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ARTICLE

THE ARCHITECTURE OF JUDICIAL INDEPENDENCE^{*}

STEPHEN B. BURBANK^{**}

I. INTRODUCTION

Concern about judicial independence has been a recurrent feature of American history, as have attacks on courts and their decisions. In recent years, however, such attacks have become more than the expected response of persons who profoundly disagree with those decisions. They have become part of orchestrated strategies of political parties and other groups, empowered by the tools of modern political campaigns and by the ignorance of the electorate, which is the godmother of the single-issue campaign and the godfather of the sound bite.¹

The perception that judicial independence is at risk has arisen before in our history. Indeed, from the perspective of people who value judicial independence, it may be that current efforts to curb it are no more serious than those faced by state and federal judiciaries in the past. Certainly they are less serious than the threats the federal judiciary and judges in some states faced in the early years of the nineteenth century.²

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1. See, e.g., ABA COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY i-ii (1997) [hereinafter ABA COMMISSION]; Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 165 (1997).

2. See *infra* text accompanying notes 33-36.

Still, today judges in some states are losing their offices because decisions with which they are associated have become lightning rods for the purveyors of single-issue politics.³ Moreover, federal judges and the jurisdiction and powers of federal courts have recently become issues in national political campaigns and in congressional debates, with the issues defined by a label.⁴ Attacks on them are regarded as therapeutic for disappointed legislators.⁵ Some even talk of impeachment or requested resignation in response to controversial decisions.⁶

A culture of sound bites, labels, and threats is not one in which judicial independence can flourish. Starting from an abysmal knowledge base about the judiciary,⁷ the public may receive from the cumulation of attacks the message that courts are inextricably entangled in partisan politics. As most federal judges have recognized—and as their predecessors were forced to recognize in the early nineteenth century⁸—that is a profoundly destructive message. Moreover, as study of the history of elective state judiciaries instructs,⁹ it should be so regarded even by those who believe that judges must be accountable to the public for their decisions.

The message that courts are engaged in partisan politics denies the possibility of the rule of law. It therefore denies that which, paradoxically, is at the same time a critical argument for and a potent check on judicial independence in the United States: “those wise restraints that make us free.”¹⁰ Thus, current battles about judicial independence jeopardize more than the terms and conditions of judicial employment or the jurisdiction

3. See Bright, *supra* note 1, at 168-70; Traciell V. Reid, *An Analysis of Judicial Retention Elections in Tennessee* 1 (Aug. 1998) (unpublished manuscript, on file with the author).

4. See Bright, *supra* note 1, at 166-67. See also Stephen B. Burbank, *Unwarranted Distrust of Federal Judges*, 81 JUDICATURE 7, 7 (1997).

5. See Ralph Z. Hallow, *Republicans Out to Impeach “Activist” Jurists*, WASH. TIMES, Mar. 12, 1997, at A1.

6. See Jerome B. Meites & Steven F. Pflaum, *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, 29 LOY. U. CHI. L.J. 741, 744 (1998); Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 156-57 (1997).

7. See, e.g., THE HEARST CORP., THE AMERICAN PUBLIC, THE MEDIA & THE JUDICIAL SYSTEM: A NATIONAL SURVEY ON PUBLIC AWARENESS AND PERSONAL EXPERIENCE (1983), reprinted in AMERICAN BAR ASS’N, OFFICE OF JUSTICE INITIATIVES, BAR PUBLIC OPINION SURVEYS CONCERNING LAWYERS AND THE JUSTICE SYSTEM 12 (1998) (presenting a table which shows the public’s unfamiliarity with the judiciary).

8. See *infra* text accompanying notes 35-36.

9. See *infra* text accompanying notes 105-06.

10. COMMENCEMENT OFFICE, HARVARD UNIVERSITY, FORM OF CONFERRING DEGREES 12 (1998) (stating language, originally penned by Professor John Maguire, which is part of the citation read by the president of Harvard University in conferring the J.D. diploma at commencement exercises).

and powers of courts. They threaten the role of law in American society and hence this society's fundamental aspirations.

In this Article, I will attempt to provide an account of judicial independence in the United States that is respectful of history, doctrine, and theory. My goal is to see where we are in the state of learning on this subject, thereby the better to gauge where we might profitably move hereafter. Perhaps, as many political scientists have long believed, judicial independence is a myth,¹¹ and so also the rule of law. That would not mean that either is dispensable, however, for it is possible that a society cannot function without myths that capture its aspirations.

My approach reflects the view that, whether one's perspective is historical, doctrinal, or theoretical, understanding in this area is made difficult, and misunderstanding is fostered, by considering judicial independence as an isolated value in the constellation of values that collectively define this society's aspirations. Rather, as the metaphor of architecture suggests, judicial independence should be approached, and can best be understood, dynamically in terms of relationships and interdependencies. Some of the critical relationships and interdependencies that I consider include those between: judicial independence and judicial accountability, individual judicial independence and institutional judicial independence, and the independence of federal courts and the independence of the courts of the several states. I will attend to these relationships and interdependencies as I define judicial independence and question whether, so defined, the concept has historical, doctrinal, and theoretical coherence, and I will return to each of them for clarity and emphasis.

II. JUDICIAL INDEPENDENCE: WHAT IT WAS, WHAT IT IS, AND WHAT IT SHOULD BE

I have the sense that many people who discuss or debate judicial independence assume that others both understand and agree with the meanings they ascribe to the concept. It will not do, however, for those engaged in an enterprise such as this symposium to proceed on that assumption. If we are to arrive at the same destination, it must be through a shared understanding of what it is that we are trying to find. For that reason, we should try to be precise about historical dimensions as well as about boundaries that separate the positive from the normative.

11. See *infra* text accompanying note 73.

If one believes, as I do, that legal concepts are children of the contexts in which they are employed, it may be impossible to speak meaningfully about judicial independence in the United States without importing a substantial measure of normative judgment. That is not only because there are fifty-one relevant contexts, which would render exceedingly difficult even the task of accurate description, but also because, in its positive dimensions, judicial independence is not an operative legal concept but rather a way of describing the consequences of legal arrangements.¹² In addition, the legal arrangements thus described are not confined to positive law in the traditional sense, as embodied in constitutions, statutes, and judicial decisions. They also include understandings developed over time as the result of practical political experience. Because they have been forged in times of crisis, these understandings may have more durability than any statute or judicial decision, and in that sense may be regarded as “constitutional law.”¹³

Finally, discussions of judicial independence are bound to import some measure of normative judgment to the extent that a person invoking the concept seeks to capture or does in fact capture something other than the consequences of legal arrangements, even broadly defined. Judicial independence can have the aspect of a “brooding omnipresence,”¹⁴ which in my experience usually signals hopes or fears more than it does legal doctrine.¹⁵

A. DEFINING JUDICIAL INDEPENDENCE: THE CORE

1. *Federal Arrangements: Separation of Powers*

The desire to avoid or mitigate difficulties such as those canvassed above might explain why most discussions of judicial independence in the legal literature start and end with the independence of federal judges and

12. See REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 9-10, 16-17 (1993) [hereinafter REPORT OF THE NATIONAL COMMISSION]; John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 380 (1998).

13. See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 220 (1998); Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928, 962 (1997) (book review); Charles G. Geyh, *Courts, Congress, and the Constitutional Politics of Interbranch Restraint*, 87 GEO. L.J. 243, 255-62 (1998) (book review).

14. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

15. See Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 117 (1996) [hereinafter Burbank, *The Past and Present of Judicial Independence*].

of the federal judiciary. It is not, however, the most probable explanation—that lies in the training, attitudes, and incentives of law professors.¹⁶

Yet, from a historical perspective, it may be a mistake to start the process of defining judicial independence in the United States by considering federal courts and federal judges, even if one is only interested in that dimension. Experience under state arrangements had a profound effect on the views of men who were instrumental in the framing and ratification of the federal arrangements reflected in the Constitution and in the Judiciary Act of 1789, arrangements that established the foundations of federal judicial independence and a court structure that endured essentially unchanged for a century.¹⁷

It is commonplace to attribute the protections of judicial tenure and compensation in Article III of the Constitution¹⁸ to the experience of the colonists.¹⁹ Yet, as Jack Rakove has pointed out:

It took a decade of experience under the state constitutions to expose the triple danger that so alarmed Madison in 1787: first, that abuse of legislative power was more ominous than arbitrary acts of the executive; second, that the true problem of rights was less to protect the ruled from the rulers than to defend minorities and individuals against factious popular majorities acting through government; and third, that agencies of central government were less dangerous than state and local despotisms.²⁰

Rakove is surely right that “[this reconception] . . . has crucial and often overlooked implications for American ideas of judicial independence and judicial review.”²¹

For present purposes, its significance lies in helping to divine the meaning of judicial independence as a way of describing the consequences of the legal arrangements established by the U.S. Constitution. It suggests

16. See RICHARD A. POSNER, *OVERCOMING LAW* 81-144 (1995). An important consequence of all of those things has traditionally been a lack of patience or interest—and, from a non-doctrinal perspective, competence—to engage state arrangements.

17. See Herbert Jacob, *The Courts as Political Agencies: An Historical Analysis*, in 8 *TUL. STUD. IN POL. SCI.* 9, 21-24 (1962) [hereinafter Jacob, *The Courts as Political Agencies*]. See also *infra* text accompanying note 20.

18. “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

19. That experience led to the grievance in the Declaration of Independence that the King had “made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.” THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

20. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 290 (1996).

21. *Id.*

what a reading of *The Federalist Papers* confirms,²² namely that, for Madison and Hamilton at least, judicial independence was an essential aspect of the separation of powers, central to what Rakove has termed “a substantive conception of the judiciary as the third branch of government.”²³ In this view, as expressed by Paul Bator, judicial independence assures “that, at the end of the day, judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law (including the Constitution).”²⁴

One need not adhere to a particular theory of constitutional interpretation to conclude that this view of federal judicial independence has come to serve as the core of most modern definitions. Yet, we have not arrived at that point without controversy. Moreover, although the verdict of history has confirmed some understandings about federal judicial independence that cannot fairly be imputed to the language of the Constitution alone, history leaves room for legitimate disagreement about the extent of freedom from control that the Constitution can properly provide. Finally, within the core as outside it, we are left with the problem of judicial independence in the states.

In describing *The Federalist No. 78*, Louis Pollak has observed that Hamilton dealt with permanency in office and security of compensation “before he went on to tell his readers what it was that federal judges were supposed to do,” which Pollak concluded was “a kind of intriguing way to make up a job description,” and which he attributed to Hamilton’s view of “the necessity of such protections for the judicial office in a judicial system which is going to have the power of judicial review.”²⁵ Hamilton’s views about both federal judicial review and federal judicial supremacy—an important distinction that the recent work of Barry Friedman has illuminated²⁶—were vigorously disputed not only during the ratification process but also soon thereafter, when the meaning of federal judicial independence assumed practical importance.

22. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton).

23. RAKOVE, *supra* note 20, at 299.

24. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 268 (1990).

25. Louis H. Pollak, *The Constitutional and Historical Origins of Judicial Independence: Testimony of Louis H. Pollak Before the Commission on Separation of Powers and Judicial Independence, October 11, 1996*, 12 ST. JOHN’S J. LEG. COMMENT. 59, 60 (1996).

26. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 352 (1998) [hereinafter Friedman, *The History of the Countermajoritarian Difficulty*].

The fact that the words “judicial independence” do not appear in the Constitution did not escape the Jeffersonians²⁷ who sought to undo the mischief wrought by the Midnight Judges Bill²⁸ and, more generally, by Federalist judges in the early nineteenth century. That they succeeded in the former enterprise, causing both the new judgeships and the new judges to disappear,²⁹ might have established a very potent power of congressional control, and hence seriously reduced the core of federal judicial independence. This success did not yield an enduring gloss on the Constitution, however. We may attribute this to the restraint of the Supreme Court at the time,³⁰ to the subsequent triumph of both the notion of federal judicial review and federal judicial supremacy,³¹ and to the acceptance by a subsequent Congress—in dealing with the Commerce Court and its judges—of the evident implications of those triumphs for such a blunt instrument of congressional control as office-stripping.³²

In this light it may seem ironic that the Jeffersonians’ failure to remove Justice Samuel Chase *did* yield an enduring gloss on the Constitution, namely, the notion that it is inconsistent with the arrangements for judicial security contained in that document, and hence with the core of federal judicial independence, to remove a federal judge from office for the content of her judicial behavior.³³ We may attribute this result to the moderating effect that the solemnity of the proceedings and relative determinacy of the legal question presented had on partisan spirit and to “statesmanship of a high order.”³⁴

Notwithstanding the well-known frustration of President Jefferson in response to this failure,³⁵ however, it did have effect, if only in curbing

27. See WILLIAM S. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES WITH ESPECIAL REFERENCE TO THE TENURE OF FEDERAL JUDGES* 73-74 (1918); CHARLES S. HYNEMAN & GEORGE W. CAREY, *A SECOND FEDERALIST* 183-84 (1967) (statement of Senator William Giles).

28. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802).

29. See Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156, 157-58.

30. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); Pollak, *supra* note 25, at 62-63; Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 380 (1992).

31. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 26, at 431-32.

32. See CARPENTER, *supra* note 27, at 78-100.

33. See *id.* at 111 (“The business of ‘judge-breaking’ had already been carried far in some of the States before it was attempted in the federal judiciary.”); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 136-37 (1950); WILLIAM H. REHNQUIST, *GRAND INQUESTS* 114 (1992) [hereinafter REHNQUIST, *GRAND INQUESTS*]; Burbank, *The Past and Present of Judicial Independence*, *supra* note 15, at 118.

34. REHNQUIST, *GRAND INQUESTS*, *supra* note 33, at 113. See PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 181-90, 228-63 (1984).

35. “For experience has already shown that the impeachment [the Constitution] has provided is not even a scare-crow.” Letter from Hon. Thomas Jefferson to Hon. Spencer Roane (Sept. 6, 1819),

partisan behavior on the bench.³⁶ On this view the irony dissolves, and we are left with the lesson that, in evaluating specific attempts to control federal judges, immediate success or failure is not a reliable guide to long-term implications for the core of federal judicial independence.

Office-stripping and impeachment hardly exhaust the methods of controlling the federal judiciary, and thereby confining the core of federal judicial independence, that have been essayed in our history.³⁷ An equally blunt instrument of control by the executive, court-packing, has suffered a similar fate in the court of history.

Although Article III provides for a Supreme Court, it does not specify the number of Justices.³⁸ The number nine is fixed in our brains not so much as a function of current legal awareness but as a number that has assumed the proportion of a constitutional understanding. This understanding emerged from a time of crisis, the crisis that President Roosevelt's court-packing plan precipitated in 1937.

In seeking to manipulate the size of the Supreme Court in order to control its decisions, Roosevelt was not breaking new ground in either the basic technique or the particular mechanism his plan proposed for triggering an increase in the number of Justices. Early in our history, Congress recognized that it could achieve a measure of control by regulating the size of the federal judiciary.³⁹ In the fractious period following the Civil War, the President and Congress used the power to determine the size of the Court to achieve a specific result on a specific legal issue.⁴⁰ Shortly there-

reprinted in 15 THE WRITINGS OF THOMAS JEFFERSON 213 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) [hereinafter THE WRITINGS OF THOMAS JEFFERSON]. See also REHNQUIST, GRAND INQUESTS, *supra* note 33, at 130.

36. "There would be no more impeachments, but also no more Chases." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 132 (2d ed. 1985) [hereinafter FRIEDMAN, A HISTORY OF AMERICAN LAW]. See also REHNQUIST, GRAND INQUESTS, *supra* note 33, at 125; Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 26, at 368.

37. For a discussion of protecting federal judges "from withdrawals of compensation," see Pollak, *supra* note 25, at 65. Judge Pollak concludes that this aspect "has happily not been a major issue." *Id.*

38. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

39. See Jacob, *The Courts as Political Agencies*, *supra* note 17, at 21-27.

40. See FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 36, at 378-79; G. Edward White, *Salmon Portland Chase and the Judicial Culture of the Supreme Court in the Civil War Era*, in THE SUPREME COURT AND THE CIVIL WAR 37-39, 43 (Jennifer M. Lowe ed., 1996).

after, however, the size of the Court was stabilized at nine,⁴¹ remaining there for more than sixty years before Roosevelt's assault.⁴²

One probably need not determine the motivation for Justice Roberts' famous "switch in time [that] saved nine"⁴³ to believe that, at least in the short term, Roosevelt's plan and the intense dissatisfaction underlying it had effect.⁴⁴

There is another blunt instrument of executive control that warrants mention. Hamilton's description of the federal judiciary as "the least dangerous" branch,⁴⁵ lacking the power of the purse and the sword, reflected keen awareness that judicial independence, as instrumental of judicial review and judicial supremacy, is meaningless unless the executive branch is willing and able to enforce the orders of federal courts.⁴⁶ That message has not been lost on the federal executive or on the states and their executives.

The claim of federal judicial orders to executive enforcement may have been most vulnerable in a vertical dimension, where the Supremacy Clause⁴⁷ would seem to make it strongest. Careful scholarship suggests that President Jackson's supposed quip about the Court's decision in *Worcester v. Georgia*⁴⁸ was as much a statement about his perception of the limits of his power as it was about his views concerning the Constitu-

41. See Act of Apr. 10, 1869, 16 Stat. 44.

42. It is ironic that Roosevelt's plan may have taken inspiration from a 1913 proposal made by Attorney-General McReynolds, who, as Justice McReynolds, was one of its targets. McReynolds "recommended that where a federal judge does not retire voluntarily at the age of seventy, after ten years' service, it shall be the duty of the President to appoint another judge, who shall preside over the court and have precedence over the older judge." CARPENTER, *supra* note 27, at 191. A more interesting irony, however, lies in the possibility that, notwithstanding years of unsuccessful Progressive attempts to curb the federal judiciary, the opposition of Progressives to Roosevelt's plan was consequential in its defeat. See WILLIAM G. ROSS, A MUTED FURY 300-11 (1994).

43. Letter from Edwin Corwin to Homer Cummings (May 19, 1937), *quoted in* William Leuchtenberg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 673.

44. See FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 36, at 129; Barry Friedman, *The New Deal and the Separation of Law and Politics* 51-77 (Oct. 2, 1998) (unpublished manuscript, on file with author). It is more difficult to divine effects arising from the various failed Progressive proposals to curb federal judicial independence: from recall of judges, to recall of judicial decisions, to congressional override of Supreme Court decisions. See ROSS, *supra* note 42, *passim*. Yet, historians and political scientists have quite consistently seen effects arising from these failed efforts. See, e.g., *id.* at 314, 316-17, 320; Rosenberg, *supra* note 30, at 382-85.

45. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

46. See Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 994 (1996) ("An orderly society, enforcement mechanisms, and a habit of obedience to courts are essential elements of a system in which judicial independence means anything.").

47. U.S. CONST. art. VI. See RAKOVE, *supra* note 20, at 175.

48. 31 U.S. (6 Pet.) 515 (1832).

tion (or Indians).⁴⁹ In any event, Jackson supported the Court when he thought that the states' pretensions threatened the nation.⁵⁰ Those incidents occurred when the power of federal judicial review was not firmly established and were part of the struggle for federal judicial supremacy.⁵¹

Even when both judicial review and judicial supremacy had long been part of our legal culture, in the aftermath of the Supreme Court's decision in *Brown v. Board of Education*,⁵² state resistance to federal judicial orders posed a serious practical and political challenge to judicial independence because it tested executive will.⁵³

The claim of federal judicial orders to executive enforcement has also tested the core of judicial independence in a horizontal dimension, particularly in times of war.⁵⁴ Here, it seems, the country's acceptance of both judicial review and judicial supremacy has left the executive, whether President Truman⁵⁵ or President Nixon,⁵⁶ with no escape.

The verdict of history has struck removal through the impeachment process, office-stripping, court-packing, and executive defiance from the list of viable methods of control. Many other methods are in the same category because they would require a constitutional amendment.⁵⁷ As a result, it is not surprising that Congress has time and again returned to the jurisdiction and powers of the federal courts as more promising territory for exercising control.⁵⁸

Within this territory shared constitutional understandings forged during the struggles for judicial review and judicial supremacy would probably doom to failure today frontal assaults on the jurisdiction or powers of the federal courts, like the mandated hiatus in the work of the Supreme

49. See generally Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341 (1956).

50. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 26, at 398.

51. See *id.* at 381-413.

52. 347 U.S. 483 (1954).

53. See, e.g., Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 26, at 433; Rosenberg, *supra* note 30, at 389-92. For a collection of "interposition" resolutions passed by the legislatures of five southern states in the aftermath of *Brown*, see *Constitutional Law—"Southern Manifesto"—United States Congress*, 1 RACE REL. L. REP. 435-47 (1956).

54. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 26-39 (1998).

55. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

56. See *United States v. Nixon*, 418 U.S. 683 (1974).

57. See ROSS, *supra* note 42, at 158-59, 309.

58. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 26, at 432.

Court in the early nineteenth century,⁵⁹ or the substance-specific adjustments to its jurisdiction made during the Civil War.⁶⁰ If so, we shall not see enacted, however often proposed, wholesale carve-outs from the general federal question subject-matter jurisdiction available under Article III reflecting profound disagreement with federal judicial decisions, whether on school prayer or abortion.⁶¹ That is not to say that such proposals have had no effect.⁶² Moreover, what Congress may not be able to achieve at wholesale, it may be able to approximate at retail.

Louis Pollak has suggested implications for federal judicial independence in Congress' recent curtailment of the federal courts' powers to issue writs of habeas corpus.⁶³ Others have expressed similar concerns about the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁶⁴ and about legislation curtailing federal judicial power to fashion remedies for violations of federal law.⁶⁵

Apart from habeas corpus and the jurisdiction of the Supreme Court, which have special status under the Constitution,⁶⁶ if we accept the inviolability of a final federal judgment in a particular case, on the one hand,⁶⁷ and Congress' power to change substantive federal law prospectively, on the other,⁶⁸ the scope of debate regarding changes in the jurisdiction or powers of the federal courts that would implicate core federal judicial independence should be confined to (1) the judicial power to interpret and

59. See Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156; CARPENTER, *supra* note 27, at 76-77; Currie, *supra* note 13, at 233.

60. See Act of Mar. 27, 1868, 15 Stat. 44; *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869). As Chief Justice Rehnquist has observed:

Congress had accomplished its purpose of preventing a possibly hostile Court from using the power of judicial review to invalidate a piece of legislation that was of vital concern to those who controlled the legislative body. But there was no threat of impeachment; Congress simply employed another one of the constitutional checks and balances at its command.

REHNQUIST, *GRAND INQUESTS*, *supra* note 33, at 132.

61. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 350-51 (4th ed. 1996) [hereinafter *HART & WECHSLER*].

62. See Rosenberg, *supra* note 30, at 388-89.

63. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217; Pollak, *supra* note 25, at 63-64 (discussing *Felker v. Turpin*, 518 U.S. 681 (1996)).

64. Pub. L. No. 104-208, §§ 304-06, 381, 604, 110 Stat. 3009-546. See ABA COMMISSION, *supra* note 1, at 57.

65. See ABA COMMISSION, *supra* note 1, at 57.

66. See U.S. CONST. art. I, § 9; *id.* art. III, § 1.

67. See, e.g., *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); Pollak, *supra* note 25, at 66-67.

68. See *THE FEDERALIST* NO. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases.").

implement the Constitution, and (2) the irreducible powers of federal courts to act as such.⁶⁹ That the debate is often not so confined reflects both the suppleness of our “constitutional law,” in particular its capacity to incorporate practice as well as text, and the suppleness of our notions of judicial independence.

2. *Challenges to the Core: The Wages of Theory*

As Barry Friedman has pointed out,⁷⁰ the political science literature furnishes one reason for skepticism about the immense scholarly enterprise devoted to what Alexander Bickel called “the countermajoritarian difficulty,”⁷¹ for that literature calls into question the premise that courts can take society where it does not wish to go by frustrating majority will over time. If this premise is wrong, there is little cause for concern about judicial review or judicial supremacy. The same body of literature, for the same reason, furnishes a basis for skepticism about federal judicial independence, including what I have defined as “the core.” Indeed, one study of the behavior of the U.S. Supreme Court in times of congressional hostility concluded that the “hypothesis of judicial independence must be rejected,”⁷² while other discussions treat judicial independence as a “myth.”⁷³

There is much of both theoretical and practical value in the political science literature on judicial independence, but it does not persuade me that this symposium is a waste of time in either dimension. First, one need not resort to the lawyering techniques that our current President has made notorious to believe that, in evaluating the claims of political scientists about judicial independence, it is important to pay attention to definitions. Second, the insights of another body of literature, founded in economics but embraced by political science—public choice—may cause one to question some traditional premises. Third, we may in any event question whether, for the practical business of government, theoretical purity is a suitable goal.

69. Cf. Breyer, *supra* note 46, at 991 (“The power over the procedural environment in which cases are heard and decisions are rendered is probably the power that is nearest the core of institutional judicial independence.”).

70. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 26, at 337-38.

71. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

72. Rosenberg, *supra* note 30, at 394.

73. For an example of the treatment of judicial independence as a myth, see Jacob, *The Courts as Political Agencies*, *supra* note 17, at 48, 50.

As for definitions, political scientists have usually deployed a robust sense of judicial independence, requiring virtual immunity from the influence of the other branches, or at least only minimal influence.⁷⁴ This approach is quite unforgiving when evidence emerges that a court has decided a case or otherwise changed its view of the import of legal doctrine in response to the views of another branch. It resonates with a contemporary audience aware of the controversy surrounding Judge Harold Baer.⁷⁵ Both theoretically and practically, however, the approach is too unforgiving.

Madison was no mean political scientist.⁷⁶ The system he and his colleagues bestowed on us was revolutionary not because of the separation of powers but because of the combination of that technique with techniques for blending government powers—what we call checks and balances.⁷⁷ But Madison and his colleagues were practical people, and it is therefore impossible to believe that they were concerned with the structure they designed to the exclusion of the processes of dialogue and interaction it enabled.

In connection with judicial independence, this means that Lord Bryce was correct in observing that “[t]o yield a little may be prudent, for the tree that cannot bend to the blast may be broken.”⁷⁸ More important, it means that James Landis was correct when he wrote that “[t]o ignore the formulation of [social ideals of time and place], as represented in a vast popular movement, would be to attribute to the Supreme Court not judicial independence but judicial ignorance of the philosophy and end of law.”⁷⁹

It is too late to deny that, in addition to being an integral part of a political system, the federal courts are involved in politics, at least if politics are “defined as the honorable profession of ensuring that government per-

74. See, e.g., Rosenberg, *supra* note 30, at 371.

75. See Newman, *supra* note 6, at 164.

76. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-33 (1956). Dahl concluded, however, that “as political science rather than as ideology the Madisonian system is clearly inadequate.” *Id.* at 31.

77. See THE FEDERALIST NOS. 47, 48 (James Madison), NO. 20 (James Madison & Alexander Hamilton); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212-24 (1989); Charles G. Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMPLE L. REV. 1041, 1051-54 (1995); Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 675 (1999).

78. 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 273 (3d ed. 1908).

79. James M. Landis, *Labor's New Day in Court*, SURVEY, Nov. 15, 1924, at 177, *quoted in* ROSS, *supra* note 42, at 317.

forms for the benefit of the people.”⁸⁰ The admission does not, however, negate either the reality or ideal of core judicial independence. Influence is not control. It is consistent with our constitutional design and may be required by evolving notions of law and of lawmaking.

The “countermajoritarian difficulty” industry in modern constitutional scholarship has recently taken another hit, also noted by Barry Friedman,⁸¹ as a result of the literature of public choice. If it is true that legislation reflects the triumph not of popular will but of interest group politics, the countermajoritarian difficulty disappears as surely as it would if there were no judicial supremacy.⁸² This literature may also have important implications for the theory and practice of judicial independence.

In their path-breaking article applying economic theory to judges, William Landes and Richard Posner argued that, contrary to first impressions, “the independent judiciary is not only consistent with, but essential to, the interest group theory of government.”⁸³ Their argument was that stability and continuity are essential to the operation of interest group politics in the legislative arena, and that an independent judiciary facilitates the practice of such politics by interpreting and applying legislation “in accordance with the original legislative understanding.”⁸⁴

Landes and Posner termed “unconvincing” the “commonest explanation . . . that an independent judiciary is necessary to enforce the Constitution against the legislative and executive branches of government,”⁸⁵ asserting that the judiciaries in England and other societies are independent (or have “considerable independence”)⁸⁶ but lack the power to invalidate legislation. In their view Article III should be understood as establishing “the ground rules for a system of interest-group politics.”⁸⁷

This argument is ahistorical, particularly in the light shed on our founding by recent historians.⁸⁸ Moreover, the argument assumes an approach to statutory interpretation that is only one of many available and not obviously entailed by the condition of freedom from external con-

80. Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1032, 1046 (1997). See POSNER, *supra* note 16, at 131.

81. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 26, at 337-38.

82. See *id.*

83. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J. LAW & ECON. 875, 877 (1975).

84. *Id.* at 879.

85. *Id.* at 887.

86. *Id.*

87. *Id.* at 892.

88. See *supra* text accompanying notes 18-24.

straint.⁸⁹ As Richard Epstein concluded, “[f]ar from propping up interest-group deals, independence allows judges to strike them down without fear of immediate and personal retribution.”⁹⁰ In any event, that seems far closer to the picture of Article III painted by Hamilton and is equally more responsive to Madison’s fears—in sum, it is closer to the “original understanding”—than the picture painted by Landes and Posner.

In this light, the core of federal judicial independence, defined in terms of separation of powers, might facilitate democracy not only in protecting the metapolitical values of “We the People” that are reflected in the Constitution,⁹¹ but also in protecting us from the day-to-day depredations of interest-group politics. Such a view presumably would not prompt the people to seek greater control of the federal judiciary through the elected branches.⁹²

The recent comparative work of J. Mark Ramseyer may furnish a basis for reconciling some of the key insights of the political science and public choice literatures on judicial independence. Drawing on the latter, Ramseyer’s work provides a theoretical explanation for the shared conclusion that “[j]udicial independence is not primarily a matter of constitutional text,” suggesting that it “may be a matter of electoral exigency.”⁹³

Ramseyer’s conclusion reflects his awareness of the array of control mechanisms that are available and that are not proscribed by constitutional text.⁹⁴ His work in this aspect convincingly dispatches the comparative argument made by Landes and Posner against the traditional view of the function of judicial independence.⁹⁵ Moreover, it may be compatible with both the view taken here that constitutional text and judicial opinions interpreting it do not exhaust what we should deem “constitutional law,” and

89. See Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 848-53. The only reason Landes and Posner gave for the posited approach to statutory interpretation has the air of a self-fulfilling prophecy. See Landes & Posner, *supra* note 83, at 885 (arguing that self-interest of independent judges in avoiding coercive measures prompts willingness to enforce legislative “contracts,” thereby yielding the predictability of decisions for which courts are valued).

90. Epstein, *supra* note 89, at 850.

91. For analysis and criticism of majoritarian arguments for nonaccountability that “rely upon the fact that preferences are inconsistent and contextual,” see Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1587-94 (1988).

92. Cf. Jacob, *The Courts as Political Agencies*, *supra* note 17, at 50 (arguing that greater understanding of the role of courts may prompt “[n]ew attempts to make them more directly responsive to the electorate”).

93. J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 746 (1994).

94. See *id.* at 738-46.

95. See *supra* text accompanying note 86.

the insight of political science that the existence and threatened use of a method of control may be all that is necessary to exercise the desired influence, if not control.

In an intriguing article about judicial independence published in this journal eleven years ago,⁹⁶ Louis Michael Seidman observed that almost all defenses of judicial independence end in contradiction:

[I]t is not possible to have it both ways. It might, of course, be desirable to have an institution that is *partially* accountable, or accountable in different ways than other branches of government. But there is more to the ambivalent attitude of these defenders of judicial independence than merely suitable moderation. The difficulty they face is that the very attributes that are treated as “good” are also treated as an “evil.”⁹⁷

Whatever one thinks of Madison and his colleagues as theorists, their theories were only incompletely specified in the Constitution, and it would be surprising if the experiment that they initiated did not require refinement. Moreover, an important element of their theoretical contribution necessarily contemplated, because it invited, both dialogue and compromise. They recognized that most American politicians would not be theorists and that more pressing matters would occupy their attention. Madison and his colleagues would not have included federal judges within the category of “politicians,” but it is a mark of their genius that the foundations they laid, including those of judicial independence, can accommodate evolving views about the nature of law and lawmaking. Thus, whether or not Seidman is correct that “the search for a normative justification for the resolution provided by judicial nonaccountability is fundamentally misguided,”⁹⁸ he has captured the current landscape: “[O]ur judicial system is defined by a complex web of different kinds and degrees of accountability. Our various decisions to limit—or not to limit—the power or independence of judges reflect the desire to produce different contexts that will yield different outcomes.”⁹⁹ Put another way, like separation of powers, to which it is instrumental, judicial independence should be seen as “an architecture that has structural integrity but can nevertheless adapt spaces and functions to meet changing needs.”¹⁰⁰

96. See Seidman, *supra* note 91.

97. *Id.* at 1572.

98. *Id.* at 1573.

99. *Id.* at 1599.

100. Bator, *supra* note 24, at 265.

3. *Challenges to the Core: State Courts and State Judges*

I have alluded to the tendency of most scholars of judicial independence (including this one) to ignore state courts and state judges, and I have suggested some of the reasons for that phenomenon. The same tendency marks most national studies of matters relating to judicial independence, including the recent work of the National Commission on Judicial Discipline and Removal¹⁰¹ and of the American Bar Association's Commission on Separation of Powers and Judicial Independence.¹⁰²

Yet, we all know that most of the judicial business in this country is conducted in state courts, and perhaps the most serious perceived threats to judicial independence today are directed at state judges. Thus, as a matter of practical politics, those concerned about judicial independence ignore state judiciaries at their peril. The same is true at the theoretical level.

I have argued that the core of federal judicial independence is freedom of judicial decisions from control by the executive or legislative branches. As others have observed, this view of the federal arrangements provides a formal (negative) answer to the question whether permitting state courts to adjudicate cases involving matters to which the judicial power of the United States extends under Article III is inconsistent with that provision.¹⁰³ It does not tell us whether the core as so identified is an accurate or useful way of thinking about state judicial independence, or whether it is feasible to speak about "judicial independence in the United States."

Attention to methods of selecting state court judges in historical context puts in question whether elections are inimical to the goal of insulating judicial decisions from control by the executive or legislative branches. Although many accounts of state judiciaries have described the movement towards selection by election as part of a broader, and largely unthinking, wave of enthusiasm for popular democracy,¹⁰⁴ recent and more discriminating scholarship persuasively argues that the movement was neither so simple nor so simplistic.

101. See REPORT OF THE NATIONAL COMMISSION, *supra* note 12, at 183-84.

102. See ABA COMMISSION, *supra* note 1, at 37-41.

103. See Thomas G. Kratenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297, 304 (1981); Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1068-69 (1998).

104. See FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 36, at 127; HURST, *supra* note 33, at 140.

This work demonstrates that an important goal of many of those who advocated the election of judges was precisely "to insulate the judiciary . . . from the branches that it was supposed to restrain."¹⁰⁵ These people were distressed by the level of partisanship in the existing selection systems and believed that the elective system would be less subject to partisan abuse.¹⁰⁶ They were also intent on reducing the scope of official power in general.¹⁰⁷

Attention to results in state selection systems over time calls into question suppositions that logically flow from formal legal arrangements. Thus, for example, numerous studies both within and across jurisdictions reveal that, in many states that have elective systems, the majority of judges have been appointed (to fill unexpired terms) rather than elected,¹⁰⁸ with the relative numbers apparently depending upon the extent of shifts in partisan control.¹⁰⁹ Moreover, no matter how they came to the bench initially and no matter how long the prescribed term between elections, judges in states with elective systems may serve as long or longer than judges appointed to serve during good behavior.¹¹⁰

Thus, we should heed Professor Ramseyer's caution that "[j]udicial independence is not primarily a matter of constitutional text."¹¹¹ We should also heed Charles Evans Hughes' caution, when comparing appointive and elective systems of judicial selection, that "it is easy to fall into extravagant statement by attaching undue importance to theoretical considerations."¹¹²

105. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL. HIST. 190, 205 (1993).

106. See *id.* at 194-98; CARPENTER, *supra* note 27, at 179-80; Jacob, *The Courts as Political Agencies*, *supra* note 17, at 19-20.

107. See Nelson, *supra* note 105, at 203, 207, 219.

108. See FRIEDMAN, *A HISTORY OF AMERICAN LAW*, *supra* note 36, at 690; HURST, *supra* note 33, at 133; Heffernan, *supra* note 80, at 1038; James Herndon, *Appointment as a Means of Initial Access to Elective State Courts of Last Resort*, 38 N.D. L. REV. 60, 64 (1962); John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 347 (1988); Mary L. Payne, *Mississippi Judicial Elections: A Problem Without a Solution?*, 67 MISS. L.J. 1, 2 (1997).

109. See Herndon, *supra* note 108, at 66-70; Herbert Jacob, *Judicial Insulation—Elections, Direct Participation, and Public Attention in the Courts of Wisconsin*, 1966 WIS. L. REV. 801, 805-08 [hereinafter Jacob, *Judicial Insulation*].

110. See Jacob, *Judicial Insulation*, *supra* note 109, at 808 & n.18.

111. Ramseyer, *supra* note 93.

112. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 16-17 (1928), quoted in Jack Ladinsky & Allan Silver, *Popular Democracy and Judicial independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 131.

Yet, neither (1) the fact that the selection of state judges by popular election is consistent with the core of judicial independence, defined in terms of separation of powers, nor (2) the fact that state judges in many elective systems were not in fact selected by election and have served without electoral interruption, provides adequate comfort to those who believe that judicial independence requires freedom of judicial decisions from all external control.

Hamilton believed that “periodical appointments” were “fatal to . . . [judges’] necessary independence,” and that judicial independence was “an essential safeguard” against not only “infractions of the Constitution,” but also “the injury of the private rights of particular classes of citizens, by unjust and partial laws.”¹¹³ He also believed that if the power of making appointments was committed “to the people . . . there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.”¹¹⁴

Elections *are* potentially a very powerful tool of control of judicial decisions at the state level. The source of potential control is different from those which occupied most of the attention of the framers of the Constitution, which is why (1) even in theory, elective selection systems should not be deemed inconsistent with core judicial independence, defined in terms of separation of powers, and (2) in the light of one powerful body of theory, namely public choice, they may be thought less troublesome than legislative or executive control from a majoritarian perspective.¹¹⁵ Nonetheless, as Stephen Croley has thoroughly demonstrated, elections pose their own difficulty, the “majoritarian difficulty,”¹¹⁶ because of the risk they pose to the rule of law, which “entails, among other important things, protection of the individual and of minorities from democratic governance over certain spheres.”¹¹⁷

In evaluating the practical importance of this difficulty, however, it is important not to confine inquiry to the text of constitutions or to apparent implications of theory. As we have seen, doing the former at the federal level leaves the executive and legislative branches with their own very powerful methods of control, such as court-packing and jurisdiction-

113. THE FEDERALIST NO. 78, *supra* note 45, at 470, 471.

114. *Id.* at 471. “State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national law.” THE FEDERALIST NO. 81, *supra* note 68, at 486.

115. See *supra* text accompanying notes 91-92.

116. Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

117. *Id.* at 694.

stripping. If federal judicial independence cannot properly be assessed without reference to constitutional understandings that are not to be found in either the Constitution or in decisions of the Supreme Court, surely the same breadth of vision is appropriate in evaluating state judicial independence.¹¹⁸ Moreover, rather than sticking on theory, we should perhaps make the same messy distinction between control and influence in considering state systems that I explored in connection with federal judicial independence.¹¹⁹ If we do so, we may regard as overly broad assertions to the effect that “[i]n nonconstitutional cases, the rule of law is compromised whenever a judge rules differently from the way she would have had electoral considerations not been taken into account.”¹²⁰

Here the path of useful generalization about judicial independence in elective systems narrows and quickly ends. In historical perspective it is clear that the length of actual tenure of state judges is no better guide to the quality of their independence than is the length of their terms between elections.¹²¹ It is also tolerably clear both that the details of the arrangements a state makes for the election of judges can affect perceptions of judicial independence,¹²² and that even a retention election system designed to give maximum scope to judicial independence, while preserving the potential of popular accountability, can be manipulated to the point where it resembles “shooting fish in a barrel.”¹²³ Finally, there is evidence that the method of selection can affect results.¹²⁴

If there is a unifying thread in the studies of state courts, it may be the adverse effect that partisan politics and interest-group politics can have on tenure of office and hence, potentially, on judicial independence. There is no necessary causal effect, at least in the case of partisan politics. Indeed, for many years the argument could be made that formally partisan elec-

118. See Jacob, *Judicial Insulation*, *supra* note 109, at 819. Hurst observed: [S]tudies made of the quality of judges focused on selection and tenure almost exclusively; they ignored the likelihood that the three protecting elements which entered into all our judicial systems—civil immunity, protected pay, assurance against arbitrary forms of removal—gave all our main judicial posts more in common than they had in difference due to variations in manner of selection or tenure.

HURST, *supra* note 33, at 138.

119. See *supra* text accompanying notes 74-80.

120. Croley, *supra* note 116, at 728.

121. In many state locales long tenure was attributable to control of the process, and in some instances, control of the judges by party bosses. See HURST, *supra* note 33, at 129-30.

122. See Epstein, *supra* note 89, at 836 n.32; Heffernan, *supra* note 80, at 1037-38; Jacob, *Judicial Insulation*, *supra* note 109, at 803-08.

123. Payne, *supra* note 108, at 4 (citation omitted).

124. See DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SECTION METHOD ON STATE-SUPREME-COURT POLICY 129-37 (1995).

tions were preferable since in the information vacuum of judicial elections, party labels were the best cues available.¹²⁵

Today the conjunction between partisan politics and interest-group politics may seem a redundancy. Although there can be interest-group politics without partisan politics, and vice versa, parties have been quick to grasp the potential of single-issue retention elections that are formally non-partisan.¹²⁶

At the end of the day, political scientists and others who believe that judicial independence has less to do with formal methods of selection and tenure than it does with culture may be right. If so, the risk for state judges in elective systems is less that people will catch on to the fact that judges make law¹²⁷ than that, in making decisions about selection or retention, they will take their cues as they do in the broader political and social culture. Federal judges face a similar risk, at one remove.

B. DEFINING JUDICIAL INDEPENDENCE: BEYOND THE CORE

The core of judicial independence, as defined above, consists of the freedom of courts to make decisions without control by the executive or legislative branches or by the people. "Control" is not a determinate concept; notions of both the methods of control that our legal arrangements reprehend and of the methods of influence that are acceptable have changed over time in response to crises in, and the practical necessities of, government, including the practical necessities of lawmaking.

The concept of judicial independence, like the idea of equality, "[o]nce loosed . . . is not easily cabined."¹²⁸ Yet profligate invocation of judicial independence, whether by judges or their supporters, risks the "wages of crying wolf,"¹²⁹ the dilution of the concept to the point that not even its core is recognizable.

At the same time, however, constitutions invite understandings not captured in their text, as well as attitudes deserving of respect. Paul Bator

125. See William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 347 (1987); Laurance M. Hyde, *Judges: Their Selection and Tenure*, 22 N.Y.U. L.Q. REV. 389, 394 (1947); Harold J. Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 531 (1926).

126. See Reid, *supra* note 3, at 11-12.

127. See Ladinsky & Silver, *supra* note 112, at 168.

128. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

129. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 920 (1973).

wisely observed that judicial independence "is an immensely powerful political ideal,"¹³⁰ and that powers in perceived conflict with it may be constitutional in theory but "anti-Constitutional in spirit."¹³¹

Attention to the core of judicial independence can obscure the view that, apart from enabling judicial review, it is instrumental to the resolution of ordinary cases according to law—a view expressed by Hamilton in *The Federalist No. 78*.¹³² To be sure, the ordinary cases he had in mind involved the interpretation of statutes.¹³³ Then, too, his expressed concern "that nothing . . . be consulted but the Constitution and the laws"¹³⁴ may strike us as quaint, if not disingenuous, although it is powerful evidence of the link that Hamilton saw between judicial independence and the rule of law.

If one is concerned, as was Hamilton, about "unjust and partial laws"¹³⁵ and sees in judicial independence the best, even if not ultimate, protection against such laws, it makes sense to define judicial independence so that it has the capacity to do the job.¹³⁶ The need is greater in a legal culture that accepts the propriety of judicial lawmaking, and it is therefore greatest in the states.¹³⁷ For this purpose the concept requires, close to the core, that those responsible for judicial decisions interpreting or making law themselves be impartial: free of interests, prejudices, or incentives that could materially affect the character or results of the judicial process.¹³⁸

130. Bator, *supra* note 24, at 258.

131. *Id.*

132. See THE FEDERALIST NO. 78 (Alexander Hamilton).

133. Thus Hamilton reasoned:

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.

THE FEDERALIST NO. 78, *supra* note 45, at 470.

134. *Id.* at 471.

135. *Id.* at 470.

136. See Currie, *supra* note 13, at 230.

137. See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1475 (1987) (book review).

138. See *Weiss v. United States*, 510 U.S. 163, 179 (1994); Stephen B. Burbank, *Is It Time for a National Commission on Judicial Independence and Accountability?*, 73 JUDICATURE 176, 177, 226 (1990) [hereinafter Burbank, *Is It Time*]; Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 566, 566-67 (1996).

There are federal constitutional provisions that speak to this aspect of judicial independence, and to all judges.¹³⁹ Tempted as we might be, however, to run with these constitutional principles,¹⁴⁰ their historically minimalist role, the influence in that regard of our federal structure, and the vast field of potentially corrupting influences should serve as reminders about the limits of constitutional regulation—indeed of legal regulation of any sort. It is one thing to require that a judge be free of direct financial interest in a case and quite another to try to protect against the influence of ambition.

In any event, we have been largely spared tests of constitutional reach in this area through the development of elaborate complexes of statutes, rules, and enforcement mechanisms that go farther and deeper than constitutions could conceivably tread.¹⁴¹ Moreover, the habits of thought of generations of citizens have given birth to attitudes and expectations towards judicial impartiality. The frustration of such attitudes and expectations can engender a feeling that an influence thought to threaten judicial impartiality, and hence judicial independence, is “anti-Constitutional in spirit”¹⁴² even if not proscribed by the Constitution. But attitudes can change.

In another contribution to the symposium on judicial independence that was published in this journal eleven years ago, Erwin Chemerinsky argued that “ideology [by which he meant political views] should play a role in selecting judges, but once they are confirmed, the need for judicial independence requires that it play no role in evaluating their performances for retention in office.”¹⁴³ He thus sought to reconcile his defense of the process by which Judge Robert Bork was denied confirmation to the U.S. Supreme Court with his criticism of the nonretention of Chief Justice Rose Bird and two colleagues on the California Supreme Court. With respect for Professor Chemerinsky, I have a somewhat different view.

If the process used to consider Judge Bork’s nomination was appropriate, it was only because of the anterior process that the executive branch

139. See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (ruling that due process forbids a state scheme in which the judge has a direct financial interest).

140. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986) (arguing that the participation of an independent adjudicator is essential to satisfy due process requirements).

141. See Burbank, *Is It Time*, *supra* note 138, at 177, 226; Epstein, *supra* note 89, at 833-40.

142. Bator, *supra* note 24, at 258.

143. Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1990 (1988). For another critique of Professor Chemerinsky’s article, see Croley, *supra* note 116, at 744-47.

used in screening possible nominees for judicial appointment. The latter process went far beyond an assessment of an individual's general political attitudes and legal philosophy, seeking assurance of conformity with executive branch views on specific legal issues.¹⁴⁴ It was thus a process geared not to politics, but to ideology in the strong sense of that word—namely, belief that does not yield to opposing ideas or evidence.¹⁴⁵ As such it was a process antithetical to judicial independence and “anti-Constitutional in spirit.”¹⁴⁶ The Senate was justified in determining whether Judge Bork, as a product of that process, in fact had the capacity for judicial independence.¹⁴⁷

I am less confident in evaluating the retention election in which Chief Justice Bird and her colleagues lost their offices. I agree with Chemerinsky that, in voting on retention, “people should not evaluate judges based on their decisions in particular cases.”¹⁴⁸ It is not my impression, however, that such would have been the necessary basis for a negative evaluation of Rose Bird. As I understand it, she could not find an adequate basis in any case—and she had some sixty opportunities—to uphold the imposition of the death penalty, but did not predicate her votes on a continuing expressed belief that the death penalty was unconstitutional.¹⁴⁹ If that is correct, it suggests a basis for the particular result, and more generally for formulating the influence-control spectrum¹⁵⁰ in retention elections, that is considerably less problematic from the perspective of judicial independence, while respectful of the principle of popular accountability.¹⁵¹ In

144. See Burbank, *The Past and Present of Judicial Independence*, *supra* note 15, at 119-20.

145. See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1999 (1997) (citations omitted) [hereinafter Burbank, *The Courtroom as Classroom*]. I argue:

A judge's political beliefs, his or her policy preferences, should not cause concern unless they hold sway with such power as to be impervious to adjudicative facts, competing policies, or the governing law as it is generally understood. When an individual's belief system about social needs or aspirations is that powerful, it seems fair to speak of ideology. And on this understanding, ideology is revealed as the enemy of judicial independence.

Id.

146. Bator, *supra* note 24, at 258.

147. See Burbank, *The Past and Present of Judicial Independence*, *supra* note 15, at 120.

148. Chemerinsky, *supra* note 143, at 1985.

149. See John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 86-87 (1986); Gerald F. Uelman, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 239 (1989).

150. See *supra* text accompanying notes 74-80, 118-20.

151. It does not, however, speak to the nonretention of Chief Justice Bird's two colleagues. Moreover, it does not provide comfort when one considers more recent retention elections in which voters could hardly be said to have acted in response to a developed judicial record. See *supra* text accompanying note 3.

any event, I do not agree with Chemerinsky that, so long as that principle *is* respected, “votes should be cast against justices only if they demonstrate that they are unfit for office, corrupt, or incompetent.”¹⁵²

That which may unify the Bird and Bork controversies is the change in attitude they reflect and have nourished. Politicians and the interest groups to which they respond have learned that judges make law. Some politicians and interest groups believe or pretend that the similarities between judges and legislators run far deeper, and that the processes of government affecting judges should reflect that view of reality. If this attitude becomes pervasive, we may add judicial independence to majoritarianism among the victims of interest group politics, and with it the rule of law.

III. JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

In previous work I have suggested that only a lawyer could think about judicial independence without thinking about judicial accountability, and that they are different sides of the same coin.¹⁵³ Judges are lawyers, but a bipolar approach to judicial independence and judicial accountability may have more to recommend it than individual self-interest. We have seen that the words “judicial independence” nowhere appear in the U.S. Constitution, and I have argued that it is not an operative legal concept, but rather a way of describing the consequences of legal arrangements. That argument has the support of *The Federalist No. 78*, in which Hamilton both linked Article III’s protections of tenure and compensation to the goal of judicial independence and linked judicial independence to separation of powers and judicial review.¹⁵⁴

It is less clear that the view I have taken of the relationship between judicial independence and judicial accountability finds support in the early period. After all, in *The Federalist No. 79*, Hamilton separately discussed the “precautions for [judges’] responsibility,” observing that they were “comprised in the article respecting impeachments.”¹⁵⁵ After briefly summarizing that article, he argued that “[t]his is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.”¹⁵⁶

152. Chemerinsky, *supra* note 143, at 1985.

153. See Burbank, *The Past and Present of Judicial Independence*, *supra* note 15, at 117-18.

154. See THE FEDERALIST NO. 78 (Alexander Hamilton).

155. THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

156. *Id.*

If this were all, one might plausibly maintain that, because the legal arrangements whose consequences they describe are separately situated in the Constitution, judicial independence and judicial accountability are analytically discrete concepts, at least as they concern the federal judiciary. Even on those terms, however, the argument would be difficult to maintain. That is because, as a concept that describes the consequences of legal arrangements, judicial independence invites attention to that which it denies, a process that quickly directs attention to the importance of context and purpose.

Once one has formulated the concept of judicial independence in light of its purposes, it becomes clear that, at the federal level, “the article respecting impeachments” is *not* the “only provision” that confers power, the exercise of which would deny the power of federal courts to make decisions free of executive or legislative control. Indeed, the impeachment article has become a virtual dead letter for that purpose, but, as we have seen, the political branches are hardly without alternative weapons.

To some extent, confusion on this matter may arise from the restricted meaning of “judicial accountability” that follows from consideration of the limits history has imposed on the federal impeachment power. But again, as a purposive legal concept, judicial independence is not so restricted, and in thinking about the level of executive or legislative control or influence that is compatible with a desired level of independence, we are thinking about accountability. The same is true in states with elective systems, where the inquiry also includes the level of popular control or influence.

Professor Seidman is correct that “[t]he search for a normative justification for judicial nonaccountability is . . . bound to be both fruitless and pointless,”¹⁵⁷ and that “there is nothing to say other than that it is the way we have chosen to mediate between our own conflicting, context-dependent desires.”¹⁵⁸

IV. INDIVIDUAL AND INSTITUTIONAL JUDICIAL INDEPENDENCE

One need not be a judge to believe that judicial independence exists to protect individual judicial officers. That certainly is the immediate effect of the specific protections contained in Article III of the Constitution, as it is of the restriction on the power of removal from judicial office that, by

157. Seidman, *supra* note 91, at 1599.

158. *Id.*

negative implication, the Constitution imposes.¹⁵⁹ It may also be a logical inference in state systems in which judges are elected.

Moreover, for most of our history, a majority of federal judges conducted most judicial business in solitary splendor, formally constrained by little except the mandate of a superior court, which can only have nourished a culture of individual independence.¹⁶⁰ Finally, most contemporary attacks on judicial decisions focus not on the judiciary as an institution but on individual judges.

Even though understandable, a judge-centered view of judicial independence is problematic from a historical perspective, and it is demonstrably inadequate given conditions in, and the needs of, contemporary American society. It is true that as an institution, the federal judiciary can act only through human agents, some of whom hold judicial office, as it is true that, for most of our history, the "federal judiciary" had more notional significance than it did organizational reality. But the framers entertained that notion, and they therefore saw more behind Article III's protections than the independence of individuals.

The primary goal of the architects of federal judicial independence was to enable the separation of powers and thereby to enable the judiciary to exercise the power of judicial review. It was also their view that judicial independence was instrumental to the resolution of ordinary cases according to law.¹⁶¹ In connection with both, it is important to remember that Article III vests judicial power in courts, not in judges.¹⁶² But, if only because a Supreme Court and the Supremacy Clause¹⁶³ were part of the necessarily sketchy constitutional design,¹⁶⁴ it contemplated institutional hierarchy and institutional integrity. Those qualities of the design were also important to prevailing notions about law and the role of courts in a legal system, which would import a strong measure of internal accountability, and hence further safeguard institutional independence.

159. See REPORT OF THE NATIONAL COMMISSION, *supra* note 12, at 17-20.

160. See, e.g., PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 3-17 (1973); Jacob, *The Courts as Political Agencies*, *supra* note 17, at 44. For a discussion of how the same was true of the judges in most states, see MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 29-90 (Arthur T. Vanderbilt ed., 1949).

161. See *supra* text accompanying note 132.

162. See U.S. CONST. art. III, § 1; Burbank, *The Courtroom as Classroom*, *supra* note 145, at 1978; Charles G. Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1193 (1996); Stern, *supra* note 103, at 1072.

163. U.S. CONST. art. VI.

164. See HART & WECHSLER, *supra* note 61, at 6-9.

The problem is, again, that if one thinks only about the impeachment process as the mechanism of control, the emphasis reverses, focusing first on the individual and then on the *in terrorem* effect of impeachment proceedings on other judges. But the impeachment process is now essentially irrelevant to decisional control. Moreover, although contemporary attacks tend to focus on judges rather than courts or the judiciary as an institution, and although individual judicial independence is also affected by the alternatives to the impeachment process to which the other branches have turned, the general thrust of those alternatives has been *ex ante* rather than *ex post*, oriented towards courts rather than individuals.

The capacity of the judiciary, federal and state, to function independently of control by the executive and legislative branches thus requires the capacity of individual judges to enjoy extrainstitutional independence. It also requires that the judiciary, as a system of courts, function and be perceived to function according to law.¹⁶⁵ This in turn requires that individual judges yield some intrainstitutional independence.

On another occasion I argued that we should be prepared to tolerate, and perhaps should welcome, "*occasional open refusals* by a trial judge to follow the law as it is generally understood."¹⁶⁶ A current controversy in California puts to the test the limits of this aspect of individual judicial independence. There, in an opinion for his court, an intermediate appellate court judge had powerfully argued against the enforceability of settlements conditioned on the vacation of lower court judgments—so-called stipulated reversals—but the California Supreme Court had disagreed.¹⁶⁷ In a subsequent case, the judge insisted on his views, dissenting from a decision that followed law stated by the California Supreme Court and asserting that he would refuse to follow it in the future, except where directly ordered to do so and hence put in the position of performing "a purely ministerial act."¹⁶⁸ Disciplinary proceedings have been commenced

165. See Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 611 (1996).

166. Burbank, *The Courtroom as Classroom*, *supra* note 145, at 1983 (citation omitted). In so doing, I distinguished on practical and normative grounds "frequent judicial disobedience by trial judges," arguing that it would "exhaust courts of appeals," and, "[f]ar more important, . . . could precipitate a constitutional crisis in which judicial independence would be the loser." *Id.* I also distinguished covert refusals to follow the law, which would be inconsistent with prevailing norms of accountability as well as the rule of law. See *id.* at 1984.

167. See *Neary v. Regents of Univ. of Cal.*, 834 P.2d 119 (Cal. 1992). Upon grant of review, the intermediate appellate court opinion was "automatically depublished." *Morrow v. Hood Communications, Inc.*, 69 Cal. Rptr. 2d 489, 491 n.2 (Cal. Ct. App. 1997) (Klein, P.J., dissenting).

168. *Morrow*, 69 Cal. Rptr. 2d at 490.

against the judge,¹⁶⁹ and, if only because almost everyone seems to see political motivation lurking everywhere,¹⁷⁰ it may be difficult to persuade those who are interested to take a dispassionate view.

Within the framework of my previous analysis of the problem, this may appear to be a situation akin to an “open refusal[] by a trial judge to follow the law as it is generally understood.”¹⁷¹ This should be tolerated, if not welcomed, because the judge’s powerfully argued views might cause the California Supreme Court to change the law. The problem, however, is that the judge did not confine himself to a dissent in the case; rather, he asserted a continuing refusal to apply the law and thus seemed to promise continuing judicial disobedience.

There are differences between the context that prompted my initial analysis and the context that yielded the current controversy in California. What I have called occasional open refusals to follow the law augur fewer benefits in the latter context than in the former. For, although judicial disobedience may be the only effective way for a trial judge to force an appellate court to reconsider legal doctrine, when practiced by an individual member of a court of appeals panel, it can have no similar effect.¹⁷² Indeed, as the very case that prompted the controversy in California indicates, expression of a desire for reconsideration at a higher level does not require a dissenting opinion.¹⁷³

At the same time and for some of the same reasons, occasional open refusals to follow the law augur fewer costs in the appellate than in the trial context. The individual disobedience of a member of an appellate panel cannot itself tax the system’s resources by forcing reconsideration at a higher level.¹⁷⁴ Additionally, if expressed in an isolated dissent, individ-

169. See Inquiry Concerning Justice J. Anthony Kline, No. 151, Cal. Comm’n on Judicial Performance, Notice of Formal Proceedings (June 30, 1998) (copy on file with author).

170. See, e.g., Scott Winokur, *Bay Area Legal Experts Rip State Panel’s Move to Discipline S.F. Jurist*, S.F. EXAMINER, July 7, 1998, at A1.

171. Burbank, *The Courtroom as Classroom*, *supra* note 145, at 1983 (emphasis omitted) (citation omitted).

172. For some of the difficulties that confront a majority of an appellate panel contemplating judicial disobedience, see Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2155 (1998).

173. The majority in *Morrow* stated their “agreement with the fundamental principles set forth by Presiding Judge Kline in his dissent (other than those pertaining to the power of an inferior court to refuse to acquiesce in precedent established by a court of superior jurisdiction).” 69 Cal. Rptr. 2d at 490. They also “agree[d] with Presiding Judge Kline that this case provides an appropriate vehicle through which the Supreme Court should reconsider and repudiate the doctrine adopted in *Neary*.” *Id.*

174. In cases that do not involve a stipulated reversal, however, it may encourage litigants to seek further appellate review.

ual disobedience will probably not put a strain on the public's perception of the rule of law.

It is not clear, however, whether these differences extend to situations in which the disobedience is not occasional but frequent with respect to the same question of law. As to benefits, there surely is a law of (very rapidly) diminishing returns when a trial judge persists in disagreement. Moreover, as to costs, although continuing disobedience by an individual member of a court of appeals should occasion little additional expenditure of resources—since most litigants have different utility functions¹⁷⁵ than judicial conscientious objectors—sooner or later someone will take note of the pattern and ask what implications it holds for the legal system.

That question is posed in the current disciplinary proceedings in California. Although I regret the forum in which it has been raised, I cannot agree that asking the question there is itself an assault on judicial independence.¹⁷⁶ Moreover, in answering the question, it will not do to invoke instances of judicial disobedience that have borne fruit in the past, any more than to summon up the ghosts of great dissenters past, at least if they were members of courts charged with ultimate responsibility within a system of courts to say what the law is.¹⁷⁷ Nor will it do to point out that the doctrine of stare decisis applies to such courts as it does to courts lower in the hierarchy.¹⁷⁸

The question is probably more difficult in the California situation because, instead of evidencing a pattern of repeated refusals to follow the law, the opinion that brought forth the disciplinary complaint merely promised a course of judicial conduct to that effect. It would have been more prudent, assuming it was possible, for the California Commission on Judicial Performance to await delivery on that promise, because those who believe in reconsideration may follow their own advice. On the other hand, it may not be a coincidence that, by the time the respondent filed his

175. See POSNER, *supra* note 16, at 259-328.

176. For additional commentary on the Kline controversy, see Stephen C. Yeazell, *A Justice's Dissent Has Snowballed into Chaos, Which All Parties Still Can Stop*, L.A. TIMES, Sept. 28, 1998, at B5. A longer version of Professor Yeazell's excellent article is forthcoming in *Court Reports*, the journal of the National Judges Association.

177. But see Inquiry Concerning Justice J. Anthony Kline, No. 151, Cal. Comm'n on Judicial Performance, Verified Answer 2-6 (Sept. 4, 1998) (copy on file with author) [hereinafter Verified Answer].

178. But see *id.* at 2. Surely we do not need Hamilton to remind us of the reasons why "all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice." THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

answer to the charges, he had implemented his “non-acquiescence”¹⁷⁹ by recusing himself in cases in which a motion for stipulated reversal was filed.¹⁸⁰ This makes the argument for control through actual discipline even more difficult to carry, but such control is now arguably unnecessary.¹⁸¹

Those accustomed to thinking about judicial independence in connection with federal courts and federal judges have difficulty accepting the notion that a judge might be disciplined for the content of his or her decisions. And so we should, if discipline or the threat of discipline portended an attempt to control judicial decisions other than through the judicial process. That has long been off limits for the impeachment process, and it is off limits under 1980 legislation that confirms the power of the federal judiciary to clean its own house by imposing discipline short of removal.¹⁸²

But there is no bright line between “judicial conduct” and “judicial decisions,” whether under the 1980 Act or under state disciplinary arrangements.¹⁸³ Moreover, as the California situation suggests, not all “judicial decisions” are amenable to control through the judicial process. That situation may also suggest that there should be at least a little room for other sources of control that ensure fidelity to the rule of law, particularly recalling Hamilton’s assurance that the impeachment process was “a complete security” against the “danger . . . [of] a series of deliberate usurpations on the authority of the legislature”¹⁸⁴

Notions about the nature of law and hence about occasions of “usurpation” have changed sufficiently since Hamilton wrote to warrant more than the usual caution in invoking his assurance. Still, a judicial branch, federal or state, may on rare occasions need help in protecting itself by en-

179. Verified Answer, *supra* note 177, at 3.

180. *See id.* at 6, 8.

181. According to Justice Kline’s verified answer, “[s]uch motions have been and will continue to be ruled upon by the three associate justices in Division Two of the First Appellate District without prejudice to the parties.” *Id.* at 6.

182. *See* 28 U.S.C. § 372 (c)(3)(A)(ii) (1994) (stating that the chief judge may dismiss a complaint of judicial misconduct if he finds it to be “directly related to the merits of a decision or procedural ruling”). The National Commission on Judicial Discipline and Removal “found no substantial evidence that the 1980 Act has threatened or impaired judicial independence.” REPORT OF THE NATIONAL COMMISSION, *supra* note 12, at 124.

183. *See* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 63-71 (1993); *In re* Complaints of Judicial Misconduct and Disability, No. 98-372-001, Comm. to Review Circuit Council Conduct and Disability Orders, Judicial Conference of the United States 15-17 (Sept. 18, 1998) (copy on file with author) [hereinafter *In re* Complaints].

184. THE FEDERALIST NO. 81, *supra* note 68, at 485.

sureing fidelity to the rule of law. When it does, claims of judicial independence should not be permitted to sacrifice the institution to the individual.

Although of great intellectual interest and exquisite difficulty, the problem posed by the current California controversy occupies relatively little space in that part of the structure in which individual and institutional judicial independence vie for dominance. That space is largely devoted to the adjacent, although sometimes overlapping, problem of judicial conduct.

At the federal level, the textual and historical influences favoring a judge-centered view of judicial independence have operated more strongly as to the control of conduct than they have as to the control of decisions. That is in part because, restricted by the verdict of history, the impeachment process has since 1805 almost always been invoked against federal judges only in response to allegations of individual misbehavior.¹⁸⁵ It also results from the fact that judicial misbehavior is more difficult to remedy through the judicial process than judicial disobedience, and that any attempt by the judiciary to remedy misbehavior other than through the judicial process may be thought to implicate individual judicial independence.

Whatever the force of those influences, however, the response should be the same. Judicial independence as a concept describes the consequences of legal arrangements that were designed to protect a branch of government. Individual judicial independence is instrumental to that greater goal, and on occasion must be moderated if institutional independence is to be preserved.¹⁸⁶ This in any event is the response suggested by a consideration of the history of our founding. It is confirmed by attention to developing conditions and needs in both the federal and state judiciaries.

For most of our history, there were few reliable checks on federal judges who abused their individual independence, and few mechanisms for assuring their accountability, other than the quality of the appointments

185. See REPORT OF THE NATIONAL COMMISSION, *supra* note 12, at 29-30.

186. *The Report of the National Commission* further states:

But judicial independence and judicial accountability are not at odds with each other. The corrupt acts of an individual reduce the judicial branch's independence because of loss of public respect for the branch. The independence, autonomy, and integrity of a branch of government take precedence over the independence of an individual officeholder.

Id. at 28.

process, the character and self-discipline of the people who served on the federal bench, and the system of appellate review.¹⁸⁷

Credible systems were needed that would enhance incentives for misbehaving or disabled federal judges to reform, retire, or resign. Impeachment certainly was not such a system before 1986,¹⁸⁸ and although the recent removals of federal judges¹⁸⁹ indicate Congress' willingness, in extreme situations, to prime Lord Bryce's "hundred ton gun,"¹⁹⁰ for most behavior the process remains, in Jefferson's words, "a scarecrow."¹⁹¹ The same is true, given the high quality of the federal bench and the multitude of sins that constitute bad behavior, of the criminal process.¹⁹²

The very substantial progress that has been made traces directly to the birth and development of modern judicial administration. That should not be surprising, because an organized judiciary can most effectively sponsor the goals of institutional independence when those goals are in tension, if not conflict, with the independence of an individual judge.¹⁹³

It appears that the advent of limited terms and elective systems of selection rendered impeachment and other legislative means of removal largely desuetudinous in the states by the end of the nineteenth century,¹⁹⁴ and impeachment was in that condition at the federal level between 1936 and 1986.¹⁹⁵ That may help to explain why the movement to adopt alternative systems of discipline took root first in the states and only later in the federal system.¹⁹⁶ Another, probably more important, reason is suggested by the different form that the federal system took under the 1980 Act, which represents less a fundamental difference in view about core judicial independence than different sensitivities about extrajudicial participation in control.¹⁹⁷ The norms applied by all such systems of discipline, what-

187. See *id.* at 1-7; Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 650-57 (1987-88) [hereinafter Burbank, *Alternative Career Resolution*].

188. See Burbank, *Alternative Career Resolution*, *supra* note 187, at 643.

189. See REPORT OF THE NATIONAL COMMISSION, *supra* note 12, at 30.

190. 1 BRYCE, *supra* note 78, at 283.

191. THE WRITINGS OF THOMAS JEFFERSON, *supra* note 35.

192. See Burbank, *Alternative Career Resolution*, *supra* note 187, at 654, 665-73.

193. See Breyer, *supra* note 46, at 990 (observing that the federal judicial disciplinary system "is a manifestation of the independence of the judicial branch, rather than a limitation upon it as is the impeachment process").

194. See CARPENTER, *supra* note 27, at 134-35; FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 36, at 373; HURST, *supra* note 33, at 137.

195. See *supra* text accompanying note 188.

196. See Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 292 (1982).

197. See *id.* at 291-300.

ever their structure, reflect acceptance of the proposition that the independence of the individual judge must on occasion be subordinated in the interests of institutional independence.

The extent of the federal judiciary's power to subordinate individual judicial independence when seemingly required by the goals of institutional judicial independence is currently at issue as a result of proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.¹⁹⁸ The proceedings in question, which involve United States District Judge John McBryde, led to a determination by the Judicial Council of the Fifth Circuit that Judge McBryde had "engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary."¹⁹⁹ The Council therefore ordered that (1) Judge McBryde be publicly reprimanded, (2) he receive no new cases for a period of one year, and (3) he not participate for three years in cases involving certain attorneys.²⁰⁰

The Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders affirmed the Fifth Circuit Council's order and public reprimand in all respects, except that it provided for possible earlier termination of the order concerning the assignment of new cases if the Council found "that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct."²⁰¹ That modification reflected the Committee's concern about the legality of such a measure as a sanction for past conduct,²⁰² its stated belief being that the Council's public reprimand was "a sufficient punishment for the judge's past pattern of abusive conduct,"²⁰³ and its conclusion that the suspension of new case assignments could be justified "as a remedial measure intended to ameliorate Judge McBryde's behavior in the future."²⁰⁴ Judge McBryde has initiated litigation challenging the actions of both the Council and the Committee.²⁰⁵

198. 28 U.S.C. § 372(c) (1994).

199. *In re Matters Involving United States District Judge John H. McBryde*, Nos. 95-05-372-0023, 0023A-0023D, Order and Public Reprimand, Judicial Council, Fifth Judicial Circuit 2 (Dec. 31, 1997) (copy on file with author).

200. *See id.* at 2-3.

201. *In re Complaints*, *supra* note 183, at 27.

202. *See id.* at 23.

203. *Id.*

204. *Id.*

205. *See McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, No. 1:98CV02457 (D.D.C. Oct. 15, 1998).

Judge McBryde's case is complicated by a prior history that included the issuance of a writ of mandamus vacating orders that reassigned two cases pending before him.²⁰⁶ That history aside, the National Commission on Judicial Discipline and Removal has provided a thoughtful analysis of the constitutional questions that his challenge poses. The Commission considered a circuit council's power to control the assignment of cases and other judicial functions of judges who have become disabled or who are personally implicated in the criminal process. Rejecting arguments that such control over judicial duties would effect a removal or be inconsistent with the constitutional grant of judicial power to courts, while acknowledging that the authority might be abused, the Commission concluded:

Objections to the circuit council case reassignment power based on more expansive notions of judicial independence are in the Commission's view unfounded. While the Commission agrees that the constitutional provisions pertaining to judicial tenure and the power of the courts may be understood in terms of their underlying purpose of judicial independence, this is not to say that everything that could interfere with the work of an Article III judge or court is unconstitutional.²⁰⁷

V. FEDERAL AND STATE JUDICIAL INDEPENDENCE

Attention to judicial independence in the states repays the effort, whether one is seeking additional insight into federal judicial independence, attempting to come up with sensible notions about judicial independence in the United States, or thinking about the enforcement of federal law by state courts.

Comparative evaluation of federal and state judicial independence suggests fundamental agreement at the core. It therefore also suggests fundamental agreement at the intersection of institutional and individual independence—agreement that is confirmed by consideration of the federal and state systems that have been established, outside of the executive and legislative branches, for the imposition of discipline.

Familiarity with the history, variability, and variousness of state arrangements reveals that matters are not always what they seem, and in particular that formal arrangements are the wrong place to focus when assessing the quality of judicial independence. Of course, the same lesson can be applied at the federal level. When it is, one sees that, from the per-

206. See *In re John H. McBryde*, 117 F.3d 208 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 2340 (1998).

207. REPORT OF THE NATIONAL COMMISSION, *supra* note 12, at 16.

spective of the core of judicial independence, the impeachment process is currently (and has since 1805 been) the least of the federal judiciary's worries. That means that scholars who are interested in the question of parity²⁰⁸ may have to dig deeper.

A recent example of the surprising results that can come from digging deeply is Professor Hartnett's marvelous article exploring the history of the statute that governs the jurisdiction of the Supreme Court to review state court decisions on questions of federal law.²⁰⁹ He examines in particular the 1914 amendment to that statute,²¹⁰ which for the first time permitted review of decisions upholding a federal claim or defense. He shows that, contrary to the conventional wisdom that the 1914 amendment was designed to ensure popular control over state judges, the more likely explanation of the amendment, consistent with the politics and views of its chief supporters, is "as a mechanism for protecting the independence of state court judges from the political pressure that arises in response to their unpopular decisions."²¹¹

Although the principle of popular accountability associated with selection of state judges by election is formally inconsistent with the federal model of judicial independence, a comparative evaluation of recent controversies involving state and federal judges suggests that, while the means of response to, and methods to avoid, unpopular decisions may be different, the dangers they pose have a common source in contemporary political culture and contemporary culture more broadly.

VI. CONCLUSION

It is a sobering thought that the presidential election of 1912 may have been lost because of issues relating to judicial independence, as Roosevelt and Taft bitterly debated the issues of recall of judges and judicial decisions, while Wilson had the good sense to focus on other issues.²¹² In an article published the following year, Taft expressed the view that "[t]he instances of great and able judges who have been placed on the bench by election are instances of the adaptability of the American people and their

208. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120-21 (1977).

209. See Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX L. REV. 907, 907 (1997).

210. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (codified as amended at 28 U.S.C. § 1257 (1994)).

211. Hartnett, *supra* note 209, at 915. For the views of Progressives on the amendment, see ROSS, *supra* note 42, at 81.

212. See ROSS, *supra* note 42, at 130-54.

genius for making the best out of bad methods, and are not a vindication of the system.”²¹³

Taft’s description of experience under elective systems, when stripped of pejoratives, well captures the American experience of judicial independence, federal and state. We have made the best of the architecture we have created, adapting original designs to accommodate changing needs, and the result has been, as Paul Bator put it, “the creation of brilliantly successful space for institutional growth and innovation.”²¹⁴ The question for the future—and it is the same question, even if posed in different ways, at the federal and state levels—is whether the time for institutional growth and innovation is over. If so, what will take its place?

213. William H. Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418, 421 (1913).

214. Bator, *supra* note 24, at 239.