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# Judicial Independence and Social Welfare

Michael D. Gilbert
*University of Virginia School of Law*

# JUDICIAL INDEPENDENCE AND SOCIAL WELFARE

*Michael D. Gilbert*[*]

*Judicial independence is a cornerstone of American constitutionalism. It empowers judges to check the other branches of government and resolve cases impartially and in accordance with law. Yet independence comes with a hazard. Precisely because they are independent, judges can ignore law and pursue private agendas.*

*For two centuries, scholars have debated those ideas and the underlying trade-off: independence versus accountability. They have achieved little consensus, in part because independence raises difficult antecedent questions. We cannot decide how independent to make a judge until we agree on what a judge is supposed to do. That depends on one's views about complicated issues like minority rights, the determinacy of law, and the nature of legalism itself. These complications have paralyzed the debate.*

*This Article presents a way forward. It reduces the debate about independence to a small set of intuitive parameters and shows how they interact. The result is a framework for identifying the optimal degree of judicial independence. The framework transcends the thorny issues bogging down the debate by allowing scholars with diverse views and methodologies to input whatever assumptions they like and get an answer to the question "how independent should judges be?"*

*This framework generates important insights. It shows that independence can implicate a new and fundamental trade-off. Independent judges make some nonlegalistic decisions, and each such decision imposes a high cost on society. Dependent judges make more nonlegalistic decisions, but each imposes a low cost on society. The framework also shows that society may prefer a dependent judge to adjudicate minority rights and that the determinacy of law can be irrelevant to the choice between an independent and a dependent judge. Finally, it shows that the debate rests on deep and contestable assumptions about the value of law. The question is not whether the legalistic decisions that independence is supposed to facilitate are better than nonlegalistic alternatives. The question is "how much better?"*

[*] Associate Professor, University of Virginia School of Law. I am grateful for comments received at the annual meetings of the American Law and Economics Association, the Political Economy and Public Law Conference, and workshops at Georgetown University, Tel Aviv University, and the University of Virginia. I also thank Scott Baker, Stephen Burbank, Josh Fischman, Charles Geyh, John Harrison, Rich Hynes, Greg Klass, Liz Magill, Paul Mahoney, Greg Mitchell, Fred Schauer, Rich Schragger, Micah Schwartzman, Larry Solum, and Matthew Stephenson.

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## Introduction

In 2009, the Supreme Court of Iowa unanimously held that same-sex couples have a right to marry under the state constitution.[1] A year later, Iowans voted out of office three justices who joined that opinion.[2] In the months leading up to the vote, out-of-state groups spent nearly one million

1. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

2. Grant Schulte, *Iowa Ousts 3 Justices After Gay-Marriage Ruling*, USA Today, Nov. 4, 2010, at A8, *available at* http://usatoday30.usatoday.com/news/politics/2010-11-03-gay-marriage-iowa-election_N.htm.

dollars on political ads targeting the justices.[3] As that storm brewed, the U.S. Supreme Court confronted *Caperton v. A.T. Massey Coal Co.*[4] That case involved an elected judge who, after refusing to recuse himself, cast the decisive vote in a multimillion-dollar contract case in favor of the principal supporter of his election campaign.[5] Over a vigorous dissent, the Supreme Court held that the judge's refusal to recuse violated the Constitution.[6]

These two events energized the debate over judicial elections.[7] They also implicated the issue anchoring that debate: judicial independence.

Judicial independence is a cornerstone of American constitutionalism, and it has long been a source of controversy. In the Federalist Papers, Alexander Hamilton argued that independence "is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."[8] According to Chief Justice John Marshall, "[T]he greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a *dependent* Judiciary."[9] But there is another side to the story. As the Anti-Federalist Brutus wrote in 1788, "[When] power is lodged in the hands of men independent of the people, and of their representatives . . . no way is left to controul them."[10]

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3. Linda Casey, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, NAT'L INST. ON MONEY IN STATE POLITICS (Jan. 10, 2011), http://www.followthemoney.org/press/ReportView.phtml?r=440.

4. 556 U.S. 868 (2009).

5. *Caperton*, 556 U.S. at 872–76.

6. *Id.* at 886.

7. For a small slice of the literature produced in the wake of these decisions, see, for example, Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207 (2010); Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80 (2009); Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009); Sandra Day O'Connor, Remark, *"Choosing (and Recusing) Our State Court Justices Wisely"*, 99 GEO. L.J. 151 (2010); and Ronald D. Rotunda, Hartman Hotz Lecture, *Constitutionalizing Judicial Ethics: Judicial Elections After* Republican Party of Minnesota v. White*,* Caperton*, and* Citizens United, 64 ARK. L. REV. 1 (2011).

8. THE FEDERALIST No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

9. John Marshall, Speech on Dec. 11, 1829, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at 608, 619 (Richmond, Samuel Shepherd & Co. 1830) (emphasis added).

10. BRUTUS, ESSAY XV (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 442 (Herbert J. Storing ed., 1981). Two centuries have hardly altered the public rhetoric. In recent years, former Republican president George W. Bush and former Democratic house speaker Nancy Pelosi have affirmed their commitments to judicial independence. *See* David D. Kirkpatrick, *After DeLay Remarks, Bush Says He Supports 'Independent Judiciary'*, N.Y. TIMES, Apr. 9, 2005, at A15, *available at* http://www.nytimes.com/2005/04/09/politics/09judges.html?_r=1; Nancy Pelosi, Op-Ed., *Respecting the Constitution and the Role of the Supreme Court*, CHI. TRIB., Apr. 19, 2012, at 19, *available at* http://articles.chicagotribune.com/2012-04-19/opinion/ct-perspec-0419-pelosi-20120419_1_judicial-review-federal-courts-supreme-court. But not all politicians have followed suit. According to former Republican house speaker Newt Gingrich, we "have judges who are dictatorial and arrogant, who pretend that they are the dominant branch and who issue orders that clearly are against the Constitution." Lucy Madison, *Gingrich: Congress, President Can Ignore Courts*, FACE THE NATION (Oct. 9, 2011, 1:56

This rhetoric captures a pair of enduring arguments. On the one hand, independence insulates judges from outside pressures, and that empowers them to interpret law impartially. That impartiality seems critical to the separation of powers and the rule of law generally.[11] On the other hand, independence means little or no accountability. That seems antithetical to democracy, and it might be dangerous, as judges can ignore law and pursue personal agendas.[12]

The debate about independence has grown more complex over time. In addition to the fundamentals—impartiality and accountability—judicial independence implicates at least three related issues. First, minority rights: What minorities merit legal protection, how much, and what kind of judge is best suited to the task? Second, the determinacy of law: How often does law yield unique, correct answers, and what kind of judge will identify them? Third, the nature of legalism itself: How exactly are judges supposed to resolve cases? As Fred Schauer has written, "[B]efore we can talk seriously about how to select and retain judges, we must have an idea of what . . . they ought to do."[13]

These issues present a challenge for the study of judicial independence. The central question seems simple: How independent should judges be? The answer matters not only because it is intrinsically interesting but also because it could inform a variety of debates. Vast literatures—on the separation of powers,[14] judicial selection mechanisms,[15] judicial review and the

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PM) (internal quotation marks omitted), http://www.cbsnews.com/stories/2011/10/09/ftn/main20117838.shtml?tag=contentMain;contentBody.Gingrich suggested that such judges be subpoenaed or even arrested. Lucy Madison, *Gingrich: Gov't Branches Should Rule 2 out of 3*, FACE THE NATION (Dec. 18, 2011, 1:19 PM), http://www.cbsnews.com/8301-3460_162-57344825/gingrich-govt-branches-should-rule-2-out-of-3. Democratic president Barack Obama has also challenged, or appeared to challenge, courts in recent years. *See, e.g.*, Jeff Mason, *Obama Takes a Shot at Supreme Court over Healthcare*, REUTERS (Apr. 2, 2012, 6:45 PM), http://www.reuters.com/article/2012/04/02/us-obama-healthcare-idUSBRE8310WP20120402 (reporting on President Obama's public statement that a decision by the Supreme Court to overturn the Affordable Care Act would constitute "judicial activism"); Terry Moran, *State of the Union: The Slam, the Scowl and the Separation of Powers*, ABC NEWS (Jan. 28, 2010), http://abcnews.go.com/Politics/State_of_the_Union/state-of-the-union-president-obama-justice-alito-political-theater/story?id=9688639 (discussing President Obama's "extraordinary step of bashing a decision of the Supreme Court in his State of the Union address").

11. *See, e.g.*, Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1571 (1988) ("[A]n independent judiciary, unco-opted by the political aims of the ruling majority and willing to defend individuals' rights against government abuse, seems crucial to liberal democracy.").

12. *See id.* ("[T]he ability of an elite corps of judges to wield enormous power that is unchecked by popular opinion and criticism seems to contradict liberal democracy's fundamental premise.").

13. Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1732 (1988).

14. *See, e.g.*, Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108 (1970).

15. *See, e.g.*, Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 51 (2003) (discussing the "judicial independence 'problem' caused by electing judges").

countermajoritarian difficulty,[16] judicial decisionmaking,[17] statutory interpretation,[18] transnational courts,[19] democratization,[20] corruption,[21] economic development,[22] and freedom itself[23]—are rooted in conceptions of and assumptions about judicial independence. But we cannot answer the central question and inform those debates without first confronting hard questions about accountability, determinacy, minority rights, and so forth. Those issues are thorny. They have positive and normative components, and scholars strongly disagree on them.

This Article presents a way forward. I develop a framework for identifying the socially optimal degree of judicial independence. By "socially optimal degree" I mean the degree that would maximize aggregate utility. Utilitarianism, like all other conceptions of social welfare, is contestable, but it is intuitive and widely understood, and I use it for purposes of illustration. The framework can accommodate many different conceptions of social welfare.

The key insight is that we do not need to resolve the thorny, underlying issues to make progress. Rather, we can stitch those issues into a logical sequence and replace them with placeholders. The result is a general decisionmaking framework. One can input into the framework whatever assumptions one likes—about the effect of independence on impartiality and

16. *See, e.g.*, Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 482 ("[T]he countermajoritarian difficulty is usually posited as a concern with unelected judges who have life tenure . . . displacing the choices of elected representatives.").

17. *See, e.g.*, Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004) (finding that elected judges impose harsher sentences as their elections draw nearer).

18. *See, e.g.*, Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1120–21 (1992) (stating that "[o]ne obvious solution" to the countermajoritarian difficulty "is to constrain the judge," which some argue can be accomplished in statutory interpretation cases by strict adherence to text).

19. *See, e.g.*, Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 3 (2005) (arguing that dependent international tribunals are superior to independent ones).

20. *See, e.g.*, Robert M. Howard & Henry F. Carey, *Is an Independent Judiciary Necessary for Democracy?*, 87 JUDICATURE 284 (2004); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996).

21. *See, e.g.*, Mikael Priks, *Judiciaries in Corrupt Societies*, 12 ECON. GOVERNANCE 75 (2011) (examining the relationship between judicial independence and corruption at different levels of government).

22. *See, e.g.*, Daniel M. Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 427 (2007) (reviewing literature on independence and economic growth); Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1 (2005) (examining the relationship between judicial independence and equity markets).

23. Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 445 (2004) ("We find strong support for the proposition that both judicial independence and constitutional review are associated with greater freedom.").

accountability, about the meaning of legalism, and so forth—and it will yield an answer to the question "how independent should judges be?"

The framework cannot provide a *universal* answer to the question. Its product depends on one's subjective inputs. But it still makes many contributions. It organizes the swirling debate about independence into a small set of intuitive arguments. It shows how those arguments, which are usually pursued in isolation, interact. It provides a common device that scholars with diverse methodologies and varying opinions on the underlying questions can use and adapt to different legal, political, and institutional settings. It identifies the optimal degree of independence for any set of assumptions, and conversely, it identifies the assumptions that must hold for any particular degree of independence to be optimal. This last point is important. Many observers take strong positions on the "right" degree of independence, but they fail to understand the necessary conditions on which their positions rest.

This Article also challenges old ideas and generates new ones. I will preview three of the conclusions. First, I reduce the debate about judicial independence to a fundamental trade-off. Not the usual one—more independence implies less accountability, and vice versa[24]—but one that is deeper and more precise. Under plausible conditions, an independent judge will make more legalistic decisions, and fewer nonlegalistic decisions, than a dependent judge. But each nonlegalistic decision will impose a high cost on society because independent judges' decisions are incongruent with the policy preferences of a representative citizen. A dependent judge will make fewer legalistic, and more nonlegalistic, decisions than an independent judge. But each nonlegalistic decision will impose a low cost on society because dependent judges are more congruent with a representative citizen. We need not agree on what exactly constitutes a legalistic decision to recognize and appreciate that trade-off.

Second, I shed light on the relationship between independence and minority rights. Many argue that independent judges are more apt to protect minority rights.[25] I show that even if that is true, and even if protecting minorities is very beneficial for society, we may still be better off with dependent judges. A few more decisions protecting minority rights may not compensate for other, nonlegalistic decisions by independent judges whose policy views depart substantially from those of a representative citizen.

Third, I address the relationship between independence and the determinacy of law. Conventional wisdom suggests that as law becomes less determinate and judges by necessity exercise more discretion, accountability becomes more important.[26] I show that this is not always so. In many circumstances, the determinacy of law is irrelevant to the choice of judge.

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24. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 271 (2008) ("Often, the debate over judicial selection methods is distilled to a single tradeoff: independence versus accountability.").

25. *See infra* Section I.B.3.

26. *See infra* Section I.B.4.

This Article concludes by suggesting that the ideas presented here are not limited to judges and judicial independence. They can be generalized to a wide variety of legal actors, including administrative agencies and prosecutors, for whom independence is relevant.

Before proceeding, I offer some clarifications about the project. This Article examines the concept of judicial independence rather than the institutions, including selection methods, that affect it. This approach focuses the analysis, albeit at the cost of concreteness. Also, this Article has descriptive and normative elements, but it is not predictive. It is descriptive insofar as it identifies plausible relationships between independence and various characteristics of a judge. It is normative insofar as it sheds light on the question of when *should* judges be independent. For the Article to be predictive, however, political actors who design judicial institutions would have to aim to maximize social welfare, defined here as aggregate utility. Most political actors probably do not do that. Consequently, I do not purport to make good predictions about when politicians will make judges independent.[27]

I proceed as follows. Part I provides background on the judicial independence debate. Part II develops the framework. Part III uses the framework to derive new insights. Part IV sketches some implications for law and policy.

## I. Background on Judicial Independence

This Part defines judicial independence and identifies the principal arguments for and against it. My objective is to summarize the literature and set the stage for my contributions, which come mostly in Part II and beyond. I say "mostly" because I am doing some original work here. First, I am reducing a large literature to a handful of spare, discrete arguments, and I am doing so in a way that will feed naturally into the framework I develop in Part II. Others may approach the literature differently and prefer different terms. Second, I am deepening the debate by suggesting that independence

27. On the question of when self-interested political actors will make judges independent, see, for example, Tom Ginsburg, Judicial Review in New Democracies 25 (2003); Martin Shapiro, Courts 32–35 (1981); The Politics of Judicial Independence (Bruce Peabody ed., 2011); F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 Am. Econ. Rev. 712 (2004); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 Law & Soc. Inquiry 91, 100–01 (2000); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875 (1975); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. Legal Stud. 721 (1994); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative–Judicial Interaction*, 45 Am. J. Pol. Sci. 84, 95 (2001); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 Int'l Rev. L. & Econ. 349 (1993); Matthew C. Stephenson, *"When the Devil Turns . . . ": The Political Foundations of Independent Judicial Review*, 32 J. Legal Stud. 59 (2003); and Georg Vanberg, *Legislative–Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 Am. J. Pol. Sci. 346, 347 (2001).

affects two distinct and precise characteristics of a judge: the judge's propensity to act in accordance with law and the judge's congruence with mainstream values. These characteristics are often conflated, and distinguishing them motivates much of the analysis. Finally, I am drawing out a question that, though critical to the debate, is usually left unspoken: How valuable is it for judges to act in accordance with law?

### A. *Defining Judicial Independence*

Theodore Becker once decried that "[w]hat is accepted as a definition of judicial independence is an occasional passing remark, a shrugging of the shoulders, a 'You know what I mean.'"[28] Forty years later, his criticism has lost force as scholars have developed rigorous definitions of the concept.[29] Here, I draw from that work and offer my own definition of judicial independence. My definition is simple and reflective of the literature. I am not trying to offer something new, just to pinpoint something old: the general consensus about the core meaning of the term. I want to be clear about what judicial independence signifies before turning to the debate it has sparked.

Judicial independence is a state in which a judge cannot be penalized, and knows that he cannot be penalized, by other actors for his official decisions. He cannot receive a penalty such as a salary reduction, loss of his judgeship, imprisonment, a foregone benefit, or any other harm. "Other actors" includes parties to a case, legislators, bureaucrats, voters, interest groups, other judges,[30] and so forth. "Official decisions" means decisions in one's professional capacity as a judge.

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28. Theodore L. Becker, Comparative Judicial Politics 140 (1970).

29. For discussions and different uses of the term, see, for example, Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 Mercer L. Rev. 835 (1995); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev. 315 (1999); Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* Judicial Independence at the Crossroads 9 (Stephen B. Burbank & Barry Friedman eds., 2002); Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, *in* Judicial Independence at the Crossroads, *supra*, at 134; Tom S. Clark & Jeffrey K. Staton, *Challenges and Opportunities of Judicial Independence Research*, L. & Cts., Summer 2011, at 10; Owen M. Fiss, Perspective, *The Limits of Judicial Independence*, 25 U. Miami Inter-Am. L. Rev. 57 (1993); Charles Gardner Geyh, *The State of the Onion: Peeling Back the Layers of America's Ambivalence Toward Judicial Independence*, 82 Ind. L.J. 1215 (2007); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. Cal. L. Rev. 535 (1999); Daniel Klerman, Commentary, *Nonpromotion and Judicial Independence*, 72 S. Cal. L. Rev. 455 (1999); Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, *in* Judicial Independence at the Crossroads, *supra*, at 45; Alex Kozinski, *The Many Faces of Judicial Independence*, 14 Ga. St. U. L. Rev. 861 (1998); Sanford Levinson, *Identifying "Independence"*, 86 B.U. L. Rev. 1297 (2006); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697 (1995); Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. Contemp. Legal Issues 129 (2006); and Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. Cal. L. Rev. 625 (1999).

30. By including judges in the list, I mean to signal that I am concerned with the independence of individual judges vis-à-vis all other actors, not the independence of the judiciary

I clarify with examples: If a judge can resolve a case on the basis of law, and if he will not suffer any harm as a consequence, that is consistent with judicial independence. If a judge can disregard law and resolve a case on the basis of his personal preferences, and if he will suffer no harm for doing so, that is consistent with judicial independence. If a judge cannot resolve a case a particular way without risking removal from office, that is inconsistent with judicial independence.

Under this definition, the independence of a judge and the popularity of his decisions are unrelated. A judge can make politically popular decisions and remain independent, so long as he would not suffer harm for different decisions.

This definition distinguishes independence from impartiality. A judge can be independent and, if he favors a litigant or disfavors a law or whatever else, partial at the same time.[31] Put differently, independence empowers judges to act impartially, but it does not imply or require that they do so.[32]

Independence is continuous, not binary.[33] Different factors—including selection methods, salary protections, and term lengths—vest judges with varying degrees of independence.[34] The question, therefore, is not whether a judge suffers *any* penalties or harm for his official decisions. Few, if any, judges achieve complete independence.[35] Rather, the question is "*how much* harm does a judge suffer for his official decisions?" The lesser the harm, the more independent the judge. The greater the harm, the more "dependent" the judge.

To the extent judges are dependent, I assume, as does the rest of the literature, that they are formally dependent on a public actor or set of actors.

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as a whole. Of course, the two are related. *See* Burbank, *supra* note 29, at 340–49 (distinguishing between individual and institutional judicial independence). *See generally* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002).

31. This is a common but not universal approach, as some argue that independence implies or requires impartiality. *See, e.g.*, Karlan, *supra* note 29, at 547 ("[T]he very architecture of the human mind poses a substantial threat to judicial independence as judges find themselves in unconscious thrall to their past experiences.").

32. *See* BECKER, *supra* note 28, at 141 ("[M]uch independence may exist without much impartiality and much impartiality may exist without much independence.").

33. *See generally* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965 (2007).

34. For discussion of such factors, see, for example, Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1279–80 (2008); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431 (2004); Jackson, *supra* note 33; McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006); Ramseyer, *supra* note 27; and Stephenson, *supra* note 27.

35. *See* Burbank & Friedman, *supra* note 29, at 12 ("No American federal or state court of which we are aware has ever enjoyed complete decisional independence . . . .").

In other words, the law makes them publicly accountable.[36] A variety of institutions could facilitate that public accountability: executive or legislative appointments,[37] popular elections,[38] the threat of recall,[39] and so forth.[40] The exact institution or combination of institutions at issue is irrelevant for present purposes.

The effects of public accountability are uncertain. Such accountability might cause judges to make decisions that reflect the preferences of a representative citizen, *regardless* of whether the law requires different decisions.[41] It might cause judges to make decisions that reflect the preferences of narrow interest groups that can influence elections and other judicial selection processes.[42] It might cause judges to remain utterly faithful to the law, if that is what the public wants, and to consider citizens' preferences only in cases where the law is ambiguous.[43] Much of the debate about judicial independence grows from disagreements about the effects of public accountability.[44]

A judge can be independent even if the executive does not enforce his decisions, so long as failure to enforce does not harm the judge.[45] Likewise, a judge can be independent even if the legislature changes the law to override

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36. *See generally* Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 Case W. Res. L. Rev. 911 (2006). People debate what judges should be accountable for. *See, e.g.*, Roy A. Schotland, *Iowa's 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 Ct. Rev. 118 (2011), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1680&context=facpub.

37. *See, e.g.*, Sandra Day O'Connor & RonNell Andersen Jones, *Reflections on Arizona's Judicial Selection Process*, 50 Ariz. L. Rev. 15 (2008) (arguing that executive appointment facilitates accountability).

38. *See, e.g.*, Chris W. Bonneau & Melinda Gann Hall, In Defense of Judicial Elections (2009) (arguing that elections facilitate accountability). *But see* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. Cal. L. Rev. 1969 (1988) (criticizing retention elections).

39. *See, e.g.*, *There Goes the Judge: Women Rout a Rape-Condoning Wisconsin Jurist*, Time, Sept. 19, 1977, at 26 (reporting on a state court judge who was recalled from office after setting free a rapist and stating, "[W]hether women like it or not, they are sex objects").

40. *See, e.g.*, Jackson, *supra* note 33 (discussing accountability mechanisms for Article III judges). *See generally* Charles Gardner Geyh, *Methods of Judicial Selection & Their Impact on Judicial Independence*, Daedalus, Fall 2008, at 86; Hanssen, *supra* note 34 (describing the different procedures used to choose and retain state judges).

41. *See, e.g.*, Geyh, *supra* note 15, at 72 (criticizing judicial elections for "mak[ing] judges no less subject to the influence of temporary majorities" than legislators and executives).

42. *See, e.g.*, Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623, 629 (2009) (finding evidence that "contributions from interest groups" to judges' election campaigns "are associated with increases in the probability that judges will vote for the litigants favored by those interest groups").

43. *See* O'Connor & Jones, *supra* note 37, at 23 (arguing that public accountability can and should cause judges to "apply[ ] the law fairly and impartially").

44. *See infra* Sections I.B.1–2.

45. In practice, judges probably care if their decisions are enforced, and this probably affects their behavior. For a discussion, see Charles Gardner Geyh, When Courts & Congress Collide 51–111 (2006).

his decisions, so long as override does not harm the judge.[46] Judicial independence matters most, however, if some judicial decisions are enforced and retained.[47] In the United States and many other countries, it is safe to assume that they are enforced and retained, at least some of the time.

In a nutshell, that is the core meaning of judicial independence, the concept around which the debate has swirled. Many scholars have gone from the core to the periphery, drawing more distinctions and adding more layers of complication,[48] but that work is unnecessary for my purposes.

### B. *The Debate over Judicial Independence*

President Woodrow Wilson once wrote, "[T]he struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, *independent*, and impartial courts."[49] In the century preceding him, and in the hundred years since, many observers—including scholars, judges, and Founding Fathers—have embraced that position.[50] It rests on a set of powerful, overlapping arguments.

First, judges cannot prevent the legislature and the executive from violating the law unless they are independent of those branches.[51] Second, judges cannot protect individual rights unless they are independent of the actors violating the rights, whether public or private.[52] Third, judges cannot give force to private law norms, such as enforcement of contracts, unless they are independent of persons interested in violating those norms.[53] In

46. *Cf.* Seidman, *supra* note 11, at 1575 ("[E]ven relatively independent judges . . . might nonetheless be held accountable if we restricted their power. This could be accomplished by permitting judicial decisions to be reversed by statute or popular referendum . . . .").

47. Burbank, *supra* note 29, at 323 ("[J]udicial independence . . . is meaningless unless the executive branch is willing and able to enforce the orders of federal courts."); *see also* Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 994 (1996) (expressing similar ideas); Seidman, *supra* note 11, at 1575 (same).

48. *See* sources cited *supra* note 29.

49. Woodrow Wilson, Constitutional Government in the United States 17 (1908) (emphasis added).

50. For a concise tour of the two-century debate over life tenure, see Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 Gonz. L. Rev. 131 (2003).

51. For early, classic expositions of this argument, see The Federalist No. 47, *supra* note 8 (James Madison); Montesquieu, The Spirit of the Laws 156–66 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748); and 2 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 722–23 (R.H. Campbell et al. eds., Clarendon Press 1976) (1776).

52. Again, for early, classic expositions, see The Federalist No. 78, *supra* note 8 (Alexander Hamilton), and Letter from Andrew Jackson to Andrew J. Donelson (July 5, 1822) *in* 3 Correspondence of Andrew Jackson 167 (John Spencer Bassett ed., 1928).

53. A vast literature develops these arguments. *See, e.g.*, Amy B. Atchison et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. Cal. L. Rev. 723 (1999); *see also, e.g.*, Judicial Independence at the Crossroads, *supra* note 29 (including Burbank, *supra* note 29, and other relevant contributions); Judicial Independence in the

short, judicial independence is a means for achieving certain ends, especially impartial adjudication, the rule of law, and the maintenance of constitutional values.[54]

But "[j]udicial independence is not an unalloyed good."[55] The same independence that empowers judges to check the other branches of government and apply the law also frees them to ignore the law and pursue private agendas.[56] Remember Brutus: when "power is lodged in the hands of men independent of the people, and of their representatives . . . no way is left to controul them."[57]

Those dueling arguments—judges should be independent, but independence implies a dangerous lack of accountability[58]—underpin the debate. In the following paragraphs, I examine these arguments and other elements of the debate in some depth.

### 1. Propensity for Legalism

In *The Wealth of Nations*, Adam Smith argued that without judicial independence, "it is scarce[ly] possible that justice should not frequently be sacrificed to, what is vulgarly called, politics."[59] Over two centuries later, this argument remains front and center in the debate. Public accountability will subject judges to pressure from voters, politicians, interest groups, and so forth. That will encourage judges to disregard law and make decisions to satisfy those actors. In short, dependence undermines judges' propensity to

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AGE OF DEMOCRACY (Peter H. Russell & David M. O'Brien, eds., 2001) (including several relevant contributions); Ervin, *supra* note 14, *cited in* Atchison et al., *supra*; Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980), *cited in* Atchison et al., *supra*.

54. Again, a vast literature addresses these ideas. *See* Ferejohn, *supra* note 30, at 353–56; Ferejohn & Kramer, *supra* note 30, at 965–76; sources cited *supra* note 53; *see also* Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1479 (2010) ("[A]n independent judiciary is considered by many commentators . . . as a *sine qua non* for [the rule of law]."); Brian Z. Tamanaha, *A Concise Guide to the Rule of Law*, *in* RELOCATING THE RULE OF LAW 3, 11 (Gianluigi Palombella & Neil Walker eds., 2009) ("An institutionalised, independent judiciary is crucial to both functions of the rule of law . . . ."); William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 738 ("[J]udicial independence is widely seen as critically necessary to the effective implementation of [the rule of law]."); Zemans, *supra* note 29, at 631 (stating that "an independent judiciary" is a "necessity" for the rule of law).

55. Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 217 (2003).

56. *See* Geyh, *supra* note 34, at 1260 ("[S]ome forms of independence from decisional constraint, such as the freedom to decide cases for the benefit of friends or in exchange for bribes, are antithetical to the rule of law . . . .").

57. BRUTUS, ESSAY XV, *supra* note 10, at 442.

58. Seidman, *supra* note 11, at 1571–72 ("[V]irtually all defenses of judicial independence end in contradiction. . . . The ability of [independent] judges to transcend ordinary politics (a good) *is*, differently characterized, the ability to exercise unchecked power (an evil).").

59. 2 SMITH, *supra* note 51, at 722.

act in accordance with law, or in my language, their propensity for legalism. So goes a core argument in favor of making judges independent.[60]

One can easily imagine examples. Suppose a multimillion-dollar contract dispute arises in which one party happens to be among the governor's principal supporters. Or consider a dispute involving the pensions of thousands of public employees. An independent judge probably would not have a personal stake in either case, but a judge subject to reappointment or reelection might. The latter judge might disregard law and make decisions to satisfy political actors.[61]

Evidence supports this logic. The state court decision in *Caperton* appeared politically motivated, as an elected judge cast the decisive vote in favor of the main supporter of his campaign.[62] Discussing his judicial appointees, all of whom were subject to reappointment or reelection, California governor Gray Davis stated, "My appointees should reflect my views. They are not there to be independent agents."[63] Empirical studies suggest that campaign contributions,[64] public opinion,[65] proximity to elections,[66] and other extralegal factors[67] influence the decisions of dependent judges.[68]

None of this is conclusive, however. Even if dependence sometimes leads judges to make decisions on the basis of extralegal factors, as some evidence

60. Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1232 (2008); *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 696–97 (1995) ("[T]o the extent majoritarian pressures influence judicial decisions because of judges' electoral calculations, elective judiciaries seem, at least at first glance, irreconcilable with one of the fundamental principles underlying constitutionalism." (emphasis omitted)); Geyh, *supra* note 15, at 51 (2003) (discussing the "judicial independence 'problem' caused by electing judges" and the concern that "a judge's impartiality in politically sensitive cases may be compromised").

61. *See* Pozen, *supra* note 24, at 291 ("Countless critics have emphasized that elections tend to make judges feel beholden to their supporters—be they major financial contributors, ideological advocates, or political parties—and perhaps also ill-disposed toward those who assisted the judges' opponents . . . .").

62. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872–76 (2009).

63. *Davis Wants His Judges to Stay in Line*, S.F. CHRON., Mar. 1, 2000, at A3, *available at* 2000 WLNR 4939353 (internal quotation marks omitted).

64. *E.g.*, Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281 (2007) (finding evidence that elected judges favor lawyers who contribute to their campaigns).

65. *See* Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360 (2008) (finding that public support for capital punishment influences judges' decisions to uphold death sentences).

66. *See* Huber & Gordon, *supra* note 17.

67. *See, e.g.*, Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009) (finding evidence that appointed judges favor government litigants).

68. Of course, extralegal factors affect the decisions of independent judges too. For discussion and abundant citations, see RICHARD A. POSNER, HOW JUDGES THINK (2008).

suggests, it might encourage greater fidelity to law overall.[69] That could happen if the actors on whom judges depend generally pressure the judges to act in accordance with law.[70] Prominent scholars claim that this happens.[71] Justice O'Connor, for example, argues that public accountability, if properly structured, can and should "ensure[ ] that judges perform their constitutional role" of "applying the law fairly and impartially."[72]

For this argument to have force, two assumptions must be satisfied at least some of the time: the actors on whom judges depend must *know* what the law requires, and they must *recognize* when judges have failed to follow it.[73] Since judges and lawyers often disagree about the meaning and requirements of law, some people doubt whether outside actors, in some cases lay voters, will possess that information.[74]

Even this criticism is not decisive, however, because the inquiry is relative. The question is not whether dependent judges *always* apply the law correctly and impartially; rather, the question is whether they do so more often than independent judges.[75] Notwithstanding the evidence and the informational problems addressed above, they just might.[76] As countless critics have argued, independent judges can exploit their insulation from politics and the public, disregard law, and resolve cases on the basis of personal preferences.[77] Substantial evidence suggests that federal judges, the most independent jurists in the American system, do exactly that.[78]

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69. *See, e.g.*, Melinda Gann Hall, *The Controversy over Electing Judges and Advocacy in Political Science*, 30 JUST. SYS. J. 284, 285 (2009) ("[P]ressures from electoral politics [can] forc[e] judges to abandon their own political preferences and act in accordance with the rule of law . . . ."); *cf.* O'Connor & Jones, *supra* note 37, at 15, 23 (promoting a "hybrid merit-selection system" for judges and arguing that accountability can and should "ensure[ ] that judges perform their constitutional role").

70. *Cf.* Tom Parker, *Elect Judges so They Can Be Held Accountable*, IOWA REPUBLICAN (Aug. 20, 2010), http://theiowarepublican.com/2010/elect-judges-so-they-can-be-held-accountable (arguing that winning a judicial election freed the author "to be a fair and balanced judge on the Alabama Supreme Court").

71. *See, e.g.*, BONNEAU & HALL, *supra* note 38; Hall, *supra* note 69.

72. O'Connor & Jones, *supra* note 37, at 23.

73. Geyh, *supra* note 15, at 59 (questioning whether voters have the information necessary to "decide whether the rulings of judges coincide with the law").

74. *See id.*

75. The language in the text simplifies the inquiry. The real inquiry is whether a relatively dependent judge would apply the law "correctly," however correctly is defined, more often than a more independent judge in the same setting hearing the same cases.

76. For evidence that state court judges objectively apply legal rules, at least some of the time, see Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEGAL STUD. 333 (2011).

77. *See, e.g.*, BONNEAU & HALL, *supra* note 38, at 14 (discussing how "several generations of scholars have established the primacy of . . . judges' personal preferences on judicial choice," including choices by Supreme Court justices, and noting that "various works attribute the ability of the justices to engage in such behavior to . . . lifetime tenure" and other independence-enhancing institutions).

78. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 1 (2002); *see also* POSNER, *supra* note 68, at 7 (discussing the

### 2. Congruence with Society

Public accountability should make judges more congruent with mainstream values. As Melinda Gann Hall and Chris Bonneau write in a book advocating judicial elections, "We think it far better for justices to draw upon public perceptions and the prevailing . . . political climate when resolving difficult disputes than to engage in the unfettered pursuit of their own personal preferences."[79] So goes a core argument in favor of making judges dependent.[80]

Some evidence supports this line of reasoning. State court judges subject to reappointment or reelection appear to respond to popular opinion some of the time.[81] To illustrate, one study found that public support for capital punishment influences the willingness of state court judges to uphold death sentences.[82]

But evidence cuts the other way too, suggesting that public accountability is neither necessary nor sufficient for making judges act consistently with mainstream values. Evidence that U.S. Supreme Court justices, plausibly the most independent judges in the land, respond to popular opinion[83] suggests that institutional accountability is not necessary.[84] And evidence that dependent judges respond to narrow interests, including political cronies and campaign contributors, rather than the public at large suggests that

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same literature). For a brief review of the judicial-politics literature, including efforts to test whether law influences judges' decisions, see Gilbert, *supra* note 76, at 336–38.

79. Bonneau & Hall, *supra* note 38, at 15.

80. *See, e.g.*, *id.*; Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31 (1986).

81. For studies on politics, popular opinion, and state court decisions, see, for example, Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, *in* Running for Judge 165 (Matthew J. Streb ed., 2007); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 Am. Pol. Q. 485 (1995); Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 Am. Pol. Sci. Rev. 315 (2001); and Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. Legal Stud. 169 (2009).

82. *See* Brace & Boyea, *supra* note 65.

83. *See, e.g.*, Tom S. Clark, The Limits of Judicial Independence (2011); Barry Friedman, The Will of the People (2009); Michael J. Klarman, From Jim Crow to Civil Rights (2004); Thomas R. Marshall, Public Opinion and the Supreme Court (1989).

84. But again, the inquiry is relative. The question is not whether independent or dependent judges respond to popular opinion; the questions are which type of judge responds more and under what conditions?

accountability is not sufficient.[85] To illustrate the latter point, one study suggests that elected judges favor lawyers who contribute to their campaigns.[86]

Of course, no one believes that public accountability, regardless of its operating mechanism, will ensure fidelity to mainstream values; it has to be properly structured. The literature on judicial selection focuses largely on that issue.[87]

To be clear, the arguments in this Section differ from the ones in the last Section. The claim here is *not* that dependence changes the frequency with which judges follow the law (i.e., their propensity for legalism). Rather, the claim is that when judges do not follow the law—either because they disregard it or because the law is indeterminate and they have to select from a menu of options—dependence changes their decisions. It can change judges' decisions for the better, as when accountability leads judges to respond to the general public and make wise decisions that align closely with society's needs and preferences.[88] Or it can change them for the worse, as when accountability leads judges to makes decisions to satisfy narrow interest groups.

Existing analyses of judicial independence conflate these issues. They treat the potential advantage of accountability (responsiveness to public sentiment) and the potential advantage of independence (impartiality and commitment to the law) like "different sides of the same coin," twin virtues that can be combined through different institutional arrangements to achieve an ideal balance.[89] But that is not quite right, or at least that is not the only way to frame it. Those virtues can represent *different* coins: one signifying representativeness and the other commitment to legalism.[90] Much of my analysis grows from that distinction.

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85. *See, e.g.*, Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 215–16 (1993); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & Pol. 57, 58–72 (1985); Shepherd, *supra* note 67; Shepherd, *supra* note 42; Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061, 1133 (2010).

86. *See* Cann, *supra* note 64.

87. *E.g.*, Pozen, *supra* note 24, at 270–75; Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 Cardozo L. Rev. 579, 600 (2004) ("[S]kepticism about universal answers to questions of judicial selection is in order . . . . [B]eing a democracy dictates less than might be expected about methodologies for judicial selection."). *See generally* Evan Haynes, The Selection and Tenure of Judges (1944).

88. I recognize that "society's needs and preferences" is a loaded phrase given disagreements about what constitutes social welfare and the difficulties inherent in aggregating group preferences. I use the phrase loosely.

89. *See* Burbank & Friedman, *supra* note 29, at 15.

90. For excellent, recent discussions of some of these themes, see Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. Chi. L. Rev. 1215 (2012), and David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047, 2076–86 (2010). Both articles, like much of the literature, blur the line between representativeness and commitment to legalism.

### 3. Minority Rights

Judges are often responsible for protecting minority rights. Dependent judges subject to majoritarian pressures may neglect this responsibility. As Steven Croley writes, "When those charged with checking the majority are themselves answerable to . . . the majority, the question arises how . . . minority protection is secured."[91] Independent judges, on the other hand, do not answer to the majority and can protect minorities.[92] So goes a core argument in favor of judicial independence.[93]

While independence empowers judges to protect minorities, it does not compel them to do so.[94] For example, the U.S. Supreme Court long permitted segregation in public schools. After reversing course and requiring integration, the Court dragged its feet in fashioning a remedy, and it permitted states to remain segregated for many years.[95] Conversely, dependent judges may ignore (or misperceive) the majority's position and protect minorities. In recent years, many state court judges have concluded that same-sex couples have a right to marry.[96] Consequently, the relationship between independence and minority rights is not clear.

### 4. Determinacy of Law

"The strong claim in favor of judicial independence rests on the case in which there is a clear legal rule . . . ."[97] This claim implicates legal determinacy.

The law as applied to a given case may be determinate, by which I mean that it provides a unique and discernable answer to the legal question presented.[98] Whether a person driving faster than the posted speed limit

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91. Croley, *supra* note 60, at 694.

92. *Cf.* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996) (discussing and critiquing the common view that independent judicial review protects minorities).

93. *See* Croley, *supra* note 60, at 694.

94. *Cf.* Klarman, *supra* note 92, at 6 ("[T]he [Supreme] Court's capacity to protect minority rights is more limited than most justices or scholars allow.").

95. *See* KLARMAN, *supra* note 83, at 290–320.

96. *E.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by state constitutional amendment*, CAL. CONST. art. 1, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

97. Karlan, *supra* note 29, at 541. The complete quotation is, "The strong claim in favor of judicial independence rests on the case in which there is a clear legal rule, but either the rule or one of the litigants is unpopular." *Id.* Karlan is not so much embracing this position as describing the conventional view.

98. *See* Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481, 481–85 (1995).

without justification violated the law is probably a determinate legal question.[99] On the other hand, law may be indeterminate, meaning that it fails to provide a unique and discernable answer. Whether the Constitution grants same-sex couples a right to marry is probably an indeterminate legal question.[100]

Determinacy is complicated.[101] One can distinguish between indeterminacy, meaning that the law fails to narrow the universe of solutions to a legal question, and underdeterminacy, meaning that the law narrows the universe but leaves more than one possibility.[102] One can distinguish between indeterminacy resulting from limitations in available facts and indeterminacy resulting from inadequacy of legal reasons.[103] Legal reasons may be inadequate because they are few in number, leaving gaps in the law, or because they are many in number, leading to contradictions among them.[104] This implicates the debate over what constitutes a legal reason.[105] Finally, there is a question of audience. Is law determinate if it provides a unique and discernable answer only to Hercules?[106] Or must it also provide an answer to ordinary members of the interpretive community?[107]

Many scholars agree that law can be determinate, however defined, but disagree on how often this happens.[108] This relates to the debate over judicial independence. Many argue that as law becomes more indeterminate—and judging becomes "more art than science," with judges routinely making policy and value judgments—the case for independence gets weaker.[109]

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99. *See* Kenneth Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 297 (1989) (using a similar example to illustrate determinacy).

100. *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

101. *See generally* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993); Leiter, *supra* note 98.

102. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987); Leiter, *supra* note 98, at 481 n.1.

103. *Cf.* Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 266 (Dennis Patterson ed., 1996) ("Indeterminacy enters not just in the interpretation of statutes and precedents, but also in the wide latitude judges have in how to characterize the facts of a case.").

104. *See* Coleman & Leiter, *supra* note 101, at 566–68.

105. For opposing views, compare, for example, ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997), with STEPHEN BREYER, ACTIVE LIBERTY (2005).

106. RONALD DWORKIN, LAW'S EMPIRE 239 (1986) (introducing Hercules, a construct of an ideal judge).

107. *Cf.* Grodin, *supra* note 38, at 1975 ("In the domain of moral judgments . . . I have yet to find that degree of objectivity which, according to Dworkin, avoids the exercise of true discretion. I am willing to accept that this may be because I am not Hercules, but I have yet to encounter him either.").

108. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); Kress, *supra* note 99; Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Solum, *supra* note 102.

109. Kermit L. Hall, *Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861–1899*, *in* THE NEW HIGH PRIESTS: LAWYERS

### 5. Value of Legalism

Freeing judges from external pressure empowers them to make decisions in accordance with law—that is, "legalistic" decisions. The debate about independence presupposes that legalistic decisions are socially beneficial, always or at least on average. Decisions that do not accord with law are "nonlegalistic" decisions. The debate presupposes that these decisions are harmful.

People disagree on what counts as a "legal" reason[110] and on the meaning of the "rule of law."[111] To illustrate, some argue that the intent of legislators who drafted a statute, if discernible,[112] can provide a valid reason for interpreting the statute a particular way.[113] Others argue that legislative intent provides an invalid reason for an interpretation; only the text of the statute can provide a valid (i.e., legal) reason.[114] Likewise, some argue that the "rule of law" does not impose constraints on the content of the law.[115] On this account, "the rule of law is perfectly compatible with iniquity in the content of laws."[116] Others argue that the rule of law requires obedience to legal rules *and also* the protection and promotion of values like equality, dignity, and justice.[117] Because people disagree about these matters, they necessarily disagree about what constitutes a legalistic or a nonlegalistic judicial decision. I will return to this dilemma later.

All judicial decisions—whether legalistic or nonlegalistic—affect social welfare, which, again, is defined here as aggregate utility. Parties who win their cases gain utility, and parties who lose suffer a utility loss. Decisions upholding or invalidating legislation or otherwise bearing on public policy affect the utility of persons who were not parties to the case.

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IN POST-CIVIL WAR AMERICA 29, 34–38, 42–43 (Gerard W. Gawalt ed., 1984). For other discussions of this argument, see, for example, Dubois, *supra* note 80; Grodin, *supra* note 38; Karlan, *supra* note 29; and Nelson, *supra* note 85.

110. *Compare* BREYER, *supra* note 105, at 85–101 (arguing that a statute's purpose and legislative intent should be emphasized when interpreting a statute), *with* SCALIA, *supra* note 105, at 3–47 (arguing that statutory interpretation should not take into account legislative intent).

111. For a compact discussion with a plethora of references, see M. Krygier, *Rule of Law*, *in* 20 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 13,403 (Neil J. Smelser & Paul B. Baltes eds., 2001).

112. On the problems of discerning intent, see, for example, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

113. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 221–30 (2d. ed. 2006).

114. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997). For a helpful overview and dissection of this debate, see Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005).

115. *See, e.g.*, H.L.A. Hart, *The Morality of Law*, 78 HARV. L. REV. 1281 (1965) (book review).

116. Krygier, *supra* note 111, at 13,406.

117. *See id.* at 13,407.

Legalistic decisions plausibly have additional effects on social welfare as well.[118] They support reliance interests and predictability in legal obligations.[119] They constrain public and private actors, which helps to ensure security and individual freedoms.[120] By implying that law is taken seriously, they encourage obedience to law and legal, as opposed to extralegal, resolution of grievances. These effects reduce violence and facilitate social order. All of this generates utility.[121]

Nonlegalistic decisions do not generate utility in these ways. On the contrary, they can undermine reliance interests, predictability, and general commitments to lawfulness, and that can decrease aggregate utility. But that does not imply that society always opposes nonlegalistic decisions. Presidents from Jefferson to Lincoln and Roosevelt to Bush have made, or threatened to make, nonlegalistic decisions in the service of some greater good.[122] In the right circumstance, such decisions can generate more net utility than legalistic decisions. The same can be true of nonlegalistic decisions by other actors, including judges.

This discussion relates to judicial independence. Independence empowers judges to make legalistic decisions, but legalism is not an absolute good. Therefore, the value of independence must turn in part on whether and to what degree legalistic decisions generate more utility than nonlegalistic decisions. The scholarship on independence does not draw out this point, but it is critical to the debate.

### C. *The Debate Stalled*

The debate about judicial independence has progressed slowly, in part because there is no single, unified debate. As the introduction to a recent book on the subject puts it, "There is no literature on judicial independence; rather, there are 'literatures.'"[123] Legal scholars, social scientists, and historians have all tackled the issue, directly or indirectly, by asking different questions and using different tools.[124] They often fail to communicate with one another.

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118. *See id.* at 13,403–04; Tamanaha, *supra* note 54.

119. This assumes that people make plans and develop expectations based on law. This is a standard assumption, but it may be wrong. In certain circumstances people may rely on, and expect, nonlegalistic decisions.

120. Nonlegalistic decisions can constrain government actors too but presumably in less predictable ways.

121. *See generally* Brad Hooker, Ideal Code, Real World (2000); Frederick Schauer, Playing by the Rules (1991).

122. For an interesting discussion and several plausible examples, see Frederick Schauer, *Is Legality Political?*, 53 Wm. & Mary L. Rev. 481 (2011).

123. Stephen B. Burbank et al., *Introduction*, *in* Judicial Independence at the Crossroads, *supra* note 29, at 3, 3.

124. *See id.*

Even among members of the first category, legal scholars, the debate is fractured. Two of the factors mentioned above that bear on judicial independence—the determinacy of law and the concept of legalism—have generated their own substantial and contested literatures.[125] We simply do not agree on what it means for law to be determinate or on how judges ought to resolve cases. Yet resolution of these issues seems like a prerequisite. As Lewis Kornhauser writes, "[D]ifferent theories of adjudication will identify different normative goals that one ought to promote through the design of a judicial system."[126] Consequently, we need to agree on a theory of adjudication before we can talk intelligently about the proper degree of judicial independence.[127]

Moreover, legal scholars have folded the debate about independence into other debates. "[I]t is fairly certain that no single subject has consumed as many pages in law reviews . . . over the past fifty years as the subject of judicial selection."[128] That debate is largely a proxy for the debate about independence.[129] There is an "immense scholarly enterprise"[130] devoted to the countermajoritarian difficulty, which arises when independent judges review acts passed by elected officials.[131] Social scientists and, increasingly, law professors study judicial decisionmaking.[132] Much of that debate rests on assumptions about independence: Just how free are judges to act without regard to external forces?[133] Through these and other[134] lines of work, legal scholars consider judicial independence indirectly.

In short, the debate about judicial independence has stalled. It has gotten bogged down by disagreements about the nature of law and judging. And it has gotten captured by important but in some ways tangential debates on judicial selection and other topics.

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125. *See infra* notes 181–195 and accompanying text.

126. Kornhauser, *supra* note 29, at 52.

127. *See id.* ("[B]ecause a conception of judicial independence is derivative of the normative theory of adjudication, the concept cannot guide a choice between competing theories.").

128. Dubois, *supra* note 80, at 31.

129. *See, e.g.*, *id.* at 34–35 (relating selection to independence).

130. Burbank, *supra* note 29, at 326.

131. *See generally* Seidman, *supra* note 11, at 1574–79 (discussing the relationship between judicial independence and the countermajoritarian difficulty).

132. *See, e.g.*, Gilbert, *supra* note 76.

133. *Cf.* CLARK, *supra* note 83, at 1–22 (tying theories of judicial decisionmaking to judges' independence).

134. *See, e.g.*, Bruhl & Leib, *supra* note 90; Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 204–05 (1993) (tying theories of statutory interpretation to judicial independence).

## II. Optimal Judicial Independence

The last Part presented five factors that animate the debate about judicial independence: propensity for legalism, congruence with society, minority rights, determinacy of law, and value of legalism. The existing literature usually conflates the first two, ignores the fifth, and largely treats the rest in isolation from one another.[135] This Part stitches the factors together. The result is a single analytical framework for identifying the socially optimal degree of judicial independence. This framework shows how the factors identified above, by themselves and in combination with one another, affect the optimal choice of judge.

This framework makes a number of contributions to the literature. I will explain most of them in Part III, but one deserves mention now: it allows us to transcend the thorny issues bogging down the debate. One can input into the framework whatever beliefs or assumptions one wishes—about relationships between independence, propensity for legalism, and social congruence, about the determinacy of law, and so forth—and the framework will still yield answers and insights. This means that we need not resolve the deep issues discussed in Part I to make progress. *Irrespective* of one's views of those matters, this analysis takes us forward.

Three clarifications merit attention at the outset. First, to make the analysis as general as possible, this framework addresses the independence of a judge in the abstract. It can be applied to a trial or an appellate judge, to a state or a national judge, or to a specialized judge or a judge with general jurisdiction.

Second, this framework helps identify the optimal level of independence for a judge resolving a *single* case. One can imagine selecting, on a case-by-case basis, the optimal judge for the dispute at hand. Arbitration, for example, sometimes has that character, and the framework could help identify the optimal arbitrator.[136] But usually judges are not selected on a case-by-case basis. Rather, they are selected to resolve hundreds, thousands, or possibly tens of thousands of cases, and they are selected before the details of those cases are known. The framework can accommodate such judges. The trick is to conceive of the single case in the framework as a *representative* case.[137] By identifying the optimal degree of independence for the representative case, one identifies the optimal degree for the whole batch of cases.

Finally, the third point is methodological. I will describe the framework with words and with a decision tree and some simple math. The tree and the math lend precision to the analysis, but one need not follow them to understand the ideas.

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135. *See, e.g.*, Pozen, *supra* note 24, at 270–96 (organizing and presenting standard arguments for and against elections, which are good proxies for arguments for and against independence).

136. *Cf.* Posner & Yoo, *supra* note 19, at 29–34 (providing a concise summary of arbitration).

137. Representative in terms of welfare implications, which in this Article means implications for aggregate utility.

Because of the decision tree and the math, one might suppose that this is a game-theoretic model. It is not. Such models are characterized by strategic interactions between two or more players, each of whom seeks to maximize his utility.[138] There are two players in my story: a benevolent dictator, who seeks the socially optimal degree of independence, and a judge. The dictator has a utility function, which is really a social welfare function: what is best for the dictator is best for society. But I am not committing to a utility function for the judge.[139] The reason is simple: there are many plausible utility functions for a judge, with the level of independence the judge enjoys playing a different role in each one. To select a particular function would limit the generality of this Article. My objective is not to derive an equilibrium and generate testable hypotheses but to provide a locus for debate, including debate about judges' utility functions and the role of independence in them.[140]

### A. *Step One: The Judge*

The framework begins with a choice. A benevolent dictator—that is, a dictator who seeks to maximize social welfare, defined here as aggregate utility—chooses between an independent and a dependent judge. As those labels suggest, the choice is binary. The dictator can select from two and only two points on the judicial independence continuum, with the one closer to the independence end of the spectrum constituting the independent judge.

I make the choice binary to simplify the analysis. In the Appendix, I relax this restriction and make the variable continuous, allowing the dictator to select any particular degree of independence. I show that this does not affect my analysis.

The dictator—and therefore society—cannot change judges. Once the judge is selected, there is no going back. That judge will resolve the case.

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138. *See generally* Nolan McCarty & Adam Meirowitz, Political Game Theory (2007).

139. At least not to a complete one. Below, I assume that judges derive utility from two activities: adjudicating and legislating. *See infra* note 146 and accompanying text.

140. Here is a fuller and slightly more technical explanation of my methodological choice. To construct a utility function for judges, I need to make assumptions not only about the sources of judges' utility—I have settled on adjudicating and legislating—but also about the relationship between independence and those sources. Specifically, I need to assume that greater independence either increases or decreases the weight judges place on adjudicating and legislating, respectively. As soon as I make such an assumption, the model itself, or at least the version I have constructed, becomes superfluous. It adds complexity to this Article but no additional insights. My contribution, and the action in this Article, lies in thinking through possible relationships between independence and sources of judicial utility, not in committing to any particular one.

### B. *Step Two: The Case*

Next, the judge is presented with a case. Suppose the case turns on a single legal question.[141] The law with respect to that question might be determinate, meaning that it provides a unique and discernable answer. Or it might be indeterminate, meaning that it fails to provide such an answer.

I conceptualize these ideas in terms of probabilities. There is some probability, $d$, that the law is determinate, and a $(1 - d)$ probability that the law is indeterminate. Adding $d$ and $(1 - d)$ yields 1, meaning that there is a 100 percent chance that the law is either determinate or indeterminate. There are no other possibilities.[142]

Note that $d$ and $(1 - d)$ are placeholders. They can accommodate different conceptions of and assumptions about the determinacy of law. This is important because it permits the analysis to proceed without implicating philosophical disagreements. Readers can substitute whatever probabilities they like based on their assumptions about the set of cases from which the representative case is drawn. There could be a zero percent chance, a 100 percent chance, or any figure in between that the law is determinate in the case. The framework still operates.

Note also that I treat the determinacy of law as an exogenous factor. The benevolent dictator can select the degree of judicial independence, but he cannot select the determinacy of law.[143] I maintain that assumption to simplify the analysis and to shed light on practical policy choices. Politicians and voters often consider changing the degree of judicial independence by changing judges' compensation, selection methods, and so forth. They typically consider such changes without simultaneously changing the body of law those judges interpret.[144]

### C. *Step Three: The Decision*

Now the judge must decide how to resolve the case. Depending on the circumstances, the judge can make a legalistic or a nonlegalistic decision. As discussed, people disagree on what distinguishes those decisions from each other,[145] but that need not paralyze the analysis. I can simply posit that both types of decisions exist, and readers can define them however they like. As long as neither category is empty—as long as readers agree that there is such a thing as a legalistic decision and such a thing as a nonlegalistic decision, however subjectively defined—then the framework operates just fine.

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141. It could be a pure legal question or a mixed question of law and fact.

142. Treating the determinacy of law as binary—the law provides a unique answer to the legal question or no answer at all—simplifies the analysis at the cost of realism. Future work could take a more nuanced approach by allowing for a continuum of determinacy.

143. In future work, I hope to relax this assumption.

144. *See, e.g.*, BONNEAU & HALL, *supra* note 38 (advocating for judicial elections without mention of changing or clarifying legal doctrines); Parker, *supra* note 70 (same).

145. *See supra* Section I.B.5.

Let me dwell on this for a moment. I am deliberately refusing to take a position on what distinguishes a legalistic decision from a nonlegalistic decision. I am not doing so because I think that the distinction is unimportant or because I have no views on the matter. Rather, I am doing so to maximize the generality of the Article. Under my approach, one can use the framework to analyze judicial independence *irrespective* of one's understanding of legalism. That is the same move I made regarding the determinacy of law. Readers can "read in" whatever conceptions of determinacy and legalism they like. The framework still works.

Suppose the law as applied to the case is determinate. In that event, the judge can make a legalistic decision. Alternatively, he can depart from the determinate law and make a nonlegalistic decision.

How does a judge choose between making a legalistic and a nonlegalistic decision? I assume that the judge derives utility in two ways: applying laws to cases (adjudicating) and pursuing personal or policy goals (legislating).[146] How the judge resolves the case will depend on the weight he places on those factors, the intensity of his preferences for the issue in the case, and the correspondence between his preferences and the law. If he places little weight on adjudicating and a lot of weight on legislating, then he will only make a legalistic decision if that decision happens to correspond with his preferences for the issue.[147] Otherwise, he will make a nonlegalistic decision. If he places a lot of weight on adjudicating, then he will make a legalistic decision—unless he has very intense preferences for the issue and strongly disagrees with the law, in which case he will make a nonlegalistic decision.[148]

Whether the judge is independent or dependent can affect this calculation. One can imagine a variety of possibilities here. Independence could increase the weight the judge places on adjudicating if it frees him from external pressure and allows him to do what he likes best, which is to interpret law objectively. There is an alternative mechanism that would have the same effect: an independent judgeship might attract candidates who place

146. These are standard inputs in the judicial utility functions constructed by scholars. *Cf.* Lawrence Baum, *Law and Policy: More and Less Than a Dichotomy*, *in* WHAT'S LAW GOT TO DO WITH IT? 71, 71 (Charles Gardner Geyh ed., 2011) ("[T]he most frequent question about judicial behavior is the balance between law and policy."). *But see* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (positing a more complicated function).

147. *Cf.* KLARMAN, *supra* note 83, at 5 ("When the law is clear, judges will generally follow it, unless they have very strong personal preferences to the contrary.").

148. I assume that judges never make mistakes, so every nonlegalistic decision in a determinate case is intentional. Alternatively, I could assume that independent and dependent judges are equally likely to make mistakes. Either way, the analysis would be the same. Some might claim that independent judgeships attract higher-quality judges, and one might suppose that means that independent judges make fewer mistakes. I do not consider that possibility. I note that such a claim is hard to evaluate, in part because sensible empirical measures of quality are hard to come by. *Cf.* Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010) (attempting to develop metrics for judicial quality).

more weight on adjudicating than a dependent judgeship.[149] Alternatively, independence could drive a wedge between the judge's preferences and the law. Freed from public accountability, an independent judge might develop or pursue idiosyncratic goals in a way that a dependent judge would not.

I want to analyze all of these possibilities without committing to any of them. I can do so cleanly with some notation. If the judge is independent, there is a probability, $p$, that he will make a legalistic decision. This represents the propensity for legalism discussed in Part I. There is a $(1 - p)$ probability that he will have sufficiently intense preferences for the issue in the case and that he will disagree with the law. In that event, he will make a nonlegalistic decision.

If the judge is dependent, there is a $(p + i)$ probability that he will make a legalistic decision and a $(1 - p - i)$ probability that he will make a nonlegalistic decision. The variable $i$ reflects the change in the likelihood that the judge will behave legalistically because he is dependent and publicly accountable. The variable $i$ is positive if dependence increases the likelihood of a legalistic decision and negative if it decreases the likelihood of a legalistic decision.

Note that minority rights enter the framework here. If dependence makes a judge prone to make nonlegalistic decisions that undermine minority rights, then the value of $i$ decreases.

So far I have assumed that the law as applied to the case is determinate. Now suppose the law is indeterminate; it fails to provide an answer. By definition, the judge must draw on a source other than law to resolve the case. Consequently, I refer to all judicial decisions in indeterminate cases as nonlegalistic decisions. That obviates the need for notation and probabilities. If the law is indeterminate, the decision necessarily will be nonlegalistic.

This approach equates decisions in cases where the law is indeterminate with decisions in cases where the law is determinate but the judge intentionally deviates from the law: all are nonlegalistic. That may seem objectionable. The former kind of decision seems less troubling than the latter. Intentional deviations from law may cause greater harm than gap-filling in indeterminate cases. While this difference may matter for other inquiries, it does not affect the present analysis. I prove this in the Appendix and provide an intuitive explanation below.[150] Consequently, I ignore this complication.

To summarize, the judge must make a decision. If the law is determinate, the judge chooses between a legalistic and a nonlegalistic decision. If the law is indeterminate, the judge makes a nonlegalistic decision.

Two final points deserve attention. First, a judge can make a nonlegalistic decision, and write an opinion explaining that decision, without appearing nonlegalistic. He can use legal language and cite precedents and

149. *See* THE FEDERALIST NO. 78, *supra* note 8, at 397 (James Madison) (arguing for life tenure on the ground that "a temporary duration in office" would "discourage" competent jurists "from quitting a lucrative line of practice to accept a seat on the bench").

150. *See infra* note 159; *infra* Appendix.

statutory and constitutional text.[151] The judge might even *believe* that the decision is legalistic, even as others with shared judicial philosophies conclude otherwise.[152] The point is that nonlegalistic decisions need not be obvious. They can resemble legalistic decisions, and be defended as such, even as they are attacked, rightly, for being nonlegalistic. This accords with casual observations of the judicial process.[153]

Second, many cases result in a singular decision by the judge: the plaintiff wins or loses. That decision involves the *outcome* of the case. Other cases, typically at the appellate level, may result in two decisions, one involving the outcome and the other involving the *rule*. One can use the framework to think about the relationship between judicial independence and either kind of decision. Consequently, I do not distinguish between an "outcome decision" and a "rule decision." I refer only to decisions. Again, in the spirit of generality, the reader can work through the framework with either type of decision in mind.

### D. *Step Four: The Payoff*

The judge's decision, whether legalistic or nonlegalistic, affects social welfare, meaning that it affects aggregate utility. I refer to this effect as the "social payoff" of the decision. This Section describes possible payoffs.

To begin, suppose the law is indeterminate. Here, the judge is like a policymaker; he chooses from a menu of options. His decision, which is necessarily nonlegalistic, yields a social payoff that reflects the sum of utility gained by the winning party, the utility lost by the losing party, and all the utility gains and losses experienced by individuals affected by, but not directly involved in, the litigation. A "good" or "wise" decision might generate a lot of utility, while a "bad" or "foolish" decision might generate very little.

I can make these ideas concrete with a concept from political science. The median voter theorem posits that, under certain conditions, the policy that the median voter prefers will defeat all alternative policies in a head-to-head vote.[154] If additional conditions are satisfied, then the policy that the median voter prefers also represents the policy that maximizes aggregate

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151. *See, e.g.*, Leiter, *supra* note 103, at 270 (describing how a judge confessed to deciding cases based on "where justice lay," and then "almost always found principles suited to [his] view of the case" (emphasis omitted) (internal quotation marks omitted) (citing JEROME FRANK, LAW AND THE MODERN MIND 104 n. (1930))).

152. *See* Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 490 (2001) (reviewing HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL (1999)). Under a "post-positivist" account, holding this belief might make the decision legalistic. *Id.* at 486.

153. Consider, for example, the opinion in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). It looks like other opinions, but by many (but of course not all) accounts, it is nonlegalistic, at least with respect to the remedy. For a critical discussion, see ALAN M. DERSHOWITZ, SUPREME INJUSTICE (2001).

154. *See* DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

utility.[155] The conditions are somewhat technical, and I will not examine them in the text.[156] Instead, I will illustrate with an example.

Suppose three voters are choosing from three tax rates: 5%, 10%, and 15%. The "conservative" voter prefers 5%, and his utility declines as taxes go up from there. The "liberal" voter prefers 15%, and his utility declines as taxes go down from there. The "moderate" voter prefers 10%, and his utility declines as taxes go up or down from there. The moderate is the median. His preferred tax rate, 10%, would defeat each alternative rate two to one in a head-to-head vote. (The conservative and the moderate prefer 10% to 15%, and the moderate and the liberal prefer 10% to 5%.) If the utility the conservative gains when the rate approaches 5% exactly offsets the utility the liberal loses and vice versa, then the moderate's preferred rate maximizes the group's utility. If the rate increases beyond 10%, the gains and losses of the conservative and the liberal would wash out, but the moderate would lose utility, leading to a net loss. Likewise if the rate dropped below 10%.

I assume that the conditions are satisfied such that the median citizen's preferred policy is also the policy that maximizes aggregate utility. This assumption simplifies and lends precision to the analysis. Now the social payoff of the judge's decision depends entirely on the congruence between the judge and the median citizen.[157] The closer the judge's decision is to the median citizen's preferred decision, the greater the social payoff of the judge's decision, and vice versa.

This assumption might seem implausible for any particular case, but it seems more plausible for a *representative* case, which, as discussed, is the focus of the framework. For every case on the docket in which a decision "left" of the median would maximize utility, there is an offsetting case in which a decision "right" of the median would maximize utility. In any event, the assumption is not critical to the analysis. If it does not hold, the question simply changes from "which judge is more congruent with the median citizen?" to "which judge is more congruent with the citizen whose ideal outcome would maximize aggregate utility?"[158]

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155. Robert D. Cooter, The Strategic Constitution 33–35 (2000).

156. Here are the conditions: there is a unique median citizen, issues are separable, and with respect to each issue, citizens are distributed symmetrically around the median and have single-peaked preferences that are symmetrically intense. *See id.*

157. Note that I have switched from the median voter to the median citizen. The citizen, and not the voter, is the relevant benchmark given my conception of social welfare.

158. This point may merit some elaboration. I assume that the social payoff of a judge's decision in a case where the law is indeterminate depends entirely on the proximity of that decision to the decision the median citizen would prefer. I have adopted this assumption to make the analysis simpler and more precise. Nothing substantive turns on it, however. One could leave the discussion general, assuming only that "good" decisions (however defined) increase social welfare and "bad" decisions reduce it. Alternatively, one could adopt a precise but different (and dubious) approach, assuming, for example, that decisions closer to the preference of an extreme liberal or an extreme conservative increase social welfare and decisions further away reduce it. All one needs to run the analysis is some benchmark for evaluating the social payoff of decisions in cases where judges exercise policymaking discretion. I have

The variable $c$ represents the social payoff of the decision by an independent judge in a case where the law is indeterminate. It reflects the congruence between the judge and the median citizen. The expression $(c + a)$ represents the payoff of the decision by a dependent judge in this circumstance. The variable $a$ reflects the change in congruence that results from making the judge dependent on an outside authority. The variable $a$ is positive if dependence makes the judge more congruent with the median citizen and negative if dependence makes him less congruent with the median citizen.

Now suppose the law is determinate, and suppose the judge makes a nonlegalistic decision. As above, that decision yields a payoff reflecting the sum of utility gained by the winner, lost by the loser, and gained or lost by third parties. That sum depends on the congruence between the judge and the median citizen. The intuition runs like this: the judge is not making a legalistic decision but rather a policy choice. Greater congruence between that choice and the median citizen's preferred choice implies a higher payoff, and vice versa.

One might suppose the payoff also depends on another factor, the nonlegalism itself. This is, after all, a decision that contradicts determinate law. Such a decision might reduce social welfare by undermining reliance interests and predictability in legal obligations, for example. I ignore that complication. As discussed in the last Section, I treat decisions in cases where the law is indeterminate the same as decisions in cases where the law is determinate but the judge does not follow it: all are nonlegalistic decisions. I do so not because such decisions are fundamentally the same but because accounting for the difference would complicate the analysis without changing the insights I am interested in. Again, I prove this assertion in the Appendix.[159]

Consistent with that approach, the payoff of all nonlegalistic decisions is a function of congruence with the median citizen and congruence alone. The payoff of a nonlegalistic decision by an independent judge is always $c$, and the payoff of such a decision by a dependent judge is always $(c + a)$.

Finally, suppose the law is determinate, and suppose the judge makes a legalistic decision. The resulting social payoff depends on two factors. First, it depends on the value of legalism itself. A legalistic decision might, through the promotion of reliance interests and predictability, generate a lot of utility. Second, it depends on the congruence between the decision and the raw

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chosen proximity to the median citizen, but others could choose different benchmarks and still use the framework.

159. Here is an intuitive explanation: I assume that the value of legalism does not depend on whether a judge is independent or dependent. *See infra* note 160. Consequently, the cost of nonlegalism (undermining reliance interests and predictability, among other things) does not depend on the judge either. If we want judges to make legalistic decisions in determinate cases, and if the cost of doing otherwise is the same regardless of the judge, then all that matters for purposes of choosing between judges is the frequency with which they make legalistic and nonlegalistic decisions—that is, their propensities for legalism.

policy preferences of the median citizen. By "raw preferences," I mean preferences of the median citizen in the absence of any legal rules. In other words, if the median citizen were fully informed and writing on a blank slate, with no reliance interests or other legal values involved, what policy would he select? The closer the legalistic decision is to that policy, the greater the utility that flows from the decision, and vice versa.

I capture all of these ideas with simple notation. A legalistic decision yields a social payoff labeled $l$.[160]

To be clear, there are two sources of utility in $l$: adherence to legalism and the result that legalism produces. Because of the former, a legalistic decision that does not align with the median citizen's raw preference may generate more utility than a nonlegalistic decision that does. Society may be better off with an "off-median" decision that furthers legalism. Because of the latter, a legalistic decision that does not align with the median citizen's raw preference may generate less utility than a nonlegalistic decision that does. Society may be better off with an "on-median" decision that undermines legalism.

This leads to some important clarifications. If a judge makes a *nonlegalistic* decision, then the welfare-maximizing decision is always the decision that aligns with the median citizen's raw preferences. If a judge makes a *legalistic* decision, that decision may or may not generate more utility than a nonlegalistic alternative that is more congruent with the median citizen's raw preferences.

All of this can be summarized in short order. If the judge, whether independent or dependent, makes a legalistic decision, the social payoff is $l$. If the judge is independent and makes a nonlegalistic decision, the social payoff is $c$. If the judge is dependent and makes a nonlegalistic decision, the social payoff is $(c + a)$.

One final note. I express the social payoff of the judge's decision in terms of aggregate utility. I do so because I assume that aggregate utility is an appropriate proxy for social welfare. Of course, that is contestable; utilitarianism has critics,[161] and there are many alternative conceptions of social welfare.[162] To be clear, the framework is not limited to utilitarianism. It could accommodate a variety of conceptions of social welfare. One would have to reformulate values for legalistic decisions ($l$) and nonlegalistic decisions ($c$ and $(c + a)$) in light of the new conception of social welfare. It would not be a straightforward aggregation of individual utilities, but the framework itself would not change.

160. I assume that the value of a legalistic decision is fixed, but in reality, it may vary by judge. To illustrate, if citizens expect a dependent judge to fold under political pressure and make nonlegalistic decisions, they may not rely on the law to guide their behavior. That would make the payoff of a legalistic decision by a dependent judge lower than the payoff of an equivalent decision by an independent judge.

161. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

162. *See, e.g.*, *id.*

### E. *Decision Tree*

Figure 1 captures the entire framework in a decision tree. Readers who do not care for the display and the math can safely skip this short Section.

Following the tree provides an easy summary. Society selects an independent or a dependent judge. The judge is then presented with a case. There is a $d$ probability that the law as applied to the case is determinate, in which case the judge must choose between making a legalistic and a nonlegalistic decision. The probability that an independent judge makes a legalistic decision is $p$, and the probability of that judge making a nonlegalistic decision is $(1 - p)$. The probability that a dependent judge makes a legalistic decision is $(p + i)$, and the probability of him making a nonlegalistic decision is $(1 - p - i)$. The payoff of a legalistic decision is always $l$. The payoff of a nonlegalistic decision is $c$ if the judge is independent and $(c + a)$ if the judge is dependent. There is a $(1 - d)$ probability that the law is indeterminate, in which case both the independent and the dependent judge make a nonlegalistic decision with payoffs of $c$ and $(c + a)$, respectively.

FIGURE 1.
INDEPENDENCE VERSUS DEPENDENCE

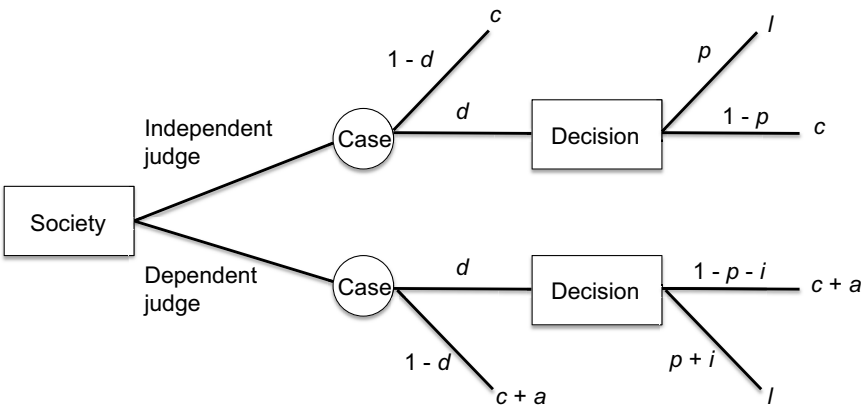

Table 1 provides definitions of the variables.

TABLE 1.
VARIABLE DEFINITIONS

| *Variable* | *Definition* |
|---|---|
| *d* | Probability law as applied to case is determinate. |
| *l* | Social payoff of legalistic decision. |
| *c* | Congruence between independent judge and median citizen. *c* is the payoff of nonlegalistic decision by independent judge. |
| *a* | Difference in congruence between independent and dependent judge. $c + a$ is the payoff of nonlegalistic decision by dependent judge. |
| *p* | Probability independent judge makes legalistic decision. |
| *i* | Difference in probability of legalistic decision between independent and dependent judge. $p + i$ is the probability a dependent judge makes a legalistic decision. |

In addition to providing a visual summary, the decision tree facilitates the translation of concepts into math. For the mathematically inclined, the social payoff of having an independent judge decide the case is

$$d(pl + (1 - p)c) + (1 - d)c.$$

The social payoff of having a dependent judge decide the case is

$$d((p + i)l + (1 - p - i)(c + a)) + (1 - d)(c + a).$$

Society is indifferent between the judges when the expected payoff of each is the same, or, after some simplification, when

$$-a(1 - dp) = di(l - c - a).$$

All of the analysis in the next Part follows from this equation.

## III. INDEPENDENCE REVISITED

The framework in Part II distills a large and complex literature into a small set of parameters and shows how they interact. If we had specific values for the parameters—law is determinate in 60 percent of cases, there is a 75 percent chance that an independent judge will make a legalistic decision, and so on—then we could identify the optimal type of judge under those conditions. Of course, we do not have such information, in part because of limitations in available facts (e.g., we do not know judges' propensities for legalism) and in part because of philosophical disagreements (e.g., we do not have a uniform definition of determinacy). But even so, the framework has value. It lends structure to the normative and policy debates about independence. It ties empirical findings and arguments about one aspect of independence to the overarching question of institutional design. It also generates new ideas about independence and reconceptualizes some old ones, as this Part will show.

One clarification is in order. As in Part II, this discussion treats the choice of judge as binary: society can have an independent or a dependent judge. This is unrealistic. Society can, by adjusting a variety of policy and institutional levers, vest judges with varying degrees of independence.[163] But the binary approach simplifies the presentation of ideas without losing generality.[164] Arguments in favor of an independent judge are really arguments in favor of *more* judicial independence. Arguments in favor of a dependent judge are arguments in favor of *less* independence.

### A. *Independence and Social Welfare*

The choice between an independent and a dependent judge turns on two characteristics: the propensity for legalism and the congruence with the median citizen. If those characteristics are the same for both types of judges (in the framework, if $a = 0$ and $i = 0$), then the judges are indistinguishable, and society is indifferent between them. That is true regardless of the determinacy of the law, $d$, and the value of legalistic decisions, $l$.

This point is important by itself. The framework reduces the swirling debate about independence to two dimensions. A wide variety of arguments about independence can be characterized in those terms.

What if independent and dependent judges do not have the same propensity for legalism and congruence with the median citizen? Several possibilities arise. To begin, I assume that the social payoff of a legalistic decision always exceeds the payoff of a nonlegalistic decision.[165] That is, legalistic decisions generate more utility than nonlegalistic alternatives.

Suppose that making a judge dependent makes the judge more congruent with the median citizen.[166] Then the payoff of a nonlegalistic decision by a dependent judge rises. The implication is intuitive: if making judges dependent makes them more congruent with the median citizen, then dependent judges become more desirable.

Even in that circumstance, society may prefer an independent judge. In addition to increasing congruence with the median citizen, suppose dependence decreases a judge's propensity for legalism. This could occur if dependence subjects judges to pressure from outside individuals or interest groups.[167] Now a trade-off arises. An independent judge will make more legalistic decisions, and fewer nonlegalistic decisions, than a dependent judge. But each nonlegalistic decision will yield a low social payoff because independent judges are less congruent with the median citizen. A dependent judge will make fewer legalistic, and more nonlegalistic, decisions than an

163. *See supra* notes 33–47 and accompanying text.

164. The Appendix, *infra*, shows this mathematically.

165. In notation, $l > c$, and $l > c + a$.

166. Note that a dependent judge may on average be more congruent with the median citizen even if he sometimes acts in the interests of narrow groups.

167. These individuals or groups would have to oppose existing law, in general or in a particular case. If they supported existing law, they would encourage and try to increase a judge's propensity for legalism.

independent judge. But each nonlegalistic decision will yield a relatively high social payoff because dependent judges are more congruent with the median citizen.

I can state the idea more simply. Independent judges will make fewer nonlegalistic decisions than dependent judges, and that is good. But the nonlegalistic decisions they make will be worse than dependent judges' nonlegalistic decisions, and that is bad.

I illustrate with an example. This example and others in this Article are politically salient and not meant to represent a typical case. I use them because they clarify ideas.

Suppose a case arises in which the legal question is "how must judges review laws discriminating against homosexuals?" There are three possible answers. Judges could give such laws strict scrutiny (harsh, few such laws upheld), intermediate scrutiny (moderate, some such laws upheld), or rational basis review (lenient, most such laws upheld). Suppose for purposes of this example that the correct legal answer is strict scrutiny and that most people know that to be so. Suppose the median citizen's first choice as a policy matter—his raw preference[168]—would be intermediate scrutiny, and his last choice would be rational basis review. And suppose the judge, although he does not feel strongly about the issue, would prefer rational basis review.

If we select an independent judge to resolve the case, he is more likely to reach the legally correct conclusion—strict scrutiny. That is socially beneficial. The public knows the right answer is strict scrutiny, and some people (legislators, litigants, employers) have relied on that fact in carrying out their activities. But if the independent judge makes a nonlegalistic decision, he will likely select his personally preferred outcome, rational basis review. That represents the public's least-favored outcome.

If we select a dependent judge to resolve the case, he will come with the opposite virtues and vices. Because of external pressure, he is less likely to select the legally correct answer—strict scrutiny—and that is harmful. But if he makes a nonlegalistic decision, he will likely select intermediate scrutiny, and that is the median citizen's preferred outcome.

So far I have assumed that there is a trade-off. I have assumed that the same accountability that increases the congruence of a dependent judge will also decrease his propensity for legalism. Intuition suggests that that trade-off will often arise, but intuition can be wrong. In a particular setting, dependence could increase congruence *and* propensity for legalism. Or it could decrease both. In such circumstances, the trade-off does not arise, and society strictly prefers an independent or dependent judge, respectively. Returning to the example, if a dependent judge would be *more* likely to choose the correct legal answer—strict scrutiny—and, in the event that he made a nonlegalistic decision, more likely to select the median citizen's preferred policy—intermediate scrutiny—then the dependent judge would clearly be preferable to the independent judge.

168. *See supra* Section II.D.

This leads to two observations. First, the debate about independence is often incomplete. Proponents of an independent judiciary often argue that independent judges make more legalistic decisions.[169] But even if that were true, that would be insufficient to make independent judges preferable. Independent judges must also be at least as congruent with society as dependent judges. Both conditions must be satisfied for society strictly to prefer an independent judge. Conversely, proponents of a dependent, publicly accountable judiciary often argue that dependence makes judges more congruent with mainstream values.[170] But even if that were true, that, again, would be insufficient. Dependent judges must also be no more likely than independent judges to make nonlegalistic decisions. Both conditions must be satisfied for society strictly to prefer a dependent judge.

Once expressed, these ideas may sound obvious, but they are routinely overlooked. I illustrate with a few examples. In an article opposing the practice of electing judges, Charles Geyh argues that, as long as our system of government "depends on its courts to ensure that the executive and legislative branches and the temporary majorities they represent conform their conduct to the dictates of the Constitution, methods of judicial selection that make judges no less subject to the influence of temporary majorities are anathema."[171] Joanna Shepherd provides evidence that elected judges make decisions to attract votes and campaign contributions. She concludes, "Until reforms are enacted, the application of impartial justice is at risk."[172] A recent editorial expresses opposition to judicial elections, arguing that if judges "start looking over their shoulders every time they vote in a controversial case . . . [t]hat will undermine impartial justice."[173] Thirty years ago, Irving Kaufman, then the chief judge of the Second Circuit, expressed opposition to legislation that could weaken judicial independence. He wrote, "[W]e must resist even well-intentioned legislation that would chill the capacity of the judge to render impartial justice."[174]

I understand these statements to mean that greater independence is desirable because it leads to more legalistic decisionmaking. Many legal scholars, journalists, judges, and others hold this view, and it may be correct. But critically, it does not mean that more independence is good for society. We cannot conclude that greater independence will improve social welfare without addressing its effect on judges' congruence with the median citizen.[175]

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169. *Cf.* Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 238–44 (2012) (discussing the relationship between independence, impartiality, and due process).

170. *See* BONNEAU & HALL, *supra* note 38.

171. Geyh, *supra* note 15, at 72.

172. Shepherd, *supra* note 42, at 684.

173. Editorial, *In Too Many States, Judges Face Reprisals for Unpopular Rulings*, USA TODAY, Oct. 19, 2010, at A8, *available at* http://usatoday30.usatoday.com/news/opinion/editorials/2010-10-19-editorial19_ST_N.htm.

174. Kaufman, *supra* note 53, at 700–01.

175. To be clear, we cannot draw that conclusion if we approach the question of optimal independence from a utilitarian or other consequentialist point of view, as I do. The

Some observers take the opposite view. In an article defending judicial elections, Melinda Gann Hall writes, "'Accountable' judges would vote strategically by following constituency preferences, while independent judges would vote their own preferences."[176] She is probably right. And if constituency preferences track the median citizen's, then dependence yields benefits. But that does not imply that greater dependence improves social welfare overall. One cannot draw that conclusion without addressing the effect of dependence on the propensity for legalism.

This discussion leads to one more conclusion: neither independence nor dependence maximizes social welfare systematically. Simply put, there is no globally optimal level of independence.[177] The optimal type of judge depends on relationships between independence, propensity for legalism, and congruence with the median citizen. These relationships surely vary across time and place.

### B. *Minority Rights Are Not Dispositive*

Conventional wisdom holds that independence makes judges more likely to protect minority rights.[178] That may not be true; an independent judge may exploit his position and undercut minority rights. But even if it is true, society still may prefer a dependent judge, at least under a utilitarian conception of social welfare.

Suppose the law protects minorities, however defined. Suppose the social payoff of a legalistic decision exceeds the value of any nonlegalistic decision. This implies that protecting minority rights generates more utility than failing to protect minority rights. Finally, suppose that dependent judges are, in fact, less likely to protect minority rights.

Even in that circumstance, society may prefer a dependent judge. The question is whether and to what degree dependent judges are more congruent with the median citizen. If they are more congruent, and by a large enough margin, then a dependent judge is optimal.

I can make the point clearer yet. The benefit of protecting minority rights with an independent judge may not compensate for the cost of nonlegalistic decisions in other cases by that judge if he is out of the mainstream.

This conclusion may be more striking than it first appears. Even if we observe a dependent judge making decisions that harm minorities, even if

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authors I quote, and many others, may (perhaps implicitly) approach the question from a deontological standpoint, favoring greater independence because they believe that it will improve impartiality, which justice and morality require. In that case, my work is not a criticism of their analyses but rather a consequentialist counterpart.

176. Hall, *supra* note 69, at 286.

177. I am not the first to make this point. *See, e.g.*, Burbank & Friedman, *supra* note 29, at 35 ("[T]here is no single correct answer . . . to the problem of judicial independence (and accountability)."). I have, however, shown precisely why this is so.

178. *See* Klarman, *supra* note 92, at 1–5 (documenting the many scholars who have espoused this view).

such decisions contradict determinate law, and even if we know that an independent judge would have protected those minorities, we cannot conclude that an independent judge would be better for society. We need to compare the social payoffs of nonlegalistic decisions by independent and dependent judges in other cases not involving minority rights.

To illustrate these ideas, imagine two cases. In the first case, the legal question once again is "how must judges review laws discriminating against homosexuals?" Suppose that in this case, the state constitution requires such laws to be given strict scrutiny. In the second case, the legal question is "can citizens recall a governor on the basis of policy disagreement alone, or must they show cause (corruption, malfeasance, and so on)?" Suppose that the law is indeterminate on that point but citizens overwhelmingly prefer the first interpretation—policy disagreement alone. Finally, suppose an independent judge would be more likely to make the legalistic decision (strict scrutiny) in the first case. If a dependent judge would be more likely to choose citizens' preferred interpretation in the second case, then a dependent judge may, all things considered, maximize social welfare. This is true even though such a judge would be less likely to make the legally correct, minority-protective decision in the first case.

This leads to several observations. First, the choice between an independent and a dependent judge turns in part on the prevalence, not just the existence, of minority-rights cases. If minority-rights cases are common, and if dependent judges regularly make nonlegalistic decisions that do not protect minorities, then dependent judges must be much more congruent with the median citizen to be preferable. Conversely, if minority-rights cases are rare, society may prefer a dependent judge even if he is not much more congruent than an independent judge.

This leads to a second observation. As changes in law or enforcement alter the fraction of minority-rights cases on courts' dockets, the optimal type of judge may change.

Third, the relationship between independence and minority rights is commonly misunderstood. Some treat the claim that independent judges are desirable because they are more likely to safeguard minority rights as a standalone rationale—sometimes the main rationale—for an independent judiciary. As Theodore Olson stated after a federal judge struck down California's ban on same-sex marriage, "That's why we have judges and that's why we have an independent judiciary."[179] But that is not quite right. If the law protects minorities, then the minority-rights argument for independence is not analytically distinct. It is just an instantiation of the general argument that independent judges are desirable because they have a higher propensity for legalism. One could make that same argument for judicial independence even if the law did *not* protect minorities.

179. Shane D'Aprile, *Olson on Prop. 8 Decision: 'That's Why We Have an Independent Judiciary'*, HILL (Aug. 8, 2010, 9:16 AM), http://thehill.com/blogs/blog-briefing-room/news/113185-olson-on-prop-8-decision-thats-why-we-have-judges (internal quotation marks omitted).

Finally, the choice of judge becomes more complicated if the law is indeterminate with respect to minority rights—and it often is. As recent cases involving same-sex marriage have shown,[180] the meaning and reach of minority rights is often contestable. In cases involving ill-defined rights, an independent judge may make a decision that protects minorities, or he may make a decision that imposes great harm on them, more than the majority would support, in which case a dependent judge may be better. Even if independent judges have a higher propensity for legalism, minorities and society as a whole may prefer a dependent judge when the law is indeterminate.

### C. *The Determinacy of Law Is Not Dispositive*

Conventional wisdom holds that as law becomes less determinate, dependent judges—particularly those responsive to mainstream values—become more desirable. For instance, Chris Bonneau and Melinda Gann Hall argue that judges often "draw upon their personal beliefs, values, and experiences in making decisions because the law is not a sufficient guide."[181] They then argue and present evidence in favor of judicial elections. Their premise appears to be that law is often indeterminate, which means that judges exercise policymaking discretion, making accountability important.[182]

Many observers embrace that logic, but it is flawed. In a variety of circumstances, the determinacy of law does not affect the optimal choice of judge. In other circumstances, it affects the choice, but it never by itself drives the choice.

Suppose the value of a legalistic decision exceeds the value of any nonlegalistic decision. Suppose further that independent and dependent judges have the same propensity for legalism, and suppose that dependent judges are more congruent with the median citizen. Here, society strictly prefers a dependent judge. Legalistic decisions are equally likely and yield the same payoff, regardless of the judge. Nonlegalistic decisions are equally likely, and such decisions from a dependent judge yield a higher payoff.

In this scenario, the determinacy of law does not affect the choice of judge. Whether law is determinate in 5 percent or 95 percent of cases is irrelevant. There are many other scenarios in which the determinacy of law is irrelevant to the choice of judge.[183]

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180. *See, e.g.*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by state constitutional amendment*, CAL. CONST. art. 1, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Brown*, 671 F.3d 1052; Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

181. BONNEAU & HALL, *supra* note 38, at 15.

182. This is, of course, a common line of reasoning. *See, e.g.*, *id.*; Scott W. Gaylord, *Unconventional Wisdom: The Roberts Court's Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1549–50.

183. If an independent judge has a higher propensity for legalism and is at least as congruent with the median citizen as a dependent judge, or if an independent judge is more congruent with the median citizen and has at least as high a propensity for legalism as a

To illustrate, imagine a series of cases. In each case, the legal question is "how must judges review laws discriminating against a particular group?" In the first case, that group could be homosexuals, in the second Muslims, in the third women, and so forth. As a policy matter, suppose citizens in every case would overwhelmingly prefer the answer to be that judges must apply strict scrutiny. If an independent and a dependent judge would be equally likely to make legalistic decisions in those cases, whatever those may be, and if, in the event of a nonlegalistic decision, the dependent judge would more often select strict scrutiny, then society would prefer the dependent judge. This is true whether there is a unique, legally correct answer in all, some, or none of the cases.

Determinacy is not always irrelevant. It matters in one scenario: when there is a trade-off between the judges. Suppose dependent judges have a lower propensity for legalism but are more congruent with the median citizen. This scenario raises the trade-off discussed above. Independent judges make fewer nonlegalistic decisions, but each decision imposes a high cost on society. Dependent judges make more nonlegalistic decisions, but each imposes a low cost on society. Now the choice between an independent and a dependent judge depends in part on determinacy.[184]

To illustrate, suppose the law becomes less determinate. Regardless of whether a judge is independent or dependent, this change increases the likelihood of a nonlegalistic decision. Because the dependent judge is more congruent with the median citizen, his nonlegalistic decisions are better, and the dependent judge becomes more attractive. So now when law becomes less determinate, the optimal judge may switch from independent to dependent.

These ideas apply across legal settings. For example, some claim that law is always determinate.[185] Every case, on that account, has a single, legally correct answer. Even if that were true, the optimal type of judge would still depend on the propensity for legalism (how likely is each type of judge to act in accordance with that determinate law?) and congruence with the median citizen (how costly is a deviation from that determinate law?).

Some take the opposite position and claim that law is always indeterminate.[186] Equivalently for purposes of this Article, some may claim that judges always make nonlegalistic decisions. In both scenarios, the optimal choice of judge turns entirely on which is more congruent with the median citizen. We usually assume that this is the dependent judge, but that need not be the

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dependent judge, society strictly prefers an independent judge, regardless of the determinacy of law. Analogous propositions hold for a dependent judge.

184. Determinacy also matters if the opposite trade-off arises: independent judges make more nonlegalistic decisions, each imposing a low cost on average, and dependent judges make fewer nonlegalistic decisions, each imposing a high cost on average. I briefly address that potential trade-off in Section III.E, *infra*.

185. *E.g.*, DWORKIN, *supra* note 106.

186. *E.g.*, Anthony D'Amato, Essay, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989).

case. Independent judges can be widely representative, and dependent judges can represent narrow groups.[187]

Finally, some claim that independent judges always make legalistic decisions in determinate cases.[188] In other words, as long as the law is clear, independent judges will follow it. Even if that were true, independent judges would still make nonlegalistic decisions in indeterminate cases. Dependent judges would make nonlegalistic decisions in indeterminate cases and possibly in some determinate cases. The optimal judge would still depend on, among other factors, how often the dependent judge would make nonlegalistic decisions in determinate cases and the congruence of each judge with the median citizen.

### D. *The Value of Legalism Matters*

So far, I have assumed that the value of a legalistic decision exceeds the value of any nonlegalistic decision.[189] This assumption is implicit in the literature. The objective of independence, as Hamilton argued, is to "secure a steady, upright, and impartial administration of the laws."[190] He and others would not embrace that position if proper "administration of the laws" did not yield better results than nonlegalistic alternatives. In most circumstances, certainly in well-functioning democracies, the assumption seems sensible. But it is not always enough. If the choice of judge involves a tradeoff—independent judges have a higher propensity for legalism, dependent judges are more congruent with the median citizen[191]—then we must consider the size of the gap.

Suppose dependent judges are much more congruent with the median citizen than independent judges and have only a slightly lower propensity for legalism. So dependent judges make a few more nonlegalistic decisions than their independent counterparts, but the social payoff of those decisions is relatively high. Even in that circumstance, society will prefer an independent judge if a legalistic decision yields a sufficiently large payoff. Just a few more legalistic decisions from an independent judge can generate enough utility to offset the advantages of a dependent judge, even one closely aligned with the median citizen.

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187. *Cf.* Geyh, *supra* note 34, at 1278 ("[Do] independent judges follow the law, and if so, how and to what extent[?] If the answer is 'no,' as many political scientists believe, then the primary justification for judicial independence disappears. If law does not constrain judges in any meaningful way—if independent judges are essentially rogue policymakers—the norms of a democratic republic dictate that judges be brought under greater popular control, so that the preferences judges act upon are better aligned with their 'constituents.'").

188. *See, e.g.*, Harry T. Edwards, Feature, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 Wis. L. Rev. 837.

189. In notation, $l > c$ and $l > c + a$.

190. The Federalist No. 78, *supra* note 8, at 392 (Alexander Hamilton).

191. Or, alternatively, if independent judges have a lower propensity for legalism and dependent judges are less congruent with the median citizen.

Conversely, suppose dependent judges are only slightly more congruent than independent judges with the median citizen and have a much lower propensity for legalism. So dependent judges make many more nonlegalistic decisions than their independent counterparts, and the social payoff of those decisions is only slightly higher than the payoff of such decisions by independent judges. Even in that circumstance, society will prefer a dependent judge if legalistic decisions do not generate much more utility than nonlegalistic decisions. A few more legalistic decisions from an independent judge may not offset the advantages of a dependent judge, even one only slightly more responsive to the median citizen.

I can state these ideas succinctly. If independent judges have a higher propensity for legalism, then they become more desirable as the difference in payoff between a legalistic and a nonlegalistic decision grows.

Another example may clarify. Imagine two types of cases, contract disputes and disputes involving campaign finance law. Suppose the law in the contract disputes is always determinate, and the law in the campaign finance disputes is always indeterminate. Compared to a dependent judge, suppose an independent judge would make more legalistic decisions in the contract disputes and more politically extreme decisions in the campaign finance disputes. If the value of legalistic decisions is sufficiently high—if, for example, many actors have relied on and planned their activities around contract law, and if a nonlegalistic decision in that area would make future contracts difficult to secure—then society would be better off with an independent judge. The value of adhering to the law of contracts outweighs the cost of bad decisions in campaign finance cases.

If legalistic decisions were not very valuable in contract disputes, perhaps because actors rely on social norms rather than formal law when making agreements,[192] then a dependent judge would be better. The benefit of good campaign finance policy would outweigh the cost of some nonlegalistic decisions in contract cases.

This discussion illustrates the importance of magnitudes. If the choice of judge involves the trade-off, with the independent judge more likely to make legalistic decisions and the dependent judge more congruent with the median citizen, then the question is not just whether legalistic decisions are better than nonlegalistic decisions. The question is "*how much better?*"

This simple idea has important implications. Legal scholars, judges, the Founding Fathers, and many others have forcefully defended judicial independence on the ground that independent judges are more likely to make legalistic decisions.[193] But if the choice of judge involves the trade-off, as it sometimes must, and if legalistic decisions are not much more valuable than

192. For evidence of this, see, for example, Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992) (discussing the diamond industry's reliance on extralegal enforcement of business norms), and Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963) (discussing instances of, and reasons for, failure to use contract law in the business community).

193. *See supra* Part I.

nonlegalistic alternatives, then independence is not that important—at least not under a utilitarian conception of social welfare.

Conversely, many critics deride judicial independence.[194] The rich literature in political science suggesting that federal judges, including Supreme Court justices, make decisions on the basis of their policy preferences supports these critics' position.[195] But if the choice of judge involves the tradeoff, and if legalistic decisions are much more valuable than nonlegalistic decisions, then independent judges are still optimal. An independent judge who sometimes follows the law and other times makes idiosyncratic and extreme decisions may well be superior to the alternative—dependent judges who simply follow the will of the median citizen.

This leads to two points. First, if the choice of judge involves the tradeoff, then one cannot convincingly advocate for more or less judicial independence without making explicit assumptions about the value of legalistic and nonlegalistic decisions. Those assumptions should be context specific. Legalistic decisions might be especially valuable, for example, in cases involving Delaware corporate law but not in cases involving New York family law. Second, because those assumptions will necessarily be tentative, we should be cautious about reform. No amount of evidence—for example, that independent judges better protect minority rights or that elected judges make decisions to attract votes—can tell us whether an independent or a dependent judge would be better, not until we make progress on those underlying issues.

### E. *Independence May Be Preferable When Legalism Is Not*

So far, I have assumed that the value of a legalistic decision exceeds the value of any nonlegalistic decision. That need not be the case. Nonlegalism may be preferable if the government is unrepresentative or corrupt, if society changes rapidly and judges are more responsive than lawmakers, if reliance interests are negligible, if law produces an especially unjust result in a particular case, or some combination thereof.

Recall that I treat decisions in indeterminate cases as nonlegalistic decisions. Benevolent legislators may intentionally make law indeterminate if it is difficult to devise a good, precise rule ex ante.[196] In such circumstances, a nonlegalistic decision, even by a judge who is not congruent with the median citizen, may be preferable to a legalistic alternative.

When nonlegalism is preferable to legalism, the choice between an independent and a dependent judge still turns on the same factors as before: propensity for legalism and congruence with the median citizen. If dependent judges have a lower propensity for legalism (they do not often follow the harmful laws) and are more congruent with the median citizen (their

194. *See supra* Part I.

195. *See supra* note 78 and accompanying text.

196. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 566, 579–80, 599–601 (1992).

policy preferences align with the public's, not, for example, the repressive government's), society strictly prefers a dependent judge.[197] If dependent judges have a lower propensity for legalism but are less congruent with the median citizen, then a new trade-off arises. Dependent judges make more nonlegalistic decisions, and that is good. But those decisions do not line up with the preferences of the median citizen, and that is bad. Independent judges have the opposite virtue and vice.

To illustrate, suppose a repressive regime implements a law forbidding the practice of Christianity, and suppose a person is caught practicing Christianity in his home. Suppose a judge has to decide whether to punish the person in accordance with the law or release him. The legalistic decision—punishing him—generates less utility than the nonlegalistic decision—releasing him. If a dependent judge would, because of pressure from the regime, be more likely to punish him, then society may oppose that judge, notwithstanding his high propensity for legalism. If an independent judge would likely release him, then society may prefer that judge, even though he makes nonlegalistic decisions more often.

This raises a final point, perhaps obvious but rarely acknowledged, about the independence debate. The case for independence is often tied to the virtues of legalism, but it need not be. When legalism is suboptimal and society would be better off with ad hoc rulings, an independent judge may be best.[198]

### F. *Summary*

This Part has covered a lot of ground. It may be helpful to quickly summarize its main points.

The debate about judicial independence can be reduced to two questions: How does independence affect a judge's propensity for legalism? And how does it affect a judge's congruence with the median citizen? Both effects may be positive. Independence may make judges more apt to make correct legal decisions, *and* it may make their nonlegalistic decisions more congruent with the political mainstream. In that case, independent judges would be best. It could go the other way: both effects could be negative. In that case, dependent judges would be best. There is a third, intriguing possibility: the first effect could be positive and the second negative.[199] Independence may

197. Note also that if nonlegalistic decisions by a dependent judge have a higher payoff than legalistic decisions, which in turn have a higher payoff than nonlegalistic decisions by an independent judge (that is, if $a > l - c$), society strictly prefers a dependent judge, irrespective of the judge's propensity for legalism.

198. These ideas relate to points made by Kornhauser, *supra* note 29. He writes, "No one values judicial independence intrinsically. . . . [I]t furthers some other, more fundamental goal." *Id.* at 50. In this section of the analysis, society values propensity for nonlegalism (because legalism is bad) and also congruence with the median citizen. Independence may promote both, one, or neither of these values depending on the circumstance.

199. There is a fourth possibility: the first effect could be negative and the second positive. *See supra* Section III.E. That possibility seems remote.

make judges more apt to make legalistic decisions, but, precisely because they are independent, it may also make their nonlegalistic decisions politically extreme.

Intuition suggests that the third circumstance often arises. When it does, independence involves a new and fundamental trade-off. Independent judges make more legalistic decisions, which is generally good for society. But their nonlegalistic decisions—and there will be some—are inconsistent with the preferences of the median citizen, which is bad. Dependent judges have the opposite virtue and vice. Whether an independent or a dependent judge would be optimal depends on the magnitudes of these cross-cutting effects.

This analysis has implications for the debate about minority rights. Even if independent judges are better at protecting minority rights, society may be better off with a dependent judge who is more congruent with the median citizen.

It also has implications for the debate about legal determinacy. In many cases, the determinacy of law is irrelevant to the choice of judge. Even when it is relevant, the choice still turns fundamentally on the two factors mentioned above.

The analysis also focuses attention on the value of legalism. To defend independent judges on the ground that they make more legalistic decisions is to argue that legalistic decisions are better than nonlegalistic decisions. But we often need more. We need to know how much better.

Finally, this work drives a wedge between independence and legalism. Even when *nonlegalistic* decisions are best, society may prefer an independent judge.

## IV. Legal and Policy Implications

This Part broadens the horizon. I apply the ideas developed earlier to a handful of important legal and policy topics: the separation of powers, legal reform, and judicial selection. The objective is to show that the ideas in this Article have implications for other debates, including practical policy debates.

I am deliberately limiting this discussion to three topics; this Article could have relevance for other issues. Because space is limited, and because my focus lies elsewhere, each discussion is brief. My objective is just to sketch some interesting applications and lay the groundwork for future scholarship.

### A. *Separation of Powers*

"[T]here [is no] liberty if the power of judging is not separate from legislative power and from executive power."[200] Montesquieu's theory was simple: if judges are not independent of the other branches of government,

200. Montesquieu, *supra* note 51, at 157.

they cannot require those branches to conform to law, including constitutional law.[201] His reasoning inspired the Founders and generations of scholars to support an independent judiciary.

This Article casts new light on that venerable logic. We can understand the central argument—independence is necessary to check the other branches—as an instantiation of the general argument that independence increases a judge's propensity for legalism. That is, independent judges are *more likely* to make legalistic decisions, including decisions that constrain the other branches in accordance with law. (That may be wrong; independent judges may have a lower propensity for legalism. But suppose it is right.) Does that mean that independent judges are better for society?

The answer is no. As discussed, the same independence that increases a judge's propensity for legalism may decrease the judge's congruence with the median citizen. In that case, we have a trade-off. Independent judges make more legalistic decisions, including decisions that keep the other branches in line. But their nonlegalistic decisions are costly because they are inconsistent with mainstream values. When the second effect exceeds the first, dependent judges would be better.

One might respond that the second effect will never exceed the first. Properly constraining the legislature and the executive in accordance with law must generate an enormous amount of utility, more than could be lost through some nonlegalistic decisions by an unrepresentative judge.

But that cannot always be right, not under all circumstances. The value of constraining the other branches must vary with the severity of those branches' planned infractions. A judicial decision permitting the executive to unlawfully aggrandize itself by a small amount probably would cause less harm than a decision permitting a large aggrandizement. On the other side of the equation, nonlegalistic decisions can be very costly. Consider *Citizens United*, the Supreme Court decision invalidating prohibitions on independent political expenditures by corporations.[202] That decision is very unpopular.[203] By many (but of course not all) accounts, it is nonlegalistic.[204] By many (but of course not all) accounts, it is causing great harm to American democracy.[205] It is possible that a dependent judge who permitted the Bush

201. *Cf. supra* notes 51–54 and accompanying text.

202. Citizens United v. FEC, 558 U.S. 310 (2010).

203. *See, e.g.*, Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html?sid=ST2010021702073 ("Americans of both parties overwhelmingly oppose a Supreme Court ruling that allows corporations and unions to spend as much as they want on political campaigns . . . .").

204. *See, e.g.*, *Citizens United*, 558 U.S. at 395 (Stevens, J., concurring in part and dissenting in part).

205. *See, e.g.*, Address Before a Joint Session of the Congress on the State of the Union, 2010 DAILY COMP. PRES. DOC. 55, at 8 (Jan. 27, 2010), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201000055/pdf/DCPD-201000055.pdf ("[*Citizens United*] will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.").

Administration to aggrandize executive power[206] but came out the other way in *Citizens United* would have been better for society than the independent Supreme Court justices who did the opposite.

This short discussion begs many questions beyond the scope of this Article, but I have confidence in the bottom line. In a world where judges sometimes make nonlegalistic decisions, judicial independence, even if it helps to check the other branches of government, may be suboptimal.

### B. *Legal Reform*

A variety of organizations, including the World Bank and the U.S. Agency for International Development ("USAID"), have spent a lot of time and money pressuring countries around the world to implement legal reforms.[207] The reforms aim to enhance democracy, strengthen the rule of law, facilitate economic growth, promote justice, and achieve other ends.[208] Many observers think that judicial independence is a critical component of these reforms.[209] Not long ago, USAID published a book-length report titled *Guidance for Promoting Judicial Independence and Impartiality*.[210]

As this Article has shown, judicial independence can raise a trade-off. Not the usual one—independence detracts from accountability—but a subtler one. Independence may enhance legalism at the expense of congruence with the median citizen. Consequently, increasing judges' independence is not always a desirable reform.

USAID and others know that more independence is not always better. They recognize that a certain amount of accountability is important; otherwise, "the drive for independence may go too far."[211] Still, this Article could inform their prescriptions by focusing attention on context.

Imagine a country characterized by some anarchy and corruption. Suppose that it implements new laws and establishes a new judicial system. Now everyone waits to see how the judges perform. If the judges make legalistic decisions, they will send a strong signal that law is binding. That may lead to greater respect for law, greater predictability in legal obligations, and easier planning for citizens, among other things. Conversely, if the judges make

206. Contrast, for example, the Court's limitation of executive power in *Rasul v. Bush*, 542 U.S. 466 (2004), which held that federal courts have jurisdiction to hear habeas challenges by aliens held at Guantanamo Bay.

207. Rodriguez et al., *supra* note 54, at 1460.

208. *Id.*

209. *E.g.*, *id.* at 1478 (discussing reform efforts and stating that "[a] fourth institutional structure that is viewed in much of the literature as a critical component of a system that values and safeguards [the rule of law] is an independent judiciary").

210. Office of Democracy & Governance, U.S. Agency for Int'l Dev., Guidance for Promoting Judicial Independence and Impartiality (rev. ed. 2002), *available at* http://transition.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

211. *Id.* at 149.

nonlegalistic decisions, they may undermine these benefits and short-circuit the reforms.

In this context, the judges' propensity for legalism is critically important; much turns on their early decisions. Reform efforts should aim to maximize this propensity. Whether this means greater or lesser independence cannot be determined in the abstract.

This example leads to some larger points. The marginal value of legalism may diminish (but remain positive) over time. Legalistic decisions in a developing or transitioning country may generate much more utility than identical decisions in a relatively developed, stable country. This means that the former country may want judges with a higher propensity for legalism than the latter country. And this means that courts in a developed country may be poor models for courts in a transitioning country. Many have recognized this last point,[212] but the analysis here shows more clearly why it is correct.

Consider one more example. A transitioning country composed of different and sometimes-warring ethnicities implements a new constitution. Because of the ethnic fractionalization, it is difficult to agree on the constitution, and many provisions are vague. This means that many fundamental laws are indeterminate. When asked to interpret them, judges will have to make nonlegalistic decisions. If these judges are incongruent with the median citizen, their nonlegalistic decisions will be costly.

This example may capture a common circumstance; law in transitioning countries might be less determinate than law in developed, stable countries. This means that more judicial decisions will be nonlegalistic, and reformers should place greater weight on ensuring that judges are congruent with the median citizen.

Where do these examples leave us? The first suggests that judges' propensity for legalism is especially important in some transitioning countries, and the second suggests that their congruence with the median citizen is especially important as well. Of course, *both* characteristics are *always* important, regardless of the country. Greater independence may enhance or detract from one or both characteristics.

This Article cannot yield answers to the difficult problems surrounding legal reform, but it provides new tools for thinking about them in particularized settings.

### C. *Judicial Selection*

How should we select judges? This question can be divided into two parts: First, how independent should judges be? And second, to the extent they are not independent, to whom should they be accountable?

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212. *E.g.*, Rodriguez et al., *supra* note 54, at 1493 ("[S]cholars and reformers too easily fall into the habit of equating American governmental institutions with good legal institutions.").

This Article focuses on the first of these questions, but it also sheds light on the second. It helps us understand what we want from judicial accountability. We want it to improve judges' congruence with the median citizen *without* decreasing their propensity for legalism.[213] By now, that point may seem obvious, but the conventional debate overlooks it. To illustrate, many contemporary observers support judicial elections as a mechanism for improving judicial accountability,[214] yet they are vague about the purpose of that accountability.[215]

This Article helps us see something else as well: when discussing selection mechanisms, the second question cannot be separated from the first. Subjecting judges to partisan elections may make them more accountable to the public, which may increase their congruence with the median citizen (the second question). But it may simultaneously reduce their independence (the first question). That loss in independence may decrease judges' propensity for legalism, and the costs of that loss on society may outweigh any gains that flow from increased congruence with the median citizen.

These ideas should look very familiar. At the beginning of this Article, I argued that the selection debate is largely a proxy for the independence debate,[216] and now we see why. In general, we want judges to do two things: make legalistic decisions when the law is determinate and make good policy when the law is indeterminate. In the language of this Article, we want to maximize judges' propensity for legalism and their congruence with the median citizen. The degree of independence we grant to judges and how we select judges are intertwined, and both plausibly affect those judicial characteristics. The debate about selection, like the debate about independence, can be reduced to those two factors.

## Conclusion

The removal from office of three justices on the Iowa Supreme Court probably undermined judicial independence, just as editorial pages across the country reported. But whether their removal was bad for society is unclear. This Article presents a framework for beginning to answer that question. The framework acknowledges and transcends the thorny issues that have long bogged down the debate about independence. It shows that we can make progress even as we continue to disagree about underlying questions. It yields new ideas about the debate and has policy implications. It can also be generalized.

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213. Assuming, of course, that legalistic decisions yield a higher social payoff than nonlegalistic decisions.

214. *E.g.*, Parker, *supra* note 70.

215. *Id.* ("If judges want to be 'super legislators,' then they must stand before their constituents and tell them what they believe about the Constitution . . . . [W]hen judges use the law like Silly Putty and make themselves essentially black-robed dictators with unlimited jurisdiction, they must be held to account.").

216. *See supra* Section I.C.

Many governmental actors perform judge-like functions, even if they are not technically judges. Prosecutors, central bankers, attorneys general, insurance commissioners, sheriffs, secretaries of state, school board members, officials at the World Trade Organization, and others are tasked with correctly interpreting and applying legal rules. These same actors sometimes make—and sometimes *are required* to make—nonlegalistic, policy decisions. They make these decisions when they disagree with and skirt determinate rules, and they are required to make them when relevant rules do not exist or are indeterminate.

In general, we want those actors to make legalistic decisions—to do what the law requires, however conceived—when possible. And when they do not follow the law, or when there is no law on point, we want them to make good policy decisions. These are the same two things we want judges to do. And as with judges, the degree of independence we grant those other actors can affect their ability to do both.

Consider administrative agencies like the Environmental Protection Agency and the Securities and Exchange Commission. A voluminous literature debates the extent to which they are, and the extent to which they should be, under the control of the political branches.[217] The argument in favor of political control is simple: agencies often make policy, and such "decisions should be made by the most politically accountable institution available."[218] But that control, whether exercised by the president or by Congress,[219] may come at a cost. It may lead to inconsistent, arbitrary decisionmaking.[220]

The framework in this Article captures and clarifies these arguments. Making agencies more dependent on the president or Congress might increase their congruence with the median citizen. That is good insofar as the agencies make nonlegalistic decisions. But that same dependence may undercut their propensity for legalism, and that is bad. The optimal level of independence depends on the magnitudes of those cross-cutting factors.[221]

The same analysis can be applied to the rest of the legal actors mentioned above and to many others. The question of independence, as it turns out, is not limited to judges, nor is this Article. It addresses more than the optimal design of the judiciary. It provides tools for understanding and debating actors across the legal system.

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217. For a concise summary, see Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 56–64 (2008).

218. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520 (1985).

219. A large segment of literature debates whether control by the president or Congress will maximize agency responsiveness. *See* Stephenson, *supra* note 217, at 59–64.

220. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

221. For a different take on optimal insulation of agencies, see Stephenson, *supra* note 217.

## Appendix

In the body of the Article, I assumed that independence is binary—judges are either independent or dependent. I also assumed that, for a given judge, decisions that deviate from determinate law yield the same payoff as decisions in indeterminate cases. This Appendix justifies these assumptions. I show that relaxing the assumptions complicates, but does not affect, the analysis.

### A. *Independence as a Continuous Variable*

Let $I$ represent the degree of judicial independence, where $I$ lies in the unit interval. Let $d$ represent the probability that the law as applied to a case is determinate. Let $p(I)$ represent a judge's propensity for legalism, or the probability that a judge makes a legalistic decision in a determinate case. The variable $p$ is a function of $I$, where $p' > 0$ (greater independence increases the propensity for legalism) and $p'' < 0$. Let $l$ and $j(I)$ represent the payoff of a legalistic and a nonlegalistic decision, respectively, where $l > j(I)$ for all $I$. The variable $j$ is a function of $I$, where $j' < 0$ (greater independence decreases congruence with the median citizen) and $j'' < 0$. To simplify notation, $p(I)$ is indicated with $p$ and $j(I)$ with $j$. $I, d, p, l, j \in [0,1]$.

A benevolent social planner selects the degree of independence to maximize this utility function:

(1) $U = d(pl + (1 - p)j) + (1 - d)j.$

The first order condition is

(2) $\partial U/\partial I = p'd(l - j) + j'(1 - dp) = 0.$

The first term in Equation 2, $p'd(l - j)$, is the marginal benefit of greater independence. It represents the additional fraction of cases that will be decided legalistically because of greater independence multiplied by the difference in payoff between legalistic and nonlegalistic decisions. The second term, $j'(1 - dp)$, is the marginal cost of greater independence. It represents the decrease in the payoff of nonlegalistic decisions because of greater independence multiplied by the fraction of cases that will be decided nonlegalistically.

The second order condition is

(3) $\partial^2 U/\partial I^2 = p''d(l - j) + j''(1 - dp) - 2dp'j' < 0.$

This condition holds when $d = 0$ or, if $d > 0$, when $p'' < (2p'j' / (l - j))$.

Now take the partial derivative of Equation 2 with respect to $d$:

(4) $\partial^2 U/\partial d\partial I = p'(l - j) - j'p.$

This cross partial is positive. Holding all else constant, this implies that increases in the determinacy of law increase the optimal degree of independence, and vice versa.

Next, take the partial derivative of Equation 2 with respect to $l$:

(5) $\partial^2 U/\partial l\partial I = dp'.$

This cross partial is positive. Holding all else constant, this result implies that increases in the value of legalistic decisions increase the optimal degree of independence.

This analysis treats independence as a continuous variable and yields the same conclusions as the Article, or at least those parts of the Article that assumed that (1) independence increases propensity for legalism, (2) independence decreases congruence with the median citizen, and (3) the payoff of legalistic decisions exceeds that of nonlegalistic decisions. Parts of the Article operating under different assumptions could be supported with a similar analysis that treats independence as a continuous variable and varies *p'*, *j'*, and so forth.

### B. *Nonlegalistic Decisions in Determinate and Indeterminate Cases*

Assume that nonlegalistic decisions in determinate cases yield a payoff of $(j - r)$, and decisions in indeterminate cases yield a payoff of $j$. Assume that $r > 0$, so nonlegalistic decisions in determinate cases yield a lower payoff than decisions in indeterminate cases.

Now the benevolent social planner selects the degree of independence to maximize this utility function:

(6) $U = d(pl + (1 - p)(j - r)) + (1 - d)j.$

The first order condition is

(7) $\partial U/\partial I = p'd(l - j + r) + j'(1 - dp) = 0.$

This uncovers the same basic trade-off. Greater independence increases the fraction of cases that will be decided legalistically, which increases utility to the extent legalistic decisions yield a higher payoff than nonlegalistic decisions in determinate cases. Greater independence decreases congruence with the median citizen, which decreases the payoff associated with all nonlegalistic decisions.

Now take the partial derivatives of Equation 7 with respect to $d$ and $l$:

(8) $\partial^2 U/\partial d\partial I = p'(l - j + r) - j'p.$

(9) $\partial^2 U/\partial l\partial I = dp'.$

Both cross partials are positive. As above, this implies that increasing the determinacy of law increases the optimal degree of independence, and increasing the payoff of a legalistic decision increases the optimal degree of independence, and vice versa.

This analysis relaxes the assumption that the payoff of nonlegalistic decisions in determinate cases is the same as the payoff of decisions in indeterminate cases. This result may make the framework more realistic, and it may have implications for different inquiries, but it does not affect the conclusions in this Article.