

Thoughts on Goldilocks and Judicial Independence

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Judicial independence, properly understood as the judiciary's freedom from control by other branches of government, is not entirely advantageous. Like any other government institution, the judiciary may be irresponsible if it is not checked and held accountable. The experience with the Iranian judiciary amply demonstrates this effect. Ideally, the judiciary will have some measure of independence with some accountability, and the trick is getting the right balance between the two. This article contends that the United States has that balance roughly correct, which is a strength of our government. One key element in the balance is judicial selection, and this article finds that elected state judiciaries appear to be more independent than those state judiciaries that are appointed with more assured tenure.

I. INTRODUCTION

Judicial independence is often treated as if it were an unalloyed good, to be furthered insofar as practically possible. In the traditional telling, an independent judiciary is regarded as if it were the font of justice, the rule of law and individual rights, if not the font of all good things. Such worship of judicial independence is not sustainable, theoretically or empirically. Indeed, the concept of judicial independence potentially flies in the face of our fundamental constitutional concept of checks and balances. While there is no doubt that a measure of judicial independence is a good thing, such independence must be kept in balance with judicial accountability. Increased judicial independence is not always better.¹

This article begins with a discussion of the concept of judicial independence. Too often such independence has been interpreted in a facile manner and equated with "all good things." To be of any practical policy value, the concept must be more precisely defined, and I define it as freedom from control or pressure by the other political branches of government.² Once the nature of judicial independence is understood, the second section of this article explores the implications of judicial independence by examining Iran's uniquely independent judiciary. Iran's experience suggests that total judicial independence is not necessarily good.

The third section of this article discusses the balance between independence and accountability in U.S. courts. U.S. judges have a fair measure of

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¹ For a very brief discussion of the importance of this balancing, see Scott H. Bice, *Foreword*, 72 S. CAL. L. REV. 311 (1999).

² There are other, equally reasonable definitions of judicial independence. It might be defined as freedom from the pressures imposed by popular will, though this is more difficult to identify and operationalize. It should not be conflated with the rule of law, which is an aspiration and not a political arrangement.

independence. This is evidenced through analysis of the legal protections of the judiciary, anecdotal evidence, and rigorous statistical measures of judicial decision-making. However, judicial independence in this nation is far from absolute. The judiciary remains accountable to the other branches of government and cannot stray too far from their preferences. The Congress has numerous tools at its disposal to discipline or constrain the judiciary, and analysis of case law reveals that judges sometimes heed that power in their decisions. Studies of judicial decision-making demonstrate the judiciary's concern for the attitudes of Congress and the President.

The fourth section of this article presents a brief empirical study on decision-making in state courts. The study evaluates the effect of judicial selection systems on judicial activism, as expressed in decisions declaring statutes unconstitutional. Such activism is surely evidence of judicial independence. I find that judges selected by the "merit plan" are significantly less prone to activism than those chosen through other methods, and that elected judges are the most activist. I also find that state judges—under any selection system—are most assertive when members of the elected branches of the state's political system are relatively less accountable due to the influence of special interests or the lack of effective competition for office.

II. THE CONCEPT OF JUDICIAL INDEPENDENCE

Understanding the concept of judicial independence requires defining from whom judges are to be independent. While judicial independence is a dynamic concept that may be defined in different ways, it is generally referred to as a shorthand for the judiciary's independence from the executive and legislative branches of government.³ The foundation of judicial independence is that "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 . . ."⁴ This is the Supreme Court's essential understanding of the phrase.⁵ At a minimum, it means that judges cannot be punished physically or economically for the content of the decisions they reach. Consequently, judges need not fear

³ This may be conflated with the distinct concept of judicial independence from the popular will. We may wish judges to be independent of public opinion out of fear for the protection of individual rights and the tyranny of the majority. While the other branches of the U.S. government are popularly elected and therefore presumably aligned with the popular will, this connection is an imperfect one.

⁴ Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 268 (1990) (emphasis added).

⁵ See *United States v. Will*, 449 U.S. 200, 218 (1980) (referring to "judges who are free from potential domination by other branches of government"). Judge Kaufman similarly emphasized that the decisions of judges must be "free from undue interference by the President or Congress." Irving Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 691 (1980).

deciding cases on their merits, even when contrary to the interests or desires of the other branches of government. Thus, other branches of government have no power over case outcomes. Judicial independence thereby frees judges to apply the rule of law and do justice in individual cases.⁶

Judicial independence is an instrumental means to an end, not an end in itself.⁷ The concept is not attractive because it makes judges happy, but because it protects against other branches forcing unfair judicial outcomes, grounded in self-interest or ideological fervor. Justice Breyer has thus noted that the “question of judicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government.”⁸ Freed from threats from the other branches, judges may be better able to render dispassionate judgments and apply the law fairly to the facts.⁹ They are to be principled decisionmakers impartially deciding cases according to the rule of law. It is against this standard that judicial independence must be measured, and there is no intrinsic guarantee that independence will further the standard.

⁶ See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 316 (1999) (describing judicial independence as interwoven with the rule of law); A.E. Dick Howard, *Judicial Independence in Post-Communist Central and Eastern Europe*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 89, 89 (Peter H. Russell & David O'Brien eds. 2001) (claiming that “[e]ssential to the rule of law is the creation and maintenance of an independent judiciary”); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 366 (1999) (stating that “a high degree of judicial independence seems a necessary condition for the maintenance of the rule of law”). Ferejohn is presumably correct that a degree of judicial independence is a necessary condition for maintenance of the rule of law, but it is not a sufficient condition. Further, too much independence may even undermine that goal.

⁷ See, e.g., Peter H. Russell, *Toward a General Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 6, at 1, 3 (stressing that judicial independence is not an end in itself and must be justified because it is “thought to serve some important objective, to contribute to some desirable state of affairs”).

⁸ Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996). There are several different theories with which to define judicial independence, including the “legalist” (considering the formal legal protections of independence), the “behavioralist” (considering the degree to which judges actually act independently), the “culturalist” (considering judges’ internal estimate of their independence), and the “careerist” (considering the determinants of appointment and promotion). Todd Foglesong, *The Dynamics of Judicial (In)dependence in Russia*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 6, at 62, 68. Breyer implicitly adopts the behavioralist definition, which I likewise find to be the most useful approach to measuring judicial independence.

⁹ See Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 608 (1996) (reporting that “judicial independence is related to the notion of conflict resolution by a ‘neutral third;’ in other words, by someone who can be trusted to settle controversies after considering only the facts and their relation to relevant laws”).

One potential problem with judicial independence is that judges may have their own self-interests and ideological fervor. An independent, unchecked judiciary may simply decide cases according to its own whims and predilections, rather than according to the rule of law.¹⁰ For example, because of the great independence of the federal life-tenured judiciary, many political scientists believe that they are more ideological in their decisions than elected legislators or executives.¹¹ Judges may allow corruption and bribery to influence their decisions.¹² They may even be lazy and decide poorly, given the lack of oversight. In these circumstances, the means (independent judiciary) does not advance the end (rule of law). We cannot rely entirely upon judicial self-discipline and restraint to avoid these circumstances.

There is nothing intrinsic in judges that causes them to favor, say, rule-of-law impartiality and the freedoms recognized in the Bill of Rights. Saintliness is not a historic precondition to becoming a judge, nor does the process of doffing judicial robes magically make one saintly. There are surely temptations not to apply the neutral rule of law. Given the absence of any threat of removal, “we should expect to see the decisions of judges heavily influenced by the intellectual orientation and political inclinations that they brought with them to the bench in the first place.”¹³ In addition to internal political desires, there may even be external pressures to this effect. Paul Carrington observed that those calling for judicial self-restraint “would have Justices eschew fame, the adoration of the media and the academy, and even ‘greatness’ to settle for the modest facelessness of drones.”¹⁴ There is little reason to expect that a wholly independent,

¹⁰ Even an honest, well-meaning, independent judiciary may present some problems. Clearly, there are close cases, not governed by the traditional materials of the law. In such cases, judges concededly must exercise their values. From a democratic perspective, it is unclear why the values of such judges should trump the values of the public or the more accountable branches of the government.

¹¹ See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 279 (1997).

¹² While the Italian judiciary is currently renowned for exposing political corruption, it was actually integrally involved in that corruption for some time. See Donatella Della Porta, *A Judges Revolution? Political Corruption and the Judiciary in Italy*, 39 EUROP. J. POL. RES. 1, 6 (2001) (noting that hundreds of judges were “under investigation for crimes such as corruption, abuse of power, and even participation in Mafia-type associations”). The country’s experience demonstrated that “[i]nstitutional independence is . . . not sufficient to promote an effective commitment of the judiciary against political corruption.” *Id.* at 2. When the Italian judges did embark on a campaign against political corruption, it was with the strong support of public opinion and a major political party. *Id.* at 15–16.

¹³ Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 838.

¹⁴ Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 406 (1999).

unaccountable judiciary would appropriately restrain itself and sincerely seek to apply neutral legal principles to the cases they decide.

If independent judges have more freedom to exercise their own preferences, plus an incentive to do so, we must recognize that those preferences may not involve the protection of individual rights or the rule of law, which is our desired end. The judicial preferences may be arbitrary and antidemocratic. We must worry about checking the judiciary, just as it checks the other branches. These checks, rather than absolute independence, are more likely to enhance the rule of law.¹⁵ Because the federal judiciary need not run for reelection, we must particularly worry about the extent of its independence.

III. CONSIDERING A TRULY INDEPENDENT JUDICIARY

The Iranian experience offers itself as a case study in true judicial independence.¹⁶ The judicial branch in Iran may be the most independent of any nation. Iran adopted a new constitution in 1979, following the overthrow of the Shah. The constitution provided for separation of powers with an independent judiciary and placed the country's courts within its Ministry of Justice. The High Judicial Council is the highest court, with considerable authority over the law; its members are chosen by the Council of Guardians.¹⁷ Half the members of the Council and the president of the Supreme Court are appointed, not by elected leaders, but by the country's religious leader. Under the constitution, Islamic governance occurs more through the judiciary than through the other branches.

The constitution was revised in 1989, but the independent power of the judiciary was not altered. The Council of Guardians was replaced with the Head of the Judiciary, who is to establish a judicial organization for the implementation of Islamic law.¹⁸ The Head of the Judiciary is appointed for a five year term by

¹⁵ See David Scott Yamanishi, *Judicial Independence and the Rule of Law: The Ineffectiveness of Judicial Independence Alone as a Path to Development* 19 (Sept. 2, 1999) (unpublished manuscript) (on file with author) (suggesting that "the proper balancing of overlapping powers between governmental bodies whose actions are generally viewed as legitimate is the essence of rule of law").

¹⁶ The summary in the following two paragraphs is drawn from Farshad Malekahmadi, *The Sociological Intersection of Religion, Law and Politics in Iran: Judicial Review and Political Control in the Islamic Republic* (1999) (unpublished Ph.D. dissertation, State University of New York) (on file with author) and LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE JUSTICE SYSTEM OF THE ISLAMIC REPUBLIC OF IRAN* (1993).

¹⁷ LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 16, at 12–14. The Council is a unique institution that is difficult to categorize. However, its supervision of the judicial system and review of the constitutionality of legislation make it more like a judicial body, such as the Supreme Court.

¹⁸ *Id.* at 16–17.

the religious Leader of the Islamic Republic but cannot be removed by the executive or legislative branches.¹⁹

The judiciary in Iran, supervised solely by the Council of Guardians, is charged with ensuring that the nation's law conforms to shari'a—Islamic religious law. The Council of Guardians is an entity like no other in the world, including clerics and representing a true hierocracy.²⁰ The religious law, as defined and applied by the Council and its subsidiary courts, has the power to trump decisions of the other branches. All laws are reviewed against the standard of fidelity to Islam, and the Council has the authority to strike down laws or executive edicts.²¹ The Council also has the authority to supervise elections and disqualify candidates. This gives considerable authority to the judiciary. It is as if, in the West, the common law could override legislation and executive decisions, as well as governing the interpretation of the Constitution.²² The expansive governmental power of the courts in Iran was combined with formal recognition of their independence from the other branches. In contrast to most other nations, where new judges are appointed by the legislature or executive, the Head of the Judiciary has the power to appoint and promote judges.²³ The Iranian judiciary is not just formally independent, it is functionally as independent as any in the world. Judges are not only "constitutionally untouchable," they are also regarded as "beyond criticism."²⁴

The power and independence of Iranian courts have come under attack recently. Iran's President Khatami has assailed his rivals, especially in the judiciary, as "narrow-minded monopolists and totalitarianists."²⁵ Ayatollah Ali

¹⁹ *Id.* at 17.

²⁰ While the Council as created had six clerics and six lay members, the clerics dominated the group. Only they may vote on whether a law is contrary to Islam.

²¹ See Guido Calabresi, *The Supreme Court, 1990 Term: Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 112 n.92 (1991).

²² See S.H. Amin, *The Legal System of Iran*, in 5 MODERN LEGAL SYSTEMS CYCLOPEDIA 5.80.6 (Kenneth Robert Redden ed., 1990) (discussing how after the 1979 Constitution, the judiciary routinely considered legislation to be invalid).

²³ The Head of the Judiciary also has the power to dismiss judges. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 16, at 17. While this power clearly compromises the independence of individual judges, who may be removed for their decisions, it does not reduce the independence of the judicial branch. See *id.* at 20–24 (addressing the nature of this dependence). See Breyer, *supra* note 8, at 990 (noting that the internal judicial disciplinary system is "a manifestation of the independence of the judicial branch, rather than a limitation upon it"); Burbank, *supra* note 6, at 340–49 (describing how judicial independence relates to an institution and not individual judges).

²⁴ *Irreconcilable Differences in Iran Overshadow Khatami's Second Term*, Deutsche Presse-Agentur, Aug. 9, 2001, LEXIS, News & Business, Wire Service Stories File.

²⁵ John Ward Anderson, *Iran's Reformist President Attacks Conservative Rivals*, WASH. POST, Feb. 15, 2001, at A17 (citation omitted).

Khamenei objected to the attack, charging Khatami with “weakening the judiciary.”²⁶ The legislative body even tried to cut the budget for the Council in order to retaliate against its decisions, but failed.²⁷ The facts present a classic battle between the elected branches, whose will is being frustrated by an unelected judiciary independent of their power.²⁸ Under the traditional telling, judicial independence must be preserved and the attack on the courts fought back. The Iranian judiciary is “thwarting the democratic will of the people,”²⁹ but this is the fundamental point of having an independent judiciary. The actions of that judiciary, though, require more scrutiny.

President Khatami was reelected with 77% of the vote and is dedicated to expanding democracy, personal freedoms, and civil liberties.³⁰ Conservatives have used their control of institutions such as the judiciary to wage a counterattack on the President’s agenda. The Council of Guardians vetoed “most of the political and social changes proposed by Khatami and approved by parliament in his first term.”³¹ The judiciary has “clos[ed] [forty] newspapers and magazines and arrest[ed] scores of reformist journalists, students and other political activists.”³² When the legislature sought to protect freedom of the press, “Tehran’s top judge, Abbas Ali Alizadeh,” invoked judicial independence and said that the legislative “body had no right to interfere in judicial affairs.”³³ The judiciary has readily sacrificed fair judicial processes in the interests of religious conformity.³⁴ A reformist legislator was jailed for criticizing the courts.³⁵ In Iran, an independent judicial branch is flexing its powers so as to undermine democracy and personal liberty and has become one of the “main tools of oppression” in the nation.³⁶

²⁶ *Id.*

²⁷ John Ward Anderson, *Dispute Delays Inauguration of Iran’s Reformist President; Conservative Ayatollah Intervenes, but Khatami Retains Power*, WASH. POST, Aug. 5, 2001, at A18.

²⁸ See John Ward Anderson, *Islamic Democracy’s Power Politics: As Iran’s Election Nears, Key Issue Is Accountability—to the Public or to God?*, WASH. POST, May 26, 2001, at A20 (describing clash between liberal elected branches and conservative institutions including judiciary).

²⁹ *Id.*

³⁰ See John Ward Anderson, *Iran’s Cultural Backlash: Public Floggings Used as Tool Against Reform*, WASH. POST, Aug. 16, 2001, at A1; Anderson, *supra* note 27.

³¹ Anderson, *supra* note 27.

³² Anderson, *supra* note 28.

³³ *Id.*

³⁴ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 16, at 25–26.

³⁵ Nazila Fathi, *Iran’s Judiciary Sends Moderate Member of Parliament to Prison*, N.Y. TIMES, Dec. 27, 2001, at A11.

³⁶ CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS, *ATTACKS ON JUSTICE: THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS* 204 (10th ed. 1999).

The questionable actions of the Iranian judiciary cannot be blamed upon the Islamic religion. Like all faiths, Islamic tenets may be interpreted in various ways, and the *Qur'an* did not inevitably compel the decisions of Iranian courts. Rather, the judiciary, freed from accountability to the public or other branches, has seized the power to impose its ideology upon society. While Iranian judges are furthering the cause of the conservative clerics, this apparently is their idea of how best to serve as a judge. In this case, judicial independence seems excessive and unwise. While Iran is by far the most extreme case of excessive judicial independence, it is not alone—the German judiciary has been vigorously criticized for excessive, undemocratic independence.³⁷

IV. THE BALANCE OF INDEPENDENCE AND ACCOUNTABILITY

The United States does not have a truly and wholly independent judiciary, which is probably a good thing, as the Iranian experience suggests. Judges in this nation have a large measure of independence but are still constrained. Americans often boast of our judicial independence. Formalistically, the judiciary does have a significant measure of independence. The federal judiciary is life-tenured, and Congress may not reduce its compensation. However, our judicial branch does not have the sort of total independence found in a nation like Iran. In this section, I review the balance of independence and accountability that characterizes the United States judiciary.

Lawyers and legal academics may be somewhat naïve about judicial independence, assuming its presence and virtues and rationalizing away evidence to the contrary. Political scientists, by contrast, may be quite cynical about the concept, claiming that judicial independence is no more than a myth.³⁸ The truth is somewhere in between, as our judiciary has a measure of independence but is not entirely unaccountable to the legislative and executive branches. The relative degree of judicial independence is a descriptive measure that should be settled by accepted tools for finding truth, which may include examples but should focus on more rigorous statistical examination of judicial behavior.

³⁷ See Donald P. Kommers, *Autonomy vs. Accountability*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 6, at 131, 146 (noting that critics have greeted German judicial independence with “devastating scorn,” attacking judges “for their arrogance, their conservatism, their passivity, their insularity, and even their lack of social consciousness”).

³⁸ See Burbank, *supra* note 6, at 326 (describing the position); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 394 (1992) (declaring that the “hypothesis of judicial independence must be rejected”).

A. Evidence of Independence

Formalistic guarantees of judicial independence do not demonstrate that the judiciary is in fact independent,³⁹ though they serve as evidence of this fact. In reality, judges in this nation generally feel free and independent, and able to decide cases as they believe appropriate. Studies of the federal judiciary demonstrate that it has some obvious independence and does not feel too constrained by the political branches of the government. While independence can be difficult to demonstrate directly, empirical evidence can shed light on its existence.

Ideological judging is a sign of independence—if judges were not independent, they would not feel free to exercise their values but would hew to the ideologies of the other branches.⁴⁰ Although such political voting by judges may seem contrary to their responsibility and the rule of law, it also evidences their relative independence. Studies of judicial decision-making provide evidence of the existence of judicial independence, in the form of ideological voting. Much empirical research has been conducted on the decision-making of the United States Supreme Court.

An accumulation of the empirical analysis on judicial voting through meta-analysis confirms the importance of ideology. Dan Pinello identified over one hundred empirical analyses that considered judicial votes by party of appointing president and had enough in common that their results could be combined.⁴¹ Virtually every study separately showed a positive association between party and voting practice. The combined analysis considered over 220,000 judicial votes, and the judge's party explained 38% of the variance in their votes.⁴² Clearly, there is reason to believe that judges feel free to vote their ideological preferences in a number of cases. That freedom could only come from a measure of independence.

³⁹ See Larkins, *supra* note 9, at 615 (reporting that “formal indicators of judicial independence often did not conform to reality” in the Latin American experience); Howard, *supra* note 6, at 94 (noting that a written constitution provides “no assurance of judicial independence”). Conversely, judicial independence may thrive even in the absence of explicit constitutional protection. See Russell, *supra* note 7, at 22 (observing that the judiciary in countries such as Israel, New Zealand, the United Kingdom, and Sweden lack constitutional protection for independence, yet maintain a level comparable to that of nations that have such protection). In the U.K., the “political culture provides protections for the independence of the judiciary, which are missing in the law.” Robert Stevens, *Judicial Independence in England, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY*, *supra* note 6, at 155, 155.

⁴⁰ See Alex Kozinski, *The Many Faces of Judicial Independence*, 14 GA. ST. U. L. REV. 861, 864 (1998) (declaring that rulings that “reflect the judges’ own biases” show that in “a real sense they were exercising judicial independence”).

⁴¹ Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219 (1999).

⁴² *Id.* at 241.

Jeff Segal has conducted a major study of judicial decision-making that concludes that the Supreme Court justices act independently in their voting.⁴³ He argues theoretically that the judiciary has tools to evade congressional reaction, including the ability to “manipulate issues strategically.”⁴⁴ Moreover, he stresses the difficulties barring congressional control of the judiciary, even should a majority wish to respond to a decision.⁴⁵ Segal also conducts an extensive test of judicial independence, based on the hypothesis that, with a dependent judiciary, “some justices should switch their votes as the political environment changes.”⁴⁶ Using several theoretical models about congressional decision-making, he then demonstrates that this is not the case.⁴⁷ He concludes that “[t]he federal judiciary was designed to be independent, so we should not be surprised that in fact it is.”⁴⁸ The design of Segal’s study did not permit him to prove that the judiciary paid no heed to congressional concerns,⁴⁹ but his results demonstrate that justices do not moderate their decisional outcomes in response to legislative preferences, which is a significant finding about judicial independence.

These findings should not come as a surprise to those who follow the Court. It is not difficult to point to particular decisions that demonstrate the independence of the courts. In *Texas v. Johnson*,⁵⁰ the Court narrowly held that burning the American flag was protected speech. This produced a storm of public outrage and congressional disapproval, and the legislature “went back and passed a statute authorizing laws which prohibit the burning of flags.”⁵¹ The issue returned to the Court and in *United States v. Eichman*,⁵² the Court responded to the legislative expression by saying “We don’t care,”⁵³ and reaffirming its earlier holding.

Perhaps the most dramatic and clear demonstration of judicial independence came in *City of Boerne v. Flores*,⁵⁴ which struck down the Religious Freedom Restoration Act of 1993 (“RFRA”).⁵⁵ The statute was passed by Congress to

⁴³ Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42 (1997).

⁴⁴ *Id.* at 31.

⁴⁵ *Id.* at 31–32 (including the costs associated with legislative action and the existence of veto points where individual or small groups of congresspersons may block legislative action).

⁴⁶ *Id.* at 35.

⁴⁷ *Id.* at 38–43.

⁴⁸ *Id.* at 42.

⁴⁹ See Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1483 (2001).

⁵⁰ 491 U.S. 397 (1989).

⁵¹ Kozinski, *supra* note 40, at 871.

⁵² 496 U.S. 310 (1990).

⁵³ Kozinski, *supra* note 40, at 871.

⁵⁴ 521 U.S. 507 (1997).

⁵⁵ 42 U.S.C. § 2000bb (1994).

expand the right of free exercise of religion, in response to the Court's decisions limiting the scope of the free exercise right.⁵⁶ RFRA had an enormous amount of bipartisan support in Congress.⁵⁷ The decision made clear that the justices would adhere to their vision of the Constitution, even in the face of a direct challenge from Congress and the Executive branch. When President Theodore Roosevelt criticized Oliver Wendell Holmes for a decision, Holmes responded: "Now, Mr. President, you can go straight to hell."⁵⁸ The Court continues to implicitly respond in this fashion, with decisions such as *City of Boerne* and *Texas v. Johnson*. Clearly, the courts are not slavish followers of the more political branches.

B. Evidence of Accountability

Judges in this country are not entirely free and unconstrained. The courts rarely challenge the decisions of the legislative and executive branches.⁵⁹ Congress and the executive may bring a variety of pressures to bear on even the life-tenured federal judges. Attacks on the judiciary, historically, "inevitably have been political" and "motivated by disagreement with the substance of judicial decisions."⁶⁰ When other institutions have significantly disagreed with the substance of judicial decisions, they have taken a variety of measures to attempt to discipline the judiciary. These powers have some effect on judicial decisions.

The congressional power that is most obvious, yet apparently futile, is the authority to impeach judges. Although Congress rarely removes judges from office, threats of impeachment are fairly common. Proponents of the practice believe that the threats are enough, as "just the process of impeachment serves as a deterrent."⁶¹ This was the position of Alexander Hamilton, who argued that the constitutional design meant that a mere threat of impeachment would suffice to deter judges from abusing their powers.⁶² Hence, "the low frequency of

⁵⁶ See, e.g., *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

⁵⁷ See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438 (1994).

⁵⁸ See Roundtable Discussion, *Is There a Threat to Judicial Independence in the United States Today?*, 26 FORDHAM URB. L.J. 7, 26 (1998).

⁵⁹ See, e.g., Henry J. Abraham, *The Pillars and Politics of Judicial Independence in the United States*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 6, at 25, 31 (pointing out that of about 100,000 laws passed by Congress, the Court has declared unconstitutional fewer than 160, while it has struck down about 1200 state laws).

⁶⁰ Barry Friedman, "Things Forgotten" in the Debate Over Judicial Independence, 14 GA. ST. U. L. REV. 737, 738 (1998).

⁶¹ DAVID BARTON, IMPEACHMENT!: RESTRAINING AN OVERACTIVE JUDICIARY 53 (1996).

⁶² THE FEDERALIST NO. 81, at 484-485 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton recognized that the judiciary would sometimes contravene legislative preferences but that such actions would "never be so extensive" because of "the power of instituting impeachments." *Id.* at 485.

impeachment should not be seen as evidence of the security of constitutional protection, because this may be due as much to judges' reluctance to make politically controversial decisions as to any display of congressional virtue."⁶³ Judge Dubois has commented: "I do not think anyone is going to get impeached; but a lot of people are going to be very uncomfortable."⁶⁴ Such discomfort surely can influence decision-making at the margin. When Judge Harold Baer came under fire for suppressing drug evidence and criticizing police practices, he vacated his ruling upon reconsideration.⁶⁵ Other judges have "publicly worried" about the criticism, and even retired in the face of political criticism.⁶⁶

Congress may also influence the federal courts by eliminating their jurisdiction over certain categories of legal issues. While such jurisdiction-stripping is not common, the threat of action may suffice, as in the case of impeachment. There is historical evidence of this effect. In the late 1950s, after Congress responded to Supreme Court decisions restraining investigation and prosecution of Communist activity with jurisdiction-stripping threats, the Court retreated and issued decisions less protective of the civil liberties of subversives.⁶⁷ More disciplined empirical research seems to confirm that jurisdiction-stripping efforts provoke the Court to respond to congressional preferences.⁶⁸ Congress need not enact restrictions on jurisdiction because "[a]rousing substantial opposition to the Court may be enough to dominate it."⁶⁹ Moreover, there are instances where Congress has actually legislated just short of jurisdiction-stripping but nonetheless curbed the Court's powers.⁷⁰ Congress may also devote

⁶³ John Ferejohn, *Independent Judges, Dependent Judiciary*, 72 S. CAL. L. REV. 353, 358 (1999); see also TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 145 (1999) (noting that the "effectiveness of political sanctions is not simply the number of times they are actively and successfully applied," because of the "rule of anticipated reactions" by other parties).

⁶⁴ Roundtable Discussion, *supra* note 58, at 16.

⁶⁵ See Cross & Nelson, *supra* note 49, at 1462 (describing pressure on Baer from Congress and the presidency and his response).

⁶⁶ *Id.* at 1463.

⁶⁷ *Id.*

⁶⁸ See, e.g., Stuart Nagel, *Court Curbing Periods in American History*, 18 VAND. L. REV. 925, 926-27 (1965) (finding that the court retreated in five of the seven historic episodes of court-curbing efforts); Roger Handberg & Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court vs. Congress*, 14 LAW & SOC'Y REV. 309 (1980) (reporting that after curbing proposals were entered in Congress, the Court responded with decisions favoring the government position).

⁶⁹ Rosenberg, *supra* note 38, at 397.

⁷⁰ When the D.C. Circuit issued a series of rulings favoring criminal defendants, Congress created a new court system for the District of Columbia that shifted authority away from the federal courts. See CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 26-32 (1999) (describing the legislation as a "comprehensive effort to tip the scales of justice in favor of the police and against mollicoddling courts or judges"). Congress has recently passed

certain issues to new non-Article III courts that permit them greater “political control” over judicial decision-making.⁷¹ Impeachment and jurisdiction-stripping threats can be seen as part of a continuing dialogue between the political branches and the courts, in which the legislature sometimes sends signals that it expects the courts to heed.⁷²

Congress and the President also have control over the resources of the courts. While the Constitution provides some salary protection to judges, salary increases may be withheld. There are no constitutional constraints on appropriations for support staff, facilities and other necessary resources.

Judge Calabresi has remarked on the significance of these appropriations:

One of the things that has made the judiciary somewhat less independent than it used to be, not perhaps in a dramatic sense but in a subtle way, is that we are, that we have come to be, too dependent on the Administrative Office of the Courts, on fancy offices, on elegant Court houses, on too many law clerks, on a whole lot of bureaucracy that Congress can take away by not allocating the money to support it. I have actually had a judge say to me: “Why not take that phrase out of your opinion, you do not need it, and it might offend the Senate. And you know how that could affect the judicial budget.”⁷³

Indeed, justices often appear before Congress and plead for additional resources and additional pay, or a reduced caseload.⁷⁴ Congress may respond favorably or critically and that response may depend in large part on the pattern of judicial decisions.

The desire for promotions is yet another factor that renders judges accountable to the other institutions of government.⁷⁵ Because promotions to higher court levels are dependent on the actions of the President and Congress, judges have reason to attend to the preferences of these institutions. Judge Calabresi has noted that “judges want to be promoted,” and declared that if he

the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996); the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); and the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), all of which removed the ability of courts to protect the rights of defendants or convicted criminals.

⁷¹ Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1062 (1999).

⁷² This dialogue also occurs in a variety of less obvious but equally powerful ways. For example, congressional oversight over judicial operations and expenditures has made the courts “nervous” and “eager to avoid confrontations.” William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 966–67 (1998).

⁷³ Roundtable Discussion, *supra* note 58, at 27.

⁷⁴ See Cross & Nelson, *supra* note 49, at 1466.

⁷⁵ See generally Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455–56 (1999) (discussing how promotion affects judicial decisions and analyzing the eighteenth century English judiciary).

“were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up.”⁷⁶ There is some empirical evidence that promotion potential influenced judicial holdings on the constitutionality of the Sentencing Guidelines.⁷⁷

Finally, the judiciary is limited by its need for assistance in effectively implementing the decisions that it reaches. Implementing any social policy, including those expressed by judicial opinions, requires a variety of resources and tools that the courts lack. The notions of judicial review and judicial independence may be “meaningless unless the executive branch is willing and able to enforce the orders of federal courts.”⁷⁸ Judges may hesitate to render opinions strongly contrary to the interests of other institutions because they are aware that “they lack the power to enforce broad policy decisions.”⁷⁹ There have been some “extreme cases of organized opposition” to judicial rulings, such as in the response to the desegregation cases.⁸⁰ Steve Griffin has observed that the “Court is aware that its rulings can be difficult to enforce and may be ignored,” which “can influence the willingness of the Court to take on certain cases and may limit the remedies the Court applies in cases it does decide.”⁸¹

The culmination of these powers of Congress and the President have the effect of influencing the judiciary at the expense of its perfect independence. Judge Joseph Rodriguez, testifying on behalf of the Judicial Conference, summarized the judiciary’s relationship with Congress:

It is safe to say that the happiness, effectiveness, stability and independence of the federal judiciary depends [sic] to a large extent on Congress. If the legislative branch is responsive to our needs, we shall remain one of the most durable legacies of the founders of this nation. If it is not, then suspicion, underfunding, minute oversight, and capricious additions to workload may become the equivalent of a constitutional amendment effectively repealing Article III.⁸²

⁷⁶ Roundtable Discussion, *supra* note 58, at 26.

⁷⁷ See Gregory B. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1488–93 (1998); Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 185–86 (1991).

⁷⁸ Burbank, *supra* note 6, at 323.

⁷⁹ CHRISTOPHER E. SMITH, COURTS AND THE POOR 95–96 (1991).

⁸⁰ Breyer, *supra* note 8, at 995.

⁸¹ STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 127 (1996).

⁸² ABA COMM’N ON SEPARATION OF POWERS & JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1999), available at <http://www.abanet.org/govaffairs/judiciary/r4b.html>.

Congress provides the judiciary with plenty of signals regarding its concerns about trends in decision-making,⁸³ and wise judges may act with those in mind.

Eugenia Toma has investigated the influence of congressional budgetary authority on judicial decisions.⁸⁴ She argues that “the relationship between the Supreme Court and the Congress is a contractual one” in which they exchange “budgetary favors” for “politically influenced output.”⁸⁵ Toma empirically analyzed the association between Court budgets and judicial outcomes for the period between 1946 and 1988. The study found that the larger the difference between the political positions in Court decisions and the Congress, the smaller the budget increase for the Court. For several chief justices, but not Earl Warren, the Supreme Court responded to the budgetary signals by shifting its decisional output in the direction preferred by the legislature.⁸⁶

Judges’ overall responsiveness to Congress has not been extensively evaluated. Testing judicial independence is possible by examining how courts decide cases involving the government. Judicial independence is said to take on “critical significance when the government is one of the parties to a dispute,”⁸⁷ so examining these cases may be considered one fair yardstick of the concept.⁸⁸ While there is evidence of independence—seen in the flag-burning cases, some defendants’ rights decisions, and the invalidation of RFRA—there is also empirical evidence of accountability.

It is well established that the Solicitor General, who represents the interests of the federal government before the Court, “is overwhelmingly successful there.”⁸⁹ This suggests judicial responsiveness to their parallel branches of government. A recent study took the database of Supreme Court decisions used by Segal and others (to demonstrate the ideological independence of the justices) and tested for the Court’s deference to the other institutions of government.⁹⁰ While the justices’ decisions show a significant ideological determinant, virtually every justice significantly modified his or her ideology when reviewing an ideologically contrary decision of another institution.⁹¹ A statistical technique called

⁸³ See Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2593 (1998) (“Congress gives signals by considering, as well as by enacting, legislation and by holding hearings; members of Congress speak, both on and off the floor, to judges.”).

⁸⁴ Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 INT’L. REV. L. & ECON. 433 (1996).

⁸⁵ *Id.* at 434.

⁸⁶ *Id.* at 441–43.

⁸⁷ Larkins, *supra* note 9, at 608.

⁸⁸ See *id.* at 616 (describing how researchers have measured independence according to the “frequency by which courts decide cases against the government”).

⁸⁹ PERETTI, *supra* note 63, at 149.

⁹⁰ Cross & Nelson, *supra* note 49, at 1475.

⁹¹ *Id.* at 1476.

“proportional reduction in error” enables the testing of whether an additional variable better explains the outcomes observed. For more than 80% of the justices, the consideration of institutional deference produced such a reduction in error.⁹² Moreover, nearly every justice showed greater deference to statutes or federal administrative agency decisions than they did to states or lower courts.⁹³ Much of this deference could not be explained by legal requirements, and the results strongly suggest that the Court tempers its decisions with concern for other institutions.

Even the Court’s bravest forays into judicial activism have been hedged by some political concern. The dramatic requirement of school desegregation in *Brown v. Board of Education*⁹⁴ was conditioned by the Court’s careful caveat requiring desegregation to proceed with “deliberate speed.”⁹⁵ This condition defused much of the practical political impact of the ruling.⁹⁶ It transformed the opinion from a judicial diktat to something more like a gentle nudge to the political processes. The courts have also been loathe to address many important public policy issues, such as the welfare of the poor.⁹⁷ Such cases and patterns suggest a measure of judicial deference.

There is also considerable evidence that judges are influenced by general public opinion, either directly or as filtered through the other branches.⁹⁸ A study of Supreme Court opinions rendered between 1956 and 1989 concluded that the Court was “highly responsive to majority opinion.”⁹⁹ Subsequent research found that judicial “decisions do, in fact, vary in accord with current public preferences.”¹⁰⁰

When justices agree with public opinion, it does not prove that they are being directly influenced by public opinion. Judges are drawn from the American public

⁹² *Id.* at 1487.

⁹³ *Id.* at 1481–82.

⁹⁴ 344 U.S. 1 (1952), *rev’d*, 349 U.S. 294 (1955).

⁹⁵ *Id.* at 301.

⁹⁶ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 93 (1991). *Brown* and ancillary court decisions were “ineffective” so long as “political leadership at the national, state, and local levels was arrayed against civil rights, making implementation of judicial decisions virtually impossible.” *Id.*

⁹⁷ See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857, 887–900, 907–08 (2001) (describing how courts, even very liberal courts, have declined to implement any rights protecting the financial interests of the impoverished).

⁹⁸ See generally LAWRENCE S. WRIGHTSMAN, *JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT?* 58–62 (1999) (summarizing evidence on effect of public opinion).

⁹⁹ William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 *AM. POL. SCI. REV.* 87 (1993).

¹⁰⁰ James A. Stimson et al., *Dynamic Representation*, 89 *AM. POL. SCI. REV.* 543, 555 (1995).

and may simply share the opinions of the majority. However, judges are hardly drawn from a random cross-section of the populace, so this correspondence of attitude is not necessarily the case. It is generally assumed that the elected branches, Congress and the presidency, represent the will of their constituents. When their actions correspond to the will of their constituents, this is presumably evidence of at least some level of responsiveness, and not a simple coincidence of attitudes. Yet the Supreme Court agrees with public opinion about as often as does the legislature.¹⁰¹

There is little direct evidence of the influence of public opinion on the Court, but there are hints of its relevance. Chief Justice Rehnquist's history of the Supreme Court suggests that public opinion about our Korean involvement influenced the outcome of *Youngstown Steel*.¹⁰² Justice Souter's opinion in *Planned Parenthood v. Casey*¹⁰³ expressly declared that the Court must make "principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."¹⁰⁴ Judges have openly expressed concern about their public standing.¹⁰⁵ Throughout the Court's history, public opinion has informed and influenced its opinions in some cases.¹⁰⁶

In addition to such direct testimony and case analysis, studies have shown that unpopular precedents are more likely to be overturned than popular ones.¹⁰⁷ Other researchers find that the Court's opinions seem to reflect the opinions of all groups of society, rich and poor, young and old, with varying degrees of education.¹⁰⁸ This is evidence the Court reflects public opinion and not just the attitudes of its members. Judge Dubois cautioned: "[O]ur courts are not completely independent. We are not independent of public opinion. If the court decisions go one way and the country is going another way, we are going to have a calamity."¹⁰⁹ Perhaps justices are aware, as Judge Irving Kaufman put it, that a

¹⁰¹ See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1553 (2000) (reviewing studies to this effect); THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 80 (1989) (finding that the "modern Court appears neither markedly more nor less consistent with the polls than are other policy makers").

¹⁰² WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 95-97 (1987).

¹⁰³ 505 U.S. 833 (1992).

¹⁰⁴ *Id.* at 866.

¹⁰⁵ See Cross, *supra* note 102, at 1556 (noting survey of judges showing concern for their public relations).

¹⁰⁶ See James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037 (reviewing this history).

¹⁰⁷ MARSHALL, *supra* note 102, at 167-85.

¹⁰⁸ See Thomas R. Marshall, *The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?*, 76 JUDICATURE 22 (1992).

¹⁰⁹ Roundtable Discussion, *supra* note 58, at 21.

level of public support is needed as the “ultimate justification of their power,”¹¹⁰ or perhaps the justices simply want to be popular.

While there is clear evidence that the Court’s decisions are more often than not consistent with public attitudes, there is a substantial minority of cases where they are inconsistent, and some decisions are very unpopular.¹¹¹ A study of individual rights claims found (a) that the level of public opinion regarding the claim was a significant determinant of the Court’s outcome and (b) that for most rights the Court was more likely to favor the claim than the public.¹¹² Public opinion exerts a pull on the justice but not an insurmountable one. The research suggests that judges are not “weathervanes,” but that public opinion exercises some effect on decisions at the margin.¹¹³ The Court does not display anything approaching the slavish devotion to majoritarianism or political preferences that one might expect from a truly dependent institution.

The judiciary has some institutional protection from complete dependency, based on public political preferences. The public, as well as the other institutions of government, desire both an independent judiciary and agreeable ideological decisions. One federal representative, in connection with legislation limiting pay increases for justices, declared that the members of the House “want a judiciary that is independent but not too independent.”¹¹⁴ Most of the historic efforts to control the judiciary, such as FDR’s Court-packing plan, have been rejected by the public and their representatives.¹¹⁵ There are political reasons why political institutions would desire an independent judiciary, even though it may sometimes contravene their preferences.¹¹⁶ Political parties have an incentive to “pre-commit

¹¹⁰ LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 84 (1998); *see also* LAWRENCE BAUM, *THE SUPREME COURT* 151 (5th ed. 1995) (reporting that “justices care about public regard for the Court, because high regard can help the Court in conflicts with the other branches of government and increase people’s willingness to carry out its decisions”).

¹¹¹ *See, e.g.,* Marshall, *supra* note 109, at 25 (noting that *Johnson v. Transportation Agency* was disapproved by a 63% to 29% majority). The same can surely be said of Supreme Court decisions in other areas, such as defendants’ rights, flag-burning and school prayer.

¹¹² Joseph Ignani, *The Supreme Court and Public Support for Rights Claims*, 78 *JUDICATURE* 146 (1994).

¹¹³ *See* Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 *AM. J. POL. SCI.* 468, 494 (1997).

¹¹⁴ *See* Toma, *supra* note 84, at 37.

¹¹⁵ *See* Friedman, *supra* note 60, at 759–60 (reporting failures of these efforts). *See also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 46 (1980) (noting of FDR that “an immensely popular President riding an immensely popular cause had his lance badly blunted by his assault on judicial independence”).

¹¹⁶ *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J. L. & ECON.* 875, 885 (1975).

[C]urrent legislature may want judicial interpretations that gut some existing laws, but if it tries to procure them by forms of coercion that impair the functioning of the judiciary

to an institutional apparatus" that will enable their decisions to perpetuate over time.¹¹⁷ James Rogers suggests that the legislature values judicial independence for informational reasons and permits some political decision-making, so long as it is not too great.¹¹⁸ As Stephen Burbank has put it: "To yield a little may be prudent, for the tree that cannot bend to the blast may be broken."¹¹⁹ There is also a powerful public political constituency for judicial independence¹²⁰ but not for total independence, which could seriously threaten democratic preferences. Perhaps we can say that the judiciary is "independent at retail, not at wholesale"¹²¹—making the courts independent in particular cases but not so independent as to change the fundamental content of the law.¹²²

V. STATE SELECTION SYSTEMS STUDY

The states have a variety of different approaches to selecting judges, and these approaches have been the source of much discussion. They provide an excellent laboratory for evaluating the importance of judicial selection systems and tenure on judicial behavior. One significant concern in choosing among selection systems is judicial independence. It has been suggested that less politicized methods of selection, such as the "merit plan" method, provide greater independence for judges and consequently empower them to more frequently reverse decisions of the state legislature or executive.¹²³ Logically, the choice of

across the board, it will impose costs on all who use the courts, including various politically effective groups and indeed the beneficiaries of whatever legislation the current legislature has enacted.

Id.; see also J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUDIES 721 (1994) (exploring economic theories of judicial independence as applied in Japan and in the United States).

¹¹⁷ Ferejohn, *supra* note 6, at 374.

¹¹⁸ See James R. Rogers, *The Reciprocal Influence of Courts and Legislatures: A Signaling Model of Judicial Review* (April 29, 2000) (unpublished paper presented at the 2000 annual meeting of the Midwest Political Science Association) (on file with author).

¹¹⁹ Burbank, *supra* note 6, at 327 (quoting 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 273 (3d. ed. 1908)) (alteration in original).

¹²⁰ See Bator, *supra* note 4, at 258 (describing judicial independence as "an immensely powerful political ideal").

¹²¹ Martin Shapiro, *The European Court of Justice, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY*, *supra* note 6, at 273, 280.

¹²² This retail/wholesale distinction calls into question the propriety of judges striking down laws as unconstitutional. However, the relative rarity of such action, at least in striking down federal legislation, suggests that the American judiciary is not committed to a wholesale overhaul of the nation's laws.

¹²³ See Kenneth L. Karst, *A New State Constitution: Of Independent State Grounds and Independent State Judges*, 28 STAN. L. REV. 829, 834-35 (1976) (book review) (suggesting that judicial activism in California could be attributed to the greater independence of their merit plan

selection systems should have a material effect on the degree of judicial independence of the courts.

The effect of judicial selection systems may be identified through studies of comparative judicial decision-making. To date, most studies have failed to find a clear correlation between the method of selection and judicial decision-making.¹²⁴ However, it seems implausible that something so significant as method of selection has no effect on their behavior. The existing studies may have been looking for an effect in the wrong places.

For purposes of the study, I have broken down state judicial selection methods into five categories: partisan elections, nonpartisan elections, legislative appointment, gubernatorial appointment, and merit plan selection.¹²⁵ The approaches seem to present a continuum of politicizing the judiciary in the order listed—partisan elections obviously link the judiciary to majoritarianism and party politics, while merit plan selection aims to remove these influences insofar as possible. Each of the states were placed into one of these five categories.

One measure to test the effect of judicial selection systems is judicial activism, which should be correlated with judicial independence. A ruling that a statute is unconstitutional is commonly regarded as a measure of activism,¹²⁶ and likewise a measure of independence, because it substitutes the judicial policy choice for that passed by the state legislature. My measure of judicial activism comes from data on the number of statutes declared unconstitutional by courts between 1981 and 1985.¹²⁷ The average number of statutes declared unconstitutional during the period was 11.82. Table 1 displays the relative frequency of declarations of statutory unconstitutionality by selection method and

selected judiciary); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 16–28 (1995) (contending that the election of judges provides accountability with little independence).

¹²⁴ See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 44 (1994) (reporting that studies have generally not found such a correlation); Jerome O' Callaghan, *Another Test for the Merit Plan*, 14 JUST. SYS. J. 477, 477 (1991) (reviewing literature finding little impact and providing new empirical evidence of little effect on judicial sentencing decisions).

¹²⁵ Any such categorization is somewhat arbitrary, as even appointed and merit plan judges typically must run for reelection. The categorization I have used is a common one, though, and was drawn from ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 258 (3d. ed. 1996) (data from the American Judicature Society).

¹²⁶ See, e.g., Baum, *supra* note 111, at 149–51 (suggesting that the “most prominent type of activism involves rulings that state statutes are unconstitutional”); Craig E. Emmert, *An Integrated Case-Related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases*, 54 J. POLITICS 543, 544 (1992) (declaring that a “decision to declare state law unconstitutional is an activist decision because a state supreme court substitutes its own judgment for that of the legislature”).

¹²⁷ See Henry R. Glick, *Policy Making and State Supreme Courts*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 100–01 (John B. Gates & Charles A. Johnson eds., 1991).

the probability that the group's difference from the average was attributable to chance.

TABLE 1
Selection Methods and Judicial Activism

	<i>Number</i>	<i>Probability</i>
Partisan Election	13.92	.26
Nonpartisan Election	13.70	.37
Legislative App.	12.25	.90
Gubernatorial App.	11.71	.97
Merit Plan	9.18	.06*

The only statistically significant results were for the merit plan selection method, which was associated with fewer declarations of unconstitutionality (and thus less apparent independence). However, the pattern of the results clearly indicates that judiciaries with greater involvement in politics appear to be independent and more likely to declare statutes unconstitutional.

The results presented in Table 1 take no account of other variables that might influence declarations of unconstitutionality and thereby create a spurious association (or obscure a stronger association). The data show that the number of constitutional challenges does not differ much by type of state.¹²⁸ However, states with differing selection systems may have other differences that affect the results.¹²⁹ I considered the following control variables: the degree of urbanization of the state ("URBAN"); the degree of interparty competition in elections ("PARCOMP"); the relative level of public participation (turnout) in elections ("PUBPART"); and the relative influence of interest groups before the state legislature ("INTGRP").¹³⁰

Urbanization was chosen as a control variable because it is the primary demographic difference between merit plan and other states, and it might relate to levels of political conflict. The hypothesized direction of this variable is positive, as such conflict might bring more conflicts before the courts. Interparty

¹²⁸ *See id.*

¹²⁹ *See* Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 37-39 (1979) (finding that merit plan states tend to have lower than average levels of urbanization, but little difference in terms of demographic, economic and judicial variables).

¹³⁰ Data for the relative level of party competition and public participation in elections are taken from KIM QUAILE HILL, *DEMOCRACY IN THE FIFTY STATES* (1994). Data on the relative influence of interest groups by states comes from Clive S. Thomas & Ronald J. Hrebenar, *Understanding Interest Group Power: Lessons from Developments in the American States Since the Mid-1980s* (April 6, 1995) (paper presented at the 1995 annual meeting of the Midwest Political Science Association) (on file with author).

competition was chosen because with lower levels of such competition the judiciary is more likely to be ideologically aligned with other branches of government. The hypothesized direction of this variable is negative, both because of the alignment and because legislatures in one-party states have greater reason to reduce the institutional independence of the judiciary.¹³¹ Public participation is a measure of the electorate's interest and involvement and, hence, majoritarianism. Interest group influence is the converse. The hypothesized direction of interest group influence is negative (because those groups will act to preserve their political victories), and the hypothesized direction of public participation is therefore positive.

I ran separate regressions with the control variables and each of the selection systems. This enables a test of whether certain selection systems respond differently to different political contexts. The results are reported in Table 2.

TABLE 2
Determinants of Judicial Activism

	(1)	(2)	(3)	(4)	(5)
INTGRP	-.35* (2.3)	-.32* (2.0)	-.34* (2.1)	-.35* (2.1)	-.38* (2.2)
PARCOMP	-.27* (1.8)	-.27* (1.8)	-.27* (1.8)	-.28* (1.8)	-.30* (2.0)
PUBPART	.24 (1.4)	.22 (1.2)	.24 (1.3)	.24 (1.3)	.26 (1.4)
URBANIZ	.14 (1.0)	.21 (1.3)	.24 (1.5)	.23 (1.4)	.21 (1.3)
Merit plan	-.27* (1.9)				
Partisan		.16 (1.2)			
Nonpartisan			.05 (0.5)		
Legislative				-.03 (0.2)	
Governor					.11 (0.7)
R ²	.26	.22	.20	.20	.20

The results of the multiple regression confirm that merit plan judges are less likely to find statutes unconstitutional than are those selected through other methods, even in the presence of significant control variables. The research reveals much else of interest about judicial decision-making. States with lower levels of inter-party competition have more statutes declared unconstitutional, as do states with greater interest group influence.¹³² Both these results are contrary to the predictions that positive political theory would make, but they are very positive about the role of the judiciary in government. It appears that state judges

¹³¹ See Ramseyer, *supra* note 117, at 746–47 (1994) (arguing that one-party states have an incentive to undermine judicial independence).

¹³² The scale for interest group influence has an inverse direction, so that a negative association suggests that judges are overturning more laws in states where interest groups have more legislative influence.

are more likely to declare a statute unconstitutional when it is the product of flawed majoritarianism in the other branches.¹³³ This may not reflect judges acting like judges and simply applying the law, but it does suggest that judges are functioning as a desirable, relatively majoritarian government institution, deferring less to legislatures that may not reflect the popular will. This is consistent with a vision that holds that judges should be relatively independent but not entirely unaccountable.

The preceding analysis and results are very preliminary and require much additional investigation.¹³⁴ Ideally, one would want to examine each of the judicial declarations of unconstitutionality to determine their nature, whether there was evidence of ideological or interest group influence (and differential levels of ideological influence according to a state's selection system), and whether they were reflecting the true public will in the state or the strength of the legal reasoning supporting the finding of unconstitutionality. However, it is generally well accepted that the cases going to the highest courts are close cases in which both sides can advance reasonably strong cases.¹³⁵ It appears that judges selected by the merit plan method are more responsive to the arguments presented by the state in these close cases and thus appear somewhat less independent, contrary to the hypotheses that have been advanced. It also appears that state judges, whatever the selection system, are acting in a generally wise and valuable fashion, responding with some independence to majoritarian weaknesses of the other branches of government.

VI. CONCLUSION

Judicial independence is not an unalloyed good. Just as a bed may be either too hard or too soft (or just right), judicial independence may be too strong or too weak (or just right). A balance must be struck between independence and accountability. While it would be naïve to assert that the United States has it "just right," history suggests that the balance of independence and accountability currently found in this nation is a pretty good one. However, the fact that our arrangements for judicial independence are good does not mean that they cannot

¹³³ The association with public participation was not significant, but this may not mean much because turnout may not be a good proxy for majoritarianism.

¹³⁴ At least one study is directly contrary to my findings here. A test of state rulings on public utility regulation found that appointed judges were more independent and activist in protecting consumers than were elected judges. F. Andrew Hanssen, *Appointed Courts, Elected Courts, and Public Utility Regulation: Judicial Independence and the Energy Crisis*, 1 *BUS. & POL.* 179 (1999). This study only contrasted elected and appointed judges, though, and did not consider differences such as merit plan selection methods.

¹³⁵ Frank B. Cross, *Political Science and the New Legal Realism*, 92 *NW. U. L. REV.* 251, 285 (1997) (cases reaching the Supreme Court are the hard cases at the margins of the law).

be improved.¹³⁶ Louis Michael Seidman stresses that the “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.”¹³⁷ We must cut through the fog of rhetorical effluence on judicial independence and examine the matter more closely. The important questions are: what sort of systemic societal outcomes do we wish to advance and what structures of judicial independence are best suited to their advancement? The answers to these questions are not well understood.¹³⁸

While theory is valuable, analysis of appropriate levels of judicial independence would benefit greatly from empirical analyses. Such research is needed first to ascertain the determinants of judicial independence. A simple constitutional declaration that a judiciary is independent is hardly sufficient in itself to protect that status. More specific protections, such as salary protection, presumably further independence but may be inadequate in their own right. We need greater understanding of what institutional features create judicial independence and that understanding would be enhanced by careful empirical analyses.

In addition, empirical research is needed to illuminate the consequences and value of a more independent judiciary. An independent, powerful and unaccountable judiciary plainly frustrates government action that reflects the will of the majority of the people. If it does so in furtherance of some higher principle, such as individual freedom or the rule of law, it may be beneficial for a society. An independent judiciary may also benefit society by generally slowing down the pace of political change and allowing more time for democratic reflection. However, if the independent judiciary only serves to facilitate arbitrary ideological decision-making, that finding might counsel for less independence. The effects of judicial independence should also be investigated more broadly. For example, it would be valuable to know if greater levels of judicial independence contribute to greater economic growth in a society.¹³⁹

The comparative empirical study of state courts should prove enlightening. Differences in selection systems, retention and tenure, and other rules among the states readily enable testing of their institutional effects on judicial decisions and

¹³⁶ See Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1572 (1988) (discussing the innate conflict between the goals of judicial independence and accountability).

¹³⁷ *Id.* at 1599.

¹³⁸ See Russell, *supra* note 7, at 1. “There is little agreement on just what this condition of judicial independence is, or on what kind or how much judicial independence is required for a liberal democratic regime, or on the societal conditions on which judicial independence depends.” *Id.*

¹³⁹ For a preliminary discussion of the significance of legal rules and legal institutions on the economic welfare of nations, see Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2002).

on society more broadly. The differing state judicial systems offer a promising natural laboratory for investigating judicial independence and other aspects of court decision-making. Political scientists are actively engaged in research on state courts and have begun to create large databases to further this study. Legal academics should participate in this investigation more aggressively.

