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# Reconsidering Judicial Independence: Forty-Five Years in the Trenches and in the Tower

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## ESSAY

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### RECONSIDERING JUDICIAL INDEPENDENCE: FORTY-FIVE YEARS IN THE TRENCHES AND IN THE TOWER

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STEPHEN B. BURBANK<sup>†</sup>

Judicial independence is in the air—again. Although I had not worked on or written about that subject directly since 2007,<sup>1</sup> I have participated in, or will participate in, four programs about judicial independence within one year. Thinking about the topic for these events has caused me to realize that issues concerning judicial independence have been an important part of my life as a lawyer, scholar, and engaged citizen since the beginning of my career more than forty years ago. Indeed, had I harbored any doubt about the reasons for the recent resurgence of interest in judicial independence, revisiting my own experience would have resolved it.

Trusting in the integrity of our institutions when they are not under stress, we focus attention on them when they *are* under stress or when we need them to protect us against other institutions. In the case of the federal judiciary, the two conditions often coincide. In this Essay, I aim to provide practical context for some of the important lessons to be learned from the periods of stress for the federal judiciary that I have observed as a lawyer

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<sup>†</sup> David Berger Professor for the Administration of Justice, University of Pennsylvania Law School. This essay is a revised and expanded version of the author's keynote address at the *Stanford Law Review's* 2019 symposium: "The Independence of the American Judicial System: Politics and Separation of Powers."

<sup>1</sup> I participated in "Fair and Independent Courts: A Conference on the State of the Judiciary" at the Georgetown Law School in 2006. See generally Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909 (2007) (arguing that the main cause of strained relations between the judiciary and the political branches is the use of strategies intended to persuade the public that judges are and should be policy agents). As is evident from the latter half of this Essay, however, insights developed while working on the subject directly have informed my scholarship on other issues.

and concerned citizen and to provide theoretical context for lessons I have deemed significant as a scholar.

I start with my personal experience of Watergate, which gave both immediacy and abiding significance to the principle that no person is above the law, affecting my attitudes towards and participation in other cases, including cases pending today, where that principle has been put to the test. I then trace lessons learned after writing rules to govern federal judicial conduct and disability proceedings and serving on a national commission investigating impeachment of federal judges and its alternatives. By far the most important of those lessons is the central role that judicial accountability plays in enabling judicial independence.

In the latter half of the Essay, I explore some of the theoretical implications that, with the help of interdisciplinary research, I derived from these experiences and from defending judges against attacks by politicians and interest groups. It shows that over the last decade or so, my work on and writing about judicial independence and accountability informed my scholarship on matters as disparate as theories of judicial behavior, term limits for Supreme Court justices, and the role of the Supreme Court in retrenching private enforcement of federal law.

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I had the privilege of clerking for Chief Justice Warren Burger during the October Term 1974. On my first day of work in July of that year, I spent the morning filling out forms. Having had lunch in the Court's cafeteria, I returned to my office. Shortly thereafter, a messenger arrived with a large envelope, which he gave to me, saying that the Chief Justice had asked me to proofread the enclosed opinion. It was, of course, *United States v. Nixon*,<sup>2</sup> the Court's decision requiring compliance with a subpoena for tape-recorded conversations in the Oval Office, which precipitated President Nixon's resignation and the end to a "long national nightmare."<sup>3</sup>

For many of my generation, Watergate was woven into the fabric of our legal and civic education. For some, the experience was more personal than for others. Archibald Cox, the Watergate Special Prosecutor and primary

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<sup>2</sup> 418 U.S. 683 (1974). I had forgotten how quickly after the Court's decision President Nixon resigned (only 16 days later, the day after a national address on August 8).

<sup>3</sup> This was Gerald Ford's characterization in remarks upon taking the oath of office on August 9, 1974: "My fellow Americans, our long national nightmare is over." Gerald R. Ford, Remarks Upon Taking the Oath of Office as President (Aug. 9, 1974), <https://www.fordlibrarymuseum.gov/library/speeches/740001.asp> [<https://perma.cc/R47Q-X2CA>].

target of what became known as the Saturday Night Massacre,<sup>4</sup> was my teacher and mentor. So also, in different ways, was Chief Justice Burger. Because of Watergate, the principle that no person is above the law was burned into my consciousness, as also the realization that, there being no guarantee that the President would obey the Court's decision, whether he did so might depend on the public's support for judicial independence.

Two decades later, this experience of Watergate caused me to do something unpopular in certain liberal legal circles, namely, to help write and to sign an amicus curiae brief arguing that President Clinton did not enjoy immunity against federal civil litigation brought by Paula Jones concerning alleged misconduct before he assumed office.<sup>5</sup> The Court unanimously sustained that position in *Clinton v. Jones*.<sup>6</sup> And two decades after that, it has caused me to join with two other professors who signed the brief in *Clinton v. Jones* in amicus curiae briefs arguing that President Trump does not enjoy immunity from state court civil litigation concerning his alleged misconduct before assuming office.<sup>7</sup> Although these briefs have elicited quite a different reaction from liberals, it has been my pleasure to demonstrate that the principle that no person is above the law is non-partisan.<sup>8</sup>

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Just as the experience of Watergate shaped my understanding of the central role that judicial independence and separation of powers play in the preservation of our democratic way of life, so also did personal experience and the scholarly paths it opened up shape my understanding of the central role that judicial accountability plays in enabling judicial independence.

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<sup>4</sup> This became the name for the events of Saturday, October 20, 1973, when President Nixon ordered Elliott Richardson, the Attorney General, and then William Ruckelshaus, the Deputy Attorney General, to fire Cox, and both refused and resigned; the third person receiving that order, Robert Bork, who was Solicitor General, complied and fired Cox. Carroll Kilpatrick, *Nixon Forces Firing of Cox: Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm> [https://perma.cc/2G7B-WZ3X].

<sup>5</sup> See generally Brief Amicus Curiae of Law Professors in Support of Respondent, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), 1996 U.S. S. Ct. Briefs LEXIS 572. Many of the signatories of an amicus brief filed in support of President Clinton were part of those "liberal legal circles." See generally Brief Amicus Curiae of Law Professors in Support of Petitioner, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), 1996 U.S. S. Ct. Briefs LEXIS 501.

<sup>6</sup> 520 U.S. 681 (1997). Justice Breyer concurred in the judgment. *Id.* at 710 (Breyer, J., concurring).

<sup>7</sup> See generally Brief of Law Professors as Amici Curiae, *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018); Brief of Amici Law Professors, *People v. Trump*, 88 N.Y.S.3d 830 (N.Y. Sup. Ct. 2018).

<sup>8</sup> "The principle for which *Clinton v. Jones* stands is bipartisan and deserves disinterested champions." Stephen B. Burbank, Richard D. Parker & Lucas A. Powe, Jr., *The President is Not Above the Law*, POLITICO (Oct. 18, 2018), <https://www.politico.com/magazine/story/2018/10/18/president-above-the-law-trump-clinton-221579> [https://perma.cc/Z9S7-DZ7K].

When I was in my second year as a full-time faculty member at Penn Law, the Chief Judge of the Third Circuit asked me to serve as co-reporter for a committee of judges charged to write the rules of that circuit implementing the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.<sup>9</sup> The product of a long legislative process that included the kind of thoughtful discussion and debate about issues of institutional prerogative and constitutional law that are sadly missing from contemporary congressional deliberations, this statute established a process and some rules for filing complaints alleging misconduct or disability against Article III judges other than Supreme Court justices.<sup>10</sup> What could I do other than cheerfully accept the invitation?

The work required, or so I believed, a deep dive into the history of the 1980 legislation, which ended up including unfettered access to the files of the Director of Legislative Affairs for the Administrative Office of the United States Courts. That individual was concerned—not without reason—that failure of the circuits to take seriously their responsibilities under the Act might lead Congress to replace the model of decentralized administrative handling of complaints that emerged from that long legislative process; most likely to take its place was a centralized model, like that used in many states, that some influential senators favored.<sup>11</sup> The experience of hammering out the compromises underlying the 1980 Act had persuaded him that, however apt such a central commission model might be for states, many of whose judges are elected, it likely would portend a degree of judicial accountability that was inimical to the historic role of federal courts and federal judges. I came to believe that he was right.

My work on the Third Circuit's rules led to requests to consult for committees of the Judicial Conference,<sup>12</sup> where, having become a champion of

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<sup>9</sup> Pub. L. No. 96-458, 94 Stat. 2035 (1980) (codified as amended at 28 U.S.C. §§ 351–364 (2012)). My co-reporter was Daniel Segal, Esq.

<sup>10</sup> See generally Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 283-88, 291-300 (1982) (describing the history of the Act).

<sup>11</sup> See *id.* at 291-94 (discussing bills that included a central commission).

<sup>12</sup> These requests were undoubtedly precipitated by the general tenor of my article on rulemaking under the 1980 Act, which is captured in the observation that the “alternative to central judicial leadership may be further action by Congress.” See *id.* at 347. That leadership first manifested in the non-binding Illustrative Rules, which were prepared in 1986 and subsequently revised and amended. Following the 2006 report of the Judicial Conduct and Disability Act Study Committee (the so-called “Breyer Committee”), the Judicial Conference finally promulgated binding rules in 2008, which were amended in 2015 and again on March 12, 2019. For the history and current rules, see 2 Guide to Judiciary Policy, pt. E, ch. 3 (2019), [https://www.uscourts.gov/sites/default/files/judicial\\_conduct\\_and\\_disability\\_rules\\_effective\\_march\\_12\\_2019\\_0.pdf](https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf) [<https://perma.cc/HWN5-CQLW>]. See also Editorial, *More Progress (and Politics) in Federal Judicial Accountability*, 91 JUDICATURE 268, 268-69 (2008) (discussing new rules, made mandatory by the Judicial Conference, incorporating many recommendations of the Breyer Committee); Editorial, *Politics and Progress in Federal Judicial Accountability*, 90

judicial accountability as the judiciary's friend, I was regarded by some as the bearer of bad news. Moreover, those experiences and the scholarship they enabled put me in a position to contribute, as a scholar and public citizen, to the reconsideration of judicial impeachment,<sup>13</sup> a topic that roiled the Senate in the mid-1980s, prompting calls for either legislation or a constitutional amendment that would ease the burdens of the legislative branch when confronted by judges who refused to resign notwithstanding felony convictions or other powerful evidence of misbehavior. Believing that such calls were at best premature and at worst misguided, I published an article calling for the creation of a national commission to reconsider impeachment and its alternatives.<sup>14</sup> To my surprise, Congress established such a commission,<sup>15</sup> and the Speaker of the House of Representatives appointed me as a member.<sup>16</sup>

The National Commission on Judicial Discipline and Removal pursued an ambitious multi-method research program and in 1993 issued its report, of which I had the privilege to be a principal author.<sup>17</sup> Rejecting arguments that removal could constitutionally be effected other than through the impeachment process,<sup>18</sup> as well as uninformed criticism of experience under the 1980 Act,<sup>19</sup> the Commission made detailed recommendations to each branch of government. An overarching goal of these recommendations was to facilitate responses to problems of judicial misconduct and disability that did

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JUDICATURE 52, 53, 92 (2006) (discussing the report of the Breyer Committee). The author was chair of the Editorial Committee of the American Judicature Society for many years and drafted these editorials. See *infra* note 32 and accompanying text.

<sup>13</sup> See generally Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 643-50 (1988).

<sup>14</sup> See generally Stephen B. Burbank, *Is it Time for a National Commission on Judicial Independence and Accountability?*, 73 JUDICATURE 176 (1990). The idea originated with Senator Dole and, after languishing in the Senate, was picked up by Representative Kastenmeier. See Burbank, *supra* note 13, at 699-700.

<sup>15</sup> Pub. L. No. 101-650, 104 Stat. 5124 (1990).

<sup>16</sup> See REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL (1993) ("Members of the Commission").

<sup>17</sup> See *id.* at iii-v (describing the creation of the Commission and the Commission's methodology, which included comprehensive academic research, public hearings, and roundtable discussions). For a more detailed discussion of the Commission's work, see generally Stephen B. Burbank & S. Jay Plager, *Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1 (1993).

<sup>18</sup> REPORT, *supra* note 16, at 17-20.

<sup>19</sup> *Id.* at 83-127. The Commission concluded its chapter on the judicial branch, of which I was the principal author, as follows:

Unjustified suspicion of the ethics and conduct of federal judges or of the federal judiciary's commitment to effective self-regulation is harmful to the rule of law and a threat to judicial independence. The judiciary thus has a direct institutional interest in a system of self-regulation that is not only effective but perceived to be effective.

*Id.* at 127.

not, in the name of efficiency or from failure to see the forest for the trees, unduly disrupt institutional compromises forged over two centuries.<sup>20</sup>

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All of these experiences proved important when, in the late 1990s, I undertook deeper scholarly engagement with the concept of judicial independence. Alas, again, one of these efforts was greeted as bad news, to wit, my contribution to a festschrift celebrating Judge Jack Weinstein's thirtieth year on the federal bench. In that article, I argued that central to Weinstein's self-image as a federal judge were conceptions of independence and accountability that he brought with him from his time as a tenured faculty member at Columbia Law School—conceptions that, I maintained, were inconsistent with his responsibilities as a lower court judge and as part of the judiciary as an institution.<sup>21</sup> In fairness, I did try to turn down this invitation, but I was persuaded not to do so by the organizer of the symposium and the judge himself, neither of whom apparently could believe that, upon sober reflection, my stated misgivings would not be overcome by appreciation of the judge's brilliance and imagination (qualities that I celebrated in my article).

“Deeper scholarly engagement with the concept of judicial independence” included systematic reading in the literatures of other disciplines, notably political science. As a result, I concluded that discussions and debates about judicial independence had produced more heat than light and that scholars in different disciplines had been talking past one another.<sup>22</sup> A few years

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<sup>20</sup> See *id.* at 147-55 (listing conclusions and recommendations).

<sup>21</sup> See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1982-93 (1997) (“In matters pertaining to judicial accountability, Judge Weinstein is a strict constructionist, parsing statutes and denying claims of inherent power of appellate courts in a fashion and with an attitude quite different from that which characterizes his own exercises of power.”). This article prompted Professor Neuborne, for whom it was bad news, to write a reply. See Burt Neuborne, *Innovation in the Interstices of the Final Judgment Rule: A Demurrer to Professor Burbank*, 97 COLUM. L. REV. 2091, 2091 (1997) (“[T]he federal ‘final judgment’ system, which places strict limits on interlocutory appeals, requires and encourages trial judge innovation as a means of balancing the just, the good, and the formal elements of law.”).

<sup>22</sup> See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 326-30 (1999) [hereinafter *Architecture*] (discussing theoretical approaches to defining and understanding judicial independence). Indeed, the same was true of scholars within the same discipline:

Imagine my surprise when, having learned from one group of political scientists that Supreme Court justices are accountable to elected politicians and thus that judicial independence is a myth, I learned from another group of political scientists that Supreme Court justices are wholly independent, and thus that judicial accountability is a myth.

Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 41, 46-47 (Charles Gardner Geyh ed., 2011) [hereinafter *On the Study of Judicial Behaviors*] (citations omitted).

later, Barry Friedman and I convened a conference of some thirty prominent academics with backgrounds spanning the disciplines of law, economics, history, and political science to discuss what we knew about judicial independence. In a chapter of the book that emerged from the conference,<sup>23</sup> and in a free-standing article,<sup>24</sup> I sought to demonstrate that judicial independence is the other side of the coin from judicial accountability; that neither is an end in itself but rather a means to an end (or variety of ends); that the relevant ends relate not primarily to individual judicial performance but rather to the performance of courts and court systems; and that there is no one ideal mix of independence and accountability, but rather that the right mix depends upon the goals of those responsible for institutional architecture with respect to a particular court or court system.

The U.S. Constitution does not refer to “judicial independence,” which is itself evidence of a proposition essential to proper understanding of the term, namely that judicial independence is a means to an end, not an end in itself.<sup>25</sup> Put otherwise, in its positive dimensions, judicial independence is not an operative legal concept but rather a way of describing the consequences of legal arrangements. In the case of federal judges, the pertinent legal arrangements are the Constitution’s provisions for life tenure and secure compensation. Yet, scholarship has made it plain that these formal protections of federal judicial independence pale in comparison with formal powers that might be deployed to control federal courts. Rather, as the work of Charles Geyh in particular demonstrates,<sup>26</sup> the traditional equilibrium between the federal judiciary and the other branches owes its existence to informal norms and customs, such as that against using the impeachment process in response to judicial decisions<sup>27</sup>

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<sup>23</sup> Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9 (Stephen B. Burbank & Barry Friedman eds., 2002).

<sup>24</sup> Stephen B. Burbank, *What Do We Mean by “Judicial Independence”?*, 64 OHIO ST. L.J. 323 (2003) [hereinafter *What Do We Mean?*]; see also Burbank, *Architecture*, *supra* note 22, at 318-26, 339-49 (describing approaches to judicial independence, including the idea that judicial independence and judicial accountability are two sides of the same coin); Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 117-18 (1996) (“It should be impossible, except perhaps for a lawyer, to think about [judicial independence] without thinking about [judicial accountability].”).

<sup>25</sup> “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.” Burbank, *Architecture*, *supra* note 22, at 336.

<sup>26</sup> See *id.* at 321-26 (describing the norm against the political branches using tools like impeachment, jurisdiction-stripping, and court-packing to control the judicial branch). See generally CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (2006) (exploring the federal judiciary’s relationship with Congress and arguing that judicial independence is attributable more to institutional norms than to constitutional structure).

<sup>27</sup> GEYH, *supra* note 26, at 113-70.



and that against court-packing as a means of ensuring decisions in accord with the preferences of the dominant coalition.<sup>28</sup>

Understanding that judicial independence is not an end in itself is perhaps easiest if one considers whether any society would seek to establish courts that were completely independent, such that they were free to decide cases as they saw fit, without any constraint.<sup>29</sup> Going down that path enables one quickly to grasp another essential proposition, which is that judicial independence and judicial accountability are not discrete concepts at war with each other. They are complements or, again, different sides of the same coin. An accountable judiciary without any independence is weak and feeble. An independent judiciary without any accountability is dangerous. In thinking about the level of executive, legislative, or popular influence that is compatible with a desired level of independence, we are thinking about accountability.

From these premises one can derive a number of additional propositions.<sup>30</sup> First, judicial accountability has as many roles to play as judicial independence. As a result, judicial accountability should serve to moderate what would otherwise be unacceptable decisional independence (i.e., decisions unchecked by law as generally understood or, in the case of inferior courts, by the prospect or reality of appellate review). In addition, judicial accountability should moderate other judicial behavior that is hostile to or inconsistent with the ability of courts to achieve the role(s) envisioned for them in the particular polity (for example, in the words of the 1980 Act, “conduct prejudicial to the effective and expeditious administration of the business of the courts”<sup>31</sup>).

Second, just as independence must be conceived in relation to other actors (independence from whom or what?), so must accountability (accountability to whom or what?). As a result, judicial accountability should run to the public, including litigants whose disputes courts resolve and who, therefore, have a legitimate interest in court proceedings that are open to the public and in judicial decisions that are accessible. Judicial accountability should also run to the people’s representatives, who appropriate the funds for the judiciary and whose laws the courts interpret and apply. As a result, they have a legitimate interest in ensuring that the judiciary has been responsible in spending the allotted funds and that, as interpreted and applied by the courts, public laws are functioning as intended. Finally, judicial accountability should run to courts and the judiciary as an institution, both because individual judicial independence exists primarily for the benefit of institutional independence and

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<sup>28</sup> *Id.* at 66-70, 77-91.

<sup>29</sup> “One implication of this proposition is that, from a pre-modern, anthropological perspective, we need law to constrain judges rather than judges to serve the rule of law.” Burbank, *What Do We Mean?*, *supra* note 24, at 326.

<sup>30</sup> See Burbank, *supra* note 1, at 912-13 (setting out the propositions that follow).

<sup>31</sup> 28 U.S.C. § 351 (2012).

because appropriate intrabranch accountability is essential if potentially inappropriate interbranch accountability is to be avoided. In each instance, proper regard for the other side of the coin—that is, for judicial independence—requires that accountability not entail influence that is deemed to be undue.

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The first decade of the new millennium found me spending a lot of time on judicial independence and accountability quite apart from the theoretical writing just described. Again, experience in the trenches helped to shape my views in the tower. As chair of the Editorial Committee for the late, lamented American Judicature Society in the 2000–2008 period, it largely fell to me to craft the Society’s responses in the pages of *Judicature* to a series of attacks on or attempts to control federal (and state) courts and judges.<sup>32</sup> Doing so enabled me to see that those attacks and attempts to control reflected a debased notion of judicial accountability implicit in a view of judges as policy agents.<sup>33</sup> Moreover, with the benefit of the political science

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<sup>32</sup> See Editorial, *An Earthquake in South Dakota?*, 89 JUDICATURE 192, 192 (2006) (describing a proposed state constitutional amendment that would allow judges defending civil suits arising from their judicial acts to be stripped of their immunity or even to face criminal indictment); Editorial, *Clinton’s Legacy or Bork’s?*, 84 JUDICATURE 224, 224 (2001) (criticizing the treatment of all federal judicial appointments as if they were Supreme Court appointments or as part of normal politics); Editorial, *Judges, Ideology, and Accountability*, 85 JUDICATURE 212, 212–13 (2002) (“Just as we should stop pretending that the policy preferences of potential appointees are or should be irrelevant in the selection process, so should we avoid the fallacy of assimilating the politics of federal judicial selection to normal politics.”); Editorial, *Judicial Accountability*, 89 JUDICATURE 4, 4 (2005) (emphasizing that, though judicial accountability is important, “heavy-handed programs implemented under the banner of ‘accountability’ are the enemy of the kind of independence that we should want in our judges.”); Editorial, *Judicial Independence at the Crossroads*, 85 JUDICATURE 260, 260 (2002) (calling for more interdisciplinary research into the structures and incentives that promote judicial independence and accountability); Editorial, *Listening to Judge Lefkow*, 88 JUDICATURE 240, 240 (2005) (calling on public officials to refrain from inflammatory rhetoric when discussing the judiciary); Editorial, *More Progress (and Politics) in Federal Judicial Accountability*, *supra* note 12, at 268 (praising the Rules for Judicial-Conduct and Judicial-Disability Proceedings as a system of self-regulation that promotes judicial accountability); Editorial, *Politics and Progress in Federal Judicial Accountability*, *supra* note 12, at 52–53 (commending three initiatives of the federal judiciary intended to address congressional concerns about judicial accountability); Editorial, *Separation of Powers and Mutual Respect*, 87 JUDICATURE 200, 200 (2004) (calling on the judicial and legislative branches to avoid inflammatory rhetoric about each other); Editorial, *The Judicial Independence and Accountability Task Force*, 88 JUDICATURE 108, 108 (2004) (describing the creation and activities of the American Judicature Society’s Judicial Independence and Accountability Task Force); Editorial, *The War on Courts and Other Wars*, 90 JUDICATURE 148, 148 (2007) (criticizing jurisdiction-stripping measures that treat judges as policy agents of the current political majority); Editorial, *Three Branches, Not Two: Congress Should Reconsider Recent Assaults on Federal Sentencing Discretion*, 86 JUDICATURE 276, 276 (2003) (criticizing legislation that limited sentencing discretion).

<sup>33</sup> Editorial, *Judicial Accountability*, *supra* note 32, at 4–5; Burbank, *supra* note 1, at 910; Editorial, *Politics and Progress in Federal Judicial Accountability*, *supra* note 12, at 52; Editorial, *The War on Courts and Other Wars*, *supra* note 32, at 148.

literatures on public knowledge of and attitudes towards courts as well as on the behavior of interest groups, it seemed to me that, if those on the front lines of the war on courts succeeded in persuading the public to view judges as policy agents and courts as part of ordinary politics, it might be impossible to maintain (or return to) the traditional equilibrium. The informal norms and customs which enable that equilibrium were forged and sustained in the shadow of what political scientists refer to as the public's diffuse support for the courts<sup>34</sup>—support that persists even in the face of unpopular decisions, where so-called specific support is lacking.<sup>35</sup>

In light of those literatures, there was reason to fear that the distinction between diffuse support and specific support would disappear, with the public asking of the judiciary not, “What does the law require?” but rather, “What have you done for me lately?”<sup>36</sup> In such a system, law itself would be seen as nothing more than ordinary politics, and it would become increasingly difficult to appoint, elect, or retain people with the qualities necessary for judicial independence, because the actors involved would be preoccupied with a degraded notion of judicial accountability. At the end of the day, judicial independence would become a junior partner to judicial accountability, or the partnership would be dissolved.

The work of these years on judicial independence and accountability, practical and theoretical, proved influential when, in 2008, I was asked to participate in an interdisciplinary conference on what judges do, why they do it, and what's at stake, and to contribute a chapter to the volume that emerged from the conference:<sup>37</sup>

What, then, do I see as the state of current knowledge about judicial behavior? The framework I have chosen to describe it is drawn from work on judicial independence and accountability . . . . Accountability to law is an important source of constraint (or self-restraint) posited by those who resist claims that judges are completely independent to decide as they wish. A putative dichotomy between independence and accountability thus maps well on to a putative dichotomy between “judicial politics,” *defined for this purpose as the pursuit of a judge's preferences on matters of policy relevant in litigation*, and “law,” *defined for this purpose as known and established (but not necessarily determinate) law*.<sup>38</sup>

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<sup>34</sup> Burbank, *supra* note 1, at 915-17.

<sup>35</sup> *See id.* at 915 (“We know that public support for the Supreme Court as an institution[,] . . . what political scientists call ‘diffuse support[,]’ . . . was consequential in the failure of President Roosevelt's court-packing plan.” (citations omitted)).

<sup>36</sup> *Id.* at 916.

<sup>37</sup> *See generally* Burbank, *On the Study of Judicial Behaviors*, *supra* note 22.

<sup>38</sup> *Id.* at 46 (citations omitted).

Using that framework, I derived a number of lessons from the judicial behavior literature. The first of them was that, as with judicial independence and accountability,

it is an error to assert or assume that the relationship between “judicial politics” and “law” is or should be the same with respect to every judge in a particular judicial system, or indeed that it is or should be the same even for judges on the same court in every type of case.<sup>39</sup>

The second lesson was that “in describing judicial behavior, it is an error to posit a dichotomy between ‘law’ and ‘judicial politics.’ Instead, like judicial independence and accountability, ‘law’ and ‘judicial politics’ are different sides of the same coin. They are not opposites but rather complements.”<sup>40</sup> The third lesson was that “as with judicial independence and judicial accountability, the quantum and quality, or mix, of ‘law’ and ‘judicial politics’ depends, or should depend, on what a particular polity wants from its courts.”<sup>41</sup>

And what would a decade in my life with judicial independence and accountability be without a bad news moment? Asked to write a paper for a conference exploring—but mostly touting—proposals to abolish life tenure for Supreme Court justices in favor of one non-renewable eighteen-year term, I demurred on the ground that I needed to think more about the proposal and the arguments advanced in its favor than the time available before the conference would permit. “No problem,” said the organizers, “you can write a paper over the summer, and we will include it in the published volume.” Well, after a summer spent with the political science literatures on public knowledge of and attitudes towards courts and on the behavior of interest groups, I concluded that this idea—to which many legal academics had subscribed—was a bad idea and explained why in the paper I sent off to the conference organizers. To say that they were not pleased would be an understatement. One of them wanted to rescind the promise of publication, but he was dissuaded by his colleague.<sup>42</sup>

It turns out that most of the justifications offered in favor of the proposal did not bear scrutiny.<sup>43</sup> Among them was the notion—which only a law professor could entertain—that the appointments process is the only check on the independence of the justices, or, put otherwise, the only source

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<sup>39</sup> *Id.* at 47 (emphasis omitted).

<sup>40</sup> *Id.* at 51 (emphasis omitted).

<sup>41</sup> *Id.* at 56-57 (emphasis omitted).

<sup>42</sup> See generally Stephen B. Burbank, *An Interdisciplinary Perspective on the Tenure of Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 317 (Roger C. Cramton & Paul D. Carrington eds., 2006). For a revised and expanded version of this paper, see Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511 (2006) [hereinafter *Alternative Career Resolution II*].

<sup>43</sup> See Burbank, *Alternative Career Resolution II*, *supra* note 42, at 1515-35.

of the Court's accountability. On the contrary, as political scientists have long argued and more recently demonstrated empirically, the Court pays attention both to Congress and to the public. The justices understand that the Court's legitimacy, and hence its independence, depends critically on what the late Richard Arnold called "the continuing consent of the governed."<sup>44</sup> And from that perspective, another grave problem with the proposal, which when fully operational would entail two Supreme Court vacancies during every four-year presidential term, is precisely that it would increase the incentives of politicians and interest groups to portray justices as policy agents, cementing the worst tendencies of contemporary politics by further undermining the rule of law.<sup>45</sup>

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Finally, although not directly the subject of my work over the past decade, judicial independence and (in particular) judicial accountability remain important themes in that work, most of which has involved collaboration with the political scientist and law professor Sean Farhang on a project that was inspired by his brilliant book, *The Litigation State*.<sup>46</sup> There, Sean interrogated the massive increases in the amount of federal litigation involving federal statutory and constitutional rights that started in the 1960s.<sup>47</sup> Through painstaking quantitative and qualitative analysis, he showed that the standard Chamber of Commerce story—which attributes the increase to a litigious populace, a greedy bar, and an imperial judiciary—is, if not simply wrong, then radically incomplete.<sup>48</sup> For it neglects the fact that starting in the 1960s, Congress increasingly made conscious decisions to include in legislation it enacted either pro-plaintiff fee-shifting, enhanced damages provisions, or both, in order to stimulate private enforcement.<sup>49</sup>

Our project has been to investigate the ways in which the most important federal lawmakers in the domain of private enforcement—Congress, those responsible for court rulemaking under the Rules Enabling Act, and the Supreme Court—have responded to the growth of the Litigation State. In a series of

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<sup>44</sup> Richard S. Arnold, *Judges and the Public*, LITIG., Summer 1983, at 5, 5; Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics, and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 22 (2005).

<sup>45</sup> Burbank, *Alternative Career Resolution II*, *supra* note 42, at 1535-48; Burbank, *supra* note 1, at 912-17, 922-26.

<sup>46</sup> SEAN FARHANG, *THE LITIGATION STATE* (2010).

<sup>47</sup> *See generally id.*

<sup>48</sup> *See generally id.*

<sup>49</sup> *See generally id.*

articles and our recent book,<sup>50</sup> we show that, starting in the first Reagan administration, the growth of litigation as a central instrument to implement social and economic regulation met opposition emanating primarily from the rising conservative legal movement and the Republican Party.<sup>51</sup> This counterrevolution fared very differently in those three lawmaking sites, however.

In marked contrast to its substantial failure in Congress<sup>52</sup> and only modest and episodic success in the domain of rulemaking,<sup>53</sup> the counterrevolution against private enforcement of federal rights achieved growing rates of support, especially over the past several decades, from an increasingly conservative Supreme Court.<sup>54</sup> In cases with at least one dissent, plaintiffs' probability of success when litigating private enforcement issues before the Supreme Court has been in decline for over forty years.<sup>55</sup> By 2014, plaintiffs were losing about 90% of the time, an outcome driven by the votes of conservative justices.<sup>56</sup> Moreover, the effect of ideology on justices' votes in private enforcement cases has grown significantly larger over time, especially since about the mid-1990s, during which time the Court's private enforcement docket has come to focus increasingly on business regulation cases and has become associated with increasing advocacy against private enforcement by the Chamber of Commerce and conservative law reform organizations.<sup>57</sup> Remarkably, at the end of the period we studied, justices were more ideologically polarized over apparently technical rules of private enforcement than they were over the actual substantive rights in statutes.<sup>58</sup>

What explains the variation across institutional sites and the Supreme Court's relative success in the counterrevolution to retrench private enforcement? Four distinguishing institutional characteristics seem to have the greatest explanatory value.<sup>59</sup> First, as contrasted with the institutional fragmentation of the legislative and rulemaking processes, the Court is governed by a more streamlined decisional process and simple voting rules, making it comparatively more capable of unilateral action—by simple majority vote—on controversial issues.<sup>60</sup> Second, in an era of divided government and party polarization, the Court has faced less credible threats

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50 STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

51 *Id.* at 25-34.

52 *Id.* at 34-64.

53 *Id.* at 65-129.

54 *Id.* at 130-91.

55 *Id.* at 21-22.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.* at 220-26.

60 *Id.*

of statutory override and, correspondingly, has enjoyed a wider range of policymaking discretion.<sup>61</sup> The growth of the influence of ideology on justices' votes on private enforcement issues after 1994 is consistent with the hypothesis that the Court exercised wider policymaking discretion during this period, with the conservative majority pushing the law of private enforcement more assertively in the anti-enforcement direction, eliciting greater opposition from the liberal minority.<sup>62</sup>

Third, courts and the judges who sit on them are far more insulated from the forces and incentives of democratic politics than elected officials or rulemakers, which gives the Supreme Court greater freedom to act decisively on divisive issues.<sup>63</sup> Legislators and presidents are democratically accountable through elections, which limits their ability to retrench existing rights that enjoy broad popularity.<sup>64</sup> Prominent among the influences that doomed the Reagan administration's legislative retrenchment initiatives was the fear, abetted by extensive press coverage, that the public would regard the bills as further evidence that the administration was hostile to civil rights and, subsequently, punish the bills' elected sponsors in the 1984 elections.<sup>65</sup> Members of the Advisory Committee on Civil Rules are not elected.<sup>66</sup> Yet, rulemaking under the Enabling Act involves the exercise of delegated legislative power.<sup>67</sup> Widespread public perception that the members of the Advisory Committee, in particular its Article III judge members, were engaged in ordinary politics could bring the process into disrepute, putting at risk the major source of the federal judiciary's power to craft rules of procedure.<sup>68</sup>

To observe that "courts and the judges who sit on them are far more insulated from the forces and incentives of democratic politics than elected officials or rulemakers" is not to say that the Supreme Court is immune to public opinion.<sup>69</sup> As previously observed, the Court's power in the long run—its independence—depends on the continued existence of a well of diffuse support, the depth of which could be adversely affected by a series of unpopular decisions, particularly decisions perceived to deprive people of rights enjoying broad support.<sup>70</sup> The Court recognizes—or at least some of the justices do—that public standing and perceived legitimacy are important to its institutional power, and it therefore is cautious about straying too far or for too long from

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 192-216, 224-26.

<sup>70</sup> *Id.*

public opinion.<sup>71</sup> Consequently, the Court's need for broad public support places limits on its ability to scale back highly visible and popular substantive rights directly.<sup>72</sup> When seeking to retrench enforcement of rights that enjoy broad public support, the Court benefits from strategically steering the discussion onto apparently technical and legalistic terrain, where the public is less likely to learn of the decisions at all.<sup>73</sup> Because of their lower public visibility, the Court's decisions on rights enforcement are less constrained by public opinion and therefore less tethered to democratic governance.<sup>74</sup>

In the first of the articles leading to our book, Professor Farhang and I advanced the hypothesis that the strategy of retrenching private enforcement of rights, rather than the rights themselves, enables justices who share the goals of the counterrevolution to avoid eroding diffuse support for the Court, even when the decisions in question do not track public opinion, because the public is unlikely to be aware of them.<sup>75</sup> Some readers of that article challenged the hypothesis by invoking this or that high-profile decision retrenching private enforcement, such as *Wal-Mart Stores, Inc. v. Dukes*.<sup>76</sup> Accordingly, we undertook an empirical investigation.<sup>77</sup> Recognizing that the media are the primary source of the public's information about Supreme Court decisions, we created an original dataset based on content analysis of newspaper coverage of Supreme Court decisions affecting private enforcement—such as decisions on damages, fees, and class actions—and decisions on the associated merits issues. It allowed us to compare the extent of coverage of Supreme Court decisions ruling on substantive rights to that of decisions ruling on opportunities and incentives to enforce those rights. As we expected, Supreme Court decisions on laws relating to the enforcement of rights receive dramatically less press coverage than decisions on the rights themselves.<sup>78</sup> The media's role in informing the public about the work of the Supreme Court declines precipitously when one moves from rulings on rights to rulings on their enforcement. Thus, the Court's relative success in retrenching legal rules salient to private enforcement was fostered by the lower visibility of its retrenchment efforts as compared to those of Congress or the

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1581-82 (2014).

<sup>76</sup> 564 U.S. 338 (2011) (reversing certification of a national class of female employees allegedly discriminated against by management).

<sup>77</sup> BURBANK & FARHANG, *supra* note 50, at 192-216; Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Reform*, 65 DEPAUL L. REV. 293 (2016).

<sup>78</sup> BURBANK & FARHANG, *supra* note 50, at 201-03.



Advisory Committee. The story of retrenchment of private enforcement by court decision is one of substantial change effected in large part by many comparatively small acts of lawmaking over decades, few of which garnered much public or press attention. As Paul Pierson put it, such slow-moving processes of retrenchment may be “invisible at the surface” while producing “long-term erosion”—like “termites working on a foundation.”<sup>79</sup>

Dependent on the media for information about the Court’s work, most members of the public have not been aware that the Court has sapped the value of their statutory and constitutional rights by making it more difficult to enforce them. The resulting lack of accountability has freed the justices to do indirectly what prudent management of the institution’s perceived legitimacy would prevent them from doing directly. The Court recognizes that its public standing is not hurt by decisions that the public does not learn about. The media must recognize, then, that by not covering the Court’s private enforcement cases, they are enabling the subterranean counterrevolution.

This is not the only democratic deficit that our work reveals. A majority of the cases in our data involved the interpretation of private enforcement regimes in federal statutes, and in 79% of the cases, plaintiffs were asserting federal statutory rights.<sup>80</sup> One need not subscribe to a naïve or simplistic view of federal courts as wholly beyond democratic control or of Congress as resembling a New England town meeting in order to believe that judicial subversion of legislation raises troubling questions from the standpoint of democratic values.

To be sure, Congress sometimes intentionally fails to resolve foreseeable and controversial issues for strategic reasons, delegating policymaking authority to courts. When democratically accountable legislators intentionally license courts to resolve issues left unaddressed, regarding the ensuing judicial policymaking as undemocratic is mistaken. But this account does not fit the Court’s increasingly assertive anti-private enforcement posture. There is no legislative license for retrenchment through judicial interpretation. The bulk of the laws on which the Litigation State was founded were passed by Democratic congresses distrustful of an administrative state under Republican presidential leadership. The conservative wing of the Court mounted a campaign against private enforcement with the goal of demobilizing those private lawsuits. Rather than carrying out an implicit legislative mandate to make policy choices that Congress sought to avoid, the conservative wing of the Court is better understood as seeking to enfeeble legislative policy with which it disagrees and doing so by means that avoid accountability.

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<sup>79</sup> Paul Pierson, *The Rise and Reconfiguration of Activist Government*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 19, 33 (Paul Pierson & Theda Skocpol eds., 2007).

<sup>80</sup> BURBANK & FARHANG, *supra* note 50, at 233-39.

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Judicial independence and judicial accountability present challenges that are fascinating, difficult, and of the utmost importance to our democracy. Laws, we are told, are “those wise restraints that make us free.”<sup>81</sup> Experience over the last two years has reminded us that, in times of aspiring authoritarianism in the executive branch and serial subservience in the legislative branch, independent and accountable courts are the bulwark of our freedoms. Those who lived through Watergate should not need the reminder.

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<sup>81</sup> This language is part of the citation read by the president of Harvard University in conferring the J.D. diploma at commencement. See Burbank, *Architecture*, *supra* note 22, at 317 & n.10.