIE KLEIN, *ENVY AND GRATITUDE* (1957), reprinted in MELANIE KLEIN, *ENVY AND GRATITUDE AND OTHER WORKS* 176, 187-89 (1975) (exploring psychoanalytic connection between gratitude, love, and generosity); JOHN H. SCHAAR, *LOYALTY IN AMERICA* (1957) (analyzing political loyalty in American democracy); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 157-90 (1979) (analyzing gratitude as basis for political obligation); EDWARD WEISBAND & THOMAS M. FRANCK, *RESIGNATION IN PROTEST* (1975) (examining political and ethical choices between loyalty to team and loyalty to conscience in American political life).

7. Daniel Lyons, *The Odd Debt of Gratitude*, 29 *ANALYSIS* 92, 92 (1969) (describing gratitude as "norm of etiquette"); see also 1 WILLIAM GODWIN, *AN ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON GENERAL VIRTUE AND HAPPINESS* 42-47 (Raymond A. Preston ed., 1926) (arguing that one need not show any particular kindness to benefactors). According to Godwin, gratitude is "no part either of justice or virtue." *Id.* at 43. For the purpose of this assertion, Godwin understands gratitude to be "a sentiment of preference which would lead me to prefer one man to another from some other consideration than that of his superior usefulness or worth." *Id.*

8. See JOHN BALGUY, *THE FOUNDATIONS OF MORAL GOODNESS* (1734), reprinted in 1 *BRITISH MORALISTS 1650-1800*, at 186, 188 (D.D. Raphael ed., 1969) (observing that receiver of benefits not only should be, but is, obliged to be grateful); IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 248-49 (Mary J. Gregor trans., 1991) (positing that gratitude shows respect and honor to person who has shown kindness); see also Andrew Oldenquist, *Loyalties*, 79 *J. PHIL.* 173, 184 (1982) (suggesting that gratitude is response of one who has been "provided . . . with certain benefits and protections").

There is also no dispute that the concept of gratitude has powerful common-sense and intuitive appeal. Perhaps nowhere is this sentiment more forcefully expressed than by Shakespeare's King Lear, who, after being revolted by his daughter's repeated failure to discharge her obligations, declared, "How sharper than a serpent's tooth it is to have a thankless child. . . . Ingratitude, thou marble-hearted fiend, more hideous when thou show'st thee in a child than the sea-monster."⁹ Early philosophers echoed this recognition of a child's duty to a parent.¹⁰ In addition, they invoked gratitude to explain the obligation of humans to God.¹¹

In some early examples, philosophers treated gratitude as a general duty, an unquestionable obligation. For example, British moralist John Balguy declared in 1734: "That a man ought to be grateful to his benefactors, may be looked upon as equivalent to a self-evident proposition."¹² David Hume was equally unambiguous, writing that "[o]f all crimes that human creatures are capable of committing, the most horrid and unnatural is ingratitude."¹³ Even Hobbes included gratitude in his fourth "Law of Nature" as necessary to inspire humans to engage in benevolent action.¹⁴

Later writings commonly expressed a more restrained view of gratitude. Nevertheless, moral philosophers have repeatedly cited gratitude's role in fostering mutual trust and beneficence among humans. For example, utilitarian philosophers find a prominent place for gratitude in their social vision.¹⁵ As explained recently by Terrance McConnell, acts of gratitude promote important values: "[T]hey acknowledge the moral importance of the benefactor's original act, thus rewarding merit; they promote respect, the kind of

9. WILLIAM SHAKESPEARE, KING LEAR, act 1, sc. 4.

10. See SIMMONS, *supra* note 6, at 164-65 (citing Socrates' reliance on "paradigmatic obligation of gratitude which children are thought to owe to their parents"). For an interesting contemporary look at loyalty and parent-child relationships, see Drucilla Cornell, *Loyalty and the Limits of Kantian Impartiality*, 107 HARV. L. REV. 2081, 2085 (1994) (book review) ("[T]he dominance of the view of the self as constituted only through its own auto-genesis is based on a profound erasure of the ethical significance of the mother.").

11. SIMMONS, *supra* note 6, at 165.

12. BALGUY, *supra* note 8, at 189. Another British moralist, Richard Price, lists gratitude as one of his six "heads of virtue." RICHARD PRICE, A REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS 152 (D.D. Raphael ed., Oxford University Press 1974) (1787). Price explained, "The consideration that we have received benefits, lays us under peculiar obligations to the persons who have conferred them; and renders that behavior, which to others may be innocent, to them criminal." *Id.*

13. DAVID HUME, A TREATISE OF HUMAN NATURE 466 (Selby Bigge ed., Oxford University Press 1967).

14. THOMAS HOBBS, LEVIATHAN 105 (Richard Tuck ed., Cambridge University Press 1991) (1651).

15. See TERRANCE MCCONNELL, GRATITUDE 119 (1993) (discussing "utilitarian basis of gratitude as a moral requirement").

respect that is earned; they further well-being and beneficence, and they foster good social relations."¹⁶ Gratitude therefore has a ready place in utilitarian moral systems, which are designed to ensure the greatest good for the greatest number of individuals.

Even those who do not follow a utilitarian approach embrace gratitude as an important component of ethical philosophy. For Immanuel Kant, gratitude "must be regarded especially as a sacred duty . . . whose violation can destroy the moral incentive for benevolence."¹⁷ Although Kant's full account of gratitude is complex,¹⁸ his starting point is straightforward. He writes, "[G]ratitude consists of honoring a person because of a kindness he has done us. The feeling connected with this recognition is respect for the benefactor (who puts one under obligation)."¹⁹

2. Loyalty

For the purposes of this Article, gratitude and loyalty are closely related, since a beneficiary can show gratitude to a benefactor through the expression of loyalty. Nevertheless, loyalty differs from gratitude because it is not necessarily reactive.²⁰ One can develop loyalty to an individual, a group, or a cause independent of any benefit received.²¹ Loyalty is generally the product of a complex, ongoing relationship between an individual and the object of that individual's loyalty.²² The sentiment is often generated over time through an intricate web of social interactions.²³ By contrast, gratitude is an obligation frequently generated by a single beneficial

16. MCCONNELL, *supra* note 15, at 134. Some utilitarians are, however, unwilling to classify gratitude as a duty or an obligation. See, e.g., JAN NARVESON, *MORALITY AND UTILITY* 177-78 (1967) (stating that holding gratitude to be obligation would "turn gift-giving into a sort of psychological exploitation").

17. KANT, *supra* note 8, at 249.

18. See MCCONNELL, *supra* note 15, at 163-72 (summarizing Kant's account of gratitude).

19. KANT, *supra* note 8, at 248-49. For a discussion of gratitude from a philosophical perspective separate from utilitarianism and Kantism, see MCCONNELL, *supra* note 15, at 172-78, which focuses on the ethics of virtue.

20. See JOHN LADD, *LOYALTY*, in 5 *ENCYCLOPEDIA OF PHILOSOPHY* 97, 98 (Paul Edwards ed., 1972). ("[L]oyalty may often be one-sided, although it need not be.")

21. See LADD, *supra* note 20, at 98 (discussing parameters of loyalty).

22. See LADD, *supra* note 20, at 98 (explaining special ties between members of loyalty relationship that "provide both the necessary and specific conditions" for such relationship to arise).

23. As Josiah Royce eloquently explained:

[A]nything which can link various people by fixed social ties may suggest to somebody the opportunity for a lifelong loyalty Wherever there are mothers and brethren, and kindred of any degree, and social organizations of any type; where men accept offices, or pledge their word, or as in the pursuit of science or of art, cooperate in the search.

JOSIAH ROYCE, *PHILOSOPHY OF LOYALTY* 54-55 (1908).

act or series of related acts.²⁴

In defining loyalty, philosophers generally agree that loyalty is a social concept.²⁵ The study of loyalty involves inquiry into "networks of personal and economic relationships—of friends and acquaintances, of families and nations, of corporations, universities, and religious communities."²⁶ Disagreement emerges, however, over the precise moral content of the sentiment.

Some philosophers question whether, as an abstract concept, loyalty has any special moral significance.²⁷ In particular, for utilitarians, the moral status of loyalty depends wholly on its consequences.²⁸ Acting loyally toward an individual, group, country, or institution can be wrong if the loyalty undermines a greater good to an equal or larger whole.²⁹

Other philosophers argue that loyalty has independent moral value. Some go so far as to identify loyalty as an ultimate good or "first principle."³⁰ At the beginning of the twentieth century, idealist philosopher Josiah Royce claimed with notable vigor that "[i]n loyalty, when loyalty is properly defined, is the fulfillment of the whole moral law."³¹ More recent work by George Fletcher avoids such extravagant claims, but nonetheless emphasizes loyalty as an essential social phenomenon:

When we take people as they are, we are led to understand and to appreciate the critical role of loyalty in buttressing theories of justice. Loyalty is a critical element in a theory of justice; for we invariably need some basis for group cohesion, for caring about others, for seeing them not as strangers who threaten our security but as partners in a common venture.³²

Fletcher makes an important point: whatever the precise role of loyalty in moral philosophy, its place in society is undeniable. Understanding loyalty is understanding "who we are in our friend-

24. One notable exception to this proposition is the gratitude said to emerge from the parent-child relationship, which is characterized by more than a related series of beneficial acts. See SIMMONS, *supra* note 6, at 164-65 (discussing gratitude in parent-child relationship).

25. See FLETCHER, *supra* note 5, at 25 (defining loyalty by reference to "[a]ctions of standing by one's friends, family, nation, or people"); ROYCE, *supra* note 23, at 20 (observing that "[l]oyalty is social"); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 371 (1992) ("Loyalty becomes a term of moral discourse when it involves social action.").

26. FLETCHER, *supra* note 5, at 3.

27. See LADD, *supra* note 20, at 98 (explaining that utilitarians and empiricists attribute no moral significance to loyalty).

28. See LADD, *supra* note 20, at 98 (describing utilitarian definition of loyalty).

29. Oldenquist, *supra* note 8, at 180.

30. McChrystal, *supra* note 25, at 370 (citing Oldenquist, *supra* note 8, at 180).

31. ROYCE, *supra* note 23, at 371.

32. FLETCHER, *supra* note 5, at 21.

ships, loves, family bonds, national ties, and religious devotion."³³ Fletcher brings new vigor to the social underpinnings of loyalty, arguing that abandoning loyalty forces individuals both to ignore ties with other people and to sacrifice the opportunity to honor themselves and others by acknowledging the unique sources of their own identity.³⁴ Indeed, the works of other contemporary philosophers also show that many human interactions would not happen without trust in others to act loyally.³⁵

B. *The Works of Sociology*

When exploring obligations between recipient and benefactor, sociologists do not often press into service the terms "loyalty" and "gratitude."³⁶ Instead, they use words such as "reciprocity," "exchange," "friendship," and "balance" to analyze the recipients of significant gains. In addition, the relevant sociological work often focuses more on descriptive analysis than on the aspirational standards articulated by moral philosophers. Despite these differences in rhetoric and approach, moral philosophy and sociology share a common understanding: a force exists in organized society that motivates recipients to acknowledge a benefactor's conferral of benefit.³⁷

Sociological theory exploring this phenomenon starts with the notion of interactions between persons as an exchange of material or immaterial goods, analogous to a *quid pro quo* in contract law.³⁸ In

33. FLETCHER, *supra* note 5, at 175; see also LADD, *supra* note 20, at 98 (stressing that loyalty relationships are necessary for social transactions).

34. FLETCHER, *supra* note 5, at 16, 87; see also Christina Whitman, *Whose Loyalties?*, 91 MICH. L. REV. 1266, 1267 (1993) (reviewing critique of impartial ethical systems in FLETCHER, *supra* note 5).

35. See, e.g., MARCIA BARON, *THE MORAL STATUS OF LOYALTY* 10-11 (1984) (identifying examples of friends who expect loyalty in form of keeping confidences and corporations who support employees on expectation that employees will not divulge trade secrets).

36. A notable exception is George Simmel, whose work includes an analysis of "faithfulness" and "gratitude." See George Simmel, *Faithfulness and Gratitude*, in *THE SOCIOLOGY OF GEORGE SIMMEL* 377, 379-95 (Kurt H. Wolff ed. & trans., 1950) (analyzing sociological importance of faithfulness and gratitude).

37. As contrasted to loyalty, gratitude is more closely tied to the process of reacting to the act of another. See PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 94 (1967) (stating that social exchange engenders "feelings of personal obligation, gratitude, and trust"). Gratitude thus bears a closer kinship with sociological concepts of exchange. Indeed, social scientists have often made explicit the connection between social exchange and the concept of gratitude. See MARCEL MAUSS, *THE GIFT* 63 (1967) ("The gift not yet repaid debases the man who accepted it, particularly if he did so without thought of return."); MICHAEL E. ROLOFF, *INTERPERSONAL COMMUNICATION—THE SOCIAL EXCHANGE APPROACH* 17 (1981) (observing that social dealings "create feelings of personal obligation, gratitude, and trust").

38. See, e.g., BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 46-49 (1976) (describing mutuality and repayment of services as bases of social cohesion); ROLOFF, *supra* note 37, at 14 (explaining how social exchange has been said to involve "protraction" and "reac-

the words of one sociologist: "[T]he principle of reciprocity implies a system of interdependent parts engaged in mutual interchanges."³⁹ The work of George Simmel treats this concept as fundamental; according to Simmel, social equilibrium and cohesion could not exist without "the reciprocity of service and return service."⁴⁰ Simmel posited that "all contacts among men rest on the schema of giving and returning the equivalence."⁴¹

This idea of reciprocity has clear limitations. Simplistically applied, the concept fails to account for such social phenomena as exploitation of one group of individuals by another and instances where culture prompts an individual to engage in one-sided giving.⁴² Similarly, the concept does not explain why individuals occasionally refuse benefits or respond to a benefit with resentment rather than gratitude.⁴³ Nor does the notion necessarily provide an adequate framework for analyzing instances where benefits are obtained through coercion.⁴⁴ Finally, anthropologist Annette Weiner has

tion"—with one person giving or denying "resource to another (protraction) which elicits a certain response from the other person (reaction)"; George Homans, *Social Behavior as Exchange*, 63 AM. J. OF SOC. 597, 597 (1958) (describing exchange theory).

Richard Emerson has explained that social exchange theory in sociology differs from the idea of a market in economic analysis in that social exchange theory begins with the concept of a "longitudinal exchange relation" between two specific actors. Richard M. Emerson, *Toward a Theory of Value in Social Exchange*, in *SOCIAL EXCHANGE THEORY* (Karen S. Cook ed., 1987). Some social science work divides the study of exchange into two categories: "business-like exchange" and "reciprocal gift." Joseph M. Perillo, *Exchange, Contract and Law in the Stone Age*, 31 ARIZ. L. REV. 18, 24-25 (1989).

39. Alvin W. Gouldner, *Reciprocity and Autonomy in Functional Theory*, in *SYMPOSIUM ON SOCIOLOGICAL THEORY* 249 (Llewellyn Gross ed., 1959).

40. Simmel, *supra* note 36, at 387.

41. Simmel, *supra* note 36, at 387; see also Claude Levi-Strauss, *The Principle of Reciprocity* (1949), reprinted in *SOCIOLOGICAL THEORY* 61-70 (Lewis A. Coser & Bernard Rosenberg eds., 1975) (describing exchange of reciprocal gifts in primitive societies as representing all aspects of society, reflecting "social and religious, magic and economic, utilitarian and sentimental, legal and moral significance").

42. See Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161, 164-67 (1960) (describing "'exploitation' problem" and social "prescriptions of one-sided or unconditional generosity," such as *noblesse oblige* and Roman notion of clemency).

One can, of course, fit unconditional gifts into an exchange analysis. See LUDWIG VON MISES, *HUMAN ACTION* 196 (1949) (explaining how making one-sided gifts is "altruistic exchange," whereby "donor acquires the satisfaction which the better condition of the receiver gives to him"). See generally Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 173-79 (1988-1989) (surveying social science literature that recognizes and analyzes empirical evidence of altruistic social behavior).

43. See Gouldner, *supra* note 42, at 164-67 (explaining problems of reciprocity theory).

44. See BLAU, *supra* note 37, at 91. In describing such coercion, Peter Blau explained:

An individual may give another money because the other stands in front of him with a gun in a holdup. While this could be conceptualized as an exchange of money for his life, it seems preferable to exclude the rule of physical coercion from the range of social conduct encompassed by the term "exchange."

Id.; see also Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992) (analyzing how line

recently criticized reciprocity theory for failing to account for the powerful attachment of people to certain precious treasures, which people seek to hoard rather than exchange.⁴⁵

Even for those who are quick to emphasize the limitations in the reciprocity principle, social exchange stands as a pervasive social norm.⁴⁶ According to one sociologist writing in the 1950s and 1960s, "a norm of reciprocity, in its universal form, makes two interrelated, minimal demands: (1) people should help those who have helped them, and (2) people should not injure those who have helped them."⁴⁷ Under this view, the reciprocity standard promotes stability in social systems by perpetuating a stream of exchanges and may even impel social interaction by assuring those initiating an exchange that recipients of benefits are obliged to repay them.⁴⁸

In analyzing gift-giving institutions in various societies, several social scientists have reinforced these principles.⁴⁹ Marcel Mauss, in particular, has identified social rituals marked by the apparently voluntary, generous, and spontaneous presentation of gifts.⁵⁰ Close study revealed, however, that these gift-giving rituals were in fact driven by obligation and economic self-interest.⁵¹ Despite the initial appearance to the contrary, gift-giving was therefore part of a reciprocity system. Through what Mauss described as the "three obligations"—giving, receiving, and repaying—gift-giving performed an important function of resource exchange.⁵² Mauss's work does

between gift and exchange is blurred).

45. ANNETTE B. WEINER, *INALIENABLE POSSESSIONS: THE PARADOX OF KEEPING-WHILE-GIVING* 5-6 (1992) ("Searching for the kinds of possessions that people try to keep out of circulation is far more theoretically meaningful than assuming that exchange simply involves the reciprocity of gift giving.").

46. Although assailing classic exchange theory as superficial, Annette Weiner even accepts exchange as a premise within which people try to accommodate their desire not to let go of certain "inalienable possessions." *Id.* at 40. In her words, "all exchange is predicated on a universal paradox—how to *keep-while-giving*." *Id.* at 5.

47. Gouldner, *supra* note 43, at 171; *see also* BLAU, *supra* note 37, at 92 (citing "fundamental and ubiquitous norm of reciprocity").

48. Gouldner, *supra* note 43, at 174-77; *cf.* BLAU, *supra* note 37, at 92 (positing that norm of reciprocity is not fundamental starting mechanism of social intercourse; rather, reciprocity merely "reinforces and stabilizes tendencies inherent in the character of social exchange itself").

49. *See* MALINOWSKI, *supra* note 38, at 172-74 (terming reciprocity "the basis of social structure"); MAUSS, *supra* note 37, at 13 (discussing obligations both to receive and to give).

50. *See* MAUSS, *supra* note 37, at 1-7 (discussing gift-giving in various social situations). Mauss framed much of his analysis by reference to the "potlatch," a social institution often identified with the giving binges occasionally indulged in by the Kwakiutl Indians of the Pacific Northwest. *Id.*

51. MAUSS, *supra* note 37, at 5-7. *See generally* Rose, *supra* note 44, at 298-99 (summarizing anthropological literature analyzing potlatch).

52. MAUSS, *supra* note 37, at 39; *see also id.* at 1 (characterizing gift-giving as "nothing less than the division of labour itself"). For a more recent work on this subject, *see generally* Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS*:

not refute the possibility of a true gift or an altruistic act within society.⁵³ Nor does it account for symbolic possessions—"imbued with the intrinsic and ineffable identities of their owners"—which are so difficult to give away.⁵⁴ Nevertheless, his analysis helps to document the pervasiveness and importance of reciprocity in social traditions.⁵⁵

Related to Mauss's work is another particularly pertinent field of scholarship: the study of friendships. Using principles of social exchange, friendship scholars have observed that reciprocity does not rest simply on the symmetry of give and take between two individuals. Rather, reciprocity can be rooted in the creation of a relation among individuals so that the relation itself, not the mere receipt of a benefit, generates the obligation to reciprocate for the benefit.⁵⁶

Drawing from friendship studies, one can argue that the obligation to reciprocate for a benefit is a general duty created by membership in a social system. According to one friendship study, the social system, like a friendship, embodies "an intricate web of reciprocal dispositions and attitudes, practical, emotional, and cognitive."⁵⁷ Just as a friendship is a relationship, so too is membership in society. As a member of society, one does not incur an obligation to reciprocate that is tied to a particular benefit.⁵⁸ Nor can one discharge one's

COMMODITIES IN CULTURAL PERSPECTIVE 3, 10-12 (1986) (criticizing tendency of some scholars to distinguish sharply between gift-giving and market exchange).

53. See Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFFAIRS 343, 344 (1972) (analyzing unilateral transactions, and taking issue with notion that "allocation of goods and services is not accomplished entirely by exchange"); Baron, *supra* note 42, at 173-79 (reviewing empirical studies of altruism in organ donation).

54. WEINER, *supra* note 45, at 6. Annette Weiner calls these possessions "inalienable." She argues that ideally, owners keep these inalienable possessions "within the closed context of family, descent group, or dynasty." *Id.* The loss of these possessions, Weiner maintains, "diminishes the self and by extension, the group to which the person belongs." *Id.*

55. See Rose, *supra* note 44, at 299 (observing that in their discussion of "gift exchanges," Mauss and other anthropologists do "not make the unilateral gift sound like a very robust" concept); see also Thomas D. Barton, *Expectations, Institutions, and Meanings*, 74 CAL. L. REV. 1805, 1811 (1989) (book review) (describing gift exchange patterns that are "not only institutionalized, but also highly meaningful to the culture").

56. See Keith E. Davis & Michael J. Todd, *Assessing Friendship: Prototypes, Paradigm Cases and Relationship Description*, in UNDERSTANDING PERSONAL RELATIONSHIPS 19 (Steve Duck & Daniel Perlman eds., 1985) (describing archetypal case of friendship as "relationship which is mutual and reciprocal," in which participants are "inclined to provide each other with assistance and support, and . . . to count on each other in times of need, trouble, or personal distress"); cf. FLETCHER, *supra* note 5, at 7 (pointing out that, like friendship, "the question of loyalty does not arise in the abstract but only in the context of a particular relationship").

57. JOSEPH RAZ, *THE AUTHORITY OF LAW* 257 (1979). Professor Raz uses the analogy of friendship to explore the foundation, if any, of any obligation of humans to obey the law.

58. Cf. GRAHAM A. ALLAN, *FRIENDSHIP: DEVELOPING A SOCIOLOGICAL PERSPECTIVE* 20-21 (1989) (describing how within friendship, equivalence is "not calculated precisely on the basis of what each side consumes," but is instead "achieved by a more rough and ready calculation, which serves to indicate that each side is willing to give to the other, while nonetheless ensuring

duty through a particular act. Instead, the obligation springs from the individual's relationship with society, and can never truly be shed so long as the relationship continues.⁵⁹ Moreover, the process of exchange strengthens the relationship, generating trust and further obligation.⁶⁰

Although this Article draws primarily on an analysis of direct reciprocity between specific individuals, the membership concept underlying friendship study is also instructive. Friendship study helps us appreciate the prominence of exchange in creating and maintaining an individual's membership in social groups. As applied to a federal judge, friendship analysis can drive home the social importance of a judge making a return gesture toward the entities responsible for the judgeship.

Alternatively, friendship study recognizes that the relationship among friends is often more important than the direct return of a benefit.⁶¹ Thus, friendship analysis also sheds light on those instances where membership in a group may excuse a federal judge from the obligation of reciprocity. Before further exploring these lessons from the sociological literature, however, I first undertake a more searching review of the dilemma posed by a federal judge's duty of impartiality.

II. THE PROBLEM FOR FEDERAL JUDGES

The principles outlined in the philosophical and sociological literature illustrate the same message for the federal judge: when an individual accepts a job as coveted as a federal judgeship, society usually expects that individual to show appreciation to the entity who made the job possible. From this starting point, a question arises whether the judge can express this appreciation without sacrificing

that neither is in the other's debt"); Gouldner, *supra* note 42, at 175 (arguing that because norm of reciprocity acts as agent of social cohesion, there is "ambiguity as to whether indebtedness has been repaid and, over time, [this ambiguity] generates uncertainty about who is in whose debt").

59. Gouldner, *supra* note 42, at 175. This approach is consistent with a theory of indirect exchanges. As described by Peter Blau:

[C]onformity to social pressures tends to entail indirect exchanges. Men make charitable donations, not to earn the gratitude of the recipients, whom they never see, but to earn the approval of their peers who participate in the philanthropic campaign. Donations are exchanged for social approval, though the recipients of the donations and the suppliers of the approval are not identical, and the clarification of the connections between the two requires an analysis of the complex structures of indirect exchange

BLAU, *supra* note 37, at 92.

60. See BLAU, *supra* note 37, at 94 (observing how social exchanges build trust because exchanges continue and slowly expand).

61. ALLAN, *supra* note 58, at 20-21 (noting that parties in friendships are more concerned with mutual assistance rather than tracking benefits and debts).

the duty of impartiality that is essential to the job. There are several potential "solutions" for coping with this question. The judge may avoid the question altogether because no case before the judge ever involves the persons or entities to whom the judge is obligated. It is also possible that gratitude and loyalty do not require acts that compromise the impartiality duty. Alternatively, the judge may not worry about gratitude and loyalty because they are "trumped" by the superior obligation of impartiality.

To analyze these issues, this Part surveys the duty of impartiality imposed on federal judges, and compares this duty with the general expectations of gratitude and loyalty. Armed with this expanded understanding, I then identify where loyalty, gratitude, and impartiality may clash.

A. *The Duty of Impartiality*

The need for an independent, impartial federal judiciary is firmly entrenched in our historical tradition. Indeed, the Declaration of Independence complains that the King of England "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."⁶² The Federalist Papers continued this theme, heralding the proposed life-tenure provision in the Constitution as "certainly one of the most valuable of the modern improvements in the practice of government."⁶³ Alexander Hamilton characterized life tenure for judges as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."⁶⁴ Other structural components of our federal constitutional scheme, such as the provision for diversity jurisdiction, reflect the framers' concern with promoting judicial independence and impartiality.⁶⁵

62. DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). Professors Redish and Marshall document the right to an independent adjudicator as a "crucial" element of English common law and the law of the colonies in America. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 479-81 (1986).

63. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

64. *Id.*

65. U.S. CONST. art. III, § 2 ("[J]udicial Power shall extend to . . . Controversies . . . between Citizens of different States."). Describing this provision, Chief Justice Marshall explained:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehension of suitors, that it established national tribunals for the decision of controversies . . . between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); see also U.S. CONST. art.

Impartiality continues as part of the "received wisdom" today.⁶⁶ Supreme Court opinions,⁶⁷ federal statutes,⁶⁸ and the Code of Judicial Conduct for United States Judges⁶⁹ all admonish judges to be impartial and detached, to hear both sides of the controversy and to judge their cases fairly and independently. This duty of impartiality is often trotted proudly before the American public in confirmation hearings, where nominees routinely refuse to answer detailed questions on issues likely to come before them once they are on the bench.⁷⁰

III, § 1 (proclaiming that judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). Alexander Hamilton succinctly explained the connection between this salary provision and judicial independence: "a power over a man's subsistence amounts to a power over his will." *THE FEDERALIST* No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

66. Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1878, 1881-82 (1988).

67. See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988) (explaining that judges have ongoing duty "to take steps necessary to maintain public confidence in the impartiality of the judiciary"); *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (noting that litigant is entitled to have neutral and detached judge hear case); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that Fourteenth Amendment Due Process Clause is violated where individual's liberty or property is subjected "to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case").

68. See 28 U.S.C. § 144 (1988) (detailing procedure for challenging bias or prejudice of judge); *id.* § 455 (providing for disqualification of justice, judge, or magistrate where her "impartiality might reasonably be questioned").

69. See CODE OF CONDUCT FOR UNITED STATES JUDGES canon 3(C) (amended 1992) [hereinafter CODE OF CONDUCT] (setting standard to govern federal judges, adopted by Judicial Conference of United States). Canon 3(C) provides in relevant part:

(1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . (c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding; . . . (e) the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

Id.

70. See, e.g., Neil A. Lewis, *Ginsburg Promises Judicial Restraint if She Joins Court*, N.Y. TIMES, July 21, 1993, at A1. Then-judge Ruth Bader Ginsburg informed the Senate Judiciary Committee that:

It would be wrong for me to say or preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.

Id.; see also Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 75 (1991) (noting routine refusal of Supreme Court nominees to answer certain questions on ground of "professional norms of

The Supreme Court has found protection in the Constitution's Fourteenth Amendment for the right of individual litigants to an independent adjudicator.⁷¹ Although federal law contains no precise definition of what it means for a judge to be impartial, the relevant standards emphasize disengagement and dispassion.⁷² Anything giving the judge a "personal" connection with a case is seen as a threat to fairness.⁷³ Indeed, the United States Supreme Court has prohibited adjudicators from hearing cases in which they have become personally embattled with a litigant,⁷⁴ possess a personal stake in the result,⁷⁵ or were personally entangled in the litigated incidents.⁷⁶ Federal law also suggests that the standard for impartiality is quite strict. Repeatedly, the Supreme Court has ruled that actual partiality need not be shown for disqualification—potential bias or the appearance of partiality is enough.⁷⁷

Despite the broad rhetoric of the legal standards and traditions, established judicial practices fall substantially short of the ideal of

impartiality").

71. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (finding that due process requires "impartial and disinterested tribunal in both civil and criminal cases"); *Tumey*, 273 U.S. at 523 (asserting due process protections against adjudicator with "direct, personal, substantial, pecuniary interest" in outcome of case); see also U.S. CONST. amend. VI (providing right to trial by "impartial jury" in criminal cases). But cf. *Redish & Marshall*, *supra* note 62, at 475-79 (suggesting that Supreme Court's due process jurisprudence has paid insufficient attention to necessity of independent adjudicator).

72. See *Resnik*, *supra* note 66, at 1882 (explaining that under classical view of judicial role, "[d]isengagement and dispassion supposedly enable judges to decide cases fairly and impartially" (quoting Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982))); see also *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (opinion of Brennan, J.) (emphasizing importance of Article III's life tenure provision to promote "judicial individualism" by insulating judges from improper influences from colleagues and other branches of government).

73. For example, the *Code of Conduct for United States Judges* calls for disqualification when the judge has a "personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." CODE OF CONDUCT, *supra* note 69, canon 3C(1)(a) (emphasis added); see also *supra* note 69 (reporting text of Canon 3C(1)(a)).

74. See *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (holding that judge may not adjudicate defendant's criminal contempt resulting from argument with same judge).

75. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986) (holding that judge may not decide legal issue that will stand as precedent in another case in which judge is litigant); *Ward v. Monroeville*, 409 U.S. 57, 59, 61-62 (1972) (finding that mayor cannot adjudicate criminal proceedings where fines are added by mayor to village revenues).

76. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (stating that welfare official reviewing termination of benefits must not have been involved in initial decision to terminate); *In Re Murchison*, 349 U.S. 133, 138-39 (1955) (holding that judge who acted as grand jury may not adjudicate resulting contempt charges).

77. See *Murchison*, 349 U.S. at 136 (noting that "justice must satisfy the appearance of justice" (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding that where judge's financial interest is at issue, disqualification is appropriate where there exists "possible temptation to the average man as a judge"); see also *Lavoie*, 475 U.S. at 822 (endorsing *Tumey* standard).

absolute disinterest, disengagement, and impartiality.⁷⁸ Our legal traditions, however, do not explicitly acknowledge many "exceptions" to the impartiality requirement.⁷⁹ Only careful scrutiny reveals that accepted practices fall short of the pristine model found in federal case law, statutes, and codes. Such practices include allowing judges to hear cases while bearing demonstrable bias against a party's counsel,⁸⁰ permitting judges to rule on disqualification motions filed against them,⁸¹ empowering judges to find contempt violations of their own orders,⁸² and authorizing judges to reject potentially meritorious impartiality challenges because the challenges are stale or waived.⁸³

The discrepancy between theory and practice has done little to mitigate the articulated premise that a judge's impartiality obligation is unqualified.⁸⁴ In addition, other trends in the law highlight

78. See Redish & Marshall, *supra* note 62, at 492 (positing that "[r]eality forces us to tolerate some bias").

79. See Resnik, *supra* note 66, at 1887-1903 (reviewing various examples of gap between "rhetoric and reality" in legal standards governing impartiality). The rule of necessity, which allows an interested judge to take part in a decision if there is no other forum for adjudicating the dispute, is a prominent example of an explicit exception to the impartiality rule. See *United States v. Will*, 449 U.S. 200, 213 (1980) (stating that "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise" (quoting FREDERICK POLLACK, *A FIRST BOOK OF JURISPRUDENCE* 270 (6th ed. 1929))). One can argue, however, that the courts have been less than candid in dealing with this issue. See Redish & Marshall, *supra* note 62, at 492 (criticizing *Will*'s misleading use of term "necessity" in explaining rule of necessity); Resnik, *supra* note 66, at 1892-96 (listing alternative adjudicators in response to federal court claims under rule of necessity); see also CODE OF CONDUCT, *supra* note 69, canon 3C(4) (allowing judge to continue to adjudicate matters in which judge has financial interest where judge has devoted substantial time to matter before appearance or discovery of interest so long as judge divests any personal interest).

80. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 238 (1987).

81. See *id.* at 242 (describing as "bizarre" rule that calls on allegedly biased judge to decide adequacy of bias proof); Resnik, *supra* note 66, at 1887 (describing federal disqualification statutes, where "parties challenging judges make applications for disqualification to the very judges sought to be disqualified").

82. See *United States v. United Mine Workers*, 330 U.S. 258 (1947) (upholding lower court's authority to impose coercive contempt fines); see also *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2560-61 (1994) (explaining that where court adjudicates contempt committed beyond its presence, "risk of erroneous deprivation from the lack of a neutral factfinder may be substantial").

83. Professor Judith Resnik has noted that some courts have barred attempts to obtain disqualification under 28 U.S.C. § 144 as untimely. Resnik, *supra* note 66, at 1897 n.59 (collecting cases). Professor Resnik also cites certain principles of federal habeas corpus litigation that prevent a federal judge from reaching the merits of impartiality challenges. *Id.* at 1897.

84. Resnik, *supra* note 66, at 1922 (positing that those aspiring to craft new rules of judicial conduct do not require impartiality in absolute terms, but continue to speak as though absolute impartiality is required); see also Leubsdorf, *supra* note 80, at 245 (describing how lawyers and legislators too frequently proclaim "the importance of impartiality without thinking about what

impartiality's importance. Modern legal theorists, for example, have posited that independent adjudication is a core component of procedural due process.⁸⁵ Under this view, procedural safeguards such as notice, hearing, and legal counsel have little or no real instrumental value if the decisionmaker deviates from impartiality standards.⁸⁶

Supplementing this legal literature are forces that drive home the moral necessity of impartiality. Indeed, modern society has traditionally held impartiality and the related concept of equality as benchmarks.⁸⁷ As a general matter, contemporary moral principles require specific justification for giving someone extraordinary treatment or special consideration.⁸⁸

For these reasons, a judge embarking on a career in the federal system proceeds with heavy baggage, legal and otherwise, admonishing the judge to maintain an unwavering standard of impartiality. This baggage (at least initially) appears powerfully in tension with the obligations of gratitude and loyalty the judge may also bear.

B. What Do Gratitude, Loyalty, and Social Exchange Require?

1. General principles

Gratitude and loyalty require an individual to be partial. Indeed,

it might mean"). Judge Jerome N. Frank offers another perspective:

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.

In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943).

85. Redish & Marshall, *supra* note 62, at 476; see also Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899 (1986) (arguing that equality demands that "techniques for making collective decisions not imply that one person's or group's contribution (facts, interpretation, policy argument, etc.) is entitled to greater respect than another's merely because of the identity of the person or group"). See generally Jon Graydon, *Authority of the Trial Judge, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 GEO. L.J. 1338, 1338-39 (1993) (reviewing federal court cases that discuss due process right to judge who is free from bias).

86. Redish & Marshall, *supra* note 62, at 476.

87. Equality and impartiality are, of course, different notions. A judge acting free from bias or other partiality can still treat people unequally without adequate grounds. Both concepts have their own unique complexities. See Roger Crisp, *First Among Equals*, LONDON TIMES, June 24, 1994, (Literary Supp.) at 12 (reviewing LARRY S. TEMPKIN, *INEQUALITY* (1994), which discusses complexity of evaluating inequality in society). Nevertheless, impartiality shares strong ties with the admonition that similarly situated persons must be treated equally.

88. See MCCONNELL, *supra* note 15, at viii (observing that "in graduate school, it was a virtual dogma that impartiality is a mark of the moral"); Marcia Baron, *Impartiality and Friendship*, 101 ETHICS 836, 837-38 (1991) (describing moral philosophy's traditional ideal that under certain circumstances impartiality requires that persons not be treated as "special"); see also JOHN RAWLS, *A THEORY OF JUSTICE* 190 (1971) (averring that moral judgments should be impartial).

they do not arise in a vacuum, but only in the context of human relationships.⁸⁹ These moral sentiments require one to identify with the object of loyalty or gratitude, rather than others who may compete for equal attention.⁹⁰ Thus, inequality is a touchstone for loyalty and gratitude: outsiders cannot demand the same treatment as those claiming loyal attachment or grateful appreciation.⁹¹

Translated to sociology's language, the point is the same: reciprocity or exchange must have an object. Exchange requires an individual to single out the recipient of a reciprocal act.⁹² It is for this reason that social exchange engenders "feelings of personal obligation, gratitude, and trust."⁹³

The founding premises of gratitude, loyalty, and reciprocity thus stand at opposite poles from impartiality. Nevertheless, it does not necessarily follow that an individual can never accommodate the commands of each obligation simultaneously. To begin, significant showings of gratitude, loyalty, and reciprocal acts are not required for every type of benefit conferred.⁹⁴ For small gifts and other minimal benefits, one can dispel the obligations of gratitude and exchange with a gracious "thank you."⁹⁵ Nor do binding pangs of loyalty emerge from such social niceties. For benefits of greater value, however, a recipient's obligation to reciprocate and demonstrate loyalty and gratitude becomes a weightier, more "moral" duty.⁹⁶ A benefit as valuable and prestigious as a federal judgeship would seem to fall into this category. For this reason, loyalty, gratitude, and reciprocity stand as threats to a judge's impartiality.

89. See LADD, *supra* note 20, at 97 (commenting that relationship or tie is basis for loyalty).

90. See BARON, *supra* note 35, at 6 (arguing that in some instances there is link between loyalty to one group and discrimination against those not members of that group); FLETCHER, *supra* note 5, at 7 (stating that loyalties receive "partialities" because relationships create them and "in the realm of loyalty, inequality reigns"); LADD, *supra* note 20, at 97 (arguing that one can only be loyal to specific people, not to humanity in general or other broad principles); MCCONNELL, *supra* note 15, at 115 (commenting that gratitude is problematic for impartialists).

91. See FLETCHER, *supra* note 5, at 8 (maintaining that loyalty demands partiality); MCCONNELL, *supra* note 15, at 121-23 (discussing gratitude's effect on impartialists). *But cf.* BARON, *supra* note 35, at 26-27 (discussing circumstances under which "loyalty" can be considered "impartial").

92. *Cf.* BLAU, *supra* note 37, at 92 (arguing that even though return exchange sometimes is not directed at precise entity who initiated exchange, return exchange still *does* have object).

93. BLAU, *supra* note 37, at 94; *see also* ROLOFF, *supra* note 37, at 16 (stating, in context of discussing Blau's work, that social exchanges cause certain feelings including "personal obligation, gratitude, and trust").

94. *Cf.* MCCONNELL, *supra* note 15, at 45 (suggesting that failure to respond properly to large benefits may amount to disrespect for another, but this is not always true with smaller benefits).

95. MCCONNELL, *supra* note 15, at 4, 45.

96. MCCONNELL, *supra* note 15, at 4 (arguing that in cases where significant benefits are received, morality may require gratitude).

Once a benefit is significant enough to trigger a "moral" duty, philosophical principles and social norms do not always require the return of an equally valuable benefit.⁹⁷ As George Simmel has observed, equality is often impossible, as a *theoretical* matter, because a true gift is an "irredeemable obligation."⁹⁸ Gratitude and loyalty cannot always serve as equal substitutes because they do not have the spontaneity of the benefactor's initial gesture.⁹⁹ Moreover, as is the case with a federal judgeship, it is often impossible as a *practical* matter to provide a truly "equal" benefit to the benefactor.¹⁰⁰ Nor does an "equal" benefit necessarily take into account the needs of the benefactor, an idea frequently cited as important to discharging a debt of gratitude.¹⁰¹

Significantly, certain types of roughly "equal" return benefits may also be inappropriate. Take, for example, a federal judge who overtly treats a nomination and confirmation as a gain that contractually obligates a return in the form of money or other tangible assets. Such crass behavior is so clearly at odds with the structure of our constitutional scheme as to fail as an expression of gratitude and loyalty.¹⁰² A federal judge thus does not incur any social obligation to return anything resembling an "equal" benefit to the entities most responsible for the job. The question thus becomes: What return obligations does a judge incur?

One possible answer distinguishes between duties to *feel* a certain way and duties to *take certain actions* in acknowledging receipt of the judgeship. As one philosopher explained: "One can be 'ungrateful' if one fails to *feel* certain things like feelings of gratitude, or one can be 'ungrateful' if one fails in certain *outward* performances (even if I

97. See HENRY SIDGWICK, *THE METHODS OF ETHICS* 260-61 (7th ed. 1962) (observing lack of "clear accepted principle" for identifying "equal return" for benefit). Sociologist Alvin Gouldner comments that:

Whether in fact there is a reciprocity norm specifically requiring that returns for benefits received be *equivalent* is an empirical question. So, too, is the problem of whether such a norm is part of or distinct from a more general norm which simply requires that one return some (unspecified) benefits to benefactors.

Gouldner, *supra* note 42, at 171.

98. Simmel, *supra* note 36, at 393.

99. Simmel, *supra* note 36, at 393.

100. See MCCONNELL, *supra* note 15, at 49 (arguing that requirement of equal return may make some debts of gratitude impossible to repay).

101. See MCCONNELL, *supra* note 15, at 50 (citing needs of benefactor in defining duty of gratitude); SIDGWICK, *supra* note 97, at 260-61 (arguing that where benefactor demands return or obviously needs it, it is ungrateful not to make "equal return"); Joel Feinberg, *Duties, Rights, & Claims*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 130, 134 (1980) (suggesting that it is more appropriate to wait until benefactor "needs help" than to rush to "any sort of *payment*").

102. Cf. MCCONNELL, *supra* note 15, at 50 (pointing out that "[o]bsessive concern with making an equal return may show the benefactor that his gift has 'misfired'").

feel grateful, my failure to express this gratitude somehow through action may earn me a charge of 'ingratitude')."¹⁰³

Analyzing the dichotomy between feeling and action in light of a judge's impartiality obligations, one might argue that the duty of impartiality forgives the judge from making "outward performances." Accordingly, the judge bears only the obligation to harbor sincere appreciation for her benefactors. This distinction tracks legal doctrine, which vehemently condemns outward manifestations of possible partiality by judges.¹⁰⁴ In fact, both statutory and case law show a marked preoccupation with avoiding a *public perception* of bias.¹⁰⁵ Perhaps society can accommodate the doctrine's concern with avoiding the appearance of bias by allowing the judge to forego the obligation of making visible expressions of gratitude and loyalty.

Unfortunately, this argument is flawed because it assumes that "feelings" of gratitude and loyalty make no mark on a judge's decisionmaking. As is probed more deeply in Part IV, subtle (and sometimes unconscious) social and psychological forces have an important influence on judicial decisionmaking.¹⁰⁶ If the duty of impartiality is to have meaning, it should not exempt from its proscription matters capable of creating significant prejudice in decisionmaking. The dichotomy between feeling and action thus does not provide an easy solution to the impartiality puzzle.

2. *Impartiality as the trump card*

To this point in the analysis, general moral principles have not

103. SIMMONS, *supra* note 6, at 166; see also Roslyn Weiss, *The Moral and Social Dimension of Gratitude*, 23 SO. J. PHIL. 491, 491 (1985) (positing that moral component of gratitude requires only grateful feeling toward one's benefactor, and obligation to express gratitude through action is merely social obligation).

104. See *supra* notes 62-77 and accompanying text. See generally Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 663 (1985) (arguing that fundamental purpose of judicial disqualification is to ensure confidence in judicial integrity).

105. See, e.g., *Liteky v. United States*, 114 S. Ct. 1147, 1154 (1994) (arguing that key to judicial disqualification statute, 28 U.S.C. § 455(a), is appearance of bias); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988) (discussing judges' obligation to act in ways that maintain public confidence in judiciary's impartiality); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1321 (2d Cir. 1988) (setting standard that "[w]henver any reasonable basis to doubt a judge's impartiality exists, this public trust demands that we act swiftly and decisively"), *cert. denied*, 490 U.S. 1102 (1989); *Bradshaw v. McCotter*, 785 F.2d 1327, 1329 (5th Cir. 1986) (suggesting that judge should have disqualified himself because public could view judge's acts as lacking impartiality); see also Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1050-51 (1993) (urging increased legislative concern for judicial relationships or interests that produce appearance of partiality).

106. See *infra* notes 226-42 and accompanying text (discussing impact of various factors upon judicial decisions). See generally Leubsdorf, *supra* note 80, at 247-49 (describing belief that emotional and other unconscious drives influence decisionmaking).

resolved the impartiality dilemma for federal judges. Another possible solution to the judge's conflict suggests that impartiality may be a "superior" or more weighty obligation than gratitude or loyalty.¹⁰⁷ If so, the obligation to act impartially may preempt loyalty and gratitude, eliminating the judge's obligation to be grateful or loyal to the benefactor.¹⁰⁸ Under the rubric of role morality, a judge assuming the judicial role could possibly dispense with the otherwise applicable moral standards of loyalty and gratitude.¹⁰⁹ The work of a number of philosophers and sociologists affirm this conclusion.¹¹⁰

Philosophers are engaged in a debate between "impartialists," who believe that impartiality is essential to the moral justification for an action, and "personalists," who deny that morality requires a person to vindicate all actions by reference to impartiality.¹¹¹ In their charge against impartialists, personalists often draw on the importance of personal relationships, friendship, and love.¹¹²

The impartialist presumably finds the dilemma for a federal judge easy to resolve, with a clear moral victory for the duty of impartiality. More interestingly, those who take a more personalist orientation agree with this conclusion; in unequivocal, albeit somewhat conclusory statements, many challengers to impartiality theory cite judicial

107. See MCCONNELL, *supra* note 15, at 117 (describing impartialist doctrine disallowing favored treatment only "because of personal preference").

108. See *infra* notes 134-36 and accompanying text (suggesting possibility for judge to navigate out of dilemma in some situations and repay any debt of gratitude merely by being impartial).

109. See, e.g., Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER* 25 (David Luban ed., 1983) (describing role morality as "explaining that the role constitutes a sufficient reason for doing or not doing something that would otherwise be objectionable"). See generally JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 21 (1976) (discussing interplay between role and self for judges). Noonan comments that:

It may be that the role becomes a mask whenever the purpose of serving others is forgotten; the judge who has forgotten the purpose of justice is almost surely masked.

Roles are as necessary for the display of human love as clothes for the display of human beauty. The naked individual rises to the communal expectations invested in the role—black-robed on a bench, he is different from the bureaucrat behind a desk. No more than clothes does a role obscure the human visage. But as a hat can be pulled down to cover a face, so a role, misused, becomes a mask obliterating the countenance of humanity.

Id.

110. See, e.g., LAWRENCE A. BLUM, *FRIENDSHIP, ALTRUISM, AND MORALITY* 46-47 (1980) (discussing role impartiality has in judge's duty); Baron, *supra* note 89, at 836 (arguing that impartiality's value is not overrated); cf. Everett C. Hughes, *Work and the Self*, in *SOCIAL PSYCHOLOGY AT THE CROSSROADS* 313, 322-23 (John H. Kohrer & Muzafir Sharif eds., 1951) (discussing various professions' desire to recede from public attention).

111. See MCCONNELL, *supra* note 15, at 114-47 (describing debate between "impartialists" and "personalists").

112. See BLUM, *supra* note 110, at 43-44 (1980) (explaining virtue of friendship); Stephen L. Darwall, *Two Kinds of Respect*, 88 *ETHICS* 36-49 (1986) (explaining how friendship provides reason for rejecting impartialist morality).

decisionmaking as one context where impartiality should reign.¹¹³

One rationale explains the ease with which personalists conclude that a judge's impartiality should preempt loyalty and gratitude. While personalists generally herald the value of personal relationships, some also acknowledge that certain role-related obligations require individuals within institutions to suspend their personal attachments.¹¹⁴ A judge accepting a position is embracing an institutional role to aspire toward decisionmaking free from bias and agrees to cast aside any conflicting noninstitutional duties (including obligations of loyalty and gratitude toward benefactors).¹¹⁵ Accordingly, the act of accepting a judgeship and its institutional responsibilities excuses the judge from a moral obligation to indulge the conflicting noninstitutional duties of loyalty and gratitude.¹¹⁶ Moreover, the clarity of instructions accompanying the judge's role in turn diminishes any residual "pangs" of loyalty and gratitude.

An alternative resolution to the impartiality dilemma may come from utilitarianism: one may conclude that more social good flows from allowing impartiality to "win" over loyalty and gratitude in judicial decisionmaking.¹¹⁷ Impartiality is indispensable to our

113. See, e.g., BLUM, *supra* note 110, at 47-50 (citing judging as unusual circumstance where impartiality is moral requirement); Baron, *supra* note 88, at 837 (stating that even critics of impartiality admit that some circumstances, such as judging, still require impartiality).

114. See BLUM, *supra* note 110, at 47 (listing examples of professions requiring impartiality due to role); Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283, 293-94 (1988) (indicating that family members must be impartial once certain roles are accepted).

115. This argument originated in Terrance McConnell's very helpful critique of the personalist analysis of gratitude. MCCONNELL, *supra* note 15, at 114-47. The Lord Chief Justice in HENRY IV provides an eloquent example of spurning loyalty toward a benefactor in favor of the institutional duties of impartiality:

[W]hat I did, I did in honour,
Led by th' impartial conduct of my soul,
And never shall you see that I will beg
A ragged and forestall'd remission.
...
I then did use the person of your father.
The image of his power lay then in me.
And, in th' administration of his law,
Whiles I was busy for the commonwealth,
Your Highness pleased to forget my place,
The majesty and power of law and justice,
The image of the King whom I presented,
And struck me in my very seat of judgment;
Whereon, as an offender to your father,
I gave bold way to my authority
And did commit you.

WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY IV act 5, sc. 2.

116. But see *infra* Part II.B.3 (discussing difficulties with this line of argument as applied to federal judges).

117. Cf. JAN NARVESON, MORALITY AND UTILITY 77-81 (1967) (arguing that gratitude is not moral obligation in utilitarianism).

vision of even-handed justice within the federal court system.¹¹⁸ From this premise, one may argue the symbolic and systemic damage of endorsing exceptions to the impartiality ideal outweighs the social benefit of allowing individuals to use their judicial office to express loyalty and gratitude.¹¹⁹

Several studies of the sociology of exchange echo the philosophical consensus that impartiality preempts loyalty and gratitude for a federal judge.¹²⁰ In a relatively early study, Everett Cherrington Hughes documented the tendency of individuals in certain professions to spurn social exchange and withdraw from others interested in their work.¹²¹ Analyzing jazz musicians, physicians, and others, Hughes observed that members of these professions maintained "a certain freedom and social distance from [the] people most crucially and intimately concerned with [their] work."¹²² Based on the specific demands of the professions, Hughes developed functional explanations for these exceptions to the reciprocity norm.¹²³ Certainly, the expectation that federal judges recede from public life and limit private associations fits neatly into Hughes' model of occupations demanding professional detachment. As such, Hughes' work helps explain the practice of allowing federal judges to withhold the gratitude and loyalty normally expected under principles of social exchange.

Drawing on the work of Hughes and others, sociologist Alvin Gouldner developed a more general model for defining exceptions to the norm of social exchange.¹²⁴ Gouldner suggested that the norm is most easily suspended when society develops formal mecha-

118. Cf. BLUM, *supra* note 110, at 47 (indicating need for impartial justice); *supra* notes 62-77 and accompanying text (setting out doctrines ostensibly requiring judicial neutrality).

119. The symbolic importance of impartiality is well reflected in the legal doctrine. For example, this doctrine shows strong commitments to generating faith in our system of government and to the belief that resort to the judicial process will result in justice. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring) (observing that "so important to a popular government" is sentiment "that justice has been done").

120. See Gouldner, *supra* note 39, at 250; Hughes, *supra* note 110, at 313.

121. Hughes, *supra* note 110, at 322.

122. Hughes, *supra* note 110, at 322.

123. Hughes observed that musicians are inclined to withdraw from their audiences. Although audiences are essential to a musician's livelihood, Hughes explained that musicians tend to dismiss their audience as unable to properly judge their work. To avoid "ego-wound" and "antagonism," musicians may therefore decline to return their audiences' attentions. Hughes, *supra* note 110, at 322.

For physicians and others involved in emergency treatment, Hughes documented the inclination to dismiss patient attention and concern. Hughes suggests that this phenomenon is either part of the medical worker's coping mechanism, or the result of the worker's belief (grounded in experience) that the patient is exaggerating her troubles. *Id.* at 322-23.

124. Gouldner, *supra* note 39, at 250.

nisms that compensate for a lack of reciprocity. In other words, our society develops explicit cultural prohibitions against strict reciprocity in order to exempt certain circumstances from the norm of social exchange.¹²⁵

The duty of impartiality arguably acts as such a prohibition, establishing judicial decisionmaking as a circumstance where a beneficiary should not strive for strict reciprocity. Indeed, our governmental institutions and political heritage instruct a federal judge to suspend ordinary rules of social exchange in adjudicating cases. For the judge, our society expresses a clear message: personal matters are off-limits in the decisionmaking process.

Symbolic elements of our rituals reinforce this message, strengthening the command of impartiality and detachment: we dress our judges in black robes; we place them behind a bench (frequently elevating them higher than the parties); we refer to them as "Your Honor"; we isolate their chambers within courthouses; and we respect the secrecy of judicial deliberations. For federal judges, the symbolism is further sustained by the oath of office itself,¹²⁶ as well as the (well-debated) notion that federal judges are more capable than their state counterparts to apply federal law without bias.¹²⁷ Like Hughes, Gouldner therefore provides a framework for understanding how a federal judge may be excused from any obligation toward the judge's benefactor.¹²⁸

125. Gouldner, *supra* note 39, at 250.

126. 28 U.S.C. § 453 (Supp. V 1993). The oath includes the judge's promise of impartiality: I . . . do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. So help me God.

Id.

127. See generally Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (commenting on federal judicial "superiority" debate, and arguing that litigants should be able to use state courts for federal constitutional claims); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (discussing debate over "superiority" of federal judiciary).

For the historical roots of this notion, see *The Federalist* No. 80, at 23 (Alexander Hamilton) (Roy P. Fairchild ed., 2d ed. 1981) (contending that diversity jurisdiction is necessary because federal court will be impartial in such cases, and "will never be likely to feel any bias inauspicious to the principles on which [the Union] is founded"), and *id.* No. 81, at 24 (arguing that state judges' lack of true independence will prevent them from impartially applying federal law).

128. Similarly, sociologist Peter Blau has produced significant work on exceptions to the reciprocity norm. See JACK N. MITCHELL, *SOCIAL EXCHANGE, DRAMATURGY AND ETHNOMETHODOLOGY* 63-66 (1978) (describing Blau's contribution to social exchange theory). According to Blau, there are some benefits that are so valuable and unilateral that they can only be repaid with some form of social deference, such as granting esteem or acknowledgment of status or power. BLAU, *supra* note 37, at 21-22. Blau's analysis of power and unilateral acts is certainly helpful in understanding a federal judge's relationship with his or her benefactors. Blau's analysis is not, however, directly relevant to the struggle between impartiality and the norm of

In the face of this persuasive sociological analysis—and the philosophical theories supporting it—I am still uneasy. I do not challenge the general conclusion that a judge's impartiality duty overrides moral obligations of loyalty and gratitude. Nor do I dismiss the suggestion that judging is an occupation largely exempt from mainstream currents of social exchange. I nevertheless find complexities calling for closer analysis.

One complexity arises from our institutions for appointing federal judges. In Part III, I canvass various possible motivations undergirding the selection and appointment process. Where clearly expressed, these motivations may confuse the judge's institutional duties. Take, for example, instances where the Executive nominates a judicial candidate because the candidate's ideological predispositions are in line with the President's.¹²⁹ As I examine in detail below, the Executive's ability to act on this motivation is a natural outgrowth of the politicized confirmation and nomination process. Because the institutions created under our Constitution empower the Executive to act on ideological motivations, a judge appointed under these conditions might reasonably ponder whether there is an *institutional* duty, inherent in the position of a judge, to approach decisions with a sympathetic ear to the Executive's position.¹³⁰ If the judge does bear such a duty, then the clash of impartiality against loyalty and gratitude is not easily dismissed; the judge's obligations to express loyalty and gratitude through decisionmaking may be as integral to the judge's institutional role as the impartiality duty.¹³¹

Notwithstanding this observation, the notion that our constitutional structure imposes an institutional obligation on federal judges to execute their duties consistently with the President's wishes is a flawed one. Screening procedures (combined with a measure of good fortune), rather than judicial duty under the Constitution, account for Presidents who "get what they want" from the judges they appoint. After all, our Constitution does not envision a judiciary accountable

reciprocity.

129. For the purposes of this Article, I treat a judge's ideology or ideological predispositions as equivalent to the judge's "opinions about the law and public policy that are rooted in the general experience of living," Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1087-88 n.6 (1993) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14-18, 113-15 (1921)). Ideology and ideological predispositions are therefore somewhat distinct from judicial philosophy and theories of judging. *Id.*

130. See *infra* Part III.B.1.

131. See MCCONNELL, *supra* note 15, at 138-40 (explaining how clashes between impartiality and gratitude are easier to resolve where impartiality is institutional role-related obligation and gratitude is non-institutional obligation).

to the other branches of government.¹³² To the contrary, *independence* is the hallmark of our federal courts.

What is not so easy to dismiss, however, is the psychological and emotional effect of the nomination and confirmation procedures on federal judges. Where the Executive makes plain that the judge was chosen for her ideological predispositions, the nominee is at least more likely to *feel pressure* to make decisions consistent with the Executive's position. Similarly, in instances where the Executive nominates a judge as a reward for past political service, the judge is also likely to feel the strong tug of loyalty and gratitude. Indeed, the social exchange process made possible the judge's nomination. She may well hesitate before spurning gratitude and loyalty, as both are integral parts of the process that made possible her life's work.¹³³

Many of our traditions struggle to maintain impartiality as the overriding principle for the judge, while other parts of our system work to undermine this message. Our history and doctrines say clearly that impartiality is paramount. Yet, our institutions send mixed messages. The above examples illustrate that the nomination and confirmation process may inject into a judge's decisionmaking personal feelings of obligation toward her benefactor. These feelings may undermine the apparent clarity of the impartiality ethic heralded in our legal tradition and doctrine.

3. *Nonjudicial outlets for exchange*

Thus far, this Article has described a "clash" between the duty of impartiality and the expectations of gratitude, loyalty, and exchange. This clash emerges and becomes significant where the judge can satisfy gratitude, loyalty, and exchange expectations only by compromising the judge's impartiality. If the judge can find a nonjudicial outlet to express her appreciation, her sacrifice of impartiality is minimized. Moreover, eliminating any obligation to express loyalty and gratitude in rendering decisions can not only allow her to move closer to the impartiality ideal, but may also significantly reduce dissonance for the judge. In other words, the judge may comfortably exclude loyalty and gratitude from her decisionmaking because she is able to satisfy her moral and social obligations through such acts as

132. The Constitution is not without contradiction on this score. After all, the Executive's power to appoint would be of considerably diminished consequence if we did not assume that some of the nominees willingly served the appointing President's ideological and political agenda. See Manoloff, *supra* note 129, at 1098 (finding that appointment of ideologically similar Supreme Court justices may extend President's political agenda beyond term in office).

133. See, e.g., *supra* notes 1, 6, 37-38, 56, 60 and accompanying text.

buying dinner for her benefactor or donating a kidney to save her benefactor's life. If accurate, this proposed solution would be useful both in resolving any moral conflict of impartiality, loyalty, and gratitude, *and* in dispelling the judge's emotional and psychological discomfort from her perception of conflicting duties.

The proposed resolution is promising; neither moral principles nor social norms necessarily mandate that gratitude and loyalty be expressed in the same context, or concern the same subject matter, as the forces that gave rise to them.¹³⁴ More specifically, in the language of philosophy, gratitude and loyalty are most easily classified as "imperfect duties." That is, they are obligations to take action consistent with guiding principles rather than duties to perform a certain act.¹³⁵ Their status as imperfect duties allows a judge substantial moral latitude in choosing the manner in which she satisfies them. For that reason, a nonjudicial outlet may be an entirely appropriate avenue for fulfilling her loyalty and gratitude obligations.¹³⁶

Despite its promise, the proposed solution has problems. To begin, the type of nonjudicial expression adequate to reciprocate for a federal judgeship is apt to be so significant as to draw the judge into a close web of exchange or intimacy with her benefactor.¹³⁷ Be-

134. See SIMMONS, *supra* note 6, at 167-68 (stating that obligations of gratitude are less "content-specific" than obligations to honor promise or contract).

135. MCCONNELL, *supra* note 15, at 67-68 (noting difference between "imperfect" and "perfect duties" and required corresponding actions for each); SIMMONS, *supra* note 6, at 167-68 (discussing obligations that attach to debts of gratitude). Professor Terrance McConnell explains the distinction between perfect and imperfect duties:

Imperfect duties differ from perfect duties in that only the former are, among other things, duties to adopt a maxim and to promote a prescribed end. Perfect duties require only the right sorts of acts. If there is a perfect duty to keep one's promises, an agent fulfills this duty by doing as he promised, regardless of whether he adopts a principle to that effect In giving us imperfect duties, the moral law prescribes directly only maxims of actions; it directs us to adopt certain guiding principles, to take to heart certain principles.

MCCONNELL, *supra* note 15, at 67.

136. Nor is the resolution without foundation in history. A striking example is the continued loyalty and advice (on nonjudicial matters) that Abe Fortas extended to President Johnson during Fortas' service as a justice. See LAURA KALMAN, ABE FORTAS 293 (1990) ("As a colleague on the Court said, for most of his tenure as a justice, 'Abe was sitting in Lyndon Johnson's lap.'").

137. See GEORGE C. HOMANS, SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS 55 (1961) ("The more valuable to a man a unit of the activity another gives him, the more often he will emit activity rewarded by the activity of the other."); KANT, *supra* note 8, at 249 (asserting that "intensity of gratitude . . . is to be assessed by how useful the favor was to the one put under obligation and how unselfishly it was bestowed on him"); MCCONNELL, *supra* note 15, at 61 (maintaining that to discharge obligation of gratitude, one must provide benefactor with "commensurate" benefit if suitable occasion arises); SIMMONS, *supra* note 6, at 169 (indicating that value of benefit to benefitted is relevant minimally to "the content of the debt of gratitude, if not to its generation"); see also Simmel, *supra* note 36, at 387 (explaining that gratitude

cause the web of exchange or intimacy will generate further loyalty and gratitude obligations, impartiality may continue to suffer, even though the judge is initially excused from expressing appreciation through her decisionmaking.

The judge may navigate her way out of the exchange web by concluding that the "greater" duty of impartiality excuses her from reciprocating at all. But, again, this does not relieve the judge of all tensions. Even though the judge may find relief from a moral or social duty to express loyalty and gratitude, several factors will likely continue psychological and emotional pressure for the judge to reciprocate through her decisionmaking. These forces are, of course, strongest when moral theory and social norms come closest to imposing a "duty" on the federal judge.

One strong pressure derives from the potential of gratitude and loyalty to create more than affirmative obligations. Indeed, gratitude and loyalty may also include negative proscriptions against taking action contrary to the benefactor's interests. As a matter of general moral theory, gratitude and loyalty may require an individual to avoid actions at odds with the strong preferences of her benefactor. If applied to a federal judge, this obligation would require the judge to act consistently with her benefactor's desires when confronted with a case or issue for which the benefactor has expressed a deeply held position. Were the judge to act otherwise—the argument goes—she would miss a fitting opportunity to repay her debt to the benefactor.¹³⁸

While this line of moral reasoning quite possibly does not govern a federal judge subject to the institutional duty of impartiality,¹³⁹ its force in other aspects of life may affect the judge's work. Indeed, where a benefactor holds strong beliefs about a case, the benefactor would probably *perceive* a judge's ruling adverse to the benefactor's preference as unacceptably disloyal and ungrateful. This perception is most likely to arise when nonjudicial expressions of gratitude do not even come close to satisfying the benefactor's needs and

establishes bonds of interaction among individuals through reciprocity of service and return service). *But cf.* WILLIAM L. SKIDMORE, *SOCIOLOGY'S MODELS OF MAN* 23-24 (1975) (critiquing Homans' work on issue of "success proposition" theory, where rewards lose value with increased frequency of receipt).

138. See MCCONNELL, *supra* note 15, at 69-70 (discussing Mill's discussion of "imperfect duties" (citing FRED BERGER, *HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL* 220 (1984))).

139. See *supra* notes 107-28 and accompanying text (exploring duty of impartiality and its possible superiority over loyalty and gratitude).

expectations.¹⁴⁰ Take for example the judge who was appointed solely because the Executive believed they shared the same ideological predispositions. Surely this judge would disappoint the Executive by ruling contrary to this "predisposition"—even if the judge found another, nonjudicial way of expressing her appreciation.¹⁴¹ For this judge and others like her, it is unlikely that the duty of impartiality can act as an impenetrable shield against all forces of loyalty and gratitude.

The specter of a benefactor's indignation is likely to affect the judge's performance. After all, reciprocity, gratitude, and loyalty permeate our society, serving not only as social norms but as moral guidelines as well. Given their presence in nearly all aspects of a judge's life, it is unreasonable to expect a judge to purge them wholly upon donning a black robe. Gratitude, loyalty, and social exchange are the fruit of a complex net of human relationships, the content of the "historical self"¹⁴² from which a judge cannot—and should not—divorce herself upon taking the bench.¹⁴³

One final (and unlikely) factor may contribute to a judge's inability to guard herself from loyalty and gratitude in decisionmaking: our tradition of judicial independence. This tradition—designed to

140. See SIMMONS, *supra* note 6, at 168 (arguing that requirements of obligation and gratitude depend on needs of original benefactor and position of original beneficiary).

141. Note, however, that the duties of gratitude and loyalty may be reduced in this situation because the motivation of the beneficiary is arguably self-interested. See *infra* notes 192-96 and accompanying text (discussing effects of beneficiary's selfish motives). Perhaps the most famous modern example of "the disappointed Executive" is Eisenhower, who—in answer to the question whether he had made any mistakes as President—responded: "Yes, two, and they are both sitting on the Supreme Court." Eisenhower was referring to Earl Warren and William Brennan. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 266-67 (3d ed. 1992). Another example concerns Roosevelt's appointment of the first Justice Holmes. By refusing to declare that a major railroad merger violated the Sherman Antitrust Act in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), the newly appointed Justice reportedly "turn[ed] on his benefactor, demonstrating what the President is said later to have called all the backbone of a banana." THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* 80 (1994) (citation omitted); see also ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 26 n.26 (noting Holmes' supposed reply "Some bananal. Some backbone!").

142. FLETCHER, *supra* note 5, at 16-21 (describing development and obligations of "historical self").

143. See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 129 (1983) (stating that humans must constantly fight and compensate for inherent and inescapable prejudices that "constitute our being" (quoting H. GADAMER, *PHILOSOPHICAL HERMENEUTICS* 9 (1976))); Leubsdorf, *supra* note 80, at 237-38 (arguing that it is naive to believe that judges can escape their "prepossessions").

Scholars have also discussed whether a judge should attempt to cut ties with their roots and their communities upon taking the bench. See FLETCHER, *supra* note 5, at 163 (indicating that "[c]larifying the realms of loyalty and of justice" requires judicial appreciation of past personal relationships and impartiality); Resnick, *supra* note 66, at 1922 (articulating how deficiency exists with respect to valuing love, care, and interdependency in context of judicial notions of impartiality and detachment).

isolate judges from the "political" arena¹⁴⁴—may actually nourish feelings of loyalty and gratitude. Once the seeds of gratitude and loyalty are planted during nomination and confirmation, they are allowed to endure, largely unchecked by political pressures. Although empirical evidence suggests that judges feel less allegiance to their benefactors as time passes,¹⁴⁵ a judge's isolation may initially allow such sentiments to flourish. Such a result is ironic, since the federal judiciary's insulation from politics is itself often touted as promoting impartiality.¹⁴⁶

Nonjudicial outlets for gratitude and loyalty thus do not provide a clean escape from the impartiality dilemma. While we may reasonably conclude that a judge is excused from a formal social and moral obligation to reciprocate to her benefactor, judges are subject to strong contrary emotional and psychological messages. From the foregoing discussion, these messages are most problematic in circumstances where pangs of loyalty, gratitude, and reciprocity urge a judge *disposing of cases* to consider the interests of her benefactor. The following discussion scrutinizes the nomination and confirmation process and the various motivations behind judicial appointments in order to pinpoint more accurately when this problem is most likely to arise.

III. NOMINATION AND CONFIRMATION

The Appointments Clause provides that the President "shall

144. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 68-72 (2d ed. 1986) (suggesting that judicial isolation from politics allows judges latitude in forming decisions); Alan Hirsch, *Candor and Prudence in Constitutional Adjudication*, 61 GEO. WASH. L. REV. 858, 864 (1993) (book review) (discussing Bickel's "prudentialist" approach to judiciary, in which built-in judicial isolation allows judges "to inject principles into a national discourse usually driven by self-interest and expediency").

145. A number of observers have pointed to instances when Supreme Court justices apparently became more autonomous as they spend more time in their position. See, e.g., ABRAHAM, *supra* note 141, at 195-98 (discussing Justice Harlan F. Stone's transformation from pro-business conservative to champion of individual rights); Bernard Schwartz, *The Judicial Lives of Earl Warren*, 15 SUFFOLK U. L. REV. 1, 3 (1981) (describing President Eisenhower's dissatisfaction with his selection of Chief Justice Earl Warren); David O. Stewart, *White to the Right?*, A.B.A. J., July 1990, at 40 (analyzing conservative position that Justice White assumed over time); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983) (cataloguing Justice Blackmun's migration across ideological spectrum of Court).

146. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (finding that good behavior and life tenure clauses in Article III promote judicial independence and insulate judiciary from improper influences of both other branches and colleagues); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 684 (1979) (observing that "impartiality demands freedom from political pressure").

In making this argument, I do not deny that the strength of the impartiality duty and the accompanying pressures of assuming the judicial role can at least partially cancel out pangs of loyalty and gratitude.

nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States."¹⁴⁷ Although the precise meaning of this provision is much debated,¹⁴⁸ all agree that it governs the nomination and confirmation of Supreme Court justices as well as judges of the lower federal courts.¹⁴⁹ A review of the process implementing the Appointments Clause uncovers a number of opportunities for individuals and groups to influence the selection process.¹⁵⁰ This Part will identify these potential benefactors and review potential criteria they may use in deciding which judicial candidate to promote.

A. *Who is the Judge's Benefactor?*

1. *The President and the Executive Branch*

The central dispute over the meaning of the Appointments Clause

147. U.S. CONST. art. II, § 2.

148. See generally Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970) (evaluating Senate's role in judicial nomination and confirmation process); *Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146 (1988) (containing essays by Paul A. Freund, Bruce A. Ackerman, Stephen Carter, Henry Paul Monaghan, and Nina Totenberg that discuss historical views on appointment process and noting inherent complications in process, such as public's role and relationship between law and politics); Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989) (discussing Supreme Court nomination of Judge Robert Bork and its ultimate failure); Luis Kutner, *Advice and Dissent: Due Process of the Senate*, 23 DEPAUL L. REV. 658 (1974) (insisting that Senate play more prominent role in judicial nomination and confirmation process); Charles M. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200 (1987) (explaining role and responsibility of Senators in confirmation process); Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075 (1992) (discussing and urging reform of advice and consent process); Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858 (1990) (surveying Senate's role in confirmation process, focusing primarily on Bork nomination); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633 (1987) (arguing that Senate's multifaceted role in Supreme Court appointment process is crucial to ensuring confirmation of only competent, qualified justices, necessitating utmost level of senatorial scrutiny); Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619 (1993) (condemning Senate's confirmation of Justice Thomas, and reviewing confirmation process); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992) (tracing Senate's role in confirmation process and making suggestions for its improvement); James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989) (evaluating why Senate was chosen by Framers to confirm Court nominees).

149. See Strauss & Sunstein, *supra* note 148, at 1508 n.84 (recognizing that for purposes of constitutional structure and text, "there is no difference . . . between the Supreme Court and the lower courts").

150. See generally Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57 (1993). Professor Fiss observes:

While the Constitution creates a measure of political insularity for the federal judiciary, a number of other factors—some also rooted in the Constitution—bring the judiciary to some extent under the sway of one or the other of the political branches. The first and most obvious concerns the method of selection.

Id. at 62.

concerns the proper role of the Senate in judicial selection. Consistent with the practice followed during the last few administrations,¹⁵¹ most recent scholarship has embraced an expansive role for the Senate in executing its "consent" function.¹⁵² Most commentators no longer urge the Senate to approach its review of nominees with extreme deference to the Executive. Instead, many urge the Senate to expand its scrutiny of nominees, and applaud the practice in recent years of attempting to identify a nominee's jurisprudential and ideological beliefs.¹⁵³

Several scholars have also focused on the Appointment Clause's reference to senatorial "advice," arguing that the Constitution envisions a dialogue between the Senate and the Executive at the nomination stage of the process.¹⁵⁴ Current practice, however, does not reflect any formal role for the Senate prior to nomination.¹⁵⁵

151. Historical accounts suggest that in the first century after ratification of the Constitution, the Senate was even more involved in judicial selection than today. See, e.g., ABRAHAM, *supra* note 141, at 71-155 (reviewing history of Supreme Court appointments from 1789-1829); Henry P. Monaghan, *The Confirmation Process: Law or Politics*, 101 HARV. L. REV. 1202, 1202 (1988) (surveying Senate's various justifications for rejecting Supreme Court nominees, including nominee's political views, political opposition to incumbent President, desire to hold vacancy for next President, senatorial courtesy, interest group pressure, and nominee's failure to meet minimum professional standards).

Although the Senate's role has apparently diminished since the turn of the century, the practice in the last two decades reflects the general understanding that Senators are under no constitutional compulsion to defer to the President's choice. See Nagel, *supra* note 148, at 858 (noting Senate's increasing role and active participation in judicial selection and confirmation process).

152. See Mathias, *supra* note 148, at 205 (advocating that Senate dedicate more resources to enhancing consent role); Monaghan, *supra* note 151, at 1203 (arguing that Senate's role should be viewed as "political," so that Senate can serve as "important check on the President's power to appoint" and reduce "countermajoritarian" difficulties of judicial review, which conflict with ideals of democratic government).

153. See, e.g., Black, *supra* note 148, at 662 (arguing that Senate should "take into account anything that they . . . think to bear on the wisdom of the appointment," including whether "nominee holds skewed and purblind views on social justice"); Gauch, *supra* note 148, at 341 (concluding that "if we are to achieve the ends the Framers desired, the Senate must play an active role in considering not only the basic qualifications of the nominee, but any factors that it deems important"); Judith Resnick, *Changing Criteria for Judging Judges*, 84 NW. U. L. REV. 889, 890-96 (1990) (reviewing salutary effects of Senate scrutiny of nominees); Strauss & Sunstein, *supra* note 148, at 1494, 1500 (arguing that Senate was intended to test political commitments of nominees and "should assert rather than abdicate its role as an equal partner in the appointment process"). But cf. Nagel, *supra* note 148, at 858 (arguing that "screening the beliefs of nominees may be at odds with the goal of establishing political influence over the Supreme Court").

154. See, e.g., Kutner, *supra* note 148, at 663 (arguing that Constitution requires senatorial consent prior to nomination); Strauss & Sunstein, *supra* note 148, at 1495-1500 (discussing constitutional intent that running dialogue occur between Executive and Senate regarding Supreme Court nominees). But see Simson, *supra* note 148, at 662 (observing that language of Appointments Clause undercuts position that President should have to consult with Senate before nomination).

155. See Black, *supra* note 148, at 659 (charging that stage of senatorial "advice" has been "short-circuited" in practice). For lower court judges, the President occasionally pays close

Instead, the Executive operates largely autonomously in making the ultimate nomination decision.

Whatever one's viewpoint on the proper role of the Senate in confirmation, no one denies the paramount power of the Executive in choosing federal judges.¹⁵⁶ It is the Executive who narrows the field of candidates, sets the agenda, and frames the discourse by selecting *one* among scores of possible nominees for a judgeship. Without the President's decision to put the nominee before the Senate, she would remain in the sea of hopefuls.

For these reasons, the most likely individual in the Executive Branch to stand out as the judge's benefactor is the President, who presumably has not delegated the ultimate nomination decision.¹⁵⁷ Of course, other individuals advising the President may take primary responsibility for initially identifying the nominee and shepherding the nominee through the confirmation process.¹⁵⁸ Indeed, under current practice, the President's delegates spend long hours with Supreme Court nominees before and during confirmation hearings.¹⁵⁹

Individual delegates of the President, however, have only limited prospects of emerging as benefactors of the judge. Admittedly, to the

attention to the preferences of the Senator for the state where the judicial vacancy is located. See Strauss & Sunstein, *supra* note 148, at 1508 n.82 (reiterating need for increased senatorial participation, despite usual deference accorded by President to Senator of nominee's state).

156. Recent case law, nevertheless, has emphasized the importance of strong executive and congressional power under the Appointments Clause in preserving a balance of powers. See *Weiss v. United States*, 114 S. Ct. 752, 765-66 (1994) (Souter, J., concurring) (contending that if structural benefits of Appointments Clause are to be preserved, "no Branch may aggrandize its own appointment power" and "no Branch may abdicate its Appointments Clause duties").

157. See STEPHEN L. CARTER, *THE CONFIRMATION MESS* 336 (1994) (arguing that "the cult of personality in which we foolishly wrap the modern presidency" forces vast appointment power "on the single individual whom we happen to elect"); Monaghan, *supra* note 151, at 1206 (noting that "[i]n theory, the President alone can nominate," but in practice, both President and Senate bear responsibility of ensuring that competent persons fill judgeships).

158. Many advisors are involved in the preparation for the confirmation hearing. See Strauss & Sunstein, *supra* note 148, at 1492 n.4 (acknowledging long periods of consultation between nominees and Justice Department officials prior to hearings). In addition, advisors are involved in the selection process. See, e.g., Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 285 (Apr.-May 1993) (describing initial screening and processing of judicial candidates under Bush administration); Ann Devroy & Ruth Marcus, *After 87 Days, Tortuous Selection Process Came Down to Karma*, WASH. POST, June 15, 1993, at A11 (reporting on unusually long duration and intimate Presidential involvement in process of selecting Ruth Bader Ginsburg for nomination to Supreme Court); Daniel Klaidman, *Ron Klain and the Power to Choose; Precocious Lawyer Emerges as Clinton's Top Judge-Picker*, LEGAL TIMES, Apr. 12, 1993, at 1 (discussing monograph of apparently influential adviser to President Clinton responsible for screening potential nominees).

159. See Strauss & Sunstein, *supra* note 148, at 1518 n.107 (citing extensive preparation of Justices Souter and Thomas before confirmation hearings); Neil A. Lewis, *A Rehearsed Thomas is Set for Hearings*, N.Y. TIMES, Sept. 9, 1991, at A12 (reporting that Thomas spent summer of 1991 preparing for confirmation hearing with assistance of lawyers sent by White House).

extent that these delegates are later involved—in their individual capacities—in litigation before the judge, their role in the selection process may cast them as benefactors, independent of the President or the Executive Branch as a whole. Nevertheless, few, if any, structural reasons suggest that this will occur frequently.

What is quite likely is for the Executive Branch to have an interest in a case before the judge—either because the Executive or an Executive agency is a litigant, has taken a policy position on the case (through the Solicitor General or otherwise), or has a general institutional interest in a certain outcome. If such is the case, individual Executive officials responsible for the nomination are not likely to haunt the judge as benefactors. Rather, the Administration as a whole rises out as the benefactor, and the President stands as the symbol most deserving of the judge's loyalty and gratitude.

2. *The Senate and individual Senators*

Although its role in scrutinizing nominees sometimes determines the fate of a judicial candidate, the Senate—as a body—is not a likely benefactor. First of all, the Senate's role—at least in the last century—is largely confined to veto power over a candidate.¹⁶⁰ Because this power is negative only, the Senate as a whole is not a motivating force behind nominations. The Senate lacks responsibility for sponsoring particular nominees and therefore is unlikely to ingratiate itself to a judge. Of course, where a nominee is ultimately successful after a heated confirmation battle, individual Senators or groups of Senators may become champions of the nominee. The fact that battles occur within the Senate, however, casts doubt on the proposition that feelings of gratitude, loyalty, or reciprocity exist between the nominee and the Senate as an institution.

Given the negative nature of its power, the Senate is not predisposed to use that power often.¹⁶¹ Despite celebrated cases in the last several decades, the Senate has not shown a consistent practice of using the resources and political capital necessary to engage in searching review of all nominees to the federal bench.¹⁶²

160. See *supra* notes 151-56 and accompanying text. A possible exception is Justice Cardozo, whom Hoover arguably nominated in order to satisfy rumblings from the Senate. ABRAHAM, *supra* note 141, at 205-06.

161. For reasons of proficiency and resource limitations, the Senate barely uses that power at all for lower court judges. See Strauss & Sunstein, *supra* note 148, at 1507-09 (arguing that because "Senate is essentially unable to affect the composition of the lower courts," it should play larger role in selection of Supreme Court Justices).

162. See, e.g., *The Federalist* No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (reasoning that presidential nominations are seldom rejected by Senate for reasons of senatorial

This discussion suggests another possible source for the Senate's lack of promise as a benefactor: loyalty and gratitude obligations may not even extend toward a collectivity such as the Senate. Many observers have found no limitation on institutional loyalty and gratitude.¹⁶³ Others, however, have argued that any duty of institutional loyalty and gratitude is minimal or nonexistent, especially where the institution tolerates and fosters disagreement among its members.¹⁶⁴ This position is particularly compelling in analyzing the

favoritism, given that there is no assurance that preferable candidate would subsequently be nominated); Monaghan, *supra* note 151, at 1209-10 (reiterating "institutionally important point . . . that it takes enormous energy for senators to unite in order to resist the President [on a consistent basis] [T]he hard fact is that the President's vision of what is proper judicial philosophy ultimately will prevail").

Nina Totenberg explains the disinclination of Senators to make objections during confirmation:

To be sure, most senators would rather not spend their time and political capital on an arduous confirmation process. It is a politically risky business. Controversial issues are likely to be stirred up. A confirmation battle can only create new enemies back home. And what does the politician get for his trouble? Nothing concrete. No legislation. No campaign money. Maybe he'll satisfy some of his supporters, but he'll infuriate others. At rock bottom, all a senator gets out of the confirmation process, if it turns controversial, is one's personal satisfaction that comes from doing what he thinks is right.

Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213-14 (1988).

163. See, e.g., RICHARD KRAUT, *SOCRATES AND THE STATE* 148 (1984) (finding support for institutional gratitude in observation that people owe all kinds of debts, such as financial ones, to institutions); MCCONNELL, *supra* note 15, at 193-98 (arguing that while gratitude to institution may seem peculiar, "nothing in principle rules out the possibility"); A.D.M. Walker, *Political Obligation and the Argument from Gratitude*, 17 PHIL. & PUB. AFF. 191, 197-98 (1988) (finding support for institutional gratitude in observation that pupils and patients may show obligation to institutions that received them); see also FLETCHER, *supra* note 5, at 33-36 (asserting that people are not loyal to entirely impersonal organizations but instead show their loyalty to other people within those organizations); Oldenquist, *supra* note 8, at 176 (arguing that group loyalists "can share noninstrumental goods, such as a nation, a family, a neighborhood, or a philosophy department, and therefore can constitute a moral community"). But cf. ROYCE, *supra* note 23, at 20 ("[T]he cause to which a loyal man is devoted is never something wholly impersonal. It concerns other men. Loyalty is social.").

164. See ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 53 (1980) (indicating that debts of gratitude are owed to individuals, not institutions). Philosopher A. John Simmons explains this position:

Where a group of persons is concerned, there is very seldom anything like a reason, common to all of them, for which the benefit was provided. Some members of a group may have worked against providing the benefits, others may have wanted to provide the benefits only to enhance their own positions, and so on. Because of this, it is difficult to know what to say about benefits provided for an individual by a group. But in the case of institutions, the problem is far worse; for institutions are manifestly not complex groups of persons But I suspect that the temptation to believe [in gratitude toward institutions] rests on thinking of the institution as a group of people, or thinking of particular people whose effort and generosity made benefits obtained from these institutions possible. To be sure, individuals do fill positions within the structures of institutions. But these positions have functions and the individuals filling them have "positional duties" related to these functions. Insofar as individuals who make these benefits possible are merely "doing their job," considerations of gratitude do not enter the picture at all.

Senate, which provides many legitimate avenues during the confirmation process for its members to fight against a judge's confirmation. From this point of view, the individual who ultimately receives the judgeship will not view the Senate as a body unified behind her. She is therefore apt to direct her loyalty and gratitude away from the institution and toward specific Senators.

The final factor bearing on the Senate's status as a benefactor is the likelihood that the Senate may never have a significant interest in litigation pending before the judge. It is possible for the Senate itself or its Secretary to be a litigant in a case before the judge, particularly in litigation challenging the legitimacy of legislation.¹⁶⁵ Federal statutes make it especially easy for the Office of Senate Legal Counsel to intervene as a party or as *amicus curiae* in cases in which the Senate's constitutional powers or responsibilities are placed in issue.¹⁶⁶ In addition, even where the Senate is not formally involved, litigation occasionally implicates the Senate's institutional interests, such as cases concerning separation of powers and the constitutional prerogatives enjoyed by the Senate.

Yet, litigation concerning the Senate is surely far less frequent than instances where litigation involves or implicates the interests of the Executive Branch. After all, the Executive Branch includes the Justice Department itself, which is constantly litigating on behalf of the President and administrative agencies. Thus, even assuming that the Senate, as an institution, is poised to gather significant debts of loyalty and gratitude from federal judges, it is less frequently in a position to take advantage of those debts.

In contrast to the Senate as a whole, individual Senators have many opportunities to attract the gratitude and loyalty of federal judges. As already mentioned, individual Senators may emerge as champions of

SIMMONS, *supra* note 6, at 188.

165. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 714 (1986) (describing process whereby Senate, as institution, intervened as defendant in challenge to constitutionality of Gramm-Rudman-Hollins Act); *INS v. Chada*, 462 U.S. 919, 928 (1983) (involving Senate as party in suit challenging constitutionality of procedures under Immigration and Nationality Act); *Buckley v. Valeo*, 424 U.S. 1, 8 (1976) (involving Secretary of United States Senate, in official capacity, as defendant in constitutional challenge to Federal Election Campaign Act of 1971); *Barnes v. Kline*, 759 F.2d 21, 26 n.12 (D.C. Cir. 1985) (deciding suit challenging President's "pocket-veto" to legislation, in which Senate intervened in order "to protect a direct interest in the efficacy of its legislative action"), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361, 362-65 (1987).

It is also possible that the Senate may be a party to litigation challenging the conduct of the institution or individual members. For example, the Civil Rights Act of 1991 created a process whereby employment-related complaints of Senate employees may eventually end up in the Federal Circuit Court of Appeals. See 2 U.S.C. § 1209(a) (1988).

166. 2 U.S.C. §§ 288e, 288f.

a judicial nominee during heated confirmation battles.¹⁶⁷

Perhaps more significant, however, are the traditions of senatorial sponsorship for Supreme Court justices and senatorial courtesy for lower court judges. "Senatorial sponsorship" in this context means the occasional practice of allowing one Senator to stand as the nominee's patron throughout nomination and confirmation.¹⁶⁸ "Senatorial courtesy" refers to the custom of ensuring home-state Senators veto power over judicial appointments. Through established tradition, the Senate has extended this "courtesy" through the "blue slip procedure," by which the Senate Judiciary Committee invites Senators of the nominee's state to comment on the nomination.¹⁶⁹ When a Senator does not return the "blue slip" requesting comments, the Committee assumes that the Senator objects to the nomination and declines to schedule confirmation hearings, particularly in instances where the Senator shares the same party affiliation as the President.¹⁷⁰ The blue slip procedure has historically provided home-state Senators of the President's party with leverage in *nomination* because prudence counsels that the Executive consult with a Senator *before* exercising veto power.¹⁷¹ Opposite-party Senators from a judicial candidate's home state enjoy much less, although occasionally significant, influence in nomination and confirmation.¹⁷²

The blue slip procedure and senatorial courtesy have been waning in the last two decades.¹⁷³ Because strong vestiges remain, however,

167. For a recent monograph exploring this topic, see JOHN DANFORTH, *RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS* (1994). Heated confirmation battles are not, of course, limited to Supreme Court justices. For a list of recent lower court nominations that aroused opposition in the Senate, see LAWRENCE BAUM, *AMERICAN COURTS: PROCESS & POLICY* 127 (2d ed. 1990).

168. See, e.g., Guy Gugliotta & Lynne Duke, *Alone in the Crowd, the President's Man Faces His Judges*, WASH. POST, Sept. 11, 1991, at A19 (describing Senator John Danforth as Clarence Thomas' chief sponsor); Mary McGrory, *A Justice in Training*, WASH. POST, Aug. 21, 1990, at A2 (describing Senator Warren Rudman as David Souter's chief sponsor); Marianne Means, *With Ginsburg, Clinton Did Well—About Time*, HOUS. CHRON., June 15, 1993, at A19 (describing Senator Daniel Patrick Moynihan as Ruth Bader Ginsburg's unofficial chief sponsor).

169. See BAUM, *supra* note 167, at 119-20, 126; ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 239-40 (2d ed. 1993) (describing Senate's role in judicial appointment process).

170. See Elliott E. Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection, in COURTS, LAW, AND JUDICIAL PROCESSES* 121 (S. Sidney Ulmer ed., 1981) (describing effect of political affiliation on "blue slip" procedure).

171. BAUM, *supra* note 167, at 119-20; Strauss & Sunstein, *supra* note 148, at 1508 n.82.

172. BAUM, *supra* note 167, at 120.

173. BAUM, *supra* note 167, at 121, 126; Slotnick, *supra* note 170, at 122-24; Strauss & Sunstein, *supra* note 148, at 1508 & n.82; see also Eva M. Rodriguez & Daniel Klaidman, *List Has Distinctly Local Flavor; Administration Eyeing Eight Candidates for D.C. Circuit*, LEGAL TIMES, Apr. 19, 1993, at 18 (suggesting that Clinton administration generally intends to make appellate choices itself, but perhaps to defer to Senators on district court nominations).

these traditions continue to offer prominent benefactor status for home-state Senators. Thus, along with senatorial sponsorship, senatorial courtesy opens opportunities for a Senator to forge strong personal bonds with judicial candidates.¹⁷⁴

Despite considerable chances for individual Senators to ingratiate themselves to judicial appointees, no certainty exists that a Senator will have occasion to benefit from her benefactor status in litigation before the judge. Like the Senate as a whole, an individual Senator's opportunities for benefit are far more remote than the Executive Branch's.

Nevertheless, because of the potential strength of the bond between Senator and judge, we should not ignore the possibilities. Acting as litigant, attorney, or both, a Senator with a special project or desire to attract publicity may litigate national issues,¹⁷⁵ particularly within the federal courts in the District of Columbia, that come before one of the Senator's beneficiaries. Similarly, home-state Senators may use the federal judicial process at home to sue over matters of more local interest.¹⁷⁶ This latter scenario is particularly noteworthy given that the relatively high odds that the Senator was directly responsible for the adjudicator's job. Furthermore, an individual Senator may be involved in personal litigation before a judge bearing gratitude and loyalty toward the Senator.¹⁷⁷ Finally, whether in national or local litigation, the Senator, although not a formal party to the suit, could always have a strong personal or professional interest in an issue.

3. *Other potential benefactors*

Aside from individual Senators, another player consulted during nomination and confirmation is the American Bar Association (ABA). In fact, one Supreme Court scholar describes the ABA's Standing Committee on the Federal Judiciary as "enormously influential" in

174. See *infra* notes 168-72 and accompanying text (analyzing influence of senatorial courtesy on nominee's feelings of loyalty and gratitude).

175. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 6-7 (1976) (including individual Senator among plaintiffs challenging provision of Federal Election Campaign Act of 1971); *Riegle v. Federal Open Market Comm.*, 656 F.2d 873, 878-80 (D.C. Cir. 1981) (involving individual Senator who filed challenge to constitutionality of procedures established by Federal Reserve Act).

176. See, e.g., *Specter v. Garrett*, 971 F.2d 936, 939 (3d Cir.) (challenging proposed closure of Philadelphia naval shipyard), *vacated*, 113 S. Ct. 455 (1992); *Karchin v. Metzenbaum*, 587 F. Supp. 563, 564 (N.D. Ohio 1983) (involving constituent's suit against Senator alleging incompetent handling of letter to Senator that resulted in loss of employment).

177. See, e.g., *Clifford Krauss, Senator Sues over Lost Trust Fund*, N.Y. TIMES, May 14, 1993, at A20 (detailing Senator Bond's suit in Federal Court in St. Louis against investment adviser alleging mismanagement of personal funds); Mark Potts, *Metzenbaum Sued on Little Tavern Sale*, WASH. POST, Aug. 27, 1991, at D9 (describing details of suit against Senator Metzenbaum alleging fraud in personal business deal).

federal judicial selection.¹⁷⁸ The Standing Committee's influence apparently peaked during the Nixon administration, when it enjoyed absolute veto power over lower federal court appointments.¹⁷⁹ Nevertheless, after the Haynsworth/Carswell debacle, where the Standing Committee found both nominees qualified, the Nixon Administration retracted the committee's veto power.¹⁸⁰ Today, the committee's role is limited to advising the Executive Branch on the qualifications of prospective nominees, rather than actually generating the names of nominees.¹⁸¹

Like the Senate, the ABA's present role is significant for its potential negative effect: a poor rating by the ABA can doom a candidate, but a favorable rating provides no guarantee of confirmation. Thus, a nominee who is eventually confirmed is, in most instances, likely to view a favorable ABA rating as one of many hurdles in the process, rather than a benefit requiring repayment in some form. The ABA, therefore, does not stand as a powerful benefactor for federal judges.

The final notable class of potential benefactors for judicial candidates is composed of sitting and retired judges.¹⁸² Available evidence indicates that Executive officials occasionally solicit nomination advice from present and former members of the judiciary. The details are somewhat sketchy, with history rarely reflecting unequivocally that the judges, rather than the officials, bore primary responsibility for candidate selection. The most notable exception is Chief Justice Taft, who apparently enjoyed unmatched control over the judicial selections of Presidents Harding and Coolidge.¹⁸³

Where a recommending judge sits on the court to which the candidate is destined, this recommending procedure could bear a high cost in terms of the judicial independence of the candidate. Owing one's job to a peer may not be a comfortable state of affairs for the candidate, and could breed potential loyalty and gratitude

178. ABRAHAM, *supra* note 141, at 32; see also BAUM, *supra* note 167, at 115 (stressing success of ABA in influencing President's choice of judicial candidates).

179. ABRAHAM, *supra* note 141, at 32.

180. ABRAHAM, *supra* note 141, at 32.

181. ABRAHAM, *supra* note 141, at 33-39.

182. See ABRAHAM, *supra* note 141, at 29; CARP & STIDHAM, *supra* note 169, at 235. Occasionally, private individuals can act as benefactors, although examples of this are rare. GERALD GUNTHER, *LEARNED HAND* 107-08 (1994) (observing that turn-of-century maritime lawyer Charles C. Burlingham "launched a number of distinguished judicial careers—including Learned Hand's in 1909 and, four years later, Benjamin Cardozo's").

183. ABRAHAM, *supra* note 141, at 30-31; CARP & STIDHAM, *supra* note 169, at 235. Another example of a Justice's pressure on the President is Felix Frankfurter's promotion of Learned Hand. See GUNTHER, *supra* note 182, at 554-55 (describing Frankfurter's use of enormous pressure to get Franklin Roosevelt to appoint Learned Hand to Supreme Court).

issues. Further analysis of the problem, however, is probably best left for less ambiguous historical data.

B. How Does the Benefactor Identify the Beneficiary?

Because of the President's commanding role in selecting nominees, scholars have devoted considerable effort to documenting various criteria used by Presidents in making nomination decisions. As a result, these criteria are relevant not only when the Executive acts as primary benefactor, but in instances where another individual or group may have played a key role in the appointment. Careful study of these criteria is therefore helpful in analyzing the clash of impartiality with gratitude and loyalty. Indeed, although moral philosophy and social norms may excuse the judge from formal *duties* of gratitude and loyalty, the selection criteria are important to understanding the persistent psychological and emotional effect of these sentiments.

The criteria used to select nominees are fluid, with each blending into the other. Moreover, several different factors will most likely motivate a proponent's decision to back a certain judicial candidate. In many cases, a candidate may also have difficulty ascertaining precisely what provoked a benefactor's support or may incorrectly perceive the benefactor's motivations. Despite these limitations, the following categories serve as useful analytic tools: (1) the nominee is perceived to possess certain ideological predispositions; (2) the nominee has engaged in political activities or support deserving of reward; (3) the nomination will be useful in garnering political favors for the benefactor; (4) the nominee possesses significant demographic characteristics; and (5) the nominee has a high degree of competence and ethical standards.¹⁸⁴ Empirical evidence suggests that these standards govern the nomination of Supreme Court justices as well as lower court judges, although the prominence of various factors may differ depending on the type of judgeship.¹⁸⁵

184. See ABRAHAM, *supra* note 141, at 65 (analyzing selection criteria); BAUM, *supra* note 167, at 116-17, 123-26 (analyzing selection criteria); see also DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 66 (3d ed. 1993) (claiming that considerations such as ideology, race, religion, gender, and ethnicity, as well as factors of compatibility and political opposition, compete with merit in making judicial selections).

185. See BAUM, *supra* note 167, at 123-24; CARP & STIDHAM, *supra* note 169, at 234. For a study of the selection criteria for United States court of appeals judges, see generally Rayman L. Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 1984 AM. B. FOUND. RES. J. 285.

1. Ideology

In recent years, ideology has been a key factor in judicial selection.¹⁸⁶ Few seriously doubt that ideology plays a legitimate role in the nomination and confirmation process.¹⁸⁷ In fact, the experience of the Reagan and Bush administrations suggests that the political and jurisprudential predisposition of judicial candidates was the most important criterion in nomination decisions for Supreme Court and lower court vacancies.¹⁸⁸ While confirmation battles in the Senate

186. See BAUM, *supra* note 167, at 116 (describing increasing prominence of ideology as selection criterion for Supreme Court and district court vacancies); see also *supra* note 129 (defining "ideology").

The importance of a judicial candidate's ideology is hardly a new phenomenon, particularly for Supreme Court nominations. See S. Sidney Ulmer, *Some Theoretical Perspectives on Packing the Supreme Court*, in COURTS, LAW, AND JUDICIAL PROCESS, *supra* note 170, at 251-54 (describing historical importance of candidate's party affiliation and policy preferences). Examples of Presidents strongly motivated by ideology include George Washington, Thomas Jefferson, and James Madison. See ABRAHAM, *supra* note 141, at 71-72, 85, 88; see also Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 116 (1993) (describing how Executive's "perceptions about sharing philosophical values and policy preferences with the nominee . . . exert influence over nearly every nomination"). For judgeships on the court of appeals, Rayman L. Solomon documents the increased prominence of "policy preference" as a selection criterion "during Wilson's administration and the latter years of both the Roosevelts' administrations." Solomon, *supra* note 185, at 285.

187. See, e.g., WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 235 (1987) (disagreeing with notion that President should not nominate person whose constitutional philosophy President endorses); Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 315 (1989) (arguing that ideology has influenced, and should continue to influence, selection of federal judges without constitutional objection).

188. See, e.g., CARP & STIDHAM, *supra* note 169, at 248 (stating that "Ronald Reagan provides a good example of a chief executive who selected his judicial nominees with a clear eye toward their compatibility with his own conservative philosophy"); Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 301 (Apr.-May 1993) (stating that Bush had "a fairly strong commitment to making ideologically based judicial appointments"); Goldman, *supra* note 158, at 296 (suggesting that Bush "made the federal bench far more conservative than when Reagan took office"); Douglas W. Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 39 CATH. U. L. REV. 1, 7-8 (1989) (noting that 1980 Republican Platform "unmistakably promised that President Reagan would scrutinize a judicial candidate's political or judicial philosophy"); Ezra Bowen, *Judges with Their Minds Right*, TIME, Nov. 4, 1985, at 77 (quoting Sheldon Goldman of University of Massachusetts, who contends that Ronald Reagan's commitment to changing ideological makeup of federal courts was "most self-conscious ideological selection process since the first Roosevelt Administration"). But cf. Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 767 (1987) (presenting statistical study showing that "Reagan judges are not significantly more conservative than their Republican colleagues"). For a review of the selection procedures of recent past administrations, see generally Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1258-1274.

Information on the Clinton administration is still inconclusive. See, e.g., Richard Berke, *What's Delaying Choice of High Court Nominee*, N.Y. TIMES, June 10, 1993, at A24 (listing ideal attributes of Supreme Court nominee sought by Clinton administration); Stephen Labaton, *President's Judicial Appointments: Diverse, but Well in the Mainstream*, N.Y. TIMES, Oct. 17, 1994, at A15 (reporting that Clinton's selections are "not expected to change the ideological hue of the bench, although they have won high praise for their diversity and quality"); Stephen Labaton,

are often premised on more "objective" complaints, such as the nominee's deficient legal ability or ethical record, ideology historically has acted as an important, although sometimes veiled, impetus behind Senate confrontations.¹⁸⁹

Although ideology is prominent and easy to identify as a selection criterion, its influence on the potential clash of loyalty, gratitude, and impartiality is elusive. On one hand, judicial choices based on ideology have a significant potential to exacerbate impartiality's clash with loyalty and gratitude. As suggested above, a judge with no doubt that ideology motivated her appointment may feel increased loyalty and gratitude obligations in making decisions. Burdened with this baggage, the judge must occasionally confront cases for which she believes the facts and law require a disposition at odds with the ideological position for which she was appointed.

On the other hand, a number of factors may mitigate the dissonance experienced by the judge. For example, a true ideologue may be less susceptible to influence from a benefactor than a less dogmatic appointee.¹⁹⁰ To be sure, a judge with an established ideological track record may satisfy her benefactor by routinely making decisions consistent with her record. Whenever there is disagreement with the benefactor, however, the judge's character and history as an ideologue may make her less open to alternatives, and less vulnerable to the pull of gratitude and loyalty.¹⁹¹

While not entirely conclusive, philosophical literature also suggests that—ideological resolve or not—an individual's debt of loyalty and gratitude is reduced where the benefactor is motivated by a strong selfish purpose. Some philosophers even suggest that the moral obligation of gratitude may be reduced or even eliminated where the benefactor is motivated by "self-interest,"¹⁹² or provides a benefit for the specific purpose of generating a debt of gratitude.¹⁹³ One

Shifting List of Prospects to be Justice, N.Y. TIMES, May 9, 1993, at A22 (reporting that in selecting replacement for Justice White, Clinton and advisors "have said they are looking for a progressive thinker who believes in a constitutional right to abortion and privacy as well as someone who would be able to forge coalitions").

189. See BAUM, *supra* note 167, at 127 (reviewing selected lower court nominations that aroused Senate opposition between 1979 and 1988).

190. My colleague, Professor Richard Greenstein, first suggested this observation to me.

191. See Ulmer, *supra* note 186, at 254-56 (suggesting that judge's ideological resolve is strengthened where judge has communicated to others her commitment to certain ideological perspective).

192. See SIMMONS, *supra* note 6, at 170-75, 178; see also Fred Berger, *Gratitude*, 85 ETHICS 298, 299 (1975) (suggesting that gratitude is owed only where benefactor acted with desire to help beneficiary).

193. See Roslyn Weiss, *The Moral and Social Dimensions of Gratitude*, 23 SO. J. PHIL. 491, 495 (1985) (stating that one necessary condition for gratitude is that benefactor must provide

philosopher, A. John Simmons, has also argued that a duty of gratitude will never emerge if the benefactor expended no special effort in providing the benefit.¹⁹⁴

For the federal judiciary, these points merit attention because the judge's benefactor may help the judge for mercenary reasons or may be merely "doing her job" in promoting the nomination and confirmation. Several arguments indicate, however, that the ideological appointee may continue to feel a strong debt to her benefactors. To begin with, one can dispute whether a benefactor who is intent on packing the courts with like-minded persons is indisputably "selfish" or mercenary. One could instead characterize the benefactor's motivation as communitarian, evangelical, or public-spirited. Therefore, the benefactor's motivations may not necessarily undermine the judge's feelings of gratitude or loyalty.

Even assuming that the benefactor expended no extraordinary effort and that her motivations are not entirely praiseworthy, a sense of debt may also arise simply because the benefit conferred—a federal judgeship—is so precious.¹⁹⁵ Under this view, the benefactor's motivation and minimal effort can mitigate, but cannot obliterate, the beneficiary's obligation of thankfulness owed in response to the extraordinary gain.¹⁹⁶

Other factors may lessen the judge's perception that her impartiality is compromised by the ideological motivations behind her appointment. Specifically, the judge may conclude that she was appointed to act as a judicial delegate of a certain ideology and that she may represent this perspective without threat to her ability to judge cases in a neutral, detached manner. Moreover, federal law governing judicial disqualification focuses on matters such as financial interest, familial relationship, or personal hatred, while generally remaining silent on political or ideological bias.¹⁹⁷ In fact, the law discourages investigation into the social or ideological predispositions of a sitting judge.¹⁹⁸ Indeed, the case law displays tolerance for

benefit freely and without objective for gain); see also JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 134 (1980) (asserting that it is essential that benefactor give gift freely in order to engender sense of obligation in beneficiary).

194. SIMMONS, *supra* note 6, at 170-75, 178.

195. See MCCONNELL, *supra* note 15, at 20 (asserting that gratitude may still be owed when benefactor's actions were small or self-serving but impact on beneficiary is enormous).

196. MCCONNELL, *supra* note 15, at 20-30.

197. Leubsdorf, *supra* note 80, at 258 (noting how "disqualification statutes say nothing about ideological bias").

198. See Leubsdorf, *supra* note 80, at 256 (observing that present law "discourages investigation of social or political bias on the bench"); Redish & Marshall, *supra* note 62, at 500-01 (stating that Supreme Court has gone to great lengths not to disqualify judge if judge possesses

procedural systems allowing an adjudicator to preside over a matter in which she was earlier involved or expressed a public opinion.¹⁹⁹ As Chief Justice Rehnquist once said, "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."²⁰⁰

The preceding argument suggests that one cannot precisely gauge the ideology's influence as a selection factor. Several considerations, such as the benefactor's potential self-interest, the likely personality characteristics of an ideological appointee, and the present state of impartiality law mitigate ideology's role in the clash of gratitude, loyalty, and impartiality. These points, however, should not mask ideology's potential to influence decisionmaking. As a selection criterion, ideology is particularly treacherous because it can reduce a judge's freedom to select the appropriate avenue for expressing gratitude and loyalty. Where ideology motivates a judge's appointment, the judge's benefactors anticipate ideological faithfulness from the judge in executing her duties. Although impartiality may require otherwise, feelings of gratitude and loyalty instruct the judge not to spurn her benefactor's expectations. Through this mechanism, the benefactor can impose her influence throughout the judge's docket, even in those cases where the benefactor made no effort to express a preferred disposition through an *amicus* brief, a public statement, or otherwise.

2. *Reward for political support*

Reward for political activities or support has played a more consistent role in nominations of lower court judges than Supreme Court Justices.²⁰¹ For lower court judgeships, empirical studies documenting party activism among nominees suggest that past

no "direct financial interest" in pending matter); see also, e.g., *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981) (refusing to disqualify judge from hearing suit against his alma mater), *cert. denied*, 455 U.S. 1027 (1982); *Idaho v. Freeman*, 478 F. Supp. 33, 35 (D. Idaho 1979) (stating general rule that judge is not prevented from hearing cases simply because he comes to case with general personal experiences, associations, and beliefs).

199. See, e.g., *Laird v. Tatum*, 409 U.S. 824, 839 (1972) (involving circumstances whereby then-Justice Rehnquist refused to disqualify himself from participating in decision concerning legal issue about which he had publicly spoken before taking bench); *FTC v. Cement Inst.*, 333 U.S. 683, 700 (1948) (allowing FTC to adjudicate case, even though "entire membership of Commission" had previously assessed issues in case "as a result of its prior official investigations"); *Cipollone v. Liggett Group*, 802 F.2d 658, 659 (3d Cir. 1986) (stating that prior experience with similar lawsuit is not ground for disqualification).

200. *Laird*, 409 U.S. at 835; see also *Cipollone*, 802 F.2d at 659-60 (holding that prior experience with legal issues is not ground for disqualification).

201. BAUM, *supra* note 167, at 123-24.

political activity is often an important selection factor.²⁰² Presidents, Executive officials, and Senators all use lower court judgeships to reward lawyers who helped advance their political careers. Yet, the role of political reward in Supreme Court nominations should not be underestimated. History furnishes many episodes where Presidents appointed loyal political foot soldiers and powerful party allies to the Court.²⁰³

Principles of social exchange instruct that a judge receiving her job as a political favor is apt to look to her judgeship as a means for showing gratitude and loyalty.²⁰⁴ After all, these virtues may have given her the position in the first place. Moreover, when the benefactor simply tried to be "decent" by showing gratitude and thankfulness for favors received from the judge, the benefactor's motives may be sufficiently "pure" (as a matter of philosophical theory) to make possible a return obligation of gratitude. Making matters worse, the return obligation may be directly relevant to decisionmaking, since the obligation arose in a relationship defined by political, and possibly ideological, affinity. For that reason, the return obligation may be similar to that arising for an ideological appointee: the obligation may influence many categories of cases, not just those cases in which the benefactor has expressed a position.²⁰⁵

Closer scrutiny, however, uncovers complexities. To the extent that the benefactor is acting to return the judge's past favors, all parties may understand that the award of the judgeship completes the

202. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 321-22, 324-25 (Apr.-May 1989) (using data to claim that in decade before 1988, approximately 55% of district court appointees and approximately 65% of court of appeals appointees engaged in past party activism). For a particularly candid and graphic account of the role of politics in the process of becoming a lower federal court judge, see Judge Joseph Samuel Perry, *How I Got to be a Federal Judge*, in COURTS, JUDGES, AND POLITICS 168 (Walter F. Murphy & C. Herman Pritchett eds., 2d ed. 1974).

203. Examples include: Eisenhower and Earl Warren; Truman and all four of his nominations (Burton, Vinson, Clark, and Minton); Kennedy and his two picks (White and Goldberg); Johnson and Fortas; several of Lincoln's choices (Swayne, Davis, and Chase); and Andrew Jackson and Roger Taney. See ABRAHAM, *supra* note 141, at 254-56, 241, 276-77, 289-90, 118-20, and 99-100.

204. Under traditional sociological theory, social exchange does not continue unless both parties to the exchange are making a profit. See HOMANS, *supra* note 137, at 61-69. Applied here, this theory suggests that the benefactor and the judge both expect that the judge will profit by the appointment and the benefactor will profit in some other way. A likely source of profit for the benefactor is for the judge to take some beneficial action in the context of her job. But see J.K. CHADWICK-JONES, SOCIAL EXCHANGE THEORY: ITS STRUCTURE AND INFLUENCE IN SOCIAL PSYCHOLOGY 210-26 (1976) (discussing criticisms of Homan's theory on social exchange and profit); SKIDMORE, *supra* note 137, at 18-28 (criticizing Homan's theory of social behavior).

205. See *supra* note 200 and accompanying text (discussing phenomenon in context of judge appointed because of her ideological predispositions).

reciprocity cycle,²⁰⁶ generating no further obligations. This understanding may be explicit between the parties, or may be the product of general sociological principles. As we know, social exchange does not always require direct reciprocity.²⁰⁷ Friendship studies instruct that membership in a relationship can be more important than direct return of a benefit received from another party in the relationship.²⁰⁸ In many circumstances, a member of a political group—through her relationship with the group—may be selected for a judgeship,²⁰⁹ yet excused from direct return of the benefit. According to the rules of politics, some favors carry with them the explicit obligation of return and others do not. A political favor like a judgeship, which includes a job requirement of impartiality, is a good candidate for suspension of the return obligation. The members of the group may understand that the judgeship is a big prize—one gained only after years of service to the group and one which the group understands to be exempt from the reciprocity cycle.

To the extent possible, field study would be invaluable in testing the hypothesis that social exchange expectations are often suspended for recipients of a federal judgeship. The hypothesis suggests, however, that a significant limitation on the influence of social exchange in decisionmaking exists.

3. *Garnering political favors from third parties*

A benefactor may support a judicial candidate in order to please other players in the political process. In this circumstance, the benefactor is not rewarding the candidate for anything the candidate did, but is paying off a political favor or garnering political support from a third-party. This practice is reflected in anecdotal incidents throughout history²¹⁰ and is institutionalized in the tradition of senatorial courtesies.²¹¹ When senatorial courtesies are involved, an

206. See *supra* notes 38-56 and accompanying text (discussing role of reciprocity in society).

207. See *supra* notes 42-55 and accompanying text (discussing complexities of reciprocity analysis).

208. See *supra* notes 57-60 (describing sociological and anthropological literature on friendship theory).

209. See *supra* note 202 (discussing appointed judges and their past party activism).

210. See ABRAHAM, *supra* note 141, at 145 (describing how Grover Cleveland nominated Senator E.D. White to Supreme Court in attempt to ingratiate himself to Senate); *id.* at 256 (reporting that Eisenhower is said to have appointed Warren as favor to California politicians who wanted Warren out of California politics); BAUM, *supra* note 167, at 124 (describing vote-trading and threatened retaliation in 1987 confirmation of Judge William Dwyer).

211. See BAUM, *supra* note 167, at 124 (finding that executive deference to Senators in selection of judges "constitutes yet another kind of pursuit of political support"); Solomon, *supra* note 185, at 335-36 (revealing that Presidents Harding and Coolidge deferred almost completely to Senators' choices for court of appeals judgeships).

Executive may nominate a particular candidate in order to win political support from the nominee's home-state Senator, another individual Senator, or other political leaders.²¹²

Where a benefactor, such as the Executive, promotes a nominee in order to generate or satisfy political obligations with a third-party, the nominee may view herself simply as a pawn in the political process. For a number of reasons, the nominee's feelings of gratitude and loyalty toward the promoter may accordingly be minimal.²¹³ First, the nomination lacks the element of personal exchange present when a benefactor acts to reward the nominee's political service. In addition, moral philosophy suggests that the benefactor's motivation eliminates any trace of loyalty and gratitude obligations because the benefactor is not acting to help the nominee²¹⁴ and the benefactor's motivation is arguably self-interested.²¹⁵ At the least, the nominee is not likely to view the benefactor's actions as calling for a direct return of benefit. In fact, the benefactor likely expects repayment only from the third-party, not the nominee.

The analysis thus far focuses on only one benefactor—the individual who acts to repay or to ingratiate a third-party. That third-party, however, is another potential benefactor of the nominee. For example, the third-party may be a Senator who proposes the nominee's name in order to reward the nominee for faithful support to the Senator. In that case, the earlier analysis of direct political reward may shed light on the relationship between the third-party Senator and the nominee. This situation may be unique given that the impersonal nomination process and the nominee's status as an instrument in political exchange may mitigate her personal feelings of gratitude and loyalty toward the Senator. It is possible, however, that the nominee may view the nomination as reward for membership and faithfulness to a political group. From that perspective, friendship analysis and principles of group loyalty suggest that she may bear strong sentiments of gratitude and loyalty toward both the Executive and the Senator.

212. JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 216-17 (1953).

213. See Oldenquist, *supra* note 8, at 179-80 (suggesting that nominee, once appointed, will have more loyalty to larger organization or community rather than individual benefactor, and will possibly view benefactor's interests as conflicting with those of large community).

214. See Weiss, *supra* note 193, at 495 (proposing that benefactor's intent to help recipient of benefit constitutes necessary condition for obligation of gratitude).

215. See *supra* notes 192-95 and accompanying text (discussing self-interested motivations that may eliminate debts of gratitude and loyalty).

4. *Demographics*

Key players in judicial selection often use demographics in choosing candidates.²¹⁶ Although demographics is a common selection criterion, potential benefactors of a judicial candidate may have varying motivations for focusing on the race, gender, regional affiliation, or religious identity of the candidate. On one hand, the benefactor may be using demographics in an effort to strengthen political support among certain groups in society.²¹⁷ Alternatively, the benefactor may be trying either to tailor a judiciary that approximates society's demographic diversity or to ensure that historically disempowered groups are represented on the federal bench.²¹⁸

For a federal judge, the conflict of impartiality with loyalty and gratitude will vary depending on which of these motivations predominate. If it is clear that the benefactor is primarily seeking political support from the population group the judge represents, the judge bears diminished pressure to use the judicial process for expressing gratitude and loyalty. Because the benefactor is acting with a self-interested purpose, the judge's debt is lessened or eliminated. Moreover, to the extent that pangs of obligation remain, the judge may satisfy those feelings, in large measure, merely by continuing to possess the demographic characteristic motivating her appointment. Under this view, a judge appointed because she is a woman meets her benefactor's needs by continuing to possess the identity of "woman" while performing her judicial duties. Quite possibly, the benefactor who is merely trying to garner votes is concerned with the symbolism of having appointed a woman rather than with ensuring that the nominee performs her duties in a way that specially "represents" women's interests. For this benefactor, the judge need not take affirmative steps to act in a representative capacity, whatever that may be; she need only "be" a woman.

In contrast, the benefactor interested in diversity or empowerment

216. President Carter actually issued an executive order formalizing the administration's consideration of demographics. See Exec. Order No. 12059, 3 C.F.R. 180, 182 (1978) (stating that nominating panels are "encouraged to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees"). The record of other modern Presidents reflects a similar concern with demographics. See BAUM, *supra* note 167, at 117 (describing Nixon's appointment of Justice Powell as "effort to appeal to Southern voters"); Goldman, *supra* note 158, at 294 (describing Bush's appointment of women and minorities).

217. BAUM, *supra* note 167, at 124.

218. See ABRAHAM, *supra* note 141, at 61-64 (discussing expectation that certain seats on Supreme Court may be dedicated to certain demographic group); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 106 (1985) (discussing "long tradition of conscious attention to the geographic and religious diversity" of Supreme Court).

of specific groups is apt to be more concerned that the nominee actually *represent* her demographic group. For many aspects of her job, it will be impossible, unnecessary, or absurd for the judge to ascertain how a "woman's representative" should perform a given task. But in cases where the judge has a clear view of how her representative role should influence her job, the judge may experience the clash of impartiality against loyalty and gratitude.²¹⁹

Like judges appointed for their ideological predispositions, the judge appointed to represent a demographic group has benefactors who expect her to decide cases in a certain way. In cases where it is plain how those expectations should affect her decisionmaking, and when those expectations are in tension with the disposition the judge would otherwise reach, the judge may feel the strong tug of gratitude and loyalty. After all, the benefactor's motivations in appointing the judge are apparently unselfish and civic-minded. Thus, the benefactor is better-positioned to expect loyalty and gratitude from the judge.²²⁰ Making matters worse, the judge is likely to feel some obligation to express her loyalty and gratitude by meeting the benefactor's expectations about the substance of her decisions, thereby threatening the judge's ability to perform her duties with impartiality and detachment.²²¹

Benefactors concerned with diversity and representation of disempowered groups may be said to have a more noble purpose in promoting judicial candidates than benefactors focused solely on getting votes or political support. The ironic result of the above analysis, however, is that the "noble" benefactors are more likely to increase dissonance for their appointees than benefactors pursuing selfish ends.

5. Competence

Competence is, of course, universally held out as a minimum prerequisite of eligibility for the federal bench. Formally and

219. The goals of impartiality and representation of diverse demographic groups are in many ways consistent. Indeed, both impartiality and fair representation "include a basic idea about the distribution of experiences necessary to render fair judgments." Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1202, 1206 (1992).

220. See *supra* notes 192-95 and accompanying text (explaining morally disqualifying motivations of benefactor).

221. As noted earlier, standard impartiality doctrine does not proscribe social and cultural bias in the same way that it condemns financial interest in litigation, familial relationship with litigants, and personal hatred of litigants, see *supra* notes 104-05 and accompanying text. Thus, a judge appointed to represent a segment of the population may experience less dissonance than she would if the law were less tolerant of a judge's predispositions to certain groups.

informally, judicial candidates are reviewed for their fitness to meet the demands of a federal judgeship. Less frequent are circumstances where judicial candidates are singled out simply because they possess exceptionally high intelligence, wisdom, legal skill, and ethical standards. Nevertheless, history yields examples of where these qualities appeared as the most significant factor behind a candidate's selection.²²²

There could be a number of reasons why a benefactor may be motivated to promote a judicial candidate on the basis of competence alone. From a self-interested perspective, the benefactor may want to increase political capital, trying to convey the public image that she is working hard in the country's best interest.²²³ At the other end of the spectrum, the benefactor's actions may be more altruistic, such as where the benefactor turns a deaf ear to political pressure and instead promotes a candidate believed to possess the best qualities for the job.²²⁴

The perceived motivation behind the appointment will, of course, influence the degree of gratitude and loyalty the judge feels. As explained earlier, a beneficiary's moral obligation to reciprocate is reduced as the benefactor's motivation becomes perceived as more selfish.²²⁵ Such subtle distinctions, however, may not be greatly important here: to the extent that special debts of gratitude and loyalty attach for the judge appointed for her exemplary competence, the judge can largely meet the benefactor's expectations simply by

222. The most prominent examples are President Wilson's nomination of Justice Brandeis and President Hoover's nomination of Justice Cardozo. See ABRAHAM, *supra* note 141, at 180-85, 200, 204-07 (discussing factors influencing those nominations); TRIBE, *supra* note 218, at 81 (discussing events surrounding Cardozo's nomination); see also Solomon, *supra* note 185, at 328-35 (suggesting that "professionalism" was dominant selection criterion for Taft and Hoover administrations, including, for Taft, qualities of "intelligence, close reasoning, careful explanations of result, a respect for precedent, and an ability to dispatch work quickly"); Strauss & Sunstein, *supra* note 148, at 1505 n.71 (citing Justice Stevens as another possible example of Justice appointed primarily based on quality and character); Aaron Epstein & Charles Green, *Clinton Nominates Breyer: Boston Jurist is Consensus-Builder*, DET. FREE PRESS, May 14, 1994, at A1 (describing Stephen Breyer as another example, stating that "those who know Breyer best say he's terrifically smart and quick-witted—and so fair and open-minded that he can listen carefully to warring advocates and come up with an ingenious solution that makes them think they won"); Susan Estrich, *The Nation: Concentrating on Process, We Miss Breyer's Strengths*, L.A. TIMES, May 22, 1994, at M2 (expressing similar view of Breyer).

223. President Clinton's nomination of Stephen Breyer is a possible example. See *The MacNeil/Lehrer News Hour* transcript no. 4926, May 13, 1994, available in LEXIS, News library, MACLEH file (remarks of President Clinton) (explaining, during news conference announcing Breyer nomination, that Breyer could give American people confidence in Supreme Court and help them feel that Court is accessible to them).

224. President Wilson's nomination of Justice Brandeis may be an example of this, although history also reflects strong personal and political connections between the two men dating well before the nomination. ABRAHAM, *supra* note 141, at 180-85.

225. See *supra* notes 192-95.

being extremely competent. Presumably, this competence includes the ability to satisfy fully the judge's duty of impartiality.

As a selection criterion, competence may be the least problematic of all. It is neutral in that it carries no expectations about the substance of the judge's decisions; it also does not operate to fuel or perpetuate feelings of personal obligation or exchange cycles between judge and benefactor. But even more significant, use of competence as a criterion actually works to undercut the clash of loyalty and gratitude against impartiality. By its own terms, competence encourages a federal judge to cast aside the temptation to express loyalty and gratitude through adjudication. Indeed, a judge who consciously allows her beneficiary's outcome preferences to influence her decisions would be disloyal to the beneficiary's wishes about the judge's *method* of decisionmaking. Presumably, the beneficiary who chooses the judge for her competence would be disappointed by any deviation from the strictest standard of impartiality.

IV. THE IMPARTIALITY IDEAL: EVALUATING ITS WISDOM AND REALITY

Analysis of selection criteria for federal judges shows that some judges experience a more dramatic clash of expectations and duties than others. Yet for all judges, powerful social norms and moral principles operating outside the judicial context drive home the importance of loyalty and gratitude. Although formally exiled from the judicial process, these norms and principles are likely to spill over into adjudication, often weighing heavily on the minds of judges. In many cases, psychological and emotional forces may brand as disloyal a judge who embarrasses or spurns her benefactor by rendering decisions hostile to the benefactor's deeply held and clearly expressed convictions. It is therefore important that we try to understand how the clash of gratitude, loyalty, and impartiality can affect the decisionmaking process for all judges.

Much contemporary legal scholarship has studied the proposition that true impartiality is not possible.²²⁶ As a model, the impartial

226. See, e.g., Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1947 & n.7 (1988) (asserting that blind adherence to notions of impartiality ignores reality that "judges do not step into the courtroom unconnected from their lives or from their communities"); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1626-28 (1986) (recognizing that no judge acts alone, outside social context); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 70 (1987) (suggesting that one should reach beyond assumption of "one reality" to accept that "[t]here is no neutrality, no escape from choice"); Resnick, *supra* note 66, at 1904 (finding that while society seeks impartiality and disassociation, decisions rarely reflect such qualities); cf. Baron, *supra* note 88 (discussing current

judge is symbolized by justice with a blindfold, justice without a point of view, and justice without facts or historical backdrop other than that presented by the litigants.²²⁷ Scholars have argued, however, that to pretend that a judge can actually dispense justice in this way is to assume, unrealistically, that the judge operates outside of a social context.²²⁸ Moreover, our insistence that judges try to divorce themselves from their social context may undermine valuable opportunities for judges to incorporate in their work a spirit of connectedness and understanding of that context.

This scholarship is ongoing and continues to struggle with questions pertinent to the problem analyzed here. In particular, recognition of the falsity of pure impartiality and the benefit of contextual decisionmaking does not necessarily counsel judges to unharness all personal feelings and predispositions.²²⁹ Merely because we are all "interested" at some level does not mean that all kinds of considerations have an appropriate role in decisionmaking.²³⁰ Put differently, arguing that human passions and emotions can increase fairness in judicial decisionmaking does not establish that all human responses serve justice. But where do we draw the line? In the words of Patricia Cain, we have not yet found a way to differentiate between "good bias" and "bad."²³¹

Continued study of these questions will likely shed light on the appropriate role of loyalty and gratitude in decisionmaking. What is clear at present, however, is that a system has been created under which judges are struggling under inconsistent messages. As explored

critiques of impartiality among ethical theorists); Oldenquist, *supra* note 8 (contending that impartial standpoints do not exist).

227. In a recent opinion, Justice Kennedy wrote as though such a judge could exist: "Judges, if faithful to their oath, approach every aspect of each case with a neutral and objective disposition." *Liteky v. United States*, 114 S. Ct. 1147, 1160 (1994) (Kennedy, J., concurring).

228. See *supra* note 226. This scholarship proceeds from the premise that decisionmaking involves resolution by reference to normative standards as well as general knowledge of the world. Norms are not universally shared by all individuals; nor (obviously) is one's knowledge of the world. For these reasons, all decisionmaking by necessity must begin from a particular perspective or point of view. Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 270 (1994) ("All evaluation . . . proceeds from a particular and contingent, although often unacknowledged, perspective; it always starts from a contestable point of view."). The ideal of an objective decision—"neutral" and "free from bias"—is therefore impossible to sustain. See Resnick, *supra* note 67, at 1905 (finding that once individuals understand that there is no "objective stance," they realize that "[t]here is no neutrality, no escape from choice" (quoting Minow, *supra* note 226, at 14, 70))).

229. See Leubsdorf, *supra* note 80, at 279 (discussing proper role of judge's personal views, while recognizing problems of totally impartial judges and political judges).

230. See Leubsdorf, *supra* note 80, at 253 & n.91 (stating that judicial "disqualification can be justified even if one does not believe in judicial neutrality or predictability"); Resnick, *supra* note 66, at 1934 ("I would not want to embrace the view that because we are all 'interested' at some level, no kinds of interest are disqualifying." (citing Cain, *supra* note 226, at 1947 n.7)).

231. Cain, *supra* note 226, at 1946.

earlier, our legal and social traditions make impartiality a job requirement for a federal judge. Yet, other pressures reinforce expectations that the judge express loyalty and gratitude to her benefactor. As argued above, these expectations persevere in the face of moral reasoning and social norms that exempt a judge from a formal *duty* to express loyalty and gratitude in decisionmaking. Where a judge is mindful of the impartiality ideal, how is she likely to handle these countervailing expectations?

A. Empirical Observation

Our society's view is that newly appointed judges generally exhibit strong ties to their benefactors, which may disappear over time. Empirical studies document this wisdom,²³² and history recounts episodes where the voting patterns of Supreme Court justices initially track the ideological preferences of the Executive who nominated them, but show a languorous but identifiable path away from those preferences.²³³

For my purposes, these observations are inconclusive. A judge's changed voting patterns may reflect knowledge and understanding separate from a growing sense of independence from the judge's benefactors. In addition, some empirical work suggests that the perceived tie between a judge's votes and the preferences of her benefactors may be exaggerated.²³⁴ It is also unclear whether the true effects of loyalty and gratitude on decisionmaking are too subtle or insidious for the standard tools of history or empirical research to record.

232. See, e.g., CARP & STIDHAM, *supra* note 169, at 298-301 (analyzing empirical data on published opinions, which establishes that early decisions by Bush appointees are consistent with Bush's ideology); Goldman, *supra* note 158, at 296 & n.35 (citing studies suggesting that Reagan's appointees have "had a decisional impact that has made the federal bench far more conservative than when Reagan took office").

233. Justice Harry Blackmun is perhaps the most often cited example of this phenomenon. See, e.g., Bruce S. Rogow, *Justice Harry A. Blackmun*, 14 NOVA L. REV. 9, 9-11 (1989) (discussing Blackmun's shift in ideology); Bryan H. Wildenthal, *Judicial Philosophies in Collision: Justice Blackmun, Garcia, and the Tenth Amendment*, 32 ARIZ. L. REV. 749, 749-50 (1990) (noting intellectual evolution of Blackmun); Note, *supra* note 145, at 717-19, 734-36 (discussing Blackmun's transformation from "right" to "left of center" position on issues); see also DAVID McCULLOUGH, *TRUMAN* 900-01 (1992) (discussing Justice Tom Clark's failure to vote as desired by his benefactor, Harry Truman); *Constitutional Law Scholars Assess Impact of Supreme Court's 1993-94 Term*, 63 U.S.L.W. 2229, 2230 (Oct. 18, 1994) (quoting Professor Jesse Choper as saying that Justice Souter has undergone "quickest change of any justice, at least in modern times"); Schwartz, *supra* note 145, at 1 (discussing post-appointment transformation of Earl Warren).

234. See Laura Duncan, *Political Ties of Federal Judicial Appointees have Little Effect on Case Outcomes: Researchers*, CHI. DAILY L. BULL., Feb. 23, 1993, at 1 (reporting on study showing that "political affiliations of a president and the judges he appoints have no major effect on the outcome of cases").

For these reasons, further empirical study into the precise effect of gratitude and loyalty on decisionmaking is vital. In the meantime, however, our existing understanding of the decisionmaking process suggests that the role of these sentiments in decisionmaking may be significant.

B. *Existing Understanding of Decisionmaking*

Several scholars have characterized decisionmaking as an isolating process.²³⁵ The act of adjudication may require the judge psychologically to separate from the litigants and the forces that compose the judge's "self." This separation presumably makes judging more comfortable for most people. Although perhaps fueled by the judge's inclination to avoid personal discomfort, the mental separation may also help the judge to sever loyalty and gratitude and live up to the expectation of impartiality.

Despite these observations, a judge's loyalty and gratitude remain capable of deeply affecting adjudication. Because loyalty and gratitude are so important to society's normative structure and Western philosophical tradition, we must assume that these sentiments are not easily dispelled, but instead are inclined to "stick to our ribs." Like other powerful expectations and sympathies, loyalty and gratitude are not likely to stay "on the emotion side of the line," removed from the professional task of decisionmaking.²³⁶ After all, these obligations "do not spring literally from the heart rather than the head,"²³⁷ and are not easily identified and removed from adjudication.

It may be that a judge can readily harness and isolate from adjudication some bias-creating interests, such as personal financial matters. Where such a tangible personal concern is implicated, a judge may be able to identify the interest's potential effect on her

235. As explained by Patricia Cain:

I can think of no human act more likely to separate one person from another than the act of judging. I cannot say with any confidence that the act of judging requires separation to give it meaning and validity or whether we, as human beings, require the separation as a psychological aid to reduce our own pain and conflict.

Cain, *supra* note 226, at 1946; see also Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 59 (1988) (finding that judges may need to distance or disassociate themselves from full impact of their decisions in order to fulfill their judicial duties).

236. See Minow & Spelman, *supra* note 235, at 41-45 (discussing Justice Brennan's critique of "bureaucratic rationality"); see also FLETCHER, *supra* note 5, at 170 (finding that individuals cannot free themselves from emotional impulses); Rayman L. Solomon, *U.S. Courts of Appeals and Their Judges: Howard's Courts of Appeals in the Federal Judicial System*, 1983 AM. BAR FOUND. RES. J. 761, 767-70 (embracing view that political philosophy and professional norms interact in complex ways through process of decisionmaking).

237. Minow & Spelman, *supra* note 235, at 45.

reasoning, to conclude that the interest is clearly irrelevant to the case at hand, and to take corrective action.²³⁸ Given that gratitude and loyalty are far less concrete, and their impact on a beneficiary potentially more diffuse, a judge is less likely to segregate them from the mental process of filtering, organizing, and interpreting the information received as part of the litigation.²³⁹

The nature of law and legal decisionmaking makes matters worse. Encountering a legal issue, a judge may initially conclude that established law clearly ordains a "correct" disposition of the issue. Yet, because legal issues are open-textured and possess many dimensions, initial impressions are often wrong. As Duncan Kennedy explains: "What at first [looks] open and shut is ajar, and what [looks] vague and altogether indeterminate abruptly reveals itself to be quite firmly settled under the circumstances."²⁴⁰ Consequently, principles of conscientious decisionmaking exhort a judge to reconsider first impressions and to develop counterarguments until a more fully contemplated decision emerges.²⁴¹ This is not necessarily a process confined to investigating competing legal rules governing a specific issue, but also may include considering whether a dispute is properly recharacterized in terms of a wholly different set of legal rules. Whatever the precise analysis undertaken, a dutiful judge should manipulate the relevant legal principles in a case before coming to a resolution.

A problem emerges because this process of "playing around" with the legal issues provides fruitful opportunities for the judge to integrate "extraneous" factors into adjudication. Although the law may identify the judge's personal loyalty and gratitude as contrary to the impartiality ideal, the latitude encouraged by principles of "good" decisionmaking allows the sentiments to prey on the judge, and to affect her ultimate decision.

Thus, the structure of decisionmaking strengthens the potential of loyalty and gratitude to influence adjudication. These sentiments,

238. See Redish & Marshall, *supra* note 62, at 502 n.176 (arguing that where pecuniary interest is involved, fact that interest is "so clearly irrelevant is to some extent helpful since the decider has no doubt that it is impermissible for him to consider it"). The appropriate corrective action is often clear, although sometimes expensive. See Neil A. Lewis, *Justice Breyer Severs Ties to the Lloyd's Syndicate*, N.Y. TIMES, Nov. 11, 1994, at A24 (stating that Justice Breyer extricated himself from controversial Lloyds of London investment "at a hefty price").

239. Cf. *Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1355-57 (3d Cir. 1994) (analyzing effects of loyalty on public officials outside judicial context).

240. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 522 (1986).

241. Professor Kennedy even suggests that "the ideal of impartiality" requires this rumination process of judges. *Id.* at 523.

however, have yet another—very important and potentially perverting—dimension.

Because our traditions inculcate judges with ideals of impartiality and disinterest, most judges are apt to believe that obligations of personal gratitude and loyalty do not belong in adjudication. Thus, when loyalty and gratitude seep into the judging process, they must work by stealth. Because a judge may try to deny their influence on a decision, gratitude and loyalty may inject into deliberations a process of rationalization that threatens both to confuse the ultimate result and to obscure the underlying reasoning. A judge intent on denying or hiding the influence of loyalty and gratitude is thus likely to sacrifice both clarity and candor in her decision, qualities that enhance a decision's potential to guide and to educate litigants and others interested in the outcome of a case.²⁴²

CONCLUSION

On the issue of impartiality, an individual undertaking a federal judgeship confronts a difficult task. Contemporary lawyers commonly agree that the law is not wholly the product of neutral principles and that a judge must choose among values as she shapes the law.²⁴³ Yet, the standards governing impartiality in federal courts largely assume that total judicial neutrality and dispassion are possible. The process of mapping out a personal framework for decisionmaking is therefore apt to create considerable discordance for the judge. Added to this burden are the special pulls of gratitude and loyalty toward the individuals who made possible the judge's job.

I have sought to show both that gratitude and loyalty can have a powerful influence for a federal judge undertaking to decide a case. The problem is complex because loyalty and gratitude pose a greater potential problem for some judges than for others. This complexity emerges to a great degree from the process of nomination and confirmation, which often generates, or at least reinforces, a judge's sense of loyalty and gratitude to her benefactors.

In the last few years, we have witnessed a wave of dissatisfaction with the selection process for federal judges. Legal scholarship in particular has offered frequent critique and constructive suggestions for

242. See generally Robert A. Lefflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979); Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 653-658 (1991) (discussing failure of federal court decision to provide more thorough and balanced appraisal of countervailing considerations); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (discussing virtues of candor in decisionmaking).

243. See Leubsdorf, *supra* note 80, at 253.

change.²⁴⁴ As it must, this scholarship recognizes that any change ventured must weigh the impact of nomination and confirmation on a number of segments of American life, including the constitutional balance of powers and public perception of the judiciary.

To omit from these concerns the effect of any change on the ultimate quality of judicial decisionmaking would, of course, be a mistake. Thus, in studying any new selection procedure, we must contemplate the procedure's potential for creating and invigorating a judge's feelings of loyalty and gratitude to her benefactors. The foregoing should, therefore, not only shed light on the process of federal court decisionmaking in general, but also give much needed guidance for evaluating proposed changes to judicial selection.

244. See generally CARTER, *supra* note 157 (advocating number of changes to process of appointing federal judges); Stephen L. Carter, *Why the Confirmation Process Can't Be Fixed*, 1993 U. ILL. L. REV. 1 (arguing that problems with confirmation process most likely arise from country's ill-advised expectation that Supreme Court acts as national policymaker); Fein, *supra* note 148, at 672 (advocating confining Senate's role in confirmation process to screening out unfit characters); Nathaniel R. Jones, *Whither Goest Judicial Nominations, Brown or Plessy?—Advice and Consent Revisited*, 46 SMU L. REV. 735 (1992) (reviewing debate over proper selection process for federal judiciary); Mitchell McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7 (1970) (advocating deferential Senate role in selection process); Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENTARY 283 (1990) (suggesting that Senate engage in searching inquiry into nominee's views on issues of national significance in addition to nominee's basic fitness for judicial office); Tobias, *supra* note 188, at 1274-78 (advocating judicial selection procedures that emphasize merit and promote demographic and political balance); Yackle, *supra* note 187, at 273 (analyzing appropriate judicial selection criteria and mechanisms for implementing these standards); see also *supra* notes 151-56 and accompanying text (discussing various views of appropriate role of Senate in confirmation and nomination).

