Georgia State University Law Review

Volume 14
Issue 4 *July 1998*

Article 2

7-1-1998

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Recommended Citation

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"THINGS FORGOTTEN" IN THE DEBATE OVER JUDICIAL INDEPENDENCE

Barry Friedman†

INTRODUCTION

The philosopher George Santayana said famously, "Those who cannot remember the past are condemned to repeat it."[1] Santayana's words, though shopworn, are worth recalling in the context of the present controversy over judicial independence. Recent attacks on the independence of the judiciary, often arising in response to specific judicial decisions, have fueled serious arguments at the highest levels of American government that there must be some mechanism to assure popular supervision of the judicial function. Yet, for all of its heat, the public rhetoric on this topic displays a glaring lack of understanding about the nation's long history with this very question.

When embarking on any historical account, it is important to understand the limitations of Santayana's dictum. Any notion that the past necessarily repeats itself, that there are knowable patterns to history, has been thoroughly discredited.[2] Knowledge of the past does not permit us to predict the future.[3] Nonetheless, a knowledge of history is essential because we inevitably build on our history. What has come before has an uncanny way of adding definition to the present.[4]

The battle over the judges has been fought many times in American history.[5] Although it might be put too strongly to say

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1. GEORGE SANTAYANA, REASON IN COMMON SENSE: THE LIFE OF REASON 284 (1905).

2. *See, e.g.*, ARTHUR C. DANTO, NARRATION AND KNOWLEDGE (1985).

3. *See id.* at 14 ("It is a mistake, . . . to suppose that we can write the history of events before the events themselves have happened.").

4. This is the point of Ronald Dworkin's chain novel analogy. *See* RONALD DWORKIN, LAW'S EMPIRE 228-239 (1986) (discussing how each author in the chain novel has some leeway to develop new ideas, but remains constrained by what came before); *see also* EDWARD SHILS, TRADITION 198, 199 (1981) (discussing hold of past on present); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (forthcoming 1998) (discussing role of history in defining the present).

5. These battles are explored at great length in Barry Friedman, *The History of*

Published by Reading Room, 1998

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that our history contains "lessons" for the present, it certainly is instructive. Past struggles over judicial independence suggest that there are familiar elements to these repeated discussions, and that identifying these commonalities provides some guidance as to how present discussions should play out. Although we cannot know the future with certainty, certainly we can learn something from our past.

This Article provides a historical perspective on the important discussions that presently are taking place about the relationship of popular democracy to the judicial branch. The structure of the discussion is quite simple. Part I is a brief historical review of prior periods in history in which judicial independence has been called into question. Part II then relies on that history to establish four simple points that may be gleaned from history. Finally, in light of the guidance from history, Part III offers some insight into the present controversy.

Because the four points that can be taken from the history of past struggles over judicial independence constitute the core of this paper, it may be worth identifying them at the outset. First, contrary to the impression many seem to hold today, throughout history attacks on the judiciary have come from both sides of the political spectrum. Today it seems to be conservatives who are attacking judges, but for many years liberals sat in the critic's chair. Second, throughout history the attacks on judges inevitably have been political, which is to say that no matter how the discussion was framed at any given time, at bottom, challenges to judicial independence have been motivated by disagreement with the substance of judicial decisions. Put short: when people do not like judicial decisions, they attack judicial independence. Third, almost any conceivable idea to control the judges has been tried or considered in the past, and then some. Finally, history suggests that as we have grown into our nationhood, the American people have come to reject, one-by-one, these methods of limiting the independence of judges. The People may criticize the judges vociferously,[6] but when push comes to

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the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333 (1998) [hereinafter Friedman, *Supremacy*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: The Will of the People*; (manuscript on file with author) [hereinafter Friedman, *Will of the People*].

6. The varying nature of criticisms of the federal judiciary is discussed at length in Friedman, *Supremacy, supra* note 5, and Friedman, *Will of the People, supra* note 5.

shove, the idea of an independent judiciary seems to be far more appealing than any other alternative.

I. A BIRD'S EYE HISTORY OF CHALLENGES TO JUDICIAL INDEPENDENCE

Judges have been criticized throughout American history, but certain periods of sustained challenge stand out. The job of judging, the choosing of winners and losers in hotly contested disputes, is bound to engender an unending stream of complaints. At times, however, the stream of complaints about individual decisions has grown into a broader challenge to the very nature of an independent judiciary. Political scientists and historians generally are in agreement in identifying the primary periods of popular discontent with the judiciary, particularly the federal judiciary.[7] What follows is a brief description of what occurred during those times in American history when the institution of an independent judiciary was under attack.

A. The Federalist Judiciary Under Siege

The first big struggle over the federal judiciary occurred in the aftermath of the election of 1800. The events of this period are vaguely familiar to most lawyers, as they provided the backdrop to the famous decision in *Marbury v. Madison*.[8] Nonetheless, recent discussions about impeaching judges suggest that the public understanding of what happened in the early 1800s is dim indeed.

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7. *See* Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 929 (1965) (empirical study of court-curbing periods); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 379 (1992) (describing Court-curbing periods). The classic work on the Supreme Court's first century or so is Charles Warren's two volume set: THE SUPREME COURT IN UNITED STATES HISTORY (Rev. ed. 1947) [hereinafter WARREN I and WARREN II].

8. 5 U.S. (1 Cranch) 137 (1803). The events described here briefly are chronicled at greater length in RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS (1971) [hereinafter ELLIS, JEFFERSONIAN CRISIS]; Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329; Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 11 STUD. AM. POL. DEV. (forthcoming 1998); James M. O'Fallon, Marbury, 44 STAN. L. REV. 219 (1992); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1; Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55 (1986); WARREN I, *supra* note 7, at 3.

In the election of 1800, Thomas Jefferson's Democrat-Republicans, often called simply Republicans, soundly defeated the Federalist party, taking both houses of Congress and ultimately the Presidency.[9] Before the Republicans took power, the Federalists expanded the size of the federal judiciary, largely by adding a new system of circuit courts, and filled all of those new judicial positions with Federalists. Jefferson and the Republicans were outraged, and Jefferson hinted early on that action might have to be taken. Yet, it was not until the Supreme Court issued process against Secretary of State James Madison in *Marbury v. Madison* that the Republican Congress responded.

Congress took two actions to challenge judicial independence. One was a repeal of the circuit court legislation (thereby eliminating the jobs of all the new Federalist Article III judges), following a heated debate in Congress over the role of the federal judiciary. Of greater relevance to present-day controversy, the Republicans embarked on a course of impeaching Federalist judges. The first judge impeached was John Pickering, a relatively easy case because by most accounts he was frequently drunk and mentally deranged.[10] But the Republicans next set their sights on the most hated of Federalist judges, Supreme Court Justice Samuel Chase.[11]

In the course of the Chase impeachment, the more radical Republican elements probably overplayed their hand, which suggests why the attempt failed. Rather than focus on Chase's specific misdeeds, which arguably were many, the impeachment effort was promoted as a means of removing Federalists simply because of disagreement with their decisions and their political views.[12] The attempt was serious enough that during the course of it Chief Justice John Marshall suggested giving the Senate the power to overturn Supreme Court decisions.[13] Nonetheless, the

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9. In addition to the secondary sources cited in note 8 *supra*, the events in this history are detailed (and specific statements supported) in Friedman, *Supremacy, supra* note 5.

10. *See* Whittington, *supra* note 8, at 63.

11. Federalist judges were engaging in extremely partisan activity, including giving essentially political speeches to grand juries, and campaigning for Federalist candidates. *See* Friedman, *Supremacy, supra* note 5, at 363-67. Chase's conduct in particular is detailed in Whittington, *supra* note 8, at 59-63.

12. *See* Whittington, *supra* note 8, at 101. Whittington stresses that not all Republicans were of one mind on this use of the impeachment power as is evident from the outcome. *See id.* at 74-75.

13. *See Letter from John Marshall to Samuel Chase* (Jan. 23, 1805), *in* 6 THE

idea of impeaching judges because of their political views was too much even for a solidly Republican Senate to bear.[14] Chase was acquitted, and once and for all (until recently) talk of impeaching judges because of unpopular views was put to rest.

B. The Supreme Court Takes on the States

During the period preceding and during Andrew Jackson's presidency, the Supreme Court angered many in the country by striking down state legislation and challenging other state actions on the ground that they were inconsistent with federal law, especially the federal Constitution.[15] Repeatedly throughout this period, the Supreme Court was attacked for interfering with state sovereignty.[16] State after state expressed doubt that the Supreme Court could exercise authority over the states, and states often defied Supreme Court decisions.[17] Congress seriously entertained a proposal to eliminate the jurisdiction of the Supreme Court over state courts.[18] The battle over the Supreme Court and national authority led to a famous debate in the United States Senate—the Webster-Haynes Debate—and culminated in South Carolina's adoption of John Calhoun's Nullification Proclamation.[19]

PAPERS OF JOHN MARSHALL 347 (Charles F. Hobson et al., eds., 1990).

14. *See* WARREN I, *supra* note 7, at 291; ELLIS, JEFFERSONIAN CRISIS, *supra* note 8, at 87-90, 103.

15. These events are detailed in Friedman, *Supremacy, supra* note 5, at 340-413. Important sources discussing these events include DWIGHT WILEY JESSUP, REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 1809-1835 (1987); RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS (1987) [hereinafter ELLIS, UNION AT RISK]; Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790-1860) and the European Community (1958-94)*, 11 STUD. AMER. POL. DEV. 149 (1997); Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341 (1956); Rosenberg, *supra* note 7; Graber, *supra* note 8.

16. *See* Friedman, *Supremacy, supra* note 5, at 391-93.

17. *See id.* at 64-67. On state defiance, see Rosenberg, *supra* note 7; Goldstein, *supra* note 15, JESSUP, *supra* note 15. *See also* H.R. Rep. No. 43, at 6 (1831) ("That the Constitution does not confer power on the Federal Judiciary, over the judicial departments of the States, by any express grant, is certain from the fact that the State judiciaries are not once named in that instrument.").

18. *See* WARREN I, *supra* note 7, at 738. The proposal made it out of the Judiciary Committee of the House, which suggested that the Supreme Court's appellate jurisdiction reached only to the lower federal courts. The House voted down the proposal. *See id.* at 741.

19. *See* Friedman, *Supremacy, supra* note 5, at 390, 409-13.

Perhaps the most famous pattern of defiance of judicial orders during this period was the State of Georgia's repeated disregard for Supreme Court mandates during the Cherokee controversy.[20] At bottom, the controversy was a land controversy: simply put, the Cherokee were occupying land that turned out to be valuable, and Georgia wished to (and ultimately did) displace them.[21] In the course of the controversy, however, a number of disputes made their way to the Supreme Court. In one, the state of Georgia put a man named Corn Tassels to death in the face of a Supreme Court order not to do so.[22] In another, Georgia refused to release missionaries held in custody for living on Cherokee land without a permit to do so, despite a Supreme Court order to the contrary.[23]

In part, the Supreme Court was weakened throughout this period by the failure of the President, Andrew Jackson, to come to its side in disputes with the states. Though when push came to shove, Jackson stood squarely behind the Court and the Union.[24] Jackson often seemed to favor state autonomy and was no friend of John Marshall's. It was in the course of the Cherokee controversy that Jackson was rumored to have said "John Marshall has made his decision, now let him enforce it."[25] However, in the end Jackson came down strongly for Union. Jackson's response to Nullification clearly asserted the supremacy of the Supreme Court over the states.

C. Dred Scott

The next serious attack was the Court's own doing, brought about by the decision most condemned by history, *Dred Scott v. Sandford*.[26] This story hardly needs telling.[27] In a case that

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20. On the Cherokee cases, see JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS (1996).

21. The Georgia General Assembly claimed the right to seize Cherokee lands by violence, despite existing treaties. *See* JESSUP, *supra* note 15, at 355-74. Pressure to do so increased when gold was found on Cherokee land. *See* ELLIS, UNION AT RISK, *supra* note 15, at 28.

22. *See* JESSUP, *supra* note 15, at 363-64.

23. *See* WARREN I, *supra* note 7, at 753, 755-56.

24. *See* Friedman, *Supremacy, supra* note 5, at 397-404 (discussing Jackson's conduct, and the ambiguous nature of his views).

25. *See* WARREN I, *supra* note 7, at 759.

26. 60 U.S. (19 How.) 393 (1856).

27. Nonetheless, sources are plentiful. For a rendition of events described here, albeit in greater detail, see generally DON E. FEHRENBACHER, THE *DRED SCOTT* CASE:

undoubtedly could have been resolved on more narrow grounds, the Supreme Court took it upon itself basically to enshrine slavery as a property right that Congress could not eliminate in the territories.[28] *Dred Scott* almost certainly did not "cause" the Civil War, but it was a precipitating factor.[29]

Dred Scott brought wrath upon the Supreme Court, along with calls to "reorganize" the Court. Senator Hale summarized the sentiment of many when, almost two years after the decision, he derided the Court at length on the Senate floor, concluding "So much for the Supreme Court. If it were not so late, I might say more. I hope I may be excused if I have not denounced them sufficiently for the enormity of their decision; I will make it up on some other occasion."[30] War and attrition subsequently brought much change to the Court, though it also was "reorganized" slightly when Congress increased its membership to ten for the only time in history.[31]

D. Reconstruction, Habeas Corpus, and Legal Tender

The period following the Civil War saw two of what are arguably the only successful attempts to regulate the Supreme Court in a way that would affect substantive decisions. The first was a blatant stripping of the Supreme Court's jurisdiction in order to avoid an unfavorable decision. The second involved an

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ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER (1988); CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64 (1974); DAVID ZAREFSKY, LINCOLN DOUGLAS AND SLAVERY IN THE CRUCIBLE OF PUBLIC DEBATE (1990); Paul Finkelman, *The* Dred Scott *Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1 (1996); Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (1997); WARREN II, *supra* note 7, at 294-99.

28. The precise holding in *Dred Scott* is not easy to discern, and was a subject of heated debate at the time. *See* Graber, *supra* note 27, at 275.

29. A more immediate cause of the Civil War was the dispute over the Lecompton Constitution, and the subsequent split of the Democratic party, ensuring the election of the Republican candidate, Abraham Lincoln. *See id.* at 288; LASSER, *supra* note 27, at 41-43. Warren, however, attributes Lincoln's election much more to Taney's decision in *Dred Scott*. *See* WARREN II, *supra* note 7, at 357.

30. CONG. GLOBE, 35th Cong., 2d Sess. 1265 (1859) (speech of Senator Hale of New Hampshire).

31. *See* Friedman, *Supremacy*, *supra* note 5, at 430-31; Friedman, *Will of the People*, *supra* note 5; LASSER, *supra* note 27, at 39 (discussing addition of tenth justice to deal with problem of western circuits).

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allegation of Court-packing, also to affect the outcome of a contested issue.

The first instance involved events surrounding a case known well to students of federal jurisdiction as *Ex Parte McCardle*.[32] Basically, the situation was this: as part of Reconstruction, Congress had enlarged the jurisdiction of the federal courts to hear habeas corpus cases.[33] The jurisdictional provisions also provided a statutory means of appeal to the Supreme Court.[34] Although there is some dispute as to Congress's intentions in expanding the jurisdiction, it is possible to say with confidence that Congress never anticipated that habeas jurisdiction would be used by the likes of McCardle. McCardle was an un-Reconstructed Mississippi newspaper editor who was printing vitriolic commentary on the Union military occupation of the South.[35] The Union Army reacted by throwing McCardle in prison,[36] and he responded in turn by filing a petition for a writ of habeas corpus.[37]

Congress was extremely concerned that the Court might use McCardle's case as a vehicle to hold military government of the South unconstitutional. So, Congress reacted by stripping the Court of jurisdiction to hear habeas appeals.[38] The jurisdiction-

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32. 74 U.S. (7 Wall.) 506 (1869). For background sources on the McCardle litigation, see generally WARREN II, *supra* note 7, at 465; CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, PART ONE (1971); Sever L. Eubank, *The McCardle Case: A Challenge to Radical Reconstruction*, 18 J. MISS. HIST. 111 (1956); Stanley I. Kutler, Ex Parte McCardle*: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIST. REV. 835 (1967); William Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973).

33. *See* Ex Parte McCardle, 74 U.S. (8 Wall) 506, 507 (1869).

34. *See id.*

35. *See* Van Alstyne, *supra* note 32, at 236.

36. McCardle was charged with libel; disturbing the peace; inciting insurrection, disorder and violence; and impeding reconstruction. *See id.* None of McCardle's alleged crimes were military in nature, therefore, his challenge went directly to the constitutionality of the Reconstruction Act's military rule in the South. *See id.* at 238.

37. *See id.* at 236.

38. The Court's decision in *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1867), holding military commissions unconstitutional where civil courts were still in operation fueled Congressional concern that the Court was moving towards invalidating all military commissions in the South, thus substantially undermining the Radical's Reconstruction Act. *See* Friedman, *Will of the People, supra* note 5; WARREN II, *supra* note 7, at 423-49. The debate on the jurisdiction measure occurred in the midst of President Johnson's impeachment trial; therefore, Congress was simultaneously attacking the Executive and Judicial branches for opposition to Congressional plans for Reconstruction. *See id.* at 477. A less successful effort by Congress was mounted in the House of Representatives to require a two-thirds majority vote of the Court to

stripping measure was adopted after the McCardle case had been argued, but before decision. The measure was debated heatedly, especially in the debate leading up to congressional override of Johnson's veto of the measure. After the jurisdiction-stripping legislation was enacted, the Court ordered re-argument on the question whether Congress could so dispose of a pending case.[39]

The Supreme Court's ultimate decision in *McCardle* was a mixed blessing for Congress. On the one hand, the Court determined that Congress had the authority to remove its jurisdiction, and thus dismissed the case. On the other hand, the Court hinted broadly that one reason the jurisdictional removal was permissible was because an alternative means already existed to reach the Supreme Court in habeas appeals. The hint quickly proved correct as the Court took jurisdiction over yet another habeas case, *Ex Parte Yerger*.[40] When it became obvious that Radical Republicans could not muster the votes to push a second jurisdiction-stripping measure through Congress, the Executive took action to render Yerger's case moot, again avoiding any possible unfavorable decision on the constitutionality of Reconstruction.[41]

The issue of Court-packing arose in the Legal Tender decisions,[42] which addressed the constitutionality of war

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invalidate Acts of Congress. The bill passed the House but died in the Senate. *See* Kutler, *supra* note 32, at 838; Van Alstyne, *supra* note 32, at 248 n.72.

39. These events are detailed in WARREN II, *supra* note 7, at 464-81.

40. 75 U.S. (8 Wall.) 85 (1869). The Supreme Court retained jurisdiction under section 14 of the Judiciary Act of 1789, the All Writs Act, which provides that all the courts of the United States "shall have power to issue writs of *scire facias, habeas corpus*, . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions." Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 81-82.

41. *See* WARREN II, *supra* note 7, at 485-97. Yerger's counsel and the Attorney General struck an agreement whereby Yerger was turned over to the civil authorities in Mississippi, mooting his argument on the constitutionality of his imprisonment by the military commission. *See id.* at 496-497. For an extensive discussion of the meaning of the *McCardle* case, see Friedman, *Will of the People, supra* note 5.

42. *See id.* at 498 (stating background information on Legal Tender decisions); FAIRMAN, *supra* note 32; Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367. As Professor Dam points out, the Legal Tender decisions have faded into obscurity, not even finding mention in most constitutional law casebooks. *See* Dam, *supra* (stating that even most "historically minded" of constitutional law casebook editors, Gerald Gunther, dropped Legal Tender decisions in 1975). For extensive commentary on the "court-packing" allegation regarding the Legal Tender cases, see Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 1128 (1941) [hereinafter Fairman, *Justice Bradley*]. For a discussion of public sentiment regarding court-packing during this

measures making paper money legal tender. In the first Legal Tender decision, *Hepburn v. Griswold*,[43] the Court surprised a number of observers by holding that, at least with regard to contracts that pre-existed passage of the legislation, the legal tender measure was unconstitutional.[44] At first, this decision was met with some equanimity,[45] but that belief quickly dissolved as it became apparent the Court's reasoning in *Hepburn* could well be extended to transactions occurring after Congress passed the legal tender legislation.[46]

Precisely what happened next is complicated by gyrations in the size and membership of the Supreme Court. At the time of the argument in *Hepburn v. Griswold*, there were only eight Justices on the Supreme Court.[47] Congress had reduced the size of the Court in 1866 to deprive Andrew Johnson of an opportunity to fill any Supreme Court vacancies.[48] Subsequent to Grant's ascension to the Presidency, Congress had restored a ninth seat, but it remained unfilled at the time *Hepburn* was decided.[49] In addition, by the time *Hepburn* was announced, an additional vacancy had opened up by the retirement of Judge Grier.

At the very time that the Chief Justice was reading the *Hepburn* decision from the bench, President Grant sent two names to the Senate to fill the open vacancies on the Court,[50] a move that would raise great suspicion in light of subsequent events. It appears the Chief Justice had informed Grant's Secretary of the Treasury of the outcome in *Hepburn* some two weeks before it was announced.[51] Shortly after the new Justices were confirmed, the Court took up two cases that raised anew the Legal Tender question.[52] Although these cases subsequently were dismissed, in another that followed closely thereafter, *Knox*

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period, see Friedman, *Will of the People, supra* note 5.

43. 75 U.S. (8 Wall.) 603 (1869).

44. *See id.* at 625.

45. *See* WARREN II, *supra* note 7, at 513.

46. *See id.* at 515-16.

47. *See* Dam, *supra* note 42, at 376-77.

48. *See* WARREN II, *supra* note 7, at 501.

49. *See id.*

50. *See id.* at 517; Fairman, *Justice Bradley, supra* note 42, at 979.

51. *See Fairman, Justice Bradley, supra* note 42, at 978-79.

52. *See* WARREN II, *supra* note 7, at 519-20; Fairman, *Justice Bradley, supra* note 42, at 979.

v. Lee,[53] the Court reversed the decision in *Hepburn*. Needless to say, many commentators rued the Court's change of direction as a result of nothing but a rapid change of membership on the Court,[54] which led to an age-long controversy over the question whether Grant had "packed" the Court.[55] In particular, the question many asked was whether the newly-appointed Justice Bradley had assured President Grant of his vote to reverse, prior to being nominated.[56] Charles Fairman, who studied the available documents extensively, concluded that no explicit promise likely had been made, but that Grant surely knew of Bradley's views on the subject.[57]

E. The Populist Progressive Era

The period from roughly 1890 to 1924 comprised the longest sustained challenge to independent judicial authority. Many decisions, including those of the Supreme Court, were subjected to repeated criticism for interfering with popular will. During this period courts regularly invalidated publicly-supported social welfare legislation. Among students of the Supreme Court and constitutional law, the era quite often is referred to as the "*Lochner* Era," named after the infamous decision striking down New York's maximum hour law for bakers.[58]

Criticism of the Supreme Court during this period began with three notorious decisions in 1895, in which the Court invalidated the income tax, narrowed the scope of the antitrust law, and upheld the use of injunctions in labor disputes.[59] Debate over

53. 79 U.S. (12 Wall.) 457 (1870).

54. *See* WARREN II, *supra* note 7, at 522-27.

55. *See id.* at 517; Dam, *supra* note 42, at 377-78. *See generally* Fairman, *Justice Bradley, supra* note 42 (an extended investigation into this question).

56. *See* Dam, *supra* note 42, at 377.

57. Fairman, *Justice Bradley, supra* note 42, at 1025, 1131. Warren argues strongly that Grant did not "pack" the Court by pointing out that nearly every candidate for the nomination among state court judges held the same views as Bradley on the Legal Tender issue. *See* WARREN II, *supra* note 7, at 517-18.

58. *See* Lochner v. New York, 198 U.S. 45 (1905). There has been extensive commentary on the conduct of the judiciary throughout this era, as well as on the political responses. For a sampling, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993); WILLIAM G. ROSS, A MUTED FURY (1994). For popular reaction to *Lochner*-like cases, see Friedman, *Will of the People, supra* note 5.

59. *See* In re Debs, 158 U.S. 564 (1895) (labor injunctions); Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895) (income tax); United States v. E. C. Knight Co., 156 U.S. 1 (1895) (antitrust law).

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the Court was fueled throughout the early part of the next century by decisions in cases striking wage and hour laws, particularly child labor laws, and gutting other progressive legislation.[60] The Court was a major issue of concern in the presidential elections of 1912 and 1924.[61] Teddy Roosevelt, running as the Progressive party candidate in 1912, expressed the view of many people when he charged, "[h]ere the courts decide whether or not . . . the people are to have their will."[62]

Fierce criticism of courts throughout this era fueled numerous proposals to check judicial independence.[63] Roosevelt's favorite proposal was the idea of popular "recall" of judicial decisions.[64] William Jennings Bryan called for the election of federal judges.[65] Senator William E. Borah suggested a supermajority requirement for invalidating legislation, a proposal that responded to the Supreme Court's many five-to-four decisions.[66] Robert LaFollette complained of these same decisions, arguing that "five of these nine men are actually the supreme rulers, for by a bare majority the [C]ourt has repeatedly overridden the will of the people as declared by their Representatives in Congress, and has construed the Constitution to mean whatever suited their peculiar economic and political views."[67] His favored remedy was to ban lower federal judges from overturning laws,

60. *See, e.g.,* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating District of Columbia's minimum wage law for women and children); Bailey v. Drexel Furniture, 259 U.S. 20 (1922) (invalidating tax measure aimed at child labor); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking child labor law); Standard Oil Co. v. United States, 221 U.S. 1 (1911) (upholding allegedly monopolistic practices under rule of reason).

61. *See* Friedman, *Will of the People, supra* note 5. Accepting the Republican nomination for President in 1912, Taft said: "It is said this [the issue about the courts] is not an issue in the campaign. It seems to me it is the supreme issue." William Howard Taft, S. DOC. NO. 62-902, at 11, 2d Sess. (1912) (acceptance speech for the Republican nomination for president of the United States, Aug 1, 1912); *see* ROSS, *supra* note 58, at 149.

62. Theodore Roosevelt, *Judges and Progress*, 100 OUTLOOK 40, 41 (1912).

63. The best compendium of these discussions is ROSS, *supra* note 58.

64. *See* Roosevelt, *supra* note 62; *see also* Theodore Roosevelt, *Purposes and Policies of the Progressive Party*, S DOC. NO. 62-904, at 8, 2d Sess. (1912) (speech before the Progressive Party Convention, Aug. 6, 1912).

65. *See* William Jennings Bryan, The People's Law, S. DOC. NO. 62-523, at 14, 2d Sess. (1912) (speech delivered at Mar. 12, 1912 Constitutional Convention).

66. *See* 67 CONG. REC. S3959 (daily ed. Feb. 19, 1923).

67. 62 CONG. REC. S9074-9077 (daily ed. June 21, 1922).

and to permit Congress to override decisions of the Supreme Court.[68]

Despite the many proposals to curb the Supreme Court, none were adopted during this period. It would be a mistake to suggest the Court emerged unscathed, however, for as events were to demonstrate, the Supreme Court shortly was to face its greatest challenge.

F. The Court-Packing Plan

The Supreme Court's next bit of trouble is well-known. The country, living through a great Depression, elected Franklin Delano Roosevelt as President in 1932. Roosevelt promised a "New Deal" to all the downtrodden in the country, and there were many. Repeatedly, however, the Supreme Court frustrated New Deal measures by striking them down as unconstitutional. Shortly after winning a huge mandate in the 1936 election, Roosevelt announced a plan to add Justices to the Supreme Court, supposedly to deal with problems of workload and the ages of judges.[69] Immediately, Roosevelt was criticized for trying to "pack" the Court.[70]

Just as the event itself is well-known, so too is its outcome. After a contentious fight that captured the attention of the country, the Court-packing plan died in the Congress. The

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68. *See id.*

69. *See* WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932-1940 (1963) [hereinafter LEUCHTENBERG, FDR] (describing plan). For additional commentary on the Court-packing controversy, or on the New Deal, see JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS (1938); LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT (1967); WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995) [hereinafter LEUCHTENBERG, SUPREME COURT REBORN]; Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court*, 5 WM. & MARY BILL RTS. J. 527 (1997); William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 [hereinafter Leuchtenberg, *Origins*]. Franklin Roosevelt originally couched his plan in terms of addressing an overcrowded federal docket hampered by aging judges. He proposed that for every federal judge who had served on the bench for ten years and hadn't retired or resigned six months after their seventieth birthday, the President could appoint an additional judge. Roosevelt's plan limited the President to the appointment of up to six Supreme Court justices and up to forty-four lower federal judges. *See* LEUCHTENBERG, FDR, *supra*, at 233.

70. *See, e.g., Opinions of the Nation's Press on Court Plan*, N.Y. TIMES, Feb. 6, 1937, at 10 (quoting headlines and stories from nation's papers, including the Baltimore Sun's "Holds President 'Disingenuous'" and the Boston Herald, "Holds Greater Power Aim").

outcome was hardly pre-ordained from the outset. Historians debate whether Justice Roberts famously cast the "vote in time that saved Nine" by apparently switching sides and allowing the Court to uphold some New Deal measures.[71] Whatever Roberts' motives, the Court's seeming change in direction diffused some of the anger at the Court.[72] Nonetheless, as late as July 2, Congress still was considering a compromise measure that would have limited the President to the addition of one Justice per year.[73] When Roosevelt's chief congressional lieutenant, Senator Joe Robinson, died of a heart attack, support collapsed, and the measure was recommitted to committee and disappeared there.[74]

G. The Warren Court and Communism

The last potentially serious swipe at the Supreme Court was taken in 1957, in response to a number of Supreme Court decisions that were interpreted as favorable to the Communist Party.[75] Of course, the Warren Court did a great deal that raised the ire of many groups. The desegregation decisions, beginning with *Brown v. Board of Education*,[76] alienated much of the South.[77] The reapportionment decisions angered many politicians, although the general public approved.[78] The

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71. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 348-49 (1996); G. Edmund White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392, 1412-15 (1996) (discussing debate over role of Robert's "switch").

72. *See, e.g.*, N. Y. TIMES, Apr. 13, 1937, at 21 (summarizing national press coverage of "switch in time" cases: *Kansas City Star*'s "Blow to Court Packing," *Hartford Courant*'s "Should Remove Plan's 'Last Prop,' " and the *Los Angeles Times*' "Roosevelt View Held Disproved").

73. *Court Bill Shelved by Senate Chiefs: Substitute Ready*, N.Y. TIMES, July 2, 1937, at 1.

74. *See* LEUCHTENBERG, FDR, *supra* note 69, at 238.

75. *See, e.g.*, Watkins v. United States, 354 U.S. 178 (1957) (limiting congressional committee's ability to force witnesses to name associates affiliated with communist party); Wieman v. Updegraff, 344 U.S. 183 (1952) (stating that a state may not make employment contingent on swearing a loyalty oath); *see also infra* note 83.

76. 347 U.S. 483 (1954).

77. Though the proposition hardly needs support, the "Southern Manifesto" catches the flavor of the times. *See* 102 CONG. REC. 4460 (1956).

78. The key reapportionment decisions were Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962). Even Alexander Bickel, who attacked the reapportionment decisions, acknowledged public support. *See* Alexander M. Bickel, *Reapportionment and Liberal Myths*, 35 COMMENTARY 483, 488 (1963) (observing that, among public, reapportionment "has evoked a speedy, ample, and largely favorable response").

decisions banning school prayer were unpopular, although the turmoil over them died down rather quickly.[79] Rising crime rates juxtaposed against the Court's decisions protecting the rights of criminal suspects had a bit to do with Richard Nixon's election in 1968.[80] But it was the Communist decisions that led Congress to take a serious shot at restricting the Supreme Court's authority.

Congress' tactic in 1957 was a bill, denominated the Jenner-Butler bill, which aimed initially to strip the Supreme Court's jurisdiction in a number of areas.[81] During the 1956 and 1957 Terms, the Court decided numerous cases involving the rights of Communists, Communist-sympathizers, or those accused of being Communists, with four of the decisions handed down in one day.[82] Among other things, the decisions restricted the ability of states to prosecute subversion cases, restricted state authority over bar admissions, and limited congressional investigatory powers.[83] Although the Communist Party newspaper, the *Daily*

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79. The highly-criticized early decisions were Engel v. Vitale, 370 U.S. 421 (1962), and School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963). On public reaction to the school prayer decisions, see Anthony Lewis, *Both Houses Get Bills To Lift Ban On School Prayer*, N.Y. TIMES, June 27, 1962 at 1. As to the short-lived nature of the furor, see Raymond Moley, *God, Man, and Liberty*, NEWSWEEK, July 23, 1962, at 76 (noting that within less than a month after the Engel decision, the protests had "died down").

80. On the unhappy coincidence that crime rates were rising as Supreme Court decisions granted greater rights to criminal suspects, see FRED P. GRAHAM, THE SELF-INFLICTED WOUND 4 (1970) (noting the simultaneity of the rise in "crime, violence and racial tensions in the United States and the Supreme Court's campaign to strengthen the rights of criminal suspects against the state"). Polls showed that the conflict in Vietnam and crime were the only two issues that mattered much to voters, with Nixon way ahead of Humphrey on crime. *See* Robert H. Phelps, *Humphrey's Dilemma*, N.Y. TIMES, Sept. 13, 1968, at 52.

81. A Bill to Limit the Appellate Jurisdiction of the Supreme Court in Certain Cases, S. 2646, 85th Cong. (1957). For one of the best sources on the history of this legislation, see C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957-1960 (1961). *See also* J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181 (1959). In its original form, Senator Jenner proposed a bill that would deprive the Supreme Court of appellate jurisdiction over admissions to the practice of law in state courts; over any function or practice of a Congressional committee, including any proceeding against a witness charged with Contempt of Congress; over Executive branch employee loyalty-security programs; over state attempts to control subversive activities within the state; and over regulations of school boards with respect to subversive activities of teachers. *See* PRITCHETT, *supra*, at 31.

82. *See generally* PRITCHETT, *supra* note 81, at 112-13.

83. *See, e.g.*, Watkins v. United States, 354 U.S. 178 (1957) (limiting ability of congressional committees to force witnesses admitting involvement with communist

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Worker, cheered the decisions,[84] the general public was decidedly less enthusiastic. As Representative Howard W. Smith said, "I do not recall any case decided by the present Court which the Communists have lost."[85] A committee of the American Bar Association issued a report strongly condemning the Court.[86]

As originally conceived, the Jenner-Butler legislation would have severely restricted the Supreme Court's jurisdiction over matters involving Communists, but when the battle was over all Congress did was enact a watered-down measure to modify slightly one evidentiary rule used in criminal trials.[87] In other words, the Congress and the country rejected the notion that it was appropriate to strip jurisdiction in retaliation for unpopular decisions. The battle was a fierce one, however, in committee and on the floor. In the floor debate Judge Learned Hand's name was invoked so often that the eminent judge felt compelled to write a note to Congress clarifying the position he had taken in an earlier speech.[88] Still angry about segregation, Southern Congressmen assuredly fanned the flames.[89] Yet, when all was said and done, Congress indicated that it was unwilling to take the dramatic step of stripping jurisdiction, even in the face of decisions with which it disagreed vehemently.

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party to name associates); Schware v. Bd. of Bar Examiners of New Mexico, 353 U.S. 232 (1957) (invalidating use of good moral character requirement for bar as a means to deny license to prior communist party member); Pennsylvania v. Nelson, 350 U.S. 497 (1956) (holding that most state subversion laws are preempted by the Smith Act).

84. For example, the Daily Worker's June 19, 1957 headlines following the four June 17, 1957 decisions, included "Cheer[ing] High Court Liberty Rulings" and "A Milestone for Democracy."

85. David Riesman, *New Critics of the Court*, NEW REPUBLIC, July 29, 1957, at 9, 11.

86. *See* Report of the Special Committee on Communist Tactics, Strategy and Objectives, 84 Annual Report of the A.B.A. 607 (1959).

87. For the outcome of the battle, see generally PRITCHETT, *supra* note 81, at 35-40. *See also* Anthony Lewis, *41-40 Senate Vote Kills Bills Aimed at Supreme Court*, N.Y. TIMES, Aug. 22, 1958, at 1.

88. Learned Hand had been very critical of the Supreme Court in his famous Holmes lecture, and Hand's words were quoted widely in support of curbing the Court. Alarmed, Hand wrote a letter to John Boyle, Jr., Chairman of the Speaker's Bureau, disclaiming any position on the current controversy. This story is told in GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 652-61 (1994).

89. *See* White, *supra* note 81, at 189; *Pro and Con in Growing Debate Over Powers of Supreme Court*, U.S. NEWS & WORLD REP., Oct. 24, 1958, at 114 ("The preponderant backing of the attack on the decision in the Nelson case is made up of those who would undo the Supreme Court's decision in Brown.").

H. Roe v. Wade

No history of opposition to the Supreme Court and judicial independence, even one as brief as this, would be complete without some mention of *Roe v. Wade*.[90] Decided in 1973, *Roe* established a woman's constitutional right to choose to have an abortion, and limited the states' ability to interfere with that decision. *Roe* was in many ways a turning point for twentieth-century jurisprudence. The decision triggered a long academic and public debate over interpretive techniques such as originalism and interpretivism, and led to tremendous politicization of the process of selecting and confirming judges.[91]

Despite the tremendous impact of *Roe v. Wade* on the public debate, it is perhaps telling that the measure engendered no strong support to tamper with judicial independence. True, there have been many bills introduced in Congress to limit judicial authority in this area, but none has made much headway.[92] Indeed, and this is perhaps as good a point as any to end the history, since the 1957 failure of the Jenner-Butler bill, no legislation designed to challenge judicial independence has received sustained support.

II. FOUR CONCLUSIONS

A study of the events described in this history permits drawing four conclusions about challenges to judicial independence. The conclusions may not be determinative of present day discussions, but they are instructive nonetheless.

A. Challenges Come from Across the Political Spectrum

It is easy, from our vantage point late in this century, to lose sight of the changing political complexion of attacks on the Supreme Court. The debate in recent years has been fueled for the most part by conservative voices, a point that has not gone

90. 410 U.S. 113 (1973).

91. *See* Friedman & Smith, *supra* note 4 (discussing how decision in Roe v. Wade threw debate over constitutional interpretation into high gear).

92. *See, e.g., Constitutional Restraints on the Judiciary: Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong., 1st Sess. (1981); H.R. 865, 97th Cong. (1981) (dealing with school prayer).

unnoticed.[93] Nonetheless, as the brief history makes clear, such has not always been the case.

It is a bit difficult to categorize the politics of every nineteenth century dispute, but it is true that liberals and progressives were the ones behind challenges to the judiciary throughout the first half of this century. Indeed, at least from the time of the *Dred Scott* decision until the defeat of Roosevelt's Court-packing plan, the critics' chair has been filled largely with speakers from the left. Throughout the angry years of 1912-1914, and the early 1920s, the Court's critics were the likes of the then-Progressive Theodore Roosevelt, William Jennings Bryan, and notably, Robert LaFollette, who excoriated a capacity cheering crowd in Madison Square Garden, saying:

> Either the court must be the final arbiter of what the law is, or else some means must be found to correct its decisions. If the court is the final and conclusive authority to determine what laws Congress may pass, then, obviously, the court is the real ruler of the country, exactly the same as the most absolute king would be.[94]

During this same period, it was conservatives who defended the Court, and the role of an independent judiciary in constitutional government. It was conservatives who wrote books and published articles on the judiciary's behalf, such as J. Hampden Dougherty's *Power of Federal Judiciary Over Legislation,* in which he commented that the judicial recall would be "so direct a blow at judicial independence that it can be no cure for any evils in the judicial system."[95] Indeed, some of the Court's staunchest supporters throughout the period were the Republican Presidential candidates, William Howard Taft and Calvin Coolidge. These men, in no uncertain terms, opposed any tampering with the independence of the judiciary.[96]

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93. *See* David G. Savage, *GOP Politics Stalls Judicial Nominations*, L.A. TIMES, Nov. 28, 1977, at A1.

94. *14,000 Pack Garden, Cheer LaFollette Attack on Court*, N.Y. TIMES, Sept. 19, 1924, at A1.

95. J. HAMPDEN DOUGHERTY, POWER OF FEDERAL JUDICIARY OVER LEGISLATION 6 (1912).

96. *See, e.g.*, N.Y. TIMES, May 31, 1923, at 14 (quoting Taft criticizing Borah and LaFollette proposals, as "revivals and imitations" of other efforts to limit the Court, and concluding, "Congresses have their little hour of strut and raves. The Court stays"); *Coolidge Sees Constitution or Despotism*, N.Y. TIMES, Sept. 26, 1924, at 1 (advocating "maintenance of the integrity of the judicial system that the individual

There is room for cynicism here. It seems that if one wants to identify the critics of the judiciary at any given time, it is necessary only to look at whose ox was the last gored by the judiciary. But amidst cynicism there remains this fact: neither judge-bashing nor judge-defending has been the work of any one ideological camp or political party.

B. Attacks on Judicial Independence Invariably are Political

Just as attacks have come at the judiciary from both ends of the ideological spectrum, it also is evident that the attacks invariably are political—note the use of the word "political" rather than the word "partisan." The claim here is not that challenges to judicial independence have been motivated solely by party battles, although as the events of the early 1800s make clear, that has sometimes been the case.

Rather, the claim is that despite whatever else is being said, the basis for sustained challenges to judicial independence inevitably arise out of substantive disagreement with the content of judicial decisions. Depending upon the climate of the times, challengers to judicial independence may or may not be candid about their motives. Nonetheless, even when veiled, the political nature of judicial challenges has been evident.

The prize for stunning candor may well go to Jeffersonian Republicans who sought to unseat Federalist judges. Federalists staunchly defended judicial independence, calling it "the boast of our Constitution,"[97] but Republicans were more dubious, expressing "astonish[ment]" at the claim "that their independence was necessary, . . . to protect the people against their worst enemies, themselves. . . . I had thought that we, the people, formed this Government, and might be trusted with it."[98] John Quincy Adams reported the gist of the radical Republican leaders of the impeachment effort, especially Representative Giles. In light of present-day debates, Adams' characterization of Giles

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may be secure in his rights").

97. *See* Letter from Simeon E. Baldwin to Isaac Jones (Jan. 5, 1805), *in* LIFE AND LETTERS OF SIMEON BALDWIN 444 (1919); *see also Observations on Judge Chase's Charge,* THE COURIER (CHARLESTON), June 13, 1803, at 5 ("[W]e see those last shaking hands, and apparently conspiring for the overthrow of that third branch of the constitution—and, in short, we see the whole fabric shattering and falling to pieces, before that spirit of pure democracy to which the demolition of Europe, and the usurpation of Bonaparte, are at this day wholly to be attributed.").

98. 11 ANNALS OF CONG. 708-709 (1802) (speech of Representative Macon).

views, in light of the show cause order in *Marbury v. Madison*, is quite remarkable:

> He treated with the utmost contempt the idea of an *independent* judiciary .... [I]f the Judges of the Supreme Court should dare, AS THEY HAD DONE, to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, AS THEY HAD DONE, it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them.[99]

Removal by impeachment was nothing more than a declaration by Congress to this effect: "You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices*, for the purpose of giving them to men who will fill them better."[100]

Similarly, in the wake of *Dred Scott*, opponents of the Supreme Court's decision struggled mightily to find a reason to avoid the Court's conclusions about the meaning of the Constitution, a problem made all the more difficult because judicial supremacy was coming into its own at the time.[101] Republicans wanted to strike out at judicial supremacy, as Lincoln did when he needled Douglas for defending the decision not "on its merits, but because the decision of the court is to him a 'thus saith the Lord,' "[102] but by and large they also were unwilling to deny the Court's authority. Thus, Republican attacks tried every tactic imaginable to avoid the decision's impact, from the somewhat legitimate claim that the most objectionable portions of the decision were obiter dicta,[103] to more fanciful claims that the decision was invalid because it was the product of a "conspiracy" between the

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99. *Diary Entry of John Quincy Adams* (Dec. 21, 1804), *in* 1 MEMOIRS OF JOHN QUINCY ADAMS: HIS DIARY FROM 1795-1848 322 (Charles Francis Adams ed., 1874).

100. *Id.*

101. The road to judicial supremacy, and the role the concept played in the aftermath of Dred Scott, are explored in Friedman, *Supremacy, supra* note 5, at 426-31.

102. THE LINCOLN-DOUGLAS DEBATES 75 (Harold Holzer ed., 1993).

103. *See, e.g., Extent of the Decision of the Dred Scott Case*, N.Y. EVENING POST, Mar. 12, 1857, at 2 (the dicta "must be regarded as extra-judicial and as having no more authority than the conversations of the judges held in the street"); CONG. GLOBE, 35th Cong., 1st Sess. 1114 (1858) (any portion of decision after case resolved on jurisdictional grounds was "a mere obiter dictum, entitled to no more respect than though it had been delivered here or in the streets") (statement of Sen. Wade).

Court and the incoming administration,[104] or the product of "slaveholders" or slaveholding interests.[105]

As time went on, however, it became less politic to be quite so blunt about why one sought to force judges out of office or diminish the respect due their rulings. Thus, it is little surprise that in announcing his Court-packing plan, Roosevelt first claimed a need for judicial reform simply to assist aging judges facing a burgeoning workload.[106] But opponents were quick to uncover Roosevelt's motives, calling him disingenuous, and forcing him out into the open.[107] Finally, Roosevelt was candid about what he was doing, explaining in a fireside chat:

> Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government–the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not.[108]

In light of history, one ought properly to be wary of any explanation for tampering with the judiciary that denies its political motivation, especially when popular disagreement with judicial decisions is palpable. People attack judges because they do not like the content of decisions. The question we ought to

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104. *See, e.g., The Supreme Court of the United States,* N.Y. EVENING POST, Mar. 7, 1857, at 2 ("A conspiracy has been entered into of the most treasonable character; the justices of the Supreme Court and the leading members of the new administration are parties to it."). Rumors of conspiracy were fed by a conversation between President Buchanan and a member of the Supreme Court, right before the inauguration speech. *See, e.g.,* CONG. GLOBE, 35th Cong., 1st Sess. 1004 (1858) (speech of Sen. Hamlin) (referring to conversation as "political complicity and collusion"). As fact would have it, Justice Grier had written Buchanan in advance of the decision. *See* WARREN II, *supra* note 7, at 294-95. It was little surprise that in his inaugural Buchanan announced he would "cheerfully submit" to the decision, "whatever this may be. . . ." *Id.* at 297-98.

105. *See, e.g., Opinions of the Supreme Court in the* Dred Scott *Case,* ALBANY EVENING J., Mar. 7, 1857, at 2 (accusing Justices of being slaveholders or beholden to slaveholding interests); N.Y. DAILY TRIB., Mar. 21, 1857, at 4 (describing Supreme Court as "Pro-Slavery Judges").

106. *See* LEUCHTENBERG, FDR, *supra* note 69, at 232-33.

107. *See, e.g., Opinions of the Nation's Press on Court Plan,* N.Y. TIMES, Feb. 6, 1937, at 10 (quoting headlines and stories from nation's papers, including the Baltimore Sun's "Holds President 'Disingenuous' " and the Boston Herald, "Holds Greater Power Aim").

108. *"A Fireside Chat" Discussing the Plan for Reorganization of the Federal Judiciary* (Mar. 9, 1937), *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 123-24 (1941).

face is whether such disagreement properly forms a basis for undermining the judiciary.

C. *Almost Nothing Remains Untried in the Effort to Check the Judges*

One interesting aspect of present debates about the Court is the sense that the occasional specific proposal—such as impeaching judges, or requiring a supermajority of judges to strike certain laws—is novel. This is unlikely to be the case. Short of the rack, almost every device for disciplining judges or the judiciary has been suggested. Supreme Court Justices have even been hanged in effigy.[109]

The list is long. Impeachment was tried during the Jeffersonian Era. Jurisdiction-stripping perhaps succeeded during Reconstruction, but certainly failed in the 1950's. Court-packing was alleged in the Legal Tender decisions, and clearly failed in 1937. Other non-starters were supermajority voting requirements for constitutional cases, Senate override of judicial decisions, popular override of Supreme Court decisions, referenda on judges or judicial decisions, and eliminating the life tenure of federal judges. Add to the list widespread defiance during the Jacksonian Era, and the South's defiance of *Brown v. Board of Education*, and it is difficult to see what remains untried.

Given the number of rejected proposals, it might behoove modern-day proponents to learn from prior experiences. The reasons for motivating acceptance or rejection of a specific proposal need not mirror precisely the reasons given in a prior era. Times change. But for many of the proposals, the pros and cons have been well-rehearsed in prior debates, and there might be something to be learned from reviewing that record.

D. *Over Time, the Public Has Come to Reject Limitations on Judicial Independence*

This last point is likely to be the most, and perhaps the only, controversial conclusion to be drawn from this history. After all, it is difficult to argue with the fact that attacks have come from both sides of the ideological spectrum, that the primary motivation for the attacks has been dissatisfaction with the

109. *See Six Supreme Court Justices Hanged in Effigy in Iowa,* N.Y. TIMES, Jan 8, 1936, at 15.

nature of judicial decisions, or that an extremely wide variety of measures have been aimed at the judiciary in order to check it in the face of popular dissatisfaction. But those who seek to limit the independence of the federal judiciary, either today or at any time in the future, are unlikely to be content to learn that their ideas have been ruled out of order by history.

The claim is not quite this strong, but it is not a weak one either. Again, history cannot predict the future. A public that has upheld judicial independence in the past remains free to change its mind in the future. Yet, it is both interesting and instructive to observe the trend, as well as to note the political failures of politicians who seek to run a sword through the heart of an independent judiciary.

The first important point is that with regard to virtually all of the potential devices for controlling judicial independence, there has been a serious discussion of the costs and benefits. Take, for example, the many ideas for controlling judges that flourished during the Populist/Progressive Era. Commentators took these ideas, and the whole question of popular control of the judiciary, very seriously. There were many books and articles written, some with quite comprehensive discussions of various techniques for controlling the judges.[110] Some of these ideas even played prominently in presidential elections. These ideas, or many of them, were tested in the marketplace, and then rejected.

Second, the vast majority of the devices suggested to control judges never received enough support to come close to implementation. There are some techniques, such as jurisdiction stripping, that have been tried, however, which deserve closer attention. But ideas like supermajority voting rules for constitutional cases, and popular or Senate override of decisions, never have commended themselves seriously. It would be surprising to find the situation is different today.

Third, some of these ideas were rejected during times of *far* greater tension than the present. The events of the early 1800s really did represent a constitutional crisis; the first time that

110. *See generally* GILBERT E. ROE, OUR JUDICIAL OLIGARCHY (1912); NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT (1912); James M. Asley, *Should the Supreme Court Be Reorganized?*, 14 ARENA 221 (1895); James Manahan, *The Recall of Judges*, S. DOC. NO. 62-941, at 12, 2d Sess. (1911); Melville Davidson Post, *Recall of Judicial Decisions*, 185 SATURDAY EVENING POST, Aug. 31, 1912, at 3; W. Trickett, *Judicial Nullification of Acts of Congress*, 186 N. AM. REV. 848 (1907).

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political parties and branches of government had gone head-to-head as they did. Even yet, the Senate reluctantly took up the repeal of the Circuit Judges' Act, and—more importantly—declined to utilize impeachment as a means of expressing substantive disagreement with judicial decisions. The environment surrounding Franklin Roosevelt's proposal of the Court-packing plan was again one of high constitutional tension, with the attention of much of the country focused on those events. Yet again, even under those circumstances, Court-packing was rejected.

Finally, with regard to the few techniques for controlling the judiciary with which the country has experimented, history plainly shows a trend of gradual refutation by the body politic. Not only has the public gradually come to reject these strategies for controlling the courts, but there is some basis for concluding that the public ultimately came to regret actions taken to restrict the independence of the judiciary. Notably (for what it is worth), no politician[111] has profited in the long run from attacking the courts.

Take, first, the example of Court-packing. Strictly speaking, it is not clear that the Supreme Court ever has been packed. Warren argues vociferously that Grant's appointments were not made to change the outcome of the Legal Tender decisions.[112] But suppose, for a moment, that the case was otherwise. Popular reaction to the Supreme Court's reversal of outcome in response to a change in membership was strongly negative; the country was plainly disturbed by the notion that one could change the outcome of cases just by changing the judges.[113] The subsequent rejection of Roosevelt's Court-packing plan after a six-month national debate suggests a decisive public will on this question. Perhaps it is no surprise that Roosevelt's popularity plummeted precipitously after he proposed packing the Bench, a trend that was reversed essentially by war.

The same story is true for jurisdiction-stripping. The most blatant example of this was the *McCardle* case during Reconstruction. And though the Supreme Court appeared quickly to acquiesce in the elimination of its jurisdiction, a close reading of the *McCardle* opinion, and the subsequent decision in *Yerger*,

111. Save perhaps Abraham Lincoln, and that was a unique situation.
112. *See* WARREN II, *supra* note 7, at 517.
113. *See id.* at 521-22.

suggests that any complete stripping of jurisdiction is of dubious constitutionality. More importantly, even with trouble brewing in *Yerger*, the Republican Congress declined to act yet again to strip the Court of jurisdiction. This is all the more noteworthy because the original jurisdiction-stripping measure had been enacted over Andrew Johnson's presidential veto. Yet, the original jurisdiction-stripping measure was so criticized that once passions cooled, and reflection prevailed, Congress and the country saw the error of trying to affect substantive decisions with jurisdictional tools.[114] Any doubt on this score gets resolved in 1957 when, not unlike 1937, the country had a full and tumultuous debate on the subject and declined to whittle away one bit of the Court's jurisdiction.

The only story that is a bit more complicated is that regarding defiance of judicial decrees, although it is important to distinguish defiance—which is *unlawful* by definition—from other measures of arguably greater legitimacy. There have been notable instances of defiance, and all of them are troubling: Courts have clearly declared certain rights and then these rights have been ridden over roughshod by the body politic. That was frequently the case during the Jacksonian Era, never more clearly than when Corn Tassels was hung unlawfully. Similarly troubling was the South's widespread defiance of the Supreme Court's decision in *Brown v. Board of Education*. The pictures that filled television screens at the time were not pretty ones, surely not scenes we care to see repeated, just as it was not wonderful that the Executive Branch actually had to use federal troops to enforce a federal court decree. Of defiance, perhaps nothing sums up the situation better than the *Niles Weekly Register*'s editorial commenting on Georgia's defiance of the Cherokee decisions, and Andrew Jackson's failure to support the Supreme Court: "We are sick of such talks [of defiance]. If there is not power in the [C]onstitution to preserve itself—it is not worth keeping."[115]

Today we appreciate that there is the will to adhere to constitutional government, which includes the power to enforce federal court decrees. Admittedly, there are many decrees that disappoint some, anger others, or seem dead wrong to many. But

114. *See id.* at 482-83.
115. NILES WEEKLY REGISTER 78 (Mar. 31, 1832).

the question is one of distinguishing the legitimate and sensible responses to this problem from less happy alternatives. History has suggested that the American public, often offered the opportunity to debate these questions, has settled on preserving the independence of its judges.

III. CONSTITUTIONAL METHODS FOR CONTROLLING THE JUDICIARY: AN EXAMINATION IN LIGHT OF PRESENT CONTROVERSY

It is inevitable that there will be times when the judiciary—or at least an individual judge—strays from the fold. Perhaps it is more accurate to say that it is inevitable that there will be times when some segment of the public feels this to be the case. More than any other branch, the judiciary regularly announces winners and losers, and cannot hide behind veils like delegation to administrative agencies, or to subordinates. Judges make decisions, vital ones, and they take the heat.

Recognizing this to be the case, there are two questions that might occupy us, in light of the lessons of history. The first is whether there are legitimate ways for setting the judge or judiciary straight. The second is how present controversy compares with other periods of tension concerning the judiciary. Both questions together essentially ask: "Is there now a problem that requires resolution?" If not, perhaps the old adage says it best: "If it ain't broke, don't fix it!"[116]

On examination, claims that there is a need for dramatic remedies may be overstated, ignoring solutions to the problem of an errant judiciary already a part of our constitutional system. What needs to be done is to contrast existing measures against present complaints. If existing measures are seriously inadequate, perhaps there is some need to consider alternatives. If not, then we ought to be content with the status quo.

Many recent complaints involve a judge rendering a decision that many feel is grievously wrong. Yet, this is a situation easily remedied under existing constitutional arrangements. Indeed, this problem is *so easily* corrected that it is almost impossible to

116. Or, as Eric Severeid once said, "The chief cause of problems is solutions." Eric Severeid, CBS EVENING NEWS, Dec. 29, 1970, *cited in* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 333 & n.139 (1982).

understand what the fuss is about. Anyone who thinks that "one" judge does anything in our system of government is hopelessly naive, especially when the single decision is one of relative importance or high profile.

For the problem of the errant judge the response is clear: Judicial decisions are subject to appeal. In the federal system there is a right to appeal to the Court of Appeals. This ensures that at least four judges in total will consider the objectionable matter. Moreover, there are en banc hearings in divisive or difficult cases, and, for truly important cases, the Supreme Court is always available. The fact of the matter is that many, many judges might review a case. The more controversial the decision, the likelier it is that a great amount of judicial review will follow. This collective judgment is very valuable. It may be divided at times, and those times may cause controversy, but by the time the appellate process is complete, many judges will have spoken.

When the complaint is not about the decision of an individual judge, then the challenge is more generally about the actions of the federal judiciary, but even here there is a constitutional solution. The primary solution is the natural attrition from the bench, combined with the constitutional process of appointment and confirmation. This is the process that generally keeps the judiciary in tune with present political concerns, and the political valence of the governing party. The most likely candidate to explain crises like Roosevelt's Court-packing plan is the rare instance in which appointments are not forthcoming to new administrations.

Indeed, if one stops and thinks about it, the political and social process of judicial selection is likely to provide a bench far more in concert with popular views than most theoretical understandings of an independent judiciary would commend. The view of many people about the judiciary is that it is intended to protect minorities from majority overreaching. Certainly there is much in history, and in the structural design of the judiciary, to suggest this was the goal.[117]

As a practical matter, however, the federal judiciary is likely to be of a mind much akin to popular political views, and it is somewhat surprising that minority interests have found as much protection as they have. Judges are appointed by popularly-

117. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

elected Presidents, and it generally is expected that Presidents will pick judges of like minds. Until recently senatorial confirmation was not a serious impediment to this process, and even under current conditions the most that can be said is that judicial appointees will rest somewhere between the views of the President and the median Senator. It is difficult to even imagine how any such judge or Justice would have views substantially different from most of the public. Again, the only way this could happen is when judges are on the bench for a long time, but the regular process of attrition tends to keep the courts in harmony with public views.

In fact, there is a large and growing body of scholarship studying judicial decisionmaking, much of which concludes that by and large the judicial outcomes comport with popular sentiment. Some of the scholarship is critical of the extent to which judicial decisions comport with popular wishes.[118] Other scholars simply are interested in mapping and understanding the phenomenon.[119] Whatever the case, the result seems to be that the judiciary is not nearly as "countermajoritarian" as once thought.

Indeed, given the current composition of the federal bench, it is particularly difficult to understand the chorus of present complaints about "liberal" decisions. The present Supreme Court, in particular, remains the product of numerous Republican appointments. Of the nine members, only two have been appointed by a Democrat.[120] On the lower courts, the story is much the same. Those courts predominantly are the product of many appointments by Republican Presidents. Moreover, political

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118. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993).

119. *See generally* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1990); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960); Barry Friedman, *Dialogue and Judicial Review,* 91 MICH. L. REV. 57 (1993); Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy Maker,* 6 J. PUB. L. 279 (1957); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary,* 7 STUD. AM. POL. DEV. 35 (1993); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions,* 8 VA. L. REV. 1 (1996); Steven L. Winter, *An Upside Down View of the Countermajoritarian Difficulty,* 69 TEX. L. REV. 1881 (1991); Steven L. Winter, Tennessee v. Garner *and the Democratic Practice of Judicial Review,* 14 N.Y.U. REV. L. & SOC. CHANGE 679 (1986).

120. Ruther Bader-Ginsberg and Stephen Breyer by President Clinton.

scientists evaluate President Clinton's appointees as relatively moderate.

Moreover, today's jurisprudence calls into question claims of excessive liberalism. It is difficult to call the judiciary a particularly activist force in present-day politics. With regard to most of the issues capturing conservative attention, the judiciary has ameliorated its positions. Judicial interference with the death penalty has been a matter of concern. Today executions are coming at a fast pace. If anything, some courts seem to be bending over backwards to permit executions. Abortion is another issue. True, *Roe v. Wade* has not been overruled, but the recent decision in *Casey* to not overrule *Roe* was reached by a conservative bench, and even so the Supreme Court has allowed greater restrictions on abortion. Rules regarding public religious displays also have been loosened.[121] The Supreme Court's federalism doctrine is moving in a direction generally favored by the right.[122] Despite the hue and cry regarding the occasional criminal procedure case, many protections have seen serious erosion in the last fifteen years.[123] Admittedly there are decisions that have angered, and will continue to anger, critics from the right, but there seem to be just as many contrary to the preferences of the left.

That being the case, a little skepticism is warranted regarding the pressing need to implement some technique for controlling federal judges. Despite the heat of recent accusations, they provide precious little light on what the actual problem might be. To be sure, proponents of controlling the judges point to some decisions they consider to be outrageous. Yet, the pool of cases they identify is quite small. Any system is likely to reach bad results some times. The question is whether the number of bad outcomes is sufficient to justify a drastic remedy. The burden ought to be on those who would advocate serious constitutional change, deviating from many years of accepted practice. In that light, the conclusion would seem to be "not proven."

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121. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding display of creche in town center as permissible celebration of Christmas and its origins).

122. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

123. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (establishing "good faith" exception to Fourth Amendment's warrant requirement).

CONCLUSION

The past few years have seen an intense politicization of the judiciary. As this paper demonstrates, there have been many challenges to judicial independence throughout history. Unlike the present, however, at past junctures the problem has seemed far weightier. Despite very real crises, the conclusion seems to be that the solution to judicial independence would be far more troubling than the problem itself.