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## ESSAY

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### CONSIDERING *RECONSIDERING JUDICIAL INDEPENDENCE*

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In *Reconsidering Judicial Independence*, Professor Stephen Burbank revisits the nature of the relationship between judicial independence and judicial accountability<sup>1</sup>—a relationship that he has elucidated over the course of an illustrious career. As Burbank emphasizes, the continuing success of this dichotomy depends on preserving a balance between its halves. But forces generations in the making have led to a new assault on the independence of the judiciary in the age of Trump, which has put the future of the independence–accountability balance in doubt. The age-old rule-of-law paradigm, which posits that independent judges put aside their personal biases and follow the law, has been debunked by data showing that judges are subject to ideological and other influences, undermining this traditional justification for judicial independence.<sup>2</sup> To avert the erosion and collapse of judicial independence, we must defend it with recourse to a different paradigm—a legal-culture paradigm. The legal-culture paradigm appreciates that independent judges are acculturated to apply and uphold the law as best they can, but also recognizes that judges have discretion that is subject to extralegal influences—influences that better accountability can manage.

*Reconsidering Judicial Independence* is important for what Professor Burbank has to say about judicial independence, and I will get to that; but the piece is also a tour of “beautiful, downtown Burbank.”<sup>3</sup> Like Burbank,

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<sup>1</sup> Stephen B. Burbank, *Reconsidering Judicial Independence: Forty Years in the Trenches and in the Tower*, 168 U. PA. L. REV. ONLINE 18 (2019).

<sup>2</sup> See, e.g., CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 54 (2016) (describing empirical studies).

<sup>3</sup> HAL ERICKSON, “FROM BEAUTIFUL DOWNTOWN BURBANK”: A CRITICAL REVIEW OF ROWAN AND MARTIN’S LAUGH-IN 1968–1973 (2000).

California in the aging turn of phrase from *Rowan and Martin's Laugh-In*, the cityscape of Professor Burbank's scholarship may not strike the untrained observer as eye-catching. His work is not divertingly shrill—it avoids juicy generalizations and overwrought conclusions and it includes no self-indulgent manifestos—although it does feature a 182-page law review article on the history of the Rules Enabling Act.<sup>4</sup> Also like Burbank the town, which was home to one of the most powerful television networks of its era, Burbank the scholar's body of work is home to one of the most important and influential thinkers (and doers) in American law. And to no small extent, the less than ostentatious profile of his scholarship's skyline is a key to its greatness: he is more interested in getting it right than espousing splashy conclusions the data cannot support, making friends in high places, or being lionized as the hero of any particular cause. Burbank's scholarship eschews self-indulgent flash, in favor of making an enduring contribution to the administration of justice.

My scholarship has touched on the subject of judicial independence more than a few times as well. In the spirit of full disclosure, I am the Mini-Me to Burbank's Dr. Evil. When Burbank was working with the House Judiciary Committee on matters related to judicial discipline, I was serving as counsel to the Committee. As a fledgling academic, I was a consultant to the National Commission on Judicial Discipline and Removal, on which Professor Burbank served as member and scribe. I was the director of the American Judicature Society's (AJS) Center for Judicial Independence; Burbank was on the AJS Executive Committee. I also edited *WHAT'S LAW GOT TO DO WITH IT: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE*—to which Professor Burbank contributed a chapter that he discusses in his article.<sup>5</sup> Suffice it to say that we have studied the same issues and analyzed them in similar ways, which makes me a well-positioned reviewer of Burbank's judicial independence scholarship and service.

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<sup>4</sup> Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). Despite its girth, this is one hell of an article that is required reading for anyone who teaches or writes on litigation procedure. Moreover, it deserves an honorable mention here because the Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2018)), did more than authorize the federal courts to promulgate their own procedural rules. Taken together with legislation of the same era that established both the Judicial Conference of the United States (originally denominated the Conference of Senior Circuit Judges), Pub. L. No. 67-298, § 2, 42 Stat. 837, 838 (1922) (codified as amended at 28 U.S.C. § 331 (2018)), and the Administrative Office of U.S. Courts, Pub. L. No. 76-299, 53 Stat. 1223 (1939) (codified as amended at 28 U.S.C. § 601 (2018)), and transferred budgetary control of the courts from the executive to judicial branch, *id.*, the Rules Enabling Act did much to assist in establishing a more independent judicial branch in the first half of the twentieth century.

<sup>5</sup> Stephen B. Burbank, *On the Study of Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT'S LAW GOT TO DO WITH IT: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 41 (Charles Gardner Geyh ed., 2011).

## I. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY AS THE COIN OF THE REALM

Burbank was not the first to recognize a relationship between judicial independence and accountability. If one stands in the field of judicial independence scholarship and swings a salmon, one is likely to hit half a dozen articles that dwell on this important relationship.<sup>6</sup> Burbank's article underscores the essential starting point for any conversation about judicial independence: the conception of independence and accountability as two sides of the same coin. In a system of government where the judiciary is called upon to uphold the rule of law on a case-by-case basis, independence and accountability each legitimate the other. Without independence, a judge can be driven by fear or favor to disregard the law and reach whichever conclusion will mollify those upon whom the judge is dependent. Without accountability, a judge can be liberated to disregard the law and reach whichever conclusion suits her fancy. And by conceptualizing judicial independence and accountability in terms of the consequences that flow from their absences, we can see both, as Burbank emphasizes, not as ends in themselves, but as instrumental values that protect other objectives: the rule of law, due process, and access to justice.<sup>7</sup>

Likening judicial independence and accountability to two sides of the same coin also emphasizes that independence and accountability must be in a state of relative equilibrium. If that equilibrium is corrupted and the coin is weighted to skew the toss in favor of independence or accountability, the virtues of both—which depend upon their balance—are lost. For an interdisciplinary scholar like Professor Burbank who stands with one foot in theory and the other in practice, this is where life gets tricky. Judges and the lawyers who appear before them are often more protective of independence as a means to curb intrusions upon their province, while legislators and the general public that they represent tend to be more earnest about promoting judicial accountability to the people judges serve.<sup>8</sup> Many academic lawyers, who have opted into a profession steeped in legal norms, find judicial

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<sup>6</sup> See generally, e.g., Stephen Kelson, *Judicial Independence and the Blame Game: The Earliest Target is a Sitting One*, 15 UTAH B.J., Jan./Feb. 2002, at 14; Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168 (2006); Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529 (2006); Thomas Tinkham, *Applying a Rational Approach to Judicial Independence and Accountability on Contemporary Issues*, 37 WM. MITCHELL L. REV. 1633 (2011); Edward H. Trompke, *A Natural Tension*, 62 OR. ST. B. BULL., Feb./Mar. 2002, at 9; Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625 (1999).

<sup>7</sup> Burbank, *supra* note 1, at 24; see Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 238-44 (2012) (noting that the “ermine myth”—that independent judges are influenced by facts and laws alone—is antiquated, but that independence nonetheless promotes the rule of law, due process, and justice).

<sup>8</sup> See generally GEYH, *supra* note 2.

independence easier to embrace than many political scientists, who, by virtue of their training, are more likely to think of judges as politicians in robes for whom independence is problematic.<sup>9</sup>

Against this backdrop, one cannot work and write in full-throated support of both judicial independence and accountability without alienating some people along the way or compromising one's convictions. As implied by the trail of nonplussed acquaintances described in his essay, Burbank has opted in favor for his integrity and the courage of his convictions—a point he once punctuated to me privately with a colorful observation: “You can't make chicken salad from chicken shit.” The extent to which Burbank has devoted his professional life to preserving the balance between independence and accountability is remarkable. While Burbank was the Chair of the AJS's Editorial Board, he decried attacks against the independence of judges,<sup>10</sup> whom he criticized elsewhere for being insufficiently accountable to operative law in his writings critical of Judge Weinstein<sup>11</sup> and the Supreme Court.<sup>12</sup> By the same token, as an architect of disciplinary process reform, Burbank has strived to assure the accountability of judges whose autonomy he has defended in his scholarship on the architecture of judicial independence.

In discussing how the two-sided coin of judicial independence and accountability is operationalized, Burbank references my work for the proposition that informal institutional norms have evolved to preserve the desired balance between judicial independence and accountability.<sup>13</sup> Those independence norms emerged to dissuade Congress from exploiting the full panoply of its powers, which could all but obliterate the independent judiciary that the Framers sought to establish in their Constitution, by means of unrestrained impeachment, court-packing and unpacking, budget-slashing,

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<sup>9</sup> See CHARLES GARDNER GEYH, WHO IS TO JUDGE? THE PERENNIAL DEBATE OVER WHETHER TO ELECT OR APPOINT AMERICA'S JUDGES 117-19 (2019) (comparing the “legal and political science communities” in their respective approaches to understanding and explaining “the decisions and conduct of judges” in the context of judicial elections versus appointments); Eileen Braman & J. Mitchell Pickerill, *Path Dependence in Studies of Legal Decision-Making*, in WHAT'S LAW GOT TO DO WITH IT: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE, *supra* note 5, at 114, 114 (“[P]olitical scientists are creatures of their training and professional socialization.”).

<sup>10</sup> Editorial, *Judicial Independence at the Crossroads*, 85 JUDICATURE 260, 260 (2002) (“[J]udicial independence is only a means to an end and . . . no society would want a judiciary that was completely independent and hence completely unaccountable.”).

<sup>11</sup> See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1974, 1984 (1997) (arguing that while “[a]ll of us would be better off if more federal judges emulated . . . Jack Weinstein[,]” “certain aspects of [his] judicial work . . . may cause concern from the perspective of judicial independence and accountability”).

<sup>12</sup> See generally STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

<sup>13</sup> Burbank, *supra* note 1, at 24 n.26 (citing CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006)).

jurisdiction-stripping, defiance of court orders, and so on. I have characterized the balance these norms strike—between courts and Congress, independence and accountability—as a “dynamic equilibrium.”<sup>14</sup> Episodic spikes of anticourt sentiment elicit proposals for Congress to bring the courts to heel, which are quieted with recourse to traditional independence norms that help to stay Congress’s hand—until the next transition of political power brings a new spike.<sup>15</sup>

If this was where the story ended, it would be the Constitution’s corollary to a Hallmark after-school special that closes with courts and Congress, cast as toe-headed teens who have resolved their latest spat, walking down the bucolic road of institutional norms, flipping their independence–accountability coin as they bask in the sunshine of eternal equilibrium. But that is not where the story ends—a point to which Burbank alludes and which I want to develop here.

## II. OUT WITH THE OLD: THE ANTIQUATED RULE-OF-LAW PARADIGM

To fully appreciate the precarious future that judicial independence faces, it is important to introduce two additional dichotomies that Professor Burbank discusses. The first is between diffuse and specific support for the courts. Diffuse support is systemic support, which respects the dynamic equilibrium between independence and accountability, aided by the evolution and entrenchment of norms, and enables judges to decide, as Burbank frames it, “What does the law require?”<sup>16</sup> Diffuse support manifests as public confidence in the legitimacy of the judiciary that remains stable despite occasional decisions with which the public disagrees.<sup>17</sup> Specific support, in contrast, is contingent support, in which the judiciary’s legitimacy in the public mind turns on “What have you done for me lately?”<sup>18</sup> Specific support is volatile by nature, and sublimates the rule of law to the rule of majoritarian politics, by hinging public confidence in the courts on whether the public shares the policy outcomes of the courts’ decisions, rather than whether those decisions uphold operative law.

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<sup>14</sup> GEYH, *supra* note 13, at 253–82.

<sup>15</sup> Charles Gardner Geyh, *The Choreography of Courts–Congress Conflicts*, in *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 19, 19–20 (Bruce Peabody ed., 2011) (summarizing the “predictable pattern” of periods of anticourt sentiment in the federal courts: “first comes political realignment; then attacks against holdover judges; counter-attacks against court critics; and, finally, normalization”).

<sup>16</sup> See Burbank, *supra* note 1, at 27 (“[P]olitical scientists refer to . . . the public’s diffuse support for the courts—support that persists even in the face of unpopular decisions, where so-called specific support is lacking.” (footnote omitted)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

The second dichotomy that Burbank discusses is between law and policy. Like independence and accountability, Burbank notes that law and policy are two sides of the same coin: law implements policy, while policy informs the interpretation of law—they are inextricably intertwined.<sup>19</sup> But here is where the story darkens. Preserving the balance between law and policy depends on preserving diffuse rather than specific support for the courts. If public support for the courts depends on specific support derived from judges implementing preferred policy outcomes, then the relevance of law is sublimated. And if law is sublimated to policy, this corrupts the related balance between independence and accountability: why afford judges independence from the control of the electorate or their elected representatives if courts are simply comprised of politicians in robes whose role is to implement the public's policy preferences and preserve specific support for the courts?

To recap, the American judiciary owes its long-term stability to an array of moving parts that preserves constructive tensions between independence and accountability, between courts and Congress, between law and policy, and between diffuse and specific public support for the courts. I have argued elsewhere that the balances struck across this array have been guided by a rule-of-law paradigm that informed the framing of the U.S. Constitution and that has structured our thinking about the judiciary in the generations since.<sup>20</sup> That paradigm, in brief, posits that if judges are afforded a measure of independence from political and popular pressure, they will disregard extralegal influences and impartially uphold the law on a case-by-case basis.<sup>21</sup> It is a paradigm that favors 1) robust independence, offset by just enough accountability to correct mistakes and catch rogues; 2) a Congress that defers to independence norms; and 3) courts that uphold the law without regard to their personal policy preferences—promoting diffuse support.<sup>22</sup>

Judges repeat the rule-of-law paradigm like a mantra.<sup>23</sup> But times are changing. Burbank begins his essay by noting that, “[j]udicial independence

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<sup>19</sup> *Id.* at 25 (“Going down that path enables one quickly to grasp another essential proposition, which is that judicial independence and judicial accountability are not discrete concepts at war with each other. They are complements or, again, different sides of the same coin.”).

<sup>20</sup> GEYH, *supra* note 2, at 16-23.

<sup>21</sup> *Id.* at 18-19.

<sup>22</sup> *Id.* at 16-43.

<sup>23</sup> Justice Alito discussed the paradigm at length in his opening statement for his Supreme Court nomination, stating that

The role of a practicing attorney is to achieve a desirable result for the client in the particular case at hand. But a judge can't think that way. A judge can't have any agenda . . . [or] have any preferred outcome in any particular case . . . The judge's only obligation—and it's a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.

is in the air—again.”<sup>24</sup> True enough, but why? Is it because the latest round of judicial-independence talk is like the spring, cyclical and inevitable as the seasons? If so, we can proceed to the discussion secure in the knowledge that spring showers will yield to summer sun. Or is judicial independence in the air because the asteroid has landed and shot particulates skyward that presage the possibility of an extinction event? From where I sit, the answer is a little from column A and a little from column B. We are indeed entering the latest in a centuries-long series of anticourt cycles following the transition of power to the Trump Administration, but this latest cycle must be viewed against the backdrop of more serious and sustained developments, generations in the making, that have eroded the rule-of-law paradigm and threatened its longevity.

I have elaborated on the sustained developments that jeopardize the rule-of-law paradigm in prior work, and shorthand them here:

- Beginning in the 1920s, American law schools spawned the legal realism movement.<sup>25</sup> Legal realists challenged the “Santa Clause story of complete legal certainty.”<sup>26</sup> They argued that when faced with legal indeterminacy, judges struggle between competing claims to decide what the law requires, and “since there is that struggle, how can they do otherwise than select the one that seems to them to lead to a desirable result”?<sup>27</sup>
- As the legal realist movement in American law schools was winding down, the frequency of dissenting and concurring opinions on the U.S. Supreme Court increased measurably, beginning in 1941.<sup>28</sup>

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*Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2006) (statement of Samuel A. Alito, Jr.).*

Justice Roberts also sought to allay Congress’s fear by resorting to analogizing judges to mere umpires calling balls and strikes, presumably constricted in judgment by the prescribed edges of the strike-zone. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 31 (2005) (statement of John G. Roberts, Jr.).*

In 2015, then-Judge Kavanaugh gave a speech at the Catholic University of America entitled *The Judge as Umpire*, in which he reflected on the precise drafting of the National Football League’s rulebook in defining what is a “catch.” Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 690-91 (2016); see also Geyh, *supra* note 7, at 217-18 & n.142 (providing other examples of judges who have stated the importance of having a judiciary that follows the rule of law rather than its own partisan beliefs).

<sup>24</sup> Burbank, *supra* note 1, at 18.

<sup>25</sup> GEYH, *supra* note 2, at 46.

<sup>26</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 260 (Anchor Books ed. 1963).

<sup>27</sup> Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 359 (1925).

<sup>28</sup> Cass Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 780-83 (2015).

- Beginning in the 1940s, political scientists picked up the flag of the fallen realists, correlated majority and dissenting opinions to the ideological orientations of the justices, and developed an attitudinal model of Supreme Court decisionmaking, which posited that judges are influenced by their attitudes or ideologies.<sup>29</sup>
- Beginning in earnest in the late nineteenth century, Supreme Court confirmation proceedings became increasingly fixated on the nominee's political ideology and its impact on the nominee's future rulings.<sup>30</sup> That fixation would devolve into an obsession beginning in the 1980s and spill over into circuit and district court confirmations beginning in the 1990s.<sup>31</sup>
- Beginning in the 1980s, state supreme court elections became “noisier, nastier, and costlier,”<sup>32</sup> culminating in well-funded, ideologically driven battles to defeat incumbents because of their rulings on tort liability, capital punishment, criminal sentencing, same-sex marriage, water rights, and abortion.<sup>33</sup>
- Beginning in earnest in the latter half of the twentieth century, state legislatures sought to relieve their supreme courts' docket congestion by establishing intermediate courts of appeals,<sup>34</sup> while Congress did the same by eliminating mandatory appeals for the U.S. Supreme Court.<sup>35</sup> An unintended consequence was to limit high-court dockets to fewer, more indeterminate and ideologically charged cases.<sup>36</sup> This change required the courts to focus more on making new law in controversial cases and focus less on correcting trial court errors in

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<sup>29</sup> See generally C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947* (1948) (using nonunanimous decisions to chart the political alignments and blocs of the “Roosevelt Court” justices).

<sup>30</sup> GEYH, *supra* note 13, at 214-15, 221.

<sup>31</sup> *Id.*

<sup>32</sup> David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 *LOY. L.A. L. REV.* 1369, 1373 n.5 (2001) (quoting Richard Woodbury, *Is Texas Justice for Sale?*, *TIME*, Jan. 11, 1988, at 74).

<sup>33</sup> GEYH, *supra* note 2, at 55-61. One recent example is the latest, hotly contested Wisconsin Supreme Court race. See Laurel White, *Wisconsin Supreme Court Race Too Close to Call*, *WIS. PUB. RADIO* (Apr. 3, 2019, 7:00 AM), <https://www.wpr.org/wisconsin-supreme-court-race-too-close-call> [<https://perma.cc/9U9W-2Y3A>] (describing the “razor-thin margin” separating the candidates who both “vowed to serve as impartial justices on the court while pointing fingers at their opponent’s partisan affiliations and potential biases”).

<sup>34</sup> Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 *MICH. L. REV.* 961, 966 (1978) (finding that a “crucial development[.]” in state court structure was “the establishment of intermediate appellate courts between the trial courts and supreme courts”). Congress had similarly established federal intermediate appellate courts in the Judiciary Act of 1891, Pub. L. No. 51-517, 26 Stat. 82. See Geyh, *supra* note 15, at 20-21 (referring to the Judiciary Act of 1891 as an instance where “Congress manipulated Court jurisdiction to limit the justices’ policy reach”).

<sup>35</sup> Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. § 1257 (2018)).

<sup>36</sup> GEYH, *supra* note 2, at 32.



noncontroversial cases, to the end of repeatedly elevating the political profile of the courts involved.<sup>37</sup>

- Media coverage of courts has also changed. Supreme Court decisions are routinely explained with reference to the ideological alignment of the majority and dissent.<sup>38</sup> Cable news channels offer infotainment that features court coverage with a transparent ideological bias.<sup>39</sup> Furthermore, the internet has created a forum for citizen journalists—unencumbered by professional norms that constrain the traditional media—who publish ideologically charged attacks on disfavored judges and their rulings.<sup>40</sup>

This protracted series of developments has cut the rule-of-law paradigm to the quick. It suggests that independent judges do not set extralegal influences aside and nurtures the view that independence liberates judges to flout the law and indulge their ideological biases. The new skepticism underlying these developments is manifested in survey data. Significant majorities of the general public think that 1) federal judges are influenced by their ideological preferences;<sup>41</sup> 2) that state judges are influenced by the

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 36. See generally MICHAEL F. SALAMONE, PERCEPTIONS OF A POLARIZED COURT: HOW DIVISION AMONG JUSTICES SHAPES THE SUPREME COURT'S PUBLIC IMAGE (2018) (finding that Supreme Court decisions with more dissenting justices receive more media coverage and are likelier to be framed in ideological terms).

<sup>39</sup> See GEYH, *supra* note 2, at 35-37 (“Insofar as the news is communicated in short, image-oriented segments, the public’s understanding of judges and the judiciary will, of necessity, be impressionistic.”); cf. Tom Rosentiel, *Partisanship and Cable News Audiences*, PEW RES. CTR. (Oct. 30, 2009), <http://www.pewresearch.org/2009/10/30/partisanship-and-cable-news-audiences/> [https://perma.cc/D388-3A7P] (“[T]here are stark differences in the partisan composition of the Fox News Channel, CNN and MSNBC audiences.”). Compare, e.g., *Levin: Left’s Agenda is Incompatible with Constitutionalism* (Fox News television broadcast June 29, 2018), <https://www.foxnews.com/transcript/levin-lefts-agenda-is-incompatible-with-constitutionalism> [https://perma.cc/F748-KCPJ] (arguing that liberals have turned the Court into a “politburo” and would oppose the confirmation of any conservative to replace Justice Kennedy), with *Panelist Grills Kavanaugh’s Past Opinions* (CNN television broadcast July 10, 2018), <https://www.cnn.com/videos/politics/2018/07/10/brett-kavanaugh-presidents-shielded-from-litigation-bts-cpt-vpx.cnn> [https://perma.cc/4T8M-KAP8] (debating then-Judge Kavanaugh’s jurisprudence on whether a sitting president should be shielded from litigation).

<sup>40</sup> GEYH, *supra* note 2, at 36.

<sup>41</sup> CAMPBELL PUB. AFFAIRS INST., MAXWELL POLL ON CIVIC ENGAGEMENT AND INEQUALITY: LAW AND COURTS QUESTIONS FROM 2005 POLL (2005), [https://www.maxwell.syr.edu/uploadedFiles/campbell/data\\_sources/Law%20and%20Courts%20Questions%20of%20from%202005%20Poll.pdf](https://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20of%20from%202005%20Poll.pdf) [https://perma.cc/9QUT-B6ZY].

campaign support they receive;<sup>42</sup> and 3) that judges say that they are following the law when in reality they are acting on their personal feelings.<sup>43</sup>

### III. IN WITH THE NEW: TRANSITIONING TO A LEGAL-CULTURE PARADIGM

The extinction event scenario, then, is this: the ailing rule-of-law paradigm will eventually collapse. When it does, it will take with it the primary rationale for judicial independence: if judges are dissembling or delusional when they say that they follow the law and in reality abuse their independence by disregarding the law and imposing their own policy preferences, then judicial independence serves no useful purpose. The collapse of the rule-of-law paradigm will then create a power vacuum for partisan opportunists to fill with unprecedented forms of court control imposed for the putative purpose of promoting judicial accountability.

To avert the possibility of this scenario materializing, I have proposed transitioning from the rule-of-law paradigm, which has served us long and well but outlived its utility, to a legal-culture paradigm. The legal-culture paradigm proceeds from the premise that beginning in law school, future judges are immersed in a legal culture that takes law seriously. At the same time, beginning in law school, future judges learn that in hard cases, the law is often indeterminate and that when choosing between two comparably plausible constructions of applicable law, a judge's background, education, race, gender, ideology, and other extralegal factors can inform which construction the judge deems best.<sup>44</sup> Note that independently upholding the operative law as impartially as possible remains as central to what judges do in the legal-culture paradigm as in its rule-of-law predecessor. The legal-culture paradigm simply accommodates the empirical realities that law and policy are (with a nod to Burbank) two sides of the same coin and that in close cases, a judge's reading of what the law requires can be informed by a judge's policy perspectives.

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<sup>42</sup> See James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 L. & SOC'Y REV. 899, 920-21 (2008) (finding that policy pronouncements by state judicial candidates do not negatively affect public perceptions of this court but policy promises do); James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV., Feb. 2008, at 59, 59, 72 (concluding that acceptance of campaign contributions by state judicial candidates leads to a "diminution of legitimacy" for courts); James L. Gibson, *"New-Style" Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285, 1298-1300 (2009) (finding that acceptance of campaign contributions by state judicial candidates—not policy talk or attack ads—detracts from the institutional legitimacy of state courts).

<sup>43</sup> Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, in WHAT'S LAW GOT TO DO WITH IT: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE, *supra* note 5, at 306, 308-09 ("A majority of poll respondents agreed that even though judges always say that their decisions flow from the law and the Constitution, many judges are in fact basing their decisions on their own personal beliefs.").

<sup>44</sup> Geyh, *supra* note 2, at 87-88.

In a legal-culture paradigm that defaults to the presumption that judges are acculturated to follow the law as best they can, independence serves three important purposes: 1) it buffers judges from external pressure to disregard the law in cases when the law is otherwise clear; 2) it promotes due process by enabling judges to give litigants their day in court (as good judges are acculturated to do) without external pressure to railroad litigants to achieve foreordained outcomes; and 3) it promotes justice by enabling judges to offer their best assessment of what the applicable facts and law are—unencumbered by external pressure to reach outcomes demanded by elected officials, interest groups, or voters, who lack the judge’s familiarity and commitment to upholding operative facts and law.<sup>45</sup>

By acknowledging the empirical reality that judges are subject to extralegal influences, however, the legal-culture paradigm must also acknowledge the possibility that independence can liberate judges to go rogue, ignore the lessons of their legal culture, disregard the law, and impose their own policy preferences. For that reason, the legal-culture paradigm contemplates a more robust role for accountability, relative to the rule-of-law paradigm, to guard against maverick judges leaving the range. Here, the narrative returns to Burbank, who rightly debunks the notion that, except for the little-used impeachment process, Article III judges are effectively unaccountable.<sup>46</sup> To the contrary, federal judges are accountable in myriad ways. They are accountable to higher courts, via appellate review.<sup>47</sup> They are accountable to Congress, which oversees court budgets, size, structure, administration, practice, and procedure, and can pass legislation overriding the courts’ statutory interpretations.<sup>48</sup> They are accountable to constitutional amendments that overturn court decisions.<sup>49</sup> They are accountable to a disciplinary process that remediates judicial misconduct and disability.<sup>50</sup> They are accountable to a code of conduct with which federal judges (below the Supreme Court) are bound to comply.<sup>51</sup> They are accountable to a disqualification process, when judges act in ways that call their impartiality into question.<sup>52</sup> They are accountable to each other and the mutual respect

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<sup>45</sup> Geyh, *supra* note 15, at 90-100.

<sup>46</sup> Burbank, *supra* note 1, at 28-29.

<sup>47</sup> 28 U.S.C. §§ 1254, 1291 (2018).

<sup>48</sup> See generally GEYH, *supra* note 13 (exploring the federal judiciary’s independence from and accountability to Congress).

<sup>49</sup> *Id.*

<sup>50</sup> 28 U.S.C. §§ 351–364 (2018).

<sup>51</sup> JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES (2019), [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf) [<https://perma.cc/Q6P6-KEHQ>].

<sup>52</sup> 28 U.S.C. § 455 (2018).

judges seek on collegial courts.<sup>53</sup> And they are accountable to their oaths of office, when they swear to act impartially and perform the duties that the U.S. Constitution requires.<sup>54</sup>

Some of the foregoing mechanisms hold judges accountable for bad decisions while others hold them accountable for biases, misconduct, and mismanagement that contribute to bad decisions. Either way, they offer a menu of alternatives to reassure a skeptical public that there are means to deter judicial independence gone rogue, which the judiciary should embrace and celebrate as critical to its legitimacy and as the price it must pay for its continuing independence. The balance that my legal-culture paradigm seeks to strike is decidedly Burbankian, for it effectively proposes to counter a sustained threat to judicial independence with better accountability.

Ultimately, then, the task remains to peddle the legal-culture paradigm to the bench, bar, political branches, policy wonks, social scientists, media pundits, and public who must embrace it if it is to replace the ailing rule-of-law paradigm and recalibrate the balance between independence and accountability. That task is complicated, however, by the Trump Administration's recent barrage of attacks upon the integrity of the courts, which challenges the proposed legal-culture paradigm by rejecting its premises.<sup>55</sup>

President Trump has attacked judges for invalidating executive orders without reference to operative law, proceeding from the premise that good judges do not operate independently of the president but work with him to achieve his policy goals.<sup>56</sup> He has taken issue with adverse judicial rulings, not by disputing their merits but by challenging the legitimacy of the judges

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<sup>53</sup> See generally Harry T. Edwards, *Collegial Decision Making in the U.S. Courts of Appeals* (N.Y. Univ. Pub. Law & Legal Theory Research, Working Paper No. 17-47, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3071857](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3071857) [<https://perma.cc/XB7W-WC2S>] (describing the importance of collegiality in courts and noting procedures that courts use to encourage collegiality in decisionmaking).

<sup>54</sup> 28 U.S.C. § 453 (2018).

<sup>55</sup> See *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> [<https://perma.cc/UXM5-4Q88>] (compiling President Trump's tweets that criticize the courts).

<sup>56</sup> See Julie Hirschfeld Davis, *Supreme Court Nominee Calls Trump's Attacks on Judiciary "Demoralizing"*, N.Y. TIMES (Feb. 8, 2017), [nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html?ref=politics&module=inline](https://www.nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html?ref=politics&module=inline) [<https://perma.cc/242M-S5RJ>] (quoting President Trump as saying, "If these judges wanted to, in my opinion, help the court in terms of respect for the court, they'd do what they should be doing").

themselves with labels like “so-called,”<sup>57</sup> “so political,”<sup>58</sup> or “disgraceful.”<sup>59</sup> To the consternation of the Chief Justice,<sup>60</sup> the President has effectively stereotyped judges with reference to the president who appointed them.<sup>61</sup>

The proposed legal-culture paradigm accepts empirical reality and legal realism by acknowledging circumstances in which ideology matters. The data shows that the public is at peace with judges who are subject to realist influences,<sup>62</sup> but draws the line at judges who are perceived as nakedly partisan actors.<sup>63</sup> There is an important difference between the judge who reaches result *X* because she thinks that *X* is what the law requires—even if her conservative or liberal ideology influenced her thinking—and the judge who reaches result *X* because *X* is what the judge’s appointing president would want. Describing judges categorically as “Obama judges” or “Trump

<sup>57</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976> [<https://perma.cc/8A3V-AP5Z>] (“The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”).

<sup>58</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:33 AM), <https://twitter.com/realDonaldTrump/status/871679061847879682> [<https://perma.cc/KD8M-78VF>] (“In any event we are EXTREME VETTING [sic] people coming into the U.S. in order to help keep our country safe. The courts are slow and political!”).

<sup>59</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 10, 2017, 8:15 AM), <https://twitter.com/realDonaldTrump/status/830042498806460417> [<https://perma.cc/BVS5-Y3BG>] (“LAWFARE: ‘Remarkably, in the entire opinion, the panel did not bother even to cite this (the) statute.’ A disgraceful decision!”).

<sup>60</sup> Robert Barnes, *Rebuking Trump’s Criticism of “Obama Judge,” Chief Justice Roberts Defends Judiciary as “Independent”*, WASH. POST (Nov. 21, 2018, 6:21 PM), [https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09\\_story.html](https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html) [<https://perma.cc/4YSS-NFV2>].

<sup>61</sup> See Jessica Gresko, *Judge Sides with Congress over Trump in Demands for Records*, AP NEWS (May 20, 2019), <https://www.apnews.com/49d1caabd0124efib874eec67302c55d> [<https://perma.cc/E7EH-TREA>] (“[W]e think it’s totally the wrong decision by, obviously, an Obama-appointed judge.” (quoting Trump)); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 3:51 PM), <https://twitter.com/realDonaldTrump/status/1065346909362143232> [<https://perma.cc/3YJH-MMFH>] (“Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an ‘independent judiciary.’”).

<sup>62</sup> James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC’Y REV. 195, 213 (2011) (“The American people know that the justices of the Supreme Court exercise discretion in making their decisions . . . [L]egitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.”).

<sup>63</sup> JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND JUDGMENTS OF THE AMERICAN PEOPLE* 123 (2009) (finding through empirical research that, among other things, “[m]ost Americans recognize that judges engage in policy making” and accept this notion “to the extent that the discretion is exercised in a principled, non-self-interested fashion”).

judges”—and doubling down when the Chief Justice of the United States calls you out—crosses that line.<sup>64</sup>

The ultimate strategy I propose is to meet in the middle, between the fading, fairytale world of the rule-of-law paradigm and the seventh circle of hell conjured by a president who regards judges as unprincipled, partisan agents for whomever appointed them. The legal-culture paradigm represents that middle ground

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In this piece, I have used Professor Burbank's essay as a way to introduce and integrate some of my own ideas. That is possible because Burbank's work on judicial independence is foundational. It creates a basic structure for thinking about judicial independence and accountability that serves as the starting point for future scholarship in the field. And that is one hell of a legacy.

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<sup>64</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 7:21 AM), <https://twitter.com/realDonaldTrump/status/106558119242940416> [<https://perma.cc/5WRB-CBVN>] (“Justice Roberts can say what he wants, but the 9th Circuit is a complete & total disaster. It is out of control, has a horrible reputation, is overturned more than any Circuit in the Country, 79%, & is used to get an almost guaranteed result. Judges must not Legislate Security . . .”).